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Report on Copyright Implications of Digital Audio Transmission Services

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of
Digital Audio
Transmission Services

October 1991

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of the
United States of America

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Department 17
Washington, D.C. 20540

October 1, 1991

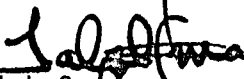
(202) 707-8350

Dear Senator DeConcini:

I have the distinct pleasure of submitting to you the report of the Copyright Office on the Copyright Implications of Digital Audio Transmission Services. As you requested in your letter of July 25, 1990, I have conducted a survey into the state of the digital audio transmission industry and evaluated the potential for harm to copyright owners caused by the copying of their works from digital sources. I have also examined the need for a royalty system to compensate copyright owners for digital uses of their works, and prepared an analysis of the need for legislation providing a public performance right for soundrecordings.

I would be pleased to respond to any requests for elaboration of any part of the report.

Sincerely,



Ralph Omar
Register of Copyrights

The Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

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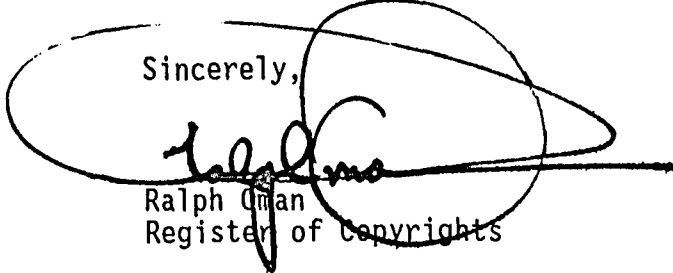
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I would be pleased to respond to any requests for elaboration of any part of the report.

Sincerely,



Ralph Oman
Register of Copyrights

The Honorable William J. Hughes
Chairman, Subcommittee on Intellectual
Property and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

**REPORT ON COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO
TRANSMISSION SERVICES**

Executive Summary

Introduction: Brief overview of request for study and steps taken by

Copyright Office to comply with this request.	1
I. Digital Audio Transmission Services	6
A. What Is Digital Audio Transmission?	6
B. Digital Audio Services	7
C. Digital Cable Services	10
D. FCC Rulemakings	12
E. Proposed DAB Systems	14
F. Predictions for Progress	16
II. Effect of Digital Audio Transmissions on Copyright	18
A. Notice of Inquiry	18
B. Legality of Home Taping	43
C. Fair Use	59
D. Issues Related to Home Taping	73
III. Alternative Compensation Systems	82
A. Royalty	82
B. Other systems	94
IV. Protection of the Performance Right in Sound Recordings in Foreign Countries	99
A. Overview	99
B. Survey of Protection in Selected Countries	105
C. Performance Rights in Sound Recordings: The Berne Convention and Model Law	138

V. Should a Performance Right be Legislated? 141

A. Responses to Notice of Inquiry 142

B. Sound Recording Act of 1971 150

C. Register's Report on Performance Rights in
Sound Recordings 152

D. The Copyright Office Position on a Sound Recording Performance
Right in 1991 154

VI. Copyright Office Conclusions and Recommendations 158

Table 1 161

APPENDIX

1. Letter of Request
2. Notice of Inquiry
3. Comments
4. Reply Comments

ACKNOWLEDGEMENTS

This report on an important new technology -- digital audio broadcasting -- and the legal and policy implications of that new technology required the skills of many people. I am therefore grateful to members of my staff who contributed their special talents to the creation and production of this report.

I would like especially to acknowledge Dorothy Schrader, General Counsel; Marilyn Kretsinger, Assistant General Counsel; and Marybeth Peters, Policy Planning Advisor, for their tireless efforts in shaping and editing the report. A special thanks also to Patricia Sinn, William Roberts, and Edward Yambrusic of the General Counsel's staff, who teamed up to draft the report; Sandy Jones, Alicia Byers, and Guy Echols for their proof reading; Mary Gray, Denise Prince, and Marylyn Martin for their secretarial assistance; and Joseph Ross and William Jebram for their aid in printing and publishing the final report.

EXECUTIVE SUMMARY

Introduction

At the request of Senator Dennis DeConcini, Chairman of the Senate Subcommittee on Patents, Copyrights and Trademarks, and Representative William Hughes, Chairman of the House of Representatives Subcommittee on Intellectual Property and the Administration of Justice, the Copyright Office conducted a study to assess the impact of the introduction of digital audio services on copyright holders and their works.

On October 24, 1990, the Copyright Office published a NOI in the Federal Register informing the public that it was examining the development of new digital audio broadcast and cable services; the NOI questioned how such systems might affect performers and owners of copyrightable works under Title 17 of the United States Code. In order to focus its examination, the Office requested comment and/or information in response to several specific inquiries, including: whether introduction of digital audio services will encourage home taping of copyrighted works and, as a result, significantly displace sales of copyrighted works recorded on phonorecords, audio tapes and compact discs; whether a royalty on recording materials such as blank tapes and recording machines was necessary to properly compensate copyright owners for home taping activities; and whether a performance right should be legislated for sound recordings.

In response to this NOI, the Office received fifteen comments and twelve reply comments. The Office also considered a wide range of informational sources, including but not limited to public comment, trade reports, legal treatises, and formal statistical studies.

On April 1, 1991, the Copyright Office submitted an Interim Report summarizing the responses to the NOI and describing the intended direction and focus of this study. This Final Report represents the culmination of the efforts of the Copyright Office to fulfill Senator Deconcini's and Representative Hughes' request.

Chapter One - Digital Audio Transmission Services

The digital audio format represents a significant improvement in sound delivery and reception that will likely replace analog sound transmission in the not-too-distant future. Transmission of audio signals in digital format poses a number of advantages over the current industry standard analog format. Digital sound is crisper and clearer than analog and reduces distortion from repeated playbacks of recorded works. In addition to the superior sound quality, signals broadcast in digital are far more resistant to interference than analog, and require much less transmission power, thereby making it cheaper to broadcast in digital. Digital represents such a technological advance in sound delivery that it is certain to be the audio transmission medium of the future.

The primary areas of application of digital technology are in the cable television and broadcast fields. In cable, several firms have already begun to provide programming services to subscribers in digital audio format. Digital Cable Radio and Digital Planet provide multiple channels of music in various genres (classical, country, rock, etc.) along with digital simulcast of the audio to several pay cable networks and radio stations. The programming packages are available to cable subscribers through installation of a converter box and a monthly subscriber fee, and the signal may be routed directly into the home recipients' stereo system. The musical programming

offered is of compact disc quality and, in some instances, includes entire albums and compilations of works of a single artist. Although Digital Cable Radio and Digital Planet have obtained licenses to perform the copyrighted works contained in their programming publicly, the ease by which subscribers may make home copies of the works in digital format concerns copyright proprietors.

Digital audio broadcasting (DAB) has lagged considerably behind its cable counterpart principally due to need of FCC authorization, regulation, and allocation. Several parties have petitioned the Commission to establish a terrestrial and satellite based DAB system, and it is likely that broadcasts in AM and FM format will eventually yield to digital. The issue of frequency allocation for DAB is of utmost importance, and the United States will be expected to have a formal position when the World Administrative Radio Conference (WARC) meets in 1992 to allocate spectrum for worldwide use of DAB. The speed at which the United States enters the DAB era will hinge not only on negotiations at the WARC, but on resolution of difficult telecommunications and regulatory issues by the FCC.

Chapter Two - Effect Of Digital Audio Transmissions On Copyright

The Copyright Office posed a number of questions in the NOI regarding home taping of copyrighted works. In particular, the Office sought to determine the likelihood of home taping from digital audio broadcasting and transmission services and the extent to which such taping would displace sales for prerecorded works and harm copyright owners. These questions drew a wide range of opinion from the commentators responding to the NOI, but it was evident that the opinions were speculative at best. The lack of widespread implementation of digital audio, particularly DAB, makes actual

evidence of home taping in digital format impossible to generate. Instead, the commentators and the Copyright Office were required to look to home taping studies in analog format. The "OTA Report," compiled by the Office of Technology Assessment, provided the most extensive data and analysis of home taping activities and their effect, followed by the Roper Organization's "Roper Report," which was compiled by industry parties in the course of Senate hearings on digital audio tape legislation.

Both the OTA and Roper reports detailed significant volumes of home copying of prerecorded copyrighted works in their respective test groups, and both projected that large amounts of tapes are made on a nationwide basis. The reports differed, however, in their assessment of the likely harm of home taping to the economic rights of copyrighted holders of the works copied. The Roper Report concluded the loss of sales of prerecorded works to home taping to be enormous, and the subsequent economic harm to copyright owners devastating. The OTA Report found that while significant numbers of sales were certainly lost to home taping, the economic impact of the loss may be mitigated by the promotional value of the home tapes and the likelihood that the ability to make home tapes actually encouraged some of the sales of prerecorded works.

In evaluating the impact of home taping on copyright owners, the Copyright Office considered the legality of home taping itself. Several commentators to the NOI, particularly the Home Recording Rights Coalition (HRRRC), argued vehemently that private home taping was a recognized protected activity under the copyright laws. The HRRRC posited that Congress recognized home taping to be exempt from copyright liability when it passed the Sound Recording Act in 1971, and that the exemption carried through passage of the

Copyright Act in 1976. The Copyright Office, however, disagrees with the position of the HRRC and does not find any home taping exemption in the current Copyright Act.

Since home taping is not specifically exempted, it must be evaluated under the traditional fair use analysis codified in section 107 of the Copyright Act. Section 107 provides four factors for consideration in deciding whether or not a particular use is fair: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion copied; and 4) the effect of the use on the potential market for the work.

Although the courts have never passed on whether home audio taping is fair use, the Supreme Court did offer some guidance in the famous Betamax case Sony Corporation of America v. Universal City Studios, Inc. The Court held that in the case of home videotaping for private use, the practice of "time-shifting"--taping programs for later viewing without long term retention--was a fair use of the copyrighted works contained on television broadcasting signals. Other home taping uses, such as taping for purposes of a permanent collection or on behalf of others, may not be permissible uses because they run afoul of one or more of the four fair use factors.

Although the commentators to the NOI disagreed as to whether home taping was or was not a per se fair use of the taped works, resolution of particular acts of home taping remain with the courts. The reasons for home taping and the form it takes vary, with some uses perhaps permissible and others not, and no blanket assertions can be made. Each case of home taping must be evaluated according to its particular circumstances, and decisions about the permissibility of home taping properly remain in the judiciary.

The Copyright Office also addressed issues tangentially related to the home taping controversy. The Office found the commentators to be in agreement that once digital audio transmission services are fully in place, copyright owners can be adequately represented by the performing rights societies in their negotiations with broadcasters and program suppliers. The commentators, who responded to this issue, also agreed that it would be unwise to mandate scrambling of digital audio transmission services as a means of protecting copyright owners proprietary rights.

The Office did not ask whether transmission of subcode information should be mandatory or voluntary, but rather sought background information on planned subcode carriage. Those few commentators responding to the question brought forth the debate over whether transmission of digital subcode by broadcasters should be done on a mandatory basis, demonstrating that a controversy has existed for some time. As the issue is obviously a complex one involving a number of telecommunications issues, the Office defers taking a position until the telecommunications and technical aspects of transmission of subcodes are more thoroughly clarified.

In its initial comments, the recording industry sought adoption of a "single-cut" rule that would prevent broadcasters and others from transmitting entire albums, sides of albums, or collections of works of a single artist in digital format. The NAB and the HRRC protested strongly, urging that such a rule was both unnecessary and a violation of first amendment rights.

The Copyright Office is not persuaded that home taping will remain at the same level when entire works are transmitted over the air in digital format. As a matter of fact it believes home taping of material broadcast on

radio and television will increase. However, the Office makes no recommendation for adoption of a "single-cut, rule" because it feels that such regulation of broadcasters is outside its jurisdiction.

Chapter Three - Alternative Compensation Systems

The question of whether or not there should be a home recording royalty, in the form of a levy on blank audio tapes and/or recording equipment, has vexed the audio industry for some time. At least seventeen countries--Argentina, Australia, Austria, Congo, Germany, Finland, France, Gabon, Hungary, Iceland, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and Zaire--have adopted legislation to compensate copyright owners for unauthorized private copying of their works. While the methods of royalty calculation, collection and distribution vary, the European Community has vowed to harmonize the national systems of its members regarding remuneration for the private copying of film, video cassettes, records, audio cassettes, and compact discs by way of a levy on blank tapes. The United States does not have such a system for either analog or digital format, but recent developments may lead to a blank tape and recording machine royalty for digital.

Although the United States has not legislated a "blank tape" royalty system, the Copyright Office has endorsed technological solutions to the problem of lost revenues attributable to home taping. The Serial Copy Management System proposed for digital audio tape recording machines would allow digitally perfect copies to be made from compact discs and other digital sources, but would not allow further copies to be made from the copies. And the digital "smart card" would operate as a prepaid royalty card

allowing the user to "charge off" home tapes against the pre-set value of the card.

The recent industry agreement concerning royalties which has been embodied in proposed legislation in both Houses represents a major step forward to solve the home taping compensation issue. The Audio Home Recording Act of 1991 would levy a royalty of two percent of cost against digital recording machines, and three percent of cost for blank digital tapes. The fund would be administered by the Copyright Office and distributed by the Copyright Royalty Tribunal to the named claimants according to pre-set percentages. The Copyright Office concludes that home taping will continue to erode profits in the digital format.

The Copyright Office agrees with the European Community's assessment that home taping will increase in the digital format. It is also convinced that U.S. copyright proprietors deserve compensation for this taping. The Office supports in principle the recent audio home recording agreement reached between the audio hardware, recording, and music industries as a workable solution to the compensation problems presented by introduction of digital audio transmission services.

Chapter Four - Protection Of The Performance Right In Sound Recordings In Foreign Countries

Protection of the performance right in sound recordings in foreign countries has two main sources: the national laws of each country, and the relevant international treaties and bilateral arrangements recognizing the existence of intellectual property rights in sound recordings, which may sometimes include the public performance right. National laws may extend copyright protection to sound recordings or may protect them through a so-

called "neighboring right" or by another legal theory such as unfair competition or criminal law. Of those countries according copyright protection to sound recordings, many, including the United States, do not grant a public performance right in the sound recording itself, although an underlying musical, dramatic, or literary work would enjoy the right of public performance.

Although sound recordings may be protected by application of either the Berne Convention or the Universal Copyright Convention, two specialized conventions apply: the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (1961) and the Geneva Phonogram Convention (1971). Of the two specialized conventions, only the Rome Convention provides for a performance right, and countries may choose to except a key article relating to that right. Five of the thirty-five countries that have acceded to the Rome Convention have made such an exception.

The Copyright Office also includes a review of recent amendments to national laws that affect sound recordings, particularly the performance right. The Office surveys the legislation in thirteen countries chosen to represent a range in size and economic development. This survey is not as comprehensive as our 1978 study, but it does attest to a continued international interest in improving protection for sound recordings.

The Office briefly discusses international developments including the European Community's proposal to harmonize laws affecting copyright proprietors in the Community and the WIPO's proposed Model Copyright Law that would provide protection for sound recordings as literary or artistic works. If sound recordings are not works, they would be protected as neighboring

rights rather than enjoy protection under the copyright laws. The Copyright Office supports inclusion of sound recordings as copyright subject matter in the model law.

During the twenty years since the Rome Convention came into effect there has been a definite movement to expand current rights and establish new rights. This movement means stronger protection for sound recordings under copyright and also makes it more likely that copyright proprietors are compensated for home taping and other uses of their work made easier by improvements in technology. The IFPI memorandum discussed in this section reports that 94 countries now provide some kind of protection for producers of sound recordings and 64 of these countries grant some performance rights.

Chapter Five - Should A Performance Right Be Legislated?

While the performance right issue was not the predominant topic of discussion in responses to the NOI, it was the most controversial. Discussion of this issue was predicated on the foreign experience. Lines were clearly drawn between broadcasters and the recording interests. Broadcasters continue to oppose enactment of a performance right, urging that it is inappropriate to make comparisons between U.S. copyright law and intellectual property laws of other countries. They also assert that imposition of new financial charges on broadcasters would be unfair, and that copyright owners receive promotional value when a work is performed on the air for free. The NAB claims broadcasters already pay enough for use of a sound recording when they pay music performing rights organizations, who represent songwriters, for airing musical compositions embodied in phonorecords.

The recording industry and other commentators representing copyright proprietors contend that the lack of such a right deprives the United States of valuable international trade dollars. The United States is the leading exporter of sound recordings, but our authors and producers are denied compensation in many countries that make great commercial use of U.S. sound recordings. The countries who do grant a performance right do so on the basis of reciprocity; therefore, the United States is denied a share in performance royalties, a pool of 100 million dollars in 1989 alone.

The Copyright Office concludes that there are strong policy reasons to equate sound recordings with other works protected by copyright and to give producers a public performance right. It, therefore, again recommends that Congress enact such legislation.

Chapter Six - Copyright Office Conclusions And Recommendations

The Copyright Office carefully examined and weighed the conflicting opinions and predictions of the commentators and the home taping studies to evaluate how the introduction of digital audio transmission services might affect copyright owners and their recorded works. It was evident that because the digital industries are in their infancy, accurate predictions concerning increased home taping activities and subsequent harm are impossible to make at the present time. However, while the various interests disagreed over whether digital technology would raise current levels of home taping, none of the parties argued that introduction of digital services would reduce the current amount of home taping. Both the OTA and the Roper reports demonstrated significant levels of home taping in analog format, and the Copyright Office believes that substantial numbers of sales and revenue are lost by copyright owners of recorded works to home taping activities.

The Office therefore concluded that current levels of taping and subsequent revenue loss were likely to continue in the digital era.

Given the economic loss to copyright owners produced by home taping, the Copyright Office explored the legality of the activity. The Office concluded that the current Copyright Act does not contain an exemption for home taping, and that the permissibility of the activity must be evaluated under the traditional fair use analysis of section 107. While some forms of taping activity such as time-shifting may indeed be fair use, the wide variety of forms and reasons for taping make wholesale pronouncements impossible. Home taping must be evaluated on a case by case basis by the federal courts.

The Copyright Office concludes that introduction of digital audio transmission services will increase the potential for economic harm to copyright owners of recorded works. The Copyright Office is in favor of some type of royalty compensation scheme. Although technological solutions such as the Serial Copy Management System and the copy card might reduce levels of private copying, the royalty system for blank digital audio tapes and recording machines agreed to by the audio hardware and music industries is a preferable solution. The Office endorses in principle the agreement already reached to place a royalty on blank digital audio tapes and recording machines.

Even if the royalty scheme embodied in the Home Audio Recording Act of 1991 were legislated, the Copyright Office still supports amendment of the Copyright Act to include a performance right in sound recordings. The omission of the performance right in sound recordings is an anomaly in the copyright laws without substantial justification. Sound recordings have been

protected as copyright subject matter since 1972. They represent the only subject matter category capable of performance which is, nevertheless, denied a right of public performance. Sales of records are the only source of revenue under existing law, yet technological developments such as satellite and digital transmission of recordings make them vulnerable to exposure to a vast audience based on the sale of a potential handful of records. Even if the widespread dissemination by satellite and digital means does not depress sales of records, the authors and copyright owners of sound recordings are unfairly deprived by existing law of their fair share of the market for performance of their works.

We can see the enormous importance of a performing right in the case of musical works. Revenues from licensing the music performing right represent a major income source for composers and lyricists. Creators of sound recordings should have a similar revenue source. The Copyright Office recommends amendment of the 1976 Copyright Act to extend a public performance right to sound recordings without diminishing or limiting the public performance right for musical works.

INTRODUCTION

The Chairman of the Senate Subcommittee on Patents, Copyrights and Trademarks, Senator Dennis DeConcini of Arizona, and the Chairman of the House of Representatives Subcommittee on Intellectual Property and Judicial Administration, Representative William J. Hughes of New Jersey, requested a Copyright Office report on the copyright implications of digital audio transmission services.

Senator DeConcini requested that the study include "any recommendations as to any additional means that may be necessary to protect the rights of copyright owners." In response, the Copyright Office offered to submit an Interim Report to inform Senator DeConcini and Representative Hughes of the status of the study and what the Office intended to achieve, and a final report of all relevant data and information, complete with the Copyright Office's suggestions and recommendations. The Interim Report was submitted on April 1, 1991. The Copyright Office now submits its final report on the copyright implications of digital audio transmission services.

As the first step towards gathering data and assessing the probable impact of digital audio services, the Copyright Office published a Notice of Inquiry (NOI) in the Federal Register on October 24, 1990, informing the public that it was examining the development of new digital audio broadcast and cable television services, and asking how such systems might affect performers and copyright owners of copyrightable works under title 17 of the United States Code. 55 FR 42916 (1990). The Office targeted delivery of digital audio programming via satellite systems, terrestrial systems, and cable television systems. In order to focus its examination on the potential

impact of future and existing digital audio systems beyond a general inquiry, the Copyright Office invited comment and/or information regarding a series of questions. Specifically, those questions were:

1. Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?
2. Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact discs?
3. Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of his/her works? If not, could representatives of copyright owners, such as performing rights organizations, accomplish this task?
4. Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would be responsible for administering this process?
5. Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for possible copying of copyrighted works?
6. Describe existing and contemplated digital audio transmission services, including a description of (a) encryption systems, if any; (b) the means of transmitting prerecorded digital signals; (c) any plans to compress the digital signals; and (d) any proposals concerning transmission of digital subcode information embodied on prerecorded works.
7. Provide information relating to the business and commercial aspects of digital audio transmission services, including (a) the current number of subscribers and predictions of future growth for existing digital cable services; (b) the anticipated start-up dates and predicted audience size of proposed digital cable and broadcast services; (c) a description of the music

channel offerings--both existing and contemplated; (d) the availability of "pay-per-listen" services; and, (e) copyright licensing arrangements, if any.

Parties interested in commenting on these questions, and any other matter involving digital audio transmissions which would affect copyright owners, were invited to submit their initial comments to the Copyright Office by December 15, 1990. Reply comments were due by January 31, 1991.

The Office received a total of 26 comments and reply comments. Parties represented were: Recording Industry Association of America, Inc. (RIAA); AFL-CIO Department of Professional Employees, American Federation of Musicians, (and) the American Federation of Television and Radio Artists; Strother Communications, Inc.; American Society of Composers, Authors & Publishers (ASCAP); Home Recording Rights Coalition (HRRRC); Copyright Coalition; Satellite CD Radio, Inc.; CBS, Inc.; National Association of Recording Merchandisers (NARM); National Association of Broadcasters (NAB); Broadcast Music, Inc. (BMI); The New York Patent, Trademark and Copyright Law Association, Inc.; National School Boards Association (NSBA); General Instrument Corporation; The Cromwell Group, Inc.; Cox Broadcasting, Inc.; Broadcast Data Systems, Inc.; and FM radio stations KKYY, San Diego, California; KDKB, Mesa, Arizona; and KEGF, Irving, Texas.

Besides the written comments, the Office also consulted other sources relevant to the digital audio inquiry. These included case law and legislative history governing the 1909 and 1976 Copyright Acts and the 1971 Sound Recording Act; law review articles; FCC filings relating to digital audio broadcasting; formal reports such as the Eureka study; the Copyright Office's 1978 study on the Performance Rights in Sound Recordings; the

Office of Technology Assessment and Roper Reports on home audio taping; and newspaper and trade magazine articles.

After reviewing the entire body of source material, it became clear that the introduction of digital audio transmissions posed three areas of major concern for copyright owners. They are: the unauthorized home taping of copyrighted audio works, the need for a royalty system to compensate for loss of revenue due to home taping activities, and the need for a public performance right in the copyright laws for sound recordings. This report deals with each of these areas separately.

Chapter one of the report provides an introduction into what digital audio transmission services are and discusses their current, and possible future applications. The section focuses on digital audio broadcasting (DAB) and digital cable television systems as the principal means of digital sound delivery.

Chapter two presents the issue of home taping of copyrighted audio works and analyzes the permissibility of home taping under copyright law. The section provides a detailed summary of the Office of Technology Assessment's report on home taping, as well as examining the competing Roper Report prepared by private industry concerns. Although these reports dealt with home taping in analog format (since digital recorders have just begun to enter the marketplace), the studies are indicative of what may occur once digital audio recording equipment gains widespread use.

Chapter three examines the need for new royalty systems to compensate copyright owners for loss of revenue due to home taping, and examines the laws and practices of other countries. This chapter discusses

royalties for blank recording tapes and on recording machines and also considers other compensation schemes.

Chapter four reviews the treatment of sound recordings under the Rome Neighboring Rights Convention and discusses other levels of treatment. It also surveys protection for sound recordings in selected countries.

Chapter five discusses whether or not there is a need for addition to the copyright law of a public performance right for sound recordings. The Office's prior findings on the subject are reviewed and updated.

The final chapter summarizes the Copyright Office's conclusions and recommendations.

I. DIGITAL AUDIO TRANSMISSION SERVICES

As the world moves toward a new century, the means and methods of sound delivery are rapidly changing. The barely audible monologue sound produced at the beginning of the 20th century will develop into the crisp, enveloping sound of digital in the 21st century. The rise of digital audio, will not only produce new heights in sound clarity and quality, but new problems as well. A principal problem is the impact that digital audio delivery systems will have on the works of copyright owners, especially the market and value of copyrighted works. But before any assessment can be made of digital audio, it is necessary to understand what digital sound is, what its existing and proposed delivery methods and regulatory schemes are, and the likely future of the medium.

A. WHAT IS DIGITAL AUDIO TRANSMISSION?

Although digital audio has been around for some time, its applications have only recently begun to be recognized and developed. Transmission of sound in digital format must be contrasted with transmission in the current industry standard analog format. Digital is the translation of information into mathematical bits. In the case of digital sound, the sound is converted into a series of either 0s and 1s (the mathematical bits) which, when played on a digital recorder, convert the bits back into sound. Analog, on the other hand, is a direct (usually physical) transfer of measurement to a readout signal. This physical process permits greater distortion and interference in the quality of the sound.

Digital audio services encompass a wide range of technologies and techniques used to provide sound quality of much higher clarity and intensity

than can be currently produced in other formats. In general, digital audio refers to the use of digital modulation techniques to provide "compact disk" quality audio; improved stereo separation, even in mobile environments; greater dynamic range; better signal-to-noise and interference performance; and, elimination or reduction of multipath and fading problems. In sum, digital audio represents a superior sound medium to the analog format currently used today.

Digital poses a number of other advantages to analog sound distribution. In addition to the superior sound quality, signals broadcast in digital format are far more resistant to interference than analog, and require much less power, thereby making it cheaper to broadcast in digital. For example, an automobile equipped with a digital receiver is capable of continuous receipt of a digital signal while traveling through tunnels, underpasses and covered bridges. This is particularly advantageous in large cities where tall buildings cause many interference problems in the case of analog broadcasts. Also, because of the power efficiencies, a radio station currently broadcasting at 50,000 watts can achieve the same amount and strength of coverage at 1,000 watts. Digital represents such a technological advance in sound delivery that it is certain to be the medium of the future.

B. DIGITAL AUDIO SERVICES.

Although digital sound is capable of many uses, its primary application is in the broadcast and cable television industries. Within the broadcast industry, several interested parties have petitioned the Federal Communications Commission for authorization to construct and operate facilities transmitting in digital format. These proposals seek to replace

AM and FM radio eventually, as well as provide for the audio portion of television broadcasts. Since the cable industry does not need FCC authorization, transmission of digital services is already underway in that industry. Several cable operators are providing musical packages in digital format, and the audio portion of pay-per-view movies and other pay cable services is transmitted in a digital format.

Digital audio has been around for some time in the music business. The most familiar example is the compact disk, or CD, which is a small disk permanently encoded in digital format and capable of playback on a CD player. CDs have grown immensely popular with music consumers and to a large extent have replaced LP records as the principal music delivery format. CDs offer sound as crisp and clear as the original master recording of the performers. They are also lightweight, not easily breakable, and do not wear out as easily as LPs and cassette tapes. CDs, however, are not recordable, at least in their present form, which is why digital audio tape (DAT) represents a possible revolution in the marketplace. DAT recorders, coupled with the tapes, will allow consumers to make copies of works from other digital formats, such as CDs, with the ease of an ordinary cassette player. A DAT recorder will not only permit the making of digital perfect copies of works, but also permit copying from analog formats as well. Although a DAT recording of an analog work will only be as good as the quality of the analog recording, the change to digital will guarantee no loss or distortion in sound quality, no matter how many subsequent copies are made.

Although digital audio had its commercial origins in the recording industry, its latest and most controversial applications are in the broadcast and cable television industries. The European Broadcasting Union began

development of digital audio broadcasting (DAB) as a radio project in 1978. The plan was to develop a satellite system whereby digital broadcasts would be provided over a multinational area. In 1987, the project broadened to include a terrestrial system, referred to as the "Eureka 147 project." Eureka is a consortium of European research laboratories and electronic manufacturing concerns that work together on communications electronics development. To date, the consortium has developed a plan for a combination of satellite and terrestrial facilities to deliver digital signals, and a digital compression system to provide for the delivery of 12 to 16 signals over a 4 megahertz band of radio spectrum.

The development and introduction of DAB in the United States has lagged considerably behind its European counterpart. Building largely on the work of the Eureka 147 project, three parties filed requests for authorization with the FCC in mid-1990 seeking to provide DAB services. Shortly thereafter, the Commission opened a proceeding to consider the establishment and regulation of new DAB services. This proceeding is particularly important, since it will be necessary for the United States to formulate frequency allocation proposals for next year's World Administrative Radio Conference (WARC). It is expected that this 1992 Conference will establish worldwide frequency allocations as a means of facilitating a conversion of national radio services to DAB.

Although the United States has been slow to develop DAB, digital audio has already made a significant appearance in the cable television arena. Due in large part to the lack of need of FCC authorization, several cable operators now provide subscribers with programming packages in digital format. The packages include selected music, as well as digital

transmission of the audio portion of several cable television networks. Plans are to expand these services, including pay per listen services.

C. DIGITAL CABLE SERVICES.

Without the need for frequency bandwidth allocation and concurrent regulation, digital cable has the potential to make a more immediate impact than DAB. Digital cable services provide programming in digital format to subscribers of cable systems at a monthly rate, plus the rental cost of a converter box. Thus the services act very much like a typical pay cable channel (such as HBO, Cinemax, Disney, etc.) currently provided by most cable systems throughout the country.

There are at least three digital cable services in existence at this time, with the possibility of more operators entering the field depending upon digital cable's initial success. Digital Cable Radio ("DCR"), operated by Jerrold Communications, Inc., and Digital Planet ("DP"), operated by Digital Radio Labs, are currently the principal programming providers. A third service, Digital Music Express, operated by International Cablecasting Technologies, Inc., is expected to begin operations soon. DCR and DP launched their services last year in test markets in Willow Grove, Pennsylvania and Walnut Creek, California, respectively, and are actively seeking to sell their programs to cable operators across the country.

1. Digital Cable Radio.

DCR is a 24-hour premium cable audio service featuring digital sound that is transmitted to subscribers' stereos via their cable television system. The service offers nineteen CD-quality music channels, which include rock, country, Top 40, classical, new age, jazz, big band and gospel music.

Selections from multiple artists are played on a commercial-free uninterrupted basis. Selections include single songs of various artists, as well as portions of albums and, in some cases, entire albums of a single artist. Also included are cable TV audio simulcasts of HBO, Cinemax, Showtime, MTV and VH-1, as well as various specials featuring performing artists and concerts. DCR uses 600 Khz channels which requires installation of a tuner in the subscriber's home to permit reception of the digital signal.

DCR can transmit up to 96 channels and plans to introduce new channels in the future which would offer pay per listen concerts and albums, talk radio, sports programs and domestic and foreign over-the-air radio programming. DCR does not currently offer pay per listen services. DCR also does not currently provide program guides, and listeners cannot identify which selections will be transmitted on various channels and at what times.

2. Digital Planet.

Based in Carson, California, DP is a digital cable service similar to DCR. DP offers 15 commercial-free music channels with formats such as classical, rock and roll, country, new age and jazz. The Star Channel and the Legends Channel offer original programming which includes music from legendary artists and new stars in uninterrupted hour-long segments. Capitol Records has signed on with DP to feature a channel containing music and interviews with various Capitol recording artists. Also, DP offers digital audio simulcasts of HBO, Showtime, Cinemax, the Movie Channel, MTV and VH-1, as well as transmissions of radio broadcast stations KUSC, KNAC, KLON and Piccadilly Radio from England.

Like DCR, reception of DP requires rental and installation of a digital tuner, in addition to the monthly subscription fee. The tuner can be wired into the subscriber's stereo system to provide CD-quality sound. Unlike DCR, DP offers the subscriber a detailed program guide which, coupled with extended play of featured artists, makes home recording of musical selections more attractive.

The digital cable industry is still in its infancy and it is impossible to predict how successful digital services will be and what features consumers will favor. Introduction of a pay-per-listen service in the future is possible, which will allow subscribers to call in their musical requests for transmission over their system. Adjustments may also be made to digital tuners to allow subscribers to program in their selections. DP and DCR are licensed by BMI and ASCAP to perform the music publicly. The greater selection opportunities and the ease by which they may be obtained, however, make home recording of music all the more appealing to subscribers. It is possible that such services as digital cable may someday become the principal means of delivery of music to the public, replacing record stores and merchandisers. Should this occur, the market for copyrighted musical works will change, creating the need for reconsideration of the means by which copyright holders are compensated.

D. FCC RULEMAKINGS.

While the television side of broadcasting has monitored the development of high definition television over the past several years, the radio side of the industry has spent the past years debating the method for establishing new digital services. Consumers have shown a desire for digital

quality sound through their purchases of compact discs, and programmers predict consumers will be eager to receive transmissions, whether by terrestrial or satellite delivery, that are interference free.

Any signal traveling over the air needs spectrum space, and the continuing global explosion of new communications and information services means that advance planning and coordination is crucial. Governments and private business entities see the need to plan ahead to participate in the 1992 World Administrative Radio Conference (WARC) in Spain where certain frequency allocations will be made.

In an effort to develop technical standards and regulatory policies for introduction of new services, the United States Federal Communications Commission (FCC) initiated an inquiry into spectrum use and implementation of new services. ¹ An additional inquiry was established in response to three parties' requests for authorization to provide digital audio broadcasting services. ² The requests for authority to conduct testing of digital audio broadcast service have not been granted by the FCC at the time of this writing.

¹ Notice of Inquiry, GEN Docket No. 89-554, 4 FCC Rcd 8546 (1989); Second Notice of Inquiry, GEN Docket No. 89-554, 5 FCC Rcd 6046 (1990).

² The parties are Satellite CD Radio, Inc., Radio Satellite Corporation and Strother Communications, Inc. The FCC's inquiry is GEN Docket No. 90-357. The Copyright Office reviewed the comments submitted in this proceeding to evaluate whether or not parties' comments might shed light on copyright aspects of initiation of digital audio services. The overwhelming majority of parties commented on spectrum allocation, delivery mechanism, impact of proceedings on other FCC inquiries, and effects eventual decisions will have on current AM and FM proceedings. Most parties that did touch on copyright issues, including the Recording Industry Association of America, the National Association of Broadcasters, the AFL-CIO & American Federation of Musicians, filed separately in this copyright proceeding.

On June 13, 1991, the FCC released its recommendations for presentation at the 1992 WARC Conference.³ It recommended use of both the L band and the S band for terrestrial and satellite digital audio delivery.⁴ Those recommendations were forwarded to the National Telecommunications and Information Administration and the U. S. State Department for review and comment. Final recommendation for global use, however, may not necessarily be the same as for domestic DAB spectrum use.

E. PROPOSED DAB SYSTEMS.

Various schemes have been proposed for putting digital audio broadcast systems into effect. Full discussion of the technical aspects and use of frequency is beyond the scope of this report, and can instead be found in documents filed in the FCC rulemakings. However, it is useful to be familiar with many of the players in the developing DAB field and their proposals.

The Eureka 147 system is the most extensively tested to date. The Eureka 147 DAB project is backed by "a consortium of 18 British, French, German and Dutch partners from industry, research institutes, and government post and telegraph agencies."⁵ It has been successfully tested in Europe and Canada on UHF television frequencies. A terrestrial-only version of the system has been endorsed by the National Association of Broadcasters in the United States, to be used in the L band (frequencies near 1500 mhz).

³ Report, GEN. Docket No. 89-544. 6 FCC Rcd 3900 (1991).

⁴ In its Report the FCL proposed to allocate some spectrum from the 2300-2390 MHz band as well as the 1493-1525 MHz band.

⁵ DAB at NAB '91, National Association of Broadcasters, at 6 (1991).

Highlights of this system are Eureka's multipath-resistant modulation pattern and the use of psychoacoustics to reduce the amount of information needed to represent CD quality stereo audio.

Other DAB systems have been proposed, but to date, they have not been tested as extensively as Eureka 147. Among them is Gannett/Standard Research Institute's in-band system. Gannett is the principle backer of USA Digital Radio whose ACORN DAB system superimposes digital coding on the regular analog signal of an FM station. ⁶

Satellite CD Radio was one of the three organizations first filing with the FCC for approval to provide new DAB service. Its request was originally for satellite and terrestrial channels, but the filing was changed to satellite channels only, which take less space in the L band, plus plans for a subscription program service in the Mobile Satellite Services band. ⁷

Another of the parties originally filing with the FCC is Strother Communications Inc. (SCI). SCI filed for experimental authority to test terrestrial DAB systems using UHF spectrum, and to file for L band frequencies as well, creating a hybrid delivery system.

An additional filing was made with the FCC by Radio Satellite Corporation. Its request was for mobile satellite service, not necessarily of CD quality. ⁸

⁶ Id. at 8.

⁷ Satellite CD Radio Changes DAB Plan, Digital Radio News, April 14, 1991, at 1.

⁸ DAB Scorecard: Status Report on Players, Digital Radio News, April 14, 1991, at 3.

F. PREDICTIONS FOR PROGRESS.

As mentioned, the FCC is trying to set transition policies to take the United States from its current broadcast technology into the digital future without endangering current operators in the broadcast industry. The Commission wants the United States to be prepared with its spectrum recommendations for the 1992 WARC Conference, but spectrum space is in demand, and allocation among business and government interests is difficult. In addition, there is pressure to act because foreign interests are already making breakthroughs in DAB such as the Eureka 147 project. There is a definite perception that consumers want more CD quality information and entertainment. FCC Commissioner Ervin Duggan said it would be ideal to have more time to make important decisions about DAB, but the pressure is on.⁹

When will digital audio broadcast services be widely available? That question is open to speculation, even among experts. In the FCC's recent report on spectrum allocation for the WARC Conference, the Commission recommended that some spectrum currently available to aeronautical mobile telemetry be switched to use for DAB services. Framing a transition period for the change, the FCC proposed to "permit telemetry to continue to operate on a primary basis until January 1, 1997, or until DAB systems are brought into use (whichever is later)."¹⁰

Ron Strother, President of Strother Communications, Inc. has been quoted in the trade press as predicting "that a viable DAB market with a

⁹ DAB Pressures Frustrate FCC, Broadcasting Vol. 120, no. 15 (April 15, 1991), at 42.

¹⁰ Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991), pt. 74, at 23.

critical mass of consumer receivers sold will arrive in 1996 or 1997." ¹¹ FCC Chairman Alfred Sikes told broadcasters at a National Association of Broadcasters convention that "while it's clear where we're going with digital, it's not clear when we will get there." ¹²

¹¹ Pondering the Possibilities - and Perils - of DAB, Broadcasting, Vol. 19, no. 12 (Sept. 17, 1990), at 21.

¹² Radio Flexes Its Muscles In Boston, supra note 10, at 19. Sikes reportedly said the FCC intends to let broadcasters have "every potential" to move into providing digital services.

II. EFFECT OF DIGITAL AUDIO TRANSMISSIONS ON COPYRIGHT

Over half of the questions posed by the Copyright Office in the Notice of Inquiry touched upon the ramifications of home taping in digital audio format. The home taping issue poses several legal and factual problems that are addressed in this report. Is home taping of pre-recorded works a serious threat to copyright owners of sound recordings and underlying works, and is digital audio technology likely to increase that threat? Is home taping a protected activity under the copyright laws, or is it an infringement of the taped work(s)? Should some type of royalty system be set into place to compensate copyright owners for lost sales to home taping? These and other equally challenging questions are addressed below.

A. THE NOTICE OF INQUIRY.

In addition to soliciting comment on any relevant home taping information that commentators were willing to provide, the Copyright Office posed four specific questions in the Notice of Inquiry dealing with home taping. The questions were:

1. Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?

2. Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact discs?

3. Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation for transmission of his/her works? If not could representatives of copyright owners, such as performing rights organizations, accomplish this task?

4. Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would be responsible for administering this process? ¹³

The central thrust of the Copyright Office's questions focuses on two basic issues: Is digital audio likely to have a significant detrimental impact on copyright holders? If so, should copyright holders be compensated for this loss through some type of royalty system? As indicated in the Interim Report, and the introduction, supra, the Office's inquiry drew a wide and varied response on the home taping issue. A detailed analysis of the responses follows:

1. Would introduction of digital audio broadcasting services prompt the average listener to copy copyrighted works? Would a listener be more likely to copy digitally transmitted works than works now broadcast on AM or FM radio frequencies, or on television? To what degree can a listener's home taping habits be monitored and what technical limitations on home taping are feasible?

Commentators addressing the likelihood of home taping focused much of their attention on discussion and analysis of two studies measuring the taping habits of Americans in the analog format. The first study, Copyright and Home Copying: Technology Challenges the Law, was conducted by the Office

¹³ 55 FR at 42917-918.

of Technology Assessment, ¹⁴ and the second the Report on Home Audio Taping and Projected DAT Use, conducted by the Roper Organization, Inc. (hereinafter the "Roper Report"). The Roper Report was commissioned by the Copyright Coalition, one of the commentators in this proceeding, and submitted to the Senate Subcommittee on Communications during hearings in the 101st Congress on S. 2358, the Digital Audio Tape Recorder Act of 1990. ¹⁵ This report will first present the OTA and Roper positions on the home taping question and then discuss the responses to the Copyright Office's inquiry.

a. The Studies.

(1) The OTA Report. The OTA Report is a broad based study attempting to determine the home copying activities of the average American. OTA's goals were stated in the introduction:

The primary focus of this study is home audiotaping. In it, we examine the nature and extent of home audiotaping and consider the impacts it may have on recording industry revenues, contrasted with consumer impacts should home copying be restricted. We also briefly examine current home videotaping practices. This report looks beyond near term potential impacts of DAT to an intellectual property concept called private use, of which home copying is one kind, and to technological trends that will become the basis for future debates over personal use of copyrighted material. ¹⁶

¹⁴ OTA-CIT-422 (Washington, D.C.: US Government Printing Office, October 1989)(hereinafter the "OTA Report").

¹⁵ See, Digital Audio Tape Recorder Act of 1990: Hearings on S. 2358 before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 101st Cong., 2d Sess. (1990). There have been many other studies done in past years by other organizations regarding home taping activities. However, as the OTA Report points out, rapid changes in technology and the marketplace, with resultant increases in consumer options, have largely rendered these previous surveys obsolete. Therefore, like the commentators, the Copyright Office is focusing on the two most recent surveys as the best source of current information.

¹⁶ OTA Report at 4.

The OTA Report, therefore, not only gathers and examines the raw data of home copying activities, but discusses current legal frameworks and offers options and suggestions for congressional change. While the report offers interesting discussions on the legal status of home copying, as well as an overview of the structure and status of the recording industry, the central issues for the Copyright Office are OTA's findings concerning home taping activities and their economic projections of likely harm to owners of copyrighted works.

The data and analysis of home taping activities are well documented in Chapter 6 of the OTA Report. Based on their data analysis, OTA concludes:

1. Four out of ten persons aged ten and over taped recorded music in 1988, which, according to prior studies, represented a significant increase.
2. Music tapers, in general, had a greater interest in music, listened to more music, and purchased more prerecorded music than nontapers. Nontapers listened to little prerecorded music.
3. Audiocassette was the most frequently purchased format of prerecorded music. Tapers, however, more frequently copied from LP records than from tapes. People who purchased a prerecorded item with the intention of taping it were far more likely to purchase a CD or LP than a prerecorded audiocassette. Also, many people copied onto tape for the practice of "place shifting," that is, copying music from LP's and CD's to the more portable audiocassette format.
4. A large majority of people who copied from a prerecorded format in their most recent taping session were copying their own LP, CD, or tape for

their own use. Copying was usually done with the intention of keeping the tape permanently, but about one-fifth of the tapers surveyed made a copy for a friend or copied a borrowed item.

5. People who taped from radio broadcasts were less likely to copy entire albums than those who copied LP's, CD's, or tapes. About half of the last home taping of prerecorded formats involved taping of whole albums.
6. Copying of noncopyrighted material occurs more frequently than that for prerecorded music. Almost three-fourths of taping sessions involved something other than prerecorded music. The study did not seek to determine how much space in home libraries was occupied by noncopyrighted material as opposed to prerecorded music.
7. The survey found that people discriminated little with respect to the grade of blank tape that they used for copying prerecorded music, and most had no idea of the grade of tape used.
8. The survey found that the availability of high speed dubbing and dual-cassette technology had little relationship to the number of home-made tapes. People with many home-made tapes, or few, or none, seemed to own equipment with taping capabilities in roughly similar proportions. Thus, according to OTA, technology did not seem to drive copying behavior.

Regarding the incidence of home copying involving videocassettes, the OTA made these findings:

1. Most videocassette recordings, unlike audiocassette recordings, were made for temporary use. A few specific

program types--including concerts and educational shows--were copied with the intention of keeping them permanently.

2. While television taping was common among VCR owners, copying tapes was not. Of the tapes that were copied, the majority were obtained from friends, although some were rented from video stores and some belonged to the copier.
3. The survey did find a somewhat higher incidence of video copying among music tapers than nontapers, but the OTA concluded that there was no strong convergence between video and audiotaping behavior. Much of the home video and home audio taping was done by different people and for different reasons. ¹⁷

(2) The Roper Report. As noted above, the Roper Report, prepared by the Roper Organization at the request of the Copyright Coalition, was submitted to the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation during hearings on S. 2358, the Digital Audio Tape Recorder Act of 1990. The Roper Report is significantly briefer than the OTA Report and was commissioned by an interested party.

The Roper Report provides information on what it describes as two basic subjects: the current amount of home audio taping of prerecorded music in the United States, and the planned or projected amount of DAT taping of prerecorded music. The survey was conducted during late April and early May of 1990 and was based on 1504 random telephone interviews with persons age 14 and over.

¹⁷ OTA Report at 145-46.

On the issue of current home taping of prerecorded music, the Roper Report found that 37% of those surveyed age 14 and over currently tape prerecorded music, and that about 50% of those in the 14 to 49 age bracket were home tapers. The report also found that among those who used audio equipment to tape from any source, about 8 out of 10 taped prerecorded music. The Roper Report estimates that the combined home taping results in about one billion tapes of prerecorded music being made. 18

On the issue of projected DAT copying, the Roper Report found that 100% of those interested in using DAT equipment for taping will use it to tape prerecorded music. The report also found that those surveyed predicted that they would copy more prerecorded music if they owned a DAT machine than they currently copy in analog format. 19

b. The Comments. The commentators offered differing opinions as to the existence of home taping and the likely impact of digital audio services on such activity. Depending upon their own position, the commentators used both the OTA Report and the Roper Report to their advantage. Those commentators who answered the Copyright Office's first question in the negative cited excerpts from the OTA Report regarding its conclusions that most taping is done only for place shifting purposes and that regulation or monitoring of public taping activities was likely to produce widespread negative reaction and detract from the public welfare. Those answering the Office's inquiry affirmatively cited the Roper Report's conclusion that the introduction of DAT was likely to cause widespread copying of copyrighted works, as well as statistics from both reports that

18 Roper Report at 1.

19 Id.

copying of prerecorded music currently occurs among roughly 40% of the surveyed public.

Commentators interested in the introduction of digital audio services, including equipment manufacturers and groups seeking to protect home recording rights, argued that digital audio does not pose a threat of increased copying of copyrighted works. For example, Strother Communication, Inc. and Satellite CD Radio, Inc., two firms which seek to implement digital broadcasting as a means of supplanting AM and FM radio, argue that there is no concrete evidence to suggest that broadcast of prerecorded music and other copyrighted works in digital format is likely to lead to a higher incidence of copying. ²⁰ Strother notes that digital broadcasting will operate in the same fashion as does AM and FM and that "existing mechanisms by which compensation is determined and paid by radio stations will continue to be adequate" for digital broadcasting. ²¹ Satellite CD Radio posits that any regulation of the digital format would ultimately hurt copyright owners by discouraging development of digital as a broadcast medium. ²²

General Instrument Corporation, a manufacturer of cable equipment that plays a role in implementation of digital cable services, argues that it is improper to treat digital differently from analog transmission services when there is no concrete evidence demonstrating an increase of home taping in digital format. To the contrary, General Instrument notes that the OTA Report showed that even those who engage in home taping paid little attention

²⁰ See e.g., Satellite CD Radio, Inc., comments at 1.

²¹ Strother Communications, Inc., comments at 2.

²² Satellite CD Radio, Inc., comments at 1.

to sound quality, suggesting that the improved sound quality of digital would do little to increase the number of home tapers. ²³

Groups such as the Home Recording Rights Coalition (HRRRC) argue from the perspective that home taping is a protected activity under the copyright laws where the use is personal and private. ²⁴ The question of whether digital audio will stimulate home taping in either broadcasting or cable formats, therefore, becomes irrelevant, as long as the use is private and personal. HRRRC opposes any attempts at monitoring home taping as intrusive and unduly expensive, and notes that such attempts could and would eventually be circumvented by users. ²⁵

Some commentators, such as the National Association of Broadcasters and the National School Boards Association, argue that it is impossible at this time accurately to calculate how the implementation of digital audio will affect home taping activities. Transmission of prerecorded works in digital format through different mediums, such as broadcasting versus cable, is likely to have a different effect on the general public's desire or even ability to copy. Until the various industries are in place, it is impossible to assess what impact the implementation of digital will have on home taping activities. NAB recommends that until there is hard evidence, the Copyright Office should refrain from making suggestions to Congress on what effects digital audio services may have on copyright owners. ²⁶ The National School Boards Association concurs, and states that the Copyright Office should wait

²³ General Instrument Corp., comments at 4-6.

²⁴ Home Recording Rights Coalition, comments at 5.

²⁵ Id. at 21-22.

²⁶ National Association of Broadcasters, comments at 2.

for accurate data on the effects of digital services, rather than basing its conclusions on the conjecture of special interest groups and empirical studies. 27

Although the NAB posits that it is too early to assess the impact of digital audio on home taping activities, the NAB does argue that the OTA Report supports the position that few people listen to radio or watch television for the purpose of taping the programming. According to NAB, "the OTA survey indicates that the tapes made by home tapers appear to be used by them to provide musical entertainment at other times and in other places in lieu of listening to music provided by broadcasters. Accordingly, broadcasters receive very little, if any, benefit from listeners who tape, and may even be harmed by it." 28 Satellite CD Radio, Inc. argues that digital audio radio broadcasts will likely be taped even less than AM and FM radio because digital audio tapes and tape players will not provide the conveniences of current analog systems, such as high speed dubbing. 29

NAB also provides other reasons why broadcasters utilizing digital audio technology are not a threat to the interests of copyright owners. Broadcasters' primary interest in digital audio at this time is to remain competitive with alternative sources of audio entertainment such as digital audio cable and satellite services. Thus, investment in digital audio by broadcasters would be for defensive purposes. 30 Furthermore, broadcasters

27 National School Boards Association, comments at 2.

28 National Association of Broadcasters, comments at 12.

29 Satellite CD Radio, Inc., comments at 2.

30 Id.

currently pay copyright owners of broadcast programming license fees to transmit their work. Adding additional fees to broadcasters' costs to compensate for the possibility of home taping would further burden the broadcast industry, and might result in the elimination of a number of radio stations, particularly those operating in the marginally profitable AM band.³¹ Finally, copyright owners of prerecorded works and the recording industry receive a huge promotional benefit from broadcasters transmitting their works. Broadcasters thus stimulate purchases of prerecorded works, without compensation to themselves, according to the NAB, which far outweigh any negative effects produced by home taping of works contained in the broadcasts.

Groups representing recording and copyright interests generally responded affirmatively that the introduction of digital audio services would increase copying of protected works. The American Society of Composers, Authors and Publishers (ASCAP) notes that new technologies like digital audio are likely to result in "rampant home taping" thereby threatening the livelihood of copyright owners in prerecorded music. ASCAP also points to several advertisements currently being run by digital cable services which promote copying of protected works, and argues that broadcasters are likely to do the same once digital broadcasting is in place.³² The Copyright Coalition argues that, while it is impossible currently to predict the exact magnitude of home taping that digital audio services will cause, the OTA Report and the Roper Report show how extensive home taping already is in

31 Id. at 13.

32 ASCAP, comments at 3.

analog format. ³³ Cable and broadcast services will provide consumers an abundant source of perfect copies, without compensation to copyright owners, thereby stimulating the desirability of home taping. ³⁴ Both ASCAP and the Coalition agree that efforts to monitor home taping will prove fruitless and result in a wasted expense. ³⁵

Some commentators aligned with copyright interests noted that it would not be the introduction of digital audio services per se that would lead to increased home copying, but rather the introduction of digital audio coupled with the use of DAT recorders. ³⁶ Increased sound quality afforded by digital audio creates the presumption that consumers will be more inclined to make tapes of prerecorded works. The Roper Report found that 100% of those expressing an interest in owning a DAT machine said that they would use it to tape prerecorded music. ³⁷

In summary, while there was a wide range of opinion expressed on what effect digital audio would have on home taping activities, a significant number of commentators did seem to acknowledge that accurate predictions were impossible to make at this time due to the lack of concrete evidence. Until such time as digital audio services, as well as DAT recorders become widespread, predictions as to home taping activities are speculative. Home taping, however, does currently exist, and the presumption that increased

³³ Copyright Coalition, comments at 11; Copyright Coalition, reply comments at 25-26.

³⁴ Copyright Coalition, comments at 10.

³⁵ ASCAP, comments at 5; Copyright Coalition, comments at 15.

³⁶ See. e.g., National Association of Recording Merchandisers, comments at 2.

³⁷ See Roper Report at 1.

sound quality will at least sustain the activity, if not increase it, can be supported by reference to the OTA and Roper studies, as well as by reference to a number of the comments in response to the Copyright Office's Notice of Inquiry.

c. Analysis. Review of the comments and the studies provides little concrete evidence about the likely effect the introduction of digital audio services will have on taping activities. The principal reason for this is a lack of actual experience as to how digital audio broadcasting and digital audio cable will develop, and how it will be marketed to the public. Furthermore, the occurrence of taping will depend in significant part on the availability of DAT recorders, whose availability should be improved by the recent industry agreement on home taping legislation.³⁸ The OTA Report and the Roper Report may serve as useful indicators of the current levels of home taping in analog format, but they cannot measure the effects of the introduction of digital audio.

Although the comments and studies do not definitively answer the question of whether digital audio will prompt the average listener to copy copyrighted works, they do affirm a common ground of understanding. Home taping currently occurs in statistically significant amounts, albeit in analog format. Not one commentator argued that taping of copyrighted works does not occur. Nor was there serious dispute over the percentages found in the surveys, particularly the OTA Report. The fact that the surveys showed that somewhere around 40% of those surveyed engage in some type of taping activity demonstrates that copying of prerecorded works is a fairly widespread practice in the United States, regardless of the conclusions one

³⁸ H.R. 3204; S. 1623.

draws as to its economic impact on authors and copyright owners. Furthermore, not one commentator argued that the incidence of taping would be reduced or eliminated after the advent of digital audio services, producing the inference that however speculative may be any predictions about increases in home taping digital audio, the studies indicate that home taping activity will at least remain at current levels. Thus while the legality and economic impact of home taping remains to be discussed,³⁹ it is safe to assume that home taping activities will continue to occur as the United States moves into the digital age.

Regarding the question of whether listeners would be more likely to copy digitally transmitted works than works now broadcast on AM, FM, or television broadcast frequencies, the lack of concrete evidence makes predictions speculative. The studies did show, however, that taping from radio and television does currently occur in analog format, although at statistically lower levels than copying from fixed prerecorded formats. As with the general question of copying, no commentator suggested that home taping of radio and television broadcasts would be eliminated by the introduction of digital audio (although one commentator, Satellite CD Radio, Inc., suggested that taping from broadcast formats would be reduced by digital audio primarily due to inconveniences presented by digital recorders). Copying of radio and television broadcasts will continue to occur, therefore, in the digital era, but at levels not currently predictable. The Copyright Office believes that home taping will increase in the digital era because the homemade digital copy will be the acoustical equal of the authorized marketed copy.

³⁹ See text, infra at 42.

2. Would the copying of works transmitted via digital audio broadcasting services significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, or compact disks?

The commentators for the most part responded to this question by discussing to what extent sales are currently displaced due to analog copying from all sources (not just broadcast), ⁴⁰ as well as potential lost sales due to DAT. They also discussed the existence and magnitude of potential harm suffered by copyright holders--particularly those of prerecorded music--as a result of lost sales.

a) The Studies.

1) The OTA Report. The OTA elected not to attempt to measure the exact amount of prerecorded music sales displaced by home taping activity. Rather, the report chose to focus on the likelihood of economic harm caused by home taping, and, conversely, the impact on consumer welfare as a result of a taping ban. However, the OTA did find that 57% of those who taped from a prerecorded format in the past year thought that they could have bought the material had they so desired. Seventy-seven percent said that if they had bought the recording, it would have been in addition to other recordings purchased, rather than in place of them. Also, 49% of those surveyed said they would have purchased the prerecorded works they desired, if they could not tape them. These percentages led the OTA to conclude that there existed a sales displacement rate of approximately 22% (.57 x .77 x

⁴⁰ It should be recalled that the OTA Report found that off-air taping in the audio format was minor compared to taping of prerecorded works from LP, audiocassette, and CD formats. OTA Report at 152-153. However, taping of broadcasts in the video format was significant, although principally for time shifting purposes. Id. at 161-162.

.49), although OTA conceded that this figure might be high. ⁴¹ Conversely, the OTA found evidence to suggest that home taping stimulated music purchases, which would offset industry loss due to displacement, although the data collected did not support a quantitative estimate of the magnitude. ⁴²

The OTA devotes an entire chapter of its report to a survey of the likely economic impact of home taping, particularly with respect to the recording industry. ⁴³ OTA contracted with three economists, Michael Katz, William Johnson, and Fred Mannering, to conduct three independent economic analyses of the survey data to provide perspectives on the effects of home taping. All three analyses used a cost-benefit framework in an effort to provide some quantitative assessment of the effects of home copying on both copyright holders and consumers. Katz considered the implications for the profits of producers and distributors of original recordings; Johnson considered the determinants of copying and purchasing originals; and Mannering used consumers' purchase/taping choices to examine hypothetically the short term effects of a home taping ban on producers' revenues and consumers' welfare. ⁴⁴

The precise findings and methodology of Katz, Johnson, and Mannering are found in the OTA Report and will not be discussed here. Some general conclusions are as follows. Katz focused on the theoretical effects of home copying on producers' profits but did not estimate them. The crucial factor in his analysis is the effect of home copying on the demand for

⁴¹ OTA Report at 158.

⁴² Id. at 158-159.

⁴³ See Id., Ch. 7.

⁴⁴ Id. at 180.

originals. Katz concluded it is theoretically possible that home copying both stimulates demand for originals and also dampens demand. The counterbalancing of the two effects makes assessing profit and loss to producers of originals difficult to measure in the short-term.⁴⁵ Johnson developed a theoretical framework to estimate the effects of home copying on the purchase of originals by using data from the OTA survey. His results provide some support for the notion that an individual's choice between copying and buying originals is affected by the value of his/her time--higher values of time raise the number of purchases and reduce the amount of copying. Although Johnson attempted to use his estimates to assess the effects of copying on the purchase of originals, he concluded that the precision of his estimates did not allow him accurately to predict the relationship.⁴⁶ Finally, Mannering's report provided a framework for a cost-benefit analysis of consumer welfare if an audio home taping ban were implemented. Mannering's detailed analysis of the consequences of such a ban led him to conclude that, in the short term, the ban's cost to the public outweighed its benefits to the recording industry, its workers, and its artists.⁴⁷ Since no one proposes an outright ban on home taping, Mannering's conclusion has little value.

2. The Roper Report. The Roper Report confines its analysis to the projected loss of sales of original recordings due to home taping both in analog and digital format, but does not attempt to assess the overall economic impact of home taping.

45 Id. at 158-159.

46 Id. at 184.

47 Id. at 191.

The report found that 34% of the people surveyed who identified themselves as tapers said that if they had been unable to make their tapes, they would not have purchased the recordings that they had taped. The remaining tapers said that they would have purchased some of the recordings that they had taped. This works out to about an average of seven recordings that would have been bought if the taper had not made a copy of prerecorded music. The Roper Report estimates lost sales as approximately 322,500,000 recordings. ⁴⁸

The report also found that 54% of those surveyed said that they listen to tapes that have been made, either by themselves or someone else, about the same (36%) or more (18%) than they listen to purchased prerecorded music. The report concludes that "it is clear that home-recorded tapes compete heavily with purchased tapes as a source of music to listen to." ⁴⁹

The Roper Report also asked questions in its survey designed to determine the likely effect of the introduction of DAT machines on the amount of home taping. The report found that over half of those who expressed an interest in owning a DAT machine said that they would make tapes with the equipment if it were available to them. ⁵⁰ Forty-one percent said that they would make more tapes of prerecorded music than they currently do, and more than half of those who currently do not make home tapes, but who would like to own a DAT machine, said that they would use the machine to make tapes of prerecorded music. The report concludes that this "indicates that DAT

⁴⁸ Roper Report at 8.

⁴⁹ Id.

⁵⁰ Id. at 11.

technology will encourage a portion of the people who are currently non-tapers of pre-recorded music to become pre-recorded music tapers." 51

b. The Comments. As with the first question posed in the Office's inquiry, opinion divided based on the disparate interests of the commentators. Those commentators siding with copyright interests argued that digital audio is likely to significantly displace sales of copyrighted works recorded on phonorecords, audio tapes, and compact discs, causing severe economic harm to copyright owners and recording interests. Commentators with an interest in the implementation of digital audio services presented views that it was too speculative to assess what impact digital services would have on sales of pre-recorded works and that evidence existed showing that home taping actually stimulates sales of prerecorded music.

Commentators answering "yes" and "no" to the Copyright Office's question concerning displacement of sales both relied heavily on the OTA Report, and to a lesser extent the Roper Report, in their responses. For instance, ASCAP notes that the OTA Report "estimated that over one billion pieces of music are copied every year in this country," which, apparently according to ASCAP's own estimates, results in music industry losses of "as much as \$1.9 billion per year." 52 ASCAP also points to the Roper Report's finding that digital recorders will increase the incidence of taping and result in a greater volume of copied works. 53 The Copyright Coalition argues that "[i]t is entirely possible that soon homemade copies from digital

51 Id. at 14.

52 American Society of Composers, Authors, and Publishers, comments at 6 (emphasis in original).

53 Id. at 7.

audio broadcast and cable services will not only displace sales, they will replace sales of music in CD's and other prerecorded formats." 54 The Coalition also highlights data from the OTA Report that shows that a "net of 38 percent of taped albums were reported as would-be purchases. Respondents indicated that nearly 5 out of every 10 taped albums are would-be purchases, but that one of these 5 would displace another purchase, leaving the net effect at nearly 4 out of 10." 55 BMI also argued that digital audio services will result in significant displacement of prerecorded music sales. 56

A major argument of the parties stating that digital audio will not displace sales of prerecorded works focuses on the stimulative effects of home taping. Satellite CD Radio, Inc. argues that digital audio broadcasting, if allowed to develop without regulatory burdens, will stimulate sale of copyrighted works because "[d]igital audio broadcasting provides the best possible 'showcase' for copyrighted works recorded on records, tapes or compact discs." CD Radio also observes that digital audio broadcasting will not displace sales because "broadcasting is not a substitute for stored media." 57

The HRRC posits that home taping from digital sources will not, on balance, displace album sales and that the OTA Report actually reveals positive evidence that home taping tends to stimulate sales. While

54 Copyright Coalition, comments at 16 (emphasis in original).

55 Copyright Coalition, reply comments at 28 (quoting the OTA Report at 206 n. 117).

56 Broadcast Music, Inc., reply comments at 7-8.

57 Satellite CD Radio, Inc., comments at 2.

acknowledging that the OTA Report did state that perhaps 22 percent of home taping transactions have the potential to displace a sale,⁵⁸ HRRC notes that the Report also found the existence of a "stimulative influence of home taping on music purchases," and that home tapes "must be considered to have some promotional value."⁵⁹ The evidence of "stimulative effects" included:

-- Twenty four percent of all purchases surveyed in the Report were of artists or music previously heard on a home tape, and 14 percent purchased the recording with the expectation of recording it.

-- Survey findings demonstrated that music purchasers were also music tapers, and vice versa. Also, frequent tapers tended to be frequent buyers.

-- Saving money was not an important consideration to home tapers, and "only 13 percent of music tapings by adults from prerecorded formats were attributed to making tapes of friends' recordings 'so they don't have to buy them.'"

-- Consumers listen to home tapes much less often than to prerecorded albums. Thus, according to HRRC, home tapes are not fungible with prerecorded albums, reducing the likelihood that home tapes displace album sales.⁶⁰

The HRRC also notes that the "parade of horrors" predicted by those decrying the threat of home taping has never in fact happened. Predictions in the early 1980's that analog home taping would destroy the recording industry proved false as sales for individual artists soared and totals reached all-time highs. Home taping has also not hurt new artists as

⁵⁸ See OTA Report at 158.

⁵⁹ Home Recording Rights Coalition, comments at 28 (quoting the OTA Report at 159).

⁶⁰ OTA Report at 159.

shown by the popularity of first time recording artists such as Paula Abdul, Mariah Carey, Tracy Chapman, etc. The HRRRC likens the claims of recording industry disaster to those made by Hollywood at the introduction of the videocassette recorder. The videocassette recorder has proven to be an advantageous business opportunity for old as well as new films, and the recording industry has profited as well from the introduction of prerecorded music videotapes. In sum, the claims of recording industry doom presented by the introduction of digital audio is way overblown and unsubstantiated. ⁶¹

The Copyright Coalition strongly disputes the HRRRC's claims that the OTA Report demonstrates stimulative effects of home taping on music sales. The Coalition points out that the "OTA stated only that 'the survey did suggest the likelihood of a stimulative influence of home taping on music purchases,'" and did not prove the point. ⁶² Furthermore, the Coalition argues that the OTA survey data fails to support even the suggestion that home taping stimulates sales for prerecorded works:

1. The data showed that 24 percent of those purchasing prerecorded materials had, prior to making the purchase, heard the artists or the music on a homemade tape. From this, OTA suggests that home tapes may serve to broaden audience awareness of performers or recordings, and thereby stimulate sales. ⁶³ Given the numerous possible motivations for purchase decisions and the other possible ways in which to be exposed to musical compositions (air play, for example), this factor cannot be relied upon to demonstrate that home taping stimulates sales.
2. OTA further speculates that home taping may stimulate sales because 14 percent of music tapers expect to tape their purchases. ⁶⁴ This finding alone does not support

⁶¹ Home Recording Rights Coalition, comments at 32, 33.

⁶² Copyright Coalition, reply comments at 27 (quoting the OTA Report at 159).

⁶³ OTA Report at 159.

⁶⁴ Id.

the conclusion that the desire to tape motivated the purchase, or that the purchase would not have occurred if the taper could not tape. ⁶⁵

The Coalition concludes that the OTA Report contains no hard data to show that home taping stimulates any music sales, nor any evidence that the alleged stimulation effect is sufficient to offset displaced sales. ⁶⁶ In summary, the high incidence of home taping shown to exist in the OTA Report and the Roper Report produces the inexorable conclusion that a significant number of sales are being replaced by home taping activities.

Some commentators observed that it was impossible to predict what effect digital audio might have on sales of prerecorded works because of a lack of current verifiable evidence. The National School Boards Association stated that "In reality, no one has a statistically valid answer to the question," and recommended an independent survey or study. ⁶⁷ General Instrument Corporation and the National Association of Recording Merchandisers concurred that it was far too early to speculate what economic impact digital audio would have on the recording industry. ⁶⁸ And the New York Patent, Trademark and Copyright Law Association, Inc. concluded that "While it is probable that there would be some loss of sales of copyrighted works (for example CDs) because of listeners taping digital audio signals, we do not believe this will be significant enough to worry about." ⁶⁹

⁶⁵ Copyright Coalition, reply comments at 27.

⁶⁶ Id. at 28.

⁶⁷ National School Boards Association, comments at 3.

⁶⁸ General Instrument Corp., comments at 7; National Association of Recording Merchandisers, comments at 3.

⁶⁹ New York Patent, Trademark and Copyright Law Association, Inc., comments at 3.

c. Analysis. As with the first question in the Copyright Office's inquiry, a wide difference of opinion was offered concerning the effect digital audio might have on sales of prerecorded works, but with little concrete evidence regarding digital copying. However, there is substantial evidence in the studies and comments about home taping in analog format, which supports the conclusion that at least a certain percentage of sales is displaced by the copying. The magnitude of the displacement, and its economic impact on the recording industry, remain speculative in digital format, as do the claims of stimulation of sales through copying.

Accurate measurement of sales lost through home taping is extremely difficult due to the subjective nature of consumer purchasing habits. The OTA Report, which concluded that accurate assessment of sales lost through home taping would not be made on the basis of the survey, found a number of factors to influence purchases of prerecorded works. The report predicted "a sales displacement rate of possibly 22 percent, but probably much lower," for record industry sales.⁷⁰ The commentators disputed the magnitude of this figure, and a number argued that it was offset, in overall economic terms, by the stimulative effects of home taping described in the Report.⁷¹

As discussed in the Analysis section to question one above, none of the studies or commentators argued that copying of prerecorded works did not occur at least to some degree. Likewise, no one argued that sales of prerecorded works are never lost due to home taping activities. At least some sales of prerecorded works are lost due to consumers making copies of the works in analog format. It is, therefore, reasonable to assume that the

⁷⁰ OTA Report at 158.

⁷¹ See Id. at 159.

introduction of digital audio and digital recorders will at least sustain the current amounts of lost sales, and will probably increase the lost sales, even though there is insufficient evidence to measure the exact magnitude of that loss.

Several commentators argued that lost sales of prerecorded works were either negated or significantly reduced by the stimulative sales effect of home taping and, in the case of broadcast, the promotional value of exposure to artists and prerecorded works. In the home taping context, the commentators placed heavy emphasis on the OTA statements concerning the possible ways in which the ability to tape and existence of homemade tapes might actually result in more record purchases. The Copyright Office, however, does not take much stock in the OTA statements about home taping as a stimulus to sales. First, the OTA prefaces its statements by noting that the "accurate measurement of sales stimulation in a retrospective interview was even more difficult than the estimate of sales displacement."⁷² And in the preceding section regarding sales displacement, the report states that "[e]xact measurement of the amount of prerecorded music sales displaced by home taping was beyond the scope of this survey."⁷³ If assessment of the stimulative effects of home taping was "even more difficult than the estimate of sales displacement," whose exact measurement was beyond the scope of the survey, then the estimates offered by the report regarding stimulation of sales must be extremely speculative.

Second, because exact measurement of sales displacement and stimulative sales effect of home taping were beyond the scope of the survey,

⁷² OTA Report at 159.

⁷³ Id. at 157-58.

the Copyright Office feels that there may be a number of significant factors, either overlooked by the report or not addressed in the survey, which may affect the relationship between sales and home taping. In other words, it is very possible that the OTA Report survey data is not comprehensive enough to make judgments about what, if any, stimulative effects home taping may have on sales of prerecorded works.

Third, the OTA Report itself acknowledges that its survey data is only suggestive of some stimulative effect of home taping. The inference that home taping stimulates sales of prerecorded works is unlikely to be so great a factor as to equal or exceed the numbers of sales lost due to the creation of homemade tapes.

Finally, the Copyright Office is not persuaded that even confirmed evidence that home taping stimulates some sales would justify the development of copyright policies favoring uncompensated copying of entire works to the extent shown by the studies of analog copying activity.

The Copyright Office, therefore, concludes that copying of prerecorded works does and will displace sales of authorized copies, both in analog and digital formats, although the magnitude and economic impact of the displacement is difficult to assess at this time.

B. LEGALITY OF HOME TAPING.

The primary issue of concern over copying of prerecorded works is the legal status of home taping. As discussed above home taping currently occurs in analog format in statistically significant amounts, and while disputes continue over the economic effect the introduction of digital audio services will have on home taping, it is reasonable to assume that home taping will at least remain at current levels in the digital era. Before

questions of control or compensation for home taping may be addressed, however, the legality of the activity should be evaluated under current copyright laws.

1. Specific Exemption.

Spurred by the Copyright Office's Notice of Inquiry, a vigorous debate arose among several of the commentators as to the existence of a specific exemption for home taping in the copyright laws. Proponents of the exemption argue that as long as copies of prerecorded copyrighted works are made for personal use and not for commercial purpose, then such copying is not an infringement of the copyrighted work. Opponents posit that no such exemption for home taping exists, and the question of whether a home tape is made for personal use is not dispositive.

a. The Comments. The HRRRC, with the support of the NAB, advances the argument that private, noncommercial home audio taping draws a specific exemption in the Copyright Act. The exemption is actually two-fold: a recognition by Congress in the legislative history of the copyright law that private home taping is not an infringing activity and/or an indication that Congress expressly recognized home taping as a fair use of the works copied. Quite naturally, copyright interests, typified by the Copyright Coalition, object to the characterization of a congressionally fashioned safe harbor for home audio taping, nor do they agree that Congress believed in passing the Copyright Act that home taping was a recognized fair use of the works taped.

The genesis of the HRRRC's exemption theory is the Sound Recording Act of 1971. Up until passage of that Act, sound recordings were not recognized within the categories of copyrightable works under the Copyright

Act, and hence received no federal copyright protection. HRRC points to the following language regarding home recordings found in the House Report:

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years. ⁷⁴

The language of the House Report to the Sound Recording Act was discussed by a district court in Elektra Records Corp. v. Gem Electronics Distributors, Inc., 360 F. Supp. 821, 824 (E.D.N.Y. 1973), wherein the court observed in dicta that "[t]he House Report accompanying the bill, as well as hearings before Subcommittee No. 3 of the House Judiciary Committee, reveals that Congress was particularly concerned with combatting extensive pirating of phonograph records and tapes and clearly did not intend to extend coverage of the bill to...home recordings." According to the HRRC, the home taping exemption created during passage of the Sound Recording Act "has never been revisited or amended by Congress either explicitly by statute or implicitly through legislative history." ⁷⁵

Almost as an alternative to its "safe harbor" argument (i.e. that the protections of the copyright laws do not apply to home recordings), the

⁷⁴ Home Recording Rights Coalition, comments at 15 (quoting from H.R. Rep. No. 487, 92d Cong., 1 Sess. 1 (1971)).

⁷⁵ Id.

HRRC offers evidence from the legislative history of the Sound Recording Act that Congress expressly recognized that home recording from broadcasts is a fair use of the copyrighted works involved. Specifically, HRRC cites to floor statements made in the House of Representatives during debate of the Sound Recording Act:

Mr. Kazen: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?

Mr. Kastenmeier: Yes.

Mr. Kazen: In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this use would not be included under the penalties of the bill?

Mr. Kastenmeier: This is not included in the bill. I am glad the gentleman raises the point. On page 7 of the report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. ⁷⁶

The HRRC argues that the recognition of home taping as fair use was carried through to the 1976 Copyright Act, even though no mention of it was made. HRRC notes that the House Report to the 1976 Act states that Congress intended to "restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way" when it enacted the fair use provisions of section 107. ⁷⁷ Furthermore, according to the HRRC, the Senate Report to the Copyright Act "confirms that off-the-air recording for convenience should be deemed fair use." ⁷⁸ Thus, by continuing the principle

⁷⁶ Id. at 16. (quoting from 117 Cong. Rec. 3748-49 (1971)).

⁷⁷ Id. (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976)).

⁷⁸ Id. at 17 (citing S.Rep. No. 473, 94th Cong., 2d Sess. 65-66 (1976)).

of fair use already in existence at the time of passage of the 1976 Act, Congress reaffirmed its 1971 view that home taping remains a legitimate fair use of copyrighted works. 79

The Copyright Coalition takes umbrage with the position advanced by the HRRRC. It criticizes the view that home taping is an exempted activity or a congressionally recognized fair use. "The Copyright Act does not provide, and no court has ever held as a general principle, that 'private' or 'personal' copying is not an infringing activity." 80

The Copyright Coalition does not find the language regarding home recording appearing in the House Report to the 1971 Sound Recording Act to be indicative of a congressional exemption of home recordings from the protections of the Act. First, the House Report language was not adopted by the Senate, and in fact the Senate had already passed the Act without including any statements regarding home recordings. Thus there is evidence that the Senate embraced the principle that the Sound Recording Act did not apply to home recordings, or that the Senate even considered the issue. Second, it is significant that the 1971 Act applied only to sound recordings, and did not affect other copyrightable works. Even assuming the existence of a home recording exemption, it would only apply to sound recordings and not to the underlying musical works.

Third, the HRRRC's reliance on Elektra Records Corp. v. Gem Electronics Distributors, Inc., 360 F. Supp. 821 (E.D.N.Y. 1973) as an affirmation that Congress intended an exemption for home recording is misplaced because the case was decided under the 1909 Act and before passage

79 Id.

80 Copyright Coalition, comments at 7 n.12.

of the 1976 Act. The Coalition also argues that Elektra has been expressly discredited. "[A]lthough the rationale now advanced by the HRRC and NAB impressed the District Court in the Sony "Betamax" case, 480 F. Supp. 429, 444-46 (C.D. Cal. 1979), the Supreme Court majority, without discussion, specifically disclaimed it as a basis for its decision. Sony Corporation of America v. Universal City Studios, Inc.,⁸¹ and the four Justice dissent explicitly and persuasively rejected it,⁸² as had the three judge Ninth Circuit panel, 659 F.2d 963 (9th Cir. 1981)."⁸³ Finally, the Copyright Coalition notes that several portions of the 1971 House Report were incorporated directly into the Senate and House Reports for the 1976 Act. However, the provision regarding home recording was not included, further demonstrating that Congress did not intend it to be a part of the new Copyright Act.⁸⁴

The Copyright Coalition also takes issue with the proposition that Congress formally declared home taping to be a fair use under the copyright laws. The Coalition reiterates its argument that the 1909 Act and its amendments, such as the 1971 Sound Recording Act, were supplanted by the 1976 Act, and further notes that none of the legislative history from the Sound Recording Act regarding home taping was incorporated into the 1976 Act. The only general references to taping activity mentioned in the 1976 Act appeared in the House Report discussing section 107, the fair use provision:

⁸¹ 464 U.S. at 430, n. 11 (1984).

⁸² Id. at 470-475.

⁸³ Copyright Coalition, reply comments at 7 n.13.

⁸⁴ Id. at 7.

[T]he reference [in section 107] to fair use by "reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use.⁸⁵

Unlike the stand-alone statements made in the 1971 House Report, the above passage was adopted by both the House and the Senate.⁸⁶

The Copyright Coalition also attacks the HRRC's incorporation argument. The HRRC posited that because the House Report to the 1976 Act states that it did not intend to alter or change the fair use doctrine as it existed before passage of the Act, and that Congress, through the 1971 floor statements of Representatives Kazen and Kastenmeier, demonstrated that it considered home taping to be a fair use, then its perception of home taping was continued through into the 1976 Act. The Copyright Coalition argues that such a reading of the 1976 House Report provisions regarding section 107 fair use "is misleading at best, deceptive at worst."⁸⁷ Congress did not intend to freeze the fair use doctrine in a manner consistent with HRRC's expansive reading of the 1971 House Report language:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the

⁸⁵ Id. at 8 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976)).

⁸⁶ Id. (citing H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976)).

⁸⁷ Id. at 9.

formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially in a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.⁸⁸

The Copyright Coalition further attacks the HRRRC's assertion that the "Senate Report [on the 1976 Act] similarly confirms that off-the-air recording for convenience should be deemed fair use."⁸⁹ The Supreme Court in Sony stated that "[t]he Senate Report endorsed the view that 'off-the-air recording for convenience' could be considered fair use under some circumstances," demonstrating that Congress did not consider home taping to necessarily be a fair use.⁹⁰ In summary, there is no expressed intention of the Congress that home taping is necessarily a fair use; thus any fair use analysis of home taping must be done in accordance with the provisions of section 107 as interpreted by the courts.

b. The Legal Commentators. Most of the legal commentators appear generally to agree that there is no exemption for home taping activities in the copyright law, nor is there a formal declaration or

⁸⁸ Id. (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976)(emphasis provided by the Copyright Coalition).

⁸⁹ Home Recording Rights Coalition, comments at 16-17.

⁹⁰ Copyright Coalition, reply comments at 10 (quoting Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 448-449 n. 31 (1984)).

acknowledgement by the Congress that such activity constitutes fair use. 91
Of particular insight is Professor Nimmer's well researched article. 92

Turning to the question of an exemption stemming from the House Report to the 1971 Sound Recording Act, Professor Nimmer found evidence of its existence to be lacking:

In the first place, the 1971 Amendment [to the Sound Recording Act] was limited to the creation of a copyright in sound recordings and did not purport to affect the copyright in the underlying musical work. Consequently, any audio home recording exemption recognized in the House report on that Amendment would apply only to the sound recording copyright, not to the copyright in the composition that was the subject of the sound recording. Assuming such a limited exemption, a person who made an unauthorized home recording of a phonograph record would not be liable for infringing the sound recording copyright but would still be liable for infringing the copyright in the underlying work. Although the House report offers the opinion that home recording does not infringe the copyright in underlying works, this statement is nothing more than the House's view in 1971 of the meaning of the 1909 Act. The observation does not have the force of a statement of legislative intent. 93

Nimmer also noted, as did the Copyright Coalition, that the Senate never joined in the House statement in 1971, indicating that the Senate never even considered the statement, let alone ratified it. "Even if one assumes that all the voting members of the House regarded a home recording exemption

91 See, e.g. Note, Home Taping of Sound Recordings: Infringement or Fair Use, 56 So. Cal. L.R. 647 (1983); Nimmer, Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth, 68 Va.L.Rev. at 1505 (1982).

92 The Copyright Office acknowledges that Nimmer's article was written before the Supreme Court's decision in the Sony case. However, despite the impact of that case on Nimmer's analysis of fair use under section 107, the case had no import on Nimmer's conclusions on the existence of an exemption or the fair use statements made in the 1971 Sound Recording Act.

93 Nimmer, 68 Va.L.Rev. at 1509-1510.

as being implicit in the statutory language, there is no justification for reading the exemption into the 1971 Amendment without evidence of a similar intent upon the part of those voting in the Senate." 94

The most telling argument against the existence of an exemption, according to Nimmer, is drawn from the language of the House Report itself:

The Committee's statement that "it is not the intention...to restrain...home recording," if read in context, reveals that the Committee never intended to create a special exemption for audio home recording. The passage in which the home recording remark appears states that "it is the intention of the Committee that this limited [sound recording] copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17....[T]he record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." This language emphasizes the point that the 1971 Amendment extends to owners of sound recording copyrights the same statutory protection already granted to owners of musical composition copyrights. No one has claimed that the pre-1971 copyright statutes contained any provision other than the doctrine of fair use for exempting home recording from copyright infringement of the musical works thereby produced. Since the House report states that the purpose of the Amendment is to extend the same protection to sound recordings, it is clear that the Amendment did not create a new exemption for home recording. 95

Professor Nimmer also criticized the suggestion of congressionally sanctioned fair use for home taping. Addressing the exchange between Representatives Kastenmeier and Kazen and other statements during the House debate on the Sound Recording Act, Nimmer concludes that they demonstrate

94 Id. at 1510.

95 Id. at 1510-1511 (emphasis in original).

some members' belief that home taping should be considered fair use, but they do not represent the collective opinion of the Congress. Furthermore, Nimmer notes that even if the 1971 Act recognized home taping as a fair use for sound recordings, there is no evidence to support the conclusion that the position survived the 1976 general revision of the copyright laws.⁹⁶ Although much of the House report to the Sound Recording Act was adopted verbatim into the 1976 House report, the home recording language was omitted. Such omission is particularly notable since the Sound Recording Act did not by its terms affect copyright in musical works, while the 1976 Act clearly did. Thus, the home recording statement in the 1971 House report could not have constituted a statement of legislative intent regarding home recording of underlying musical works, as distinct from the sound recording of that work. ⁹⁷

Finally, Nimmer states that "[a]ny lingering doubt as to whether the Copyright Act of 1976 includes a special exemption for home recording is laid to rest by the following passage from the House report on the 1976 Act."⁹⁸

The passage reads:

[I]t is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. ⁹⁹

According to Nimmer, this passage conclusively demonstrates that "[i]f home

⁹⁶ Id., at 1514.

⁹⁷ Id. at 1517.

⁹⁸ Id.

⁹⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976)).

recording is to be beyond the reach of the copyright laws, it must qualify as fair use under section 107 of the Copyright Act of 1976." 100

c. Analysis. After careful examination of the opinions and conclusions of the commentators and its own review of the legislative history, the Copyright Office concludes that there does not exist an exemption for home recordings in the current Copyright Act, nor is there conclusive evidence demonstrating that Congress intended home recording to be a sanctioned fair use under the current Act. Thus, the question of whether home taping is a fair use of the prerecorded works copied must be determined in accordance with section 107 of the Copyright Act.

While the Copyright Office acknowledges that there does exist some legislative history from the 1971 Sound Recording Act suggesting that home taping of sound recordings is permissive, the Office is not convinced that such history survived the general revision of the copyright laws in 1976. The HRRRC has put forth two theories as to why the 1971 Sound Recording Act protects home taping activities: special exemption and fair use. The special exemption position is based on the House report to the Sound Recording Act, particularly the language "[i]t is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." 101 The

100 Id.

101 H.R. Rep. No. 487, 92d Cong., 1st Sess. 7 (1971).

fair use argument is principally supported by a floor statement of Rep. Kastenmeier: "On page 7 of the [1971 House] report, under 'Home Recordings,' Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use." 102

The Copyright Office resists the characterization of the 1971 House report as creating a special exemption for home taping from the protections of the copyright laws. The Office believes that had the Congress wished to exculpate home taping from copyright liability, it would have expressly done so. Furthermore, the Office does not believe that the "Home Recordings" provision of the 1971 House Report was intended to either create or recognize a special exemption. This report noted that home taping was "common and unrestrained," and that copyright holders in sound recordings under the bill would be "in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." The report intentionally equated the rights of copyright holders in sound recordings with those of the underlying musical works. Obviously, there was no recognized exemption for home taping of musical works in the 1909 Copyright Act -- only the provisions of the fair use doctrine. It, therefore, seems likely that the House report was referring to home taping as a recognized fair use of a sound recording, but not as an activity specifically exempted from the protections of the copyright laws.

That the House report was referring to home taping as a fair use, rather than an exempted activity, is further supported by the floor statement of Representative Kastenmeier. Kastenmeier called specific attention to the

102 117 Cong. Rec. 34,748-49 (1971).

"Home Recordings" passage in the House report, and stated that the practice of home taping "is considered both presently and under the proposed law to be fair use." Kastenmeier's statement and the House report do not seem to be a pronouncement that home taping per se is fair use, but rather a recognition that, at the time of passage of the Sound Recording Act, home taping for private purposes could under certain circumstances constitute a fair use of a copyrighted work.

Given the Copyright Office's view that the House report and Kastenmeier statement were offered in 1971 as a recognition of then existing law as to the permissibility of home taping as fair use, it must be determined what significance, if any, the statements have on current copyright law. The Office notes several criticisms offered against the statements: namely, that the Senate did not join the House report in 1971 and that the statements are confined to sound recordings only as an amendment of the 1909 Act. However, the most important issue is to what extent the statements survived, or have relevance, to the 1976 Copyright Act.

The HRRC argues that because the Congress made clear in the 1976 Act that it intended to continue the doctrine of fair use as developed under the 1909 Act, and that it declared home taping for private use to be a fair use in 1971, then home taping remains a fair use under the present law. This position, however, seems to attach undue importance to the 1971 Kastenmeier statement and House report. As noted above, the Kastenmeier statement and House report indicate a recognition of existing fair use law, not a legislative pronouncement as to what the law would be in the future. It is interesting to note that none of the parties to this proceeding, nor the legal commentators, offered evidence demonstrating how home copying of

prerecorded works were treated by the courts under a fair use analysis prior to 1971. Furthermore, although the House report and Representative Kastenmeier seemed to feel that they were articulating the current law, they too offered no cases or support for their position. This is not surprising since there was no case dealing expressly with the issue of home taping of prerecorded works for personal use. Although home audio taping was "common and unrestrained," no copyright owners had pursued an infringement action. The House report and the Kastenmeier statement arguably can be seen as no more than an opinion as to how home taping should be treated under a fair use analysis, rather than a recognition of existing law.

Because the fair use status of home taping was not clearly established in the law at the time of the 1971 Sound Recording Act, the House report and the Kastenmeier statement have diminished significance. Indeed, as Professor Nimmer candidly points out, "[t]he most one can fairly attribute to the House report, then, is an opinion that home recording constitutes fair use." ¹⁰³ The fair use opinion expressed by the House report and Representative Kastenmeier is further weakened by the fact that it only appears to have been an opinion of the House of Representatives in 1971, for the Senate did not join in the House report. In summary, the legislative force of the 1971 House report is questionable because fair use was solely a judicial doctrine in 1971 and the courts had not decided whether or not home recording constituted fair use.

Even if one assumes that, with respect to sound recordings, the Congress adopted the position in 1971 that home taping constituted fair use, the evidence suggests that such a position did not survive the general

¹⁰³ Nimmer, 68 Va.L.Rev. at 1511.

revision of the copyright laws in 1976. First, while the Congress adopted wholesale in 1976 many sections of the 1971 House report on sound recordings, the passage regarding home recordings was pointedly omitted. Obviously the legislators in 1976 were aware of the language, but chose deliberately not to incorporate it into the 1976 Committee report. Second, while it is true that the Congress stated in 1976 that it did not intend to "change, narrow or enlarge" the fair use doctrine "in any way,"¹⁰⁴ the fair use status of home taping was undecided at the time of passage. This would explain why the House report in 1976 stated that "[i]t is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use."¹⁰⁵

Finally, Congress did not express any categorical findings as to the fair use status of home taping nor did it give any indication that fair use should be decided in a manner other than in accordance with the provisions of section 107. The 1976 House report stressed that fair use determinations remain with the courts, not the Congress, and must be done on a case-by-case basis: "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."¹⁰⁶ Copying activities such as home taping are therefore never per se fair use, but must be evaluated according to the particular circumstances of the

¹⁰⁴ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976).

¹⁰⁵ Id. at 66.

¹⁰⁶ Id.

activity. ¹⁰⁷ The Copyright Office, therefore, does not find any evidence suggesting that Congress intended home taping to be protected as fair use under the current Copyright Act.

C. FAIR USE.

Because home taping of copyrighted works does not receive any special exemption under the copyright laws, nor is it a congressionally recognized fair use of the works involved, the legitimacy of home taping must be considered under the fair use rubric of section 107 of the Copyright Act. Those commentators responding to the Copyright Office's Inquiry who took the time to address the fair use factors offered differing conclusions. Commentators siding with copyright interests concluded that under no circumstances was home taping of a prerecorded work a fair use of that work, while parties supporting introduction of digital audio and equipment manufacturers reached the opposite conclusion based in principal part on their reading of the Sony Corp. v. Universal Studios, Inc.

The principal focus of any discussion of fair use must begin with section 107. The section provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use

¹⁰⁷ S. Rep. No. 473, 94th Cong., 2d Sess 66 (1976). ("The committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered fair use.")

the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

As noted above, in enacting section 107, the Congress expressed an intent to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way," adding at the same time, however, that it had "no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.... [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis." ¹⁰⁸ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976).

The courts have never passed on whether home copying of prerecorded audio works constitutes a fair use of those works. ¹⁰⁹ However, in Sony Corporation of America v. Universal City Studios, Inc., ¹¹⁰ commonly known as the "Betamax" case, the Supreme Court addressed the fair use of taping

¹⁰⁸ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976).

¹⁰⁹ Several songwriters, however, recently filed suit against Sony Corp. seeking a declaration, inter alia, that unauthorized home audio taping on DAT recorders of copyrighted musical compositions is unlawful under the Copyright Act. Sammy Cahn v. Sony Corporation, 90 Civ. 4537 (S.D.N.Y. 1990). As discussed later in this report, that suit has been settled and plaintiffs have sought dismissal.

¹¹⁰ 464 U.S. 417 (1984).

television broadcast programming with video cassette recorders for later home viewing (a practice known as "time-shifting"). Both commentators arguing and opposing the fair use of home taping of prerecorded works viewed the Sony decision as favoring their position.

1. Sony Corporation of America v. Universal City Studios, Inc.

In Sony, copyright holders in several programs shown on broadcast television sued the manufacturer of the Betamax VTR (video tape recorder) machines, now commonly known as VCR's, for contributory copyright infringement. The machines were being used by consumers to make tapes of broadcast programming for private home use, principally for the reasons of "time shifting."¹¹¹ In a five to four decision, the Supreme Court held that the Betamax machines at issue were capable of being used for significant non-infringing purposes, and that because the practice of time shifting did not present any demonstrable potential economic harm to the market for the broadcast programs, taping for time shifting was an acceptable use of the copyrighted works.

Commentators arguing the permissibility of private home taping argue that the Sony decision also sanctions copying of works other than video programming, such as prerecorded musical works.¹¹² A close reading of the decision, however, reveals the case to be very narrowly confined to its facts and far from an endorsement of private home taping of copyrighted works.

In the first instance, the dissent makes it quite clear that there does not exist a per se exemption for private home taping. Reviewing the

¹¹¹ "Time shifting" is the practice of recording live broadcast programming for the purpose of viewing the programming at a later time.

¹¹² Home Recording Rights Coalition, comments at 17-18.

language of the 1971 Sound Recording Act and surrounding legislative history, discussed above, the dissent concluded that "[T]he references to home sound recording in the 1971 Amendment's legislative history demonstrate no congressional intent to create a generalized home-use exemption from copyright protection." ¹¹³ Thus, according to both majority and dissent, any evaluation of home taping must be done under a traditional fair use analysis in accordance with the provisions of section 107.

The Court's application of section 107 was narrowly confined to the findings of the district court and the posture of the case. It must first be recalled that the Court was passing on the alleged contributory infringement of Sony for making a machine capable of infringing uses, rather than on specific acts of infringement. While it is true that the Court spent a good deal of time discussing the practice of time shifting under the fair use rubric, the issue was significant primarily to the extent that it demonstrated the potential for noninfringing uses of the Betamax machine. As the Court noted, "[W]e need not explore all the different potential uses of the machine and determine whether or not they would constitute infringement," and therefore the legality of such activities as making permanent copies of broadcast programming (a practice known as librarying), and taping programs from cable or pay services was not decided by the Court. ¹¹⁴ Furthermore, the Court's discussion of the fair use of time shifting was confined to broadcast programming in the video format, and not to home taping of programming from AM or FM radio or other related services. Because of the limited ruling, it would be erroneous to conclude that Sony stands for the

¹¹³ 464 U.S. at 473.

¹¹⁴ Id. at 442 (emphasis in original).

proposition that all private home copying of copyrighted works constitutes fair use.

Although Sony is limited to its facts, the Court's application of the fair use factors to the practice of time shifting is helpful for a consideration of home taping from digital audio sources. Specifically, the Court focused on the first and fourth factors of the fair use analysis: the purpose and character of the use and the effect of the use on the potential market for the copyrighted work.

In examining the use of the Betamax machines, the Court concluded that if they were "used to make copies for commercial or profit making purpose, such use would be presumptively unfair." 115 However, the district court's findings "plainly establish[ed] that time shifting for private home use must be characterized as a noncommercial, nonprofit activity," thereby creating a contrary presumption that the use was indeed fair. 116 The Court's conclusion was limited to the practice of time shifting, and nothing was said about other copying practices such as librarying or copying works for friends.

The Court had a more difficult time applying the fourth fair use factor to the use of the Betamax to time shift broadcast programming. The Court did establish a test for assessing the potential impact of the use of a

115 Id. at 449.

116 The Court also noted that although the entire work was copied, which, under the third factor of the fair use analysis (substantiality and amount of the work used) generally requires a finding that the use was not fair, the fact that time shifting only allowed a viewer to see at a later time a work to which he was already invited to view for free further supported a finding of fair use.

copyrighted work on the market by requiring a threshold showing of harm to the copyright owner:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated. ¹¹⁷

In searching for "evidence that some meaningful likelihood of future harm exists," the Court relied exclusively on the conclusions of the district court. The district court rejected all four of the principal arguments advanced by the plaintiffs as to why time shifting would injure the potential market for their programming, ¹¹⁸ and concluded that "[h]arm from time-shifting is speculative and at best, minimal." ¹¹⁹ The district court's finding of minimal harm was also "buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits," which "supports an interpretation of

¹¹⁷ Id. at 451 (emphasis in original).

¹¹⁸ Those arguments were: 1) fear that persons watching the original telecast of a program at a later time will not be measured in the live audience and the ratings and revenues will decrease; 2) fear that live television movie audiences will decrease as more people watch Betamax tapes as an alternative; 3) fear that time-shifting will reduce audiences for telecast reruns; and 4) fear that theatre or film rental exhibition of a program will suffer because of time-shifting recording of that program.

¹¹⁹ Id. at 453-454.

the concept of 'fair use.'" 120 Ultimately the Court held that the plaintiffs had "failed to demonstrate that time shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works," and found the Betamax ". . . capable of substantial noninfringing uses." 121

1. Application of the Fair Use Factors to Home Audio Recording.

Several of the commentators, most notably the Copyright Coalition and the HRRRC, engaged in their own application of the fair use analysis to home audio taping. Although the majority of the discussion focused on current taping habits in analog format, as surveyed in both the Roper and OTA Reports, home taping activities in digital audio format are unlikely to be significantly different.

The Copyright Coalition applied the fair use factors of section 107 to the practice of home audio taping and reasoned that none of the factors favored a finding of fair use. Regarding the first factor--commercial vs. noncommercial use--the Coalition argues that it is incorrect to consider home

120 Id.

121 Id. at 456. The dissent criticized not only the majority's application of the fourth fair use factor, but also its substantive requirement of a showing of "some meaningful likelihood of future harm." Justice Blackmun wrote:

I therefore conclude that, at least when the proposed use is an unproductive one, a copyright owner need prove only a potential for harm to the market for or the value of the copyrighted work. Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present 'the real danger...of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.' Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use.

taping automatically to be a noncommercial use simply because the home taper does not seek to reap vast financial gains. Rather, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit for the exploitation of the copyrighted material without paying the customary price." 122 Individuals who make home copies of prerecorded works get full use and enjoyment from the copies of the works without paying the "customary price." 123 Furthermore, unlike the practice of time-shifting addressed in the Sony case, most home audio tapers make permanent copies of works for purposes of librarying. Also, the prerecorded works copied by home audio tapers are not offered to the public free of charge, as was the case with broadcast programming in Sony, but are sold for a profit. Whenever a home taper makes a copy of a work, whether to have a backup copy or to have a copy of the work in a more portable format (such as taping from purchased LP's onto cassettes), a potential sale is lost to the copyright owner. Whatever the reason for the taping, the Coalition asserts that the home taper benefits from the use of the work without paying for it. 124

As to the second factor--nature of the copyrighted work at issue--the Copyright Coalition notes the Sony Court's observation that the more "creative, imaginative, and original" and the less informational a work is, the less likely an unproductive use such as entertainment will be considered fair. Prerecorded musical works are certainly creative, imaginative and

122 Harper & Row Publishers, Inc. v. National Enterprises 471 U.S. 539, 562 (1984).

123 Copyright Coalition, reply comments at 13.

124 Id. at 15.

original, and therefore copying for home entertainment purposes is not fair.
125

The Coalition asserts that the third factor -- amount and substantiality of the taking--is obvious because virtually all home tapers make copies of complete selections of prerecorded works (i.e. no one tapes half a song). As noted in Sony, copying the entire work mitigates against a finding of fair use. 126

The Coalition finds that the fourth factor -- effect of the use on the potential market for or value of the copyrighted work--weighs heavily against a finding of fair use. They rely on the Roper Report's demonstration that an estimated 1 billion unauthorized copies of prerecorded works were made in a 12 month period, with an estimated 322.5 million homemade tapes displacing sales. 127 Furthermore, the Roper Report found that audio tapers were even more likely to make home tapes with the use of a DAT machine, resulting in even greater lost sales to the music industry. "With the availability of digital audio services and digital audio recording equipment, the public will have another way to obtain digital copies of protected works: they will be able to make and own perfect copies without compensation to the rights owners and creative individuals who made the work available." 128 The Copyright Coalition argues that the negative impact that digital audio will have on sales in the music industry requires a finding that home taping is not fair use. 129

125 Id. at 16.

126 Sony, 464 U.S. at 450.

127 Copyright Coalition, reply comments at 17.

128 Id. at 21.

129 Id. at 22.

The HRRC, along with the NAB and others, counter that private home taping is a fair use of copyrighted prerecorded works. Although not specifically addressing the four factors of section 107 on a point-by-point basis, the HRRC offers several arguments urging fair use. Regarding the commercial/non-commercial nature of home taping, HRRC stresses that home taping is for private, noncommercial purposes: "Home tapers are not in business to reap huge financial profits at the expense of the music industry....Home tapers...make tapes from broadcasts for their private convenience and enjoyment." 130

The HRRC notes that a substantial portion of home taping activity is selection taping, rather than wholesale copying of entire works. Home tapers thus create tapes which are not commercially available and therefore do not compete with available prerecorded works. Thus, the copyrighted works are not devalued nor is the market for the entire work harmed. 131 Furthermore, they state the OTA Report confirmed that home taping tends to promote rather than displace sales, thereby further alleviating the potential for harm to the market for prerecorded works. 132 Finally, the HRRC argues that home taping is fair use because, according to the OTA Report, "[c]onsumer's own attitudes toward home taping overwhelmingly demonstrate their belief that home taping is fair to both consumer and copyright interests." 133

130 Home Recording Rights Coalition, comments at 18.

131 Id.

132 Id. at 18-19.

133 Id. at 19.

2. Position of the Copyright Office.

The Copyright Office has examined the comments of the interested parties, the statute and caselaw, and the Roper and OTA Reports in its consideration of whether home taping of digital audio works should be considered fair use. The Office is not a court of law passing on the facts of a particular case and its opinions as to whether certain types of home taping activity are or are not fair use do not carry the force of law. The Office recognizes that home taping takes many form and is done for many reasons, and the conclusions expressed herein are only offered for purposes of guidance. Resolution of whether home taping constitutes fair use remains with the courts and must be done on a case by case basis.

After our review of these studies and the relevant discussions by commentators of the various kinds of and reasons offered for home taping, the Copyright Office is able to make some general observations about home taping. First, the Office concludes that all types of home taping activity are not fair use merely because they are of a private nature. While the private noncommercial nature of home taping is a factor to be weighed in the fair use analysis, it does not automatically render a particular taping activity fair use. Second, there are certain types of home taping activity, such as librarying and the making of multiple copies, which would seem to have at least a negative impact on the market for the copyrighted works. Third, there are some home taping practices, such as time-shifting, which are recognized as fair use. Finally, the nature of home taping where the use is not fair prohibits the copyright owner from preserving his or her rights through the infringement mechanism. The Copyright Office therefore

recommends some type of royalty system to compensate copyright owners for home taping.

While the overriding purpose of home taping would seem to be for entertainment, the practice of taping takes many forms. As described in the OTA Report, some people tape from radio and television broadcasts, while others tape from prerecorded sources. The Report found that album taping was far more widespread than selection taping (taping only selected songs or portions of a prerecorded work) and that the vast majority of tapes were made with the intention of keeping or "librarying" them.¹³⁴ Tapes were also made for other members of the tapper's household, as well as those outside the household.¹³⁵ In short, the survey showed that people tape from a variety of sources, in a variety of ways, and for a variety of reasons and purposes. Some of the means and ways of home taping appear to present greater problems to a claim of fair use than others.

One home taping practice that is particularly problematic is librarying. "Librarying" is where the home tapper makes a permanent copy of either an entire work, or selections from several works, for the purpose of continued use without any intention of erasure. The practice would appear to run afoul of the fourth factor of the fair use analysis, effect on the value or market for the copyrighted work, which the Supreme Court, considers to be "undoubtedly the single most important element of fair use."¹³⁶

Making permanent copies of prerecorded works certainly carries with it a meaningful likelihood of potential harm to the copyright holder's market

¹³⁴ See OTA Report at 155-156.

¹³⁵ Id. at 156.

¹³⁶ Harper & Row v. Nation Enterprises 471 U.S. 539, 566 (1984).

for that work. Both the OTA and Roper Reports found that considerable numbers of sales for prerecorded musical works are lost each year as a result of home taping, and common sense indicates that an individual is unlikely to buy multiple copies of a work when he or she may make copies for free. The Roper Report concluded that with the introduction of DAT, home tapers are more likely to make even more copies of works for themselves and possibly others. While the OTA Report concluded that home taping did have some stimulative effects on sales of prerecorded works, it also admitted that the stimulative effective, to the extent that it existed, was difficult to measure. The Copyright Office is convinced that it is highly unlikely that the stimulative effects of home taping are so great as to either negate or outweigh the amount of sales lost to home taping activity.

The practice of making permanent tapes for one's own collection also runs counter to the discussion of the Sony Court. The Court was persuaded to find fair use because of several factors, none of which are applicable to making permanent copies of prerecorded works. First, the Court, bound by the findings of the district court, was limited to considering only the practice of time shifting. Time shifting does not occur when tapes are made directly from prerecorded works. Second, time shifting of broadcast programming has several innocuous features not applicable to taping from prerecorded works. The Court was particularly impressed by the fact that time shifting of broadcast programming involved the copying of programs to which the taper "had been invited to witness entirely free of charge." ¹³⁷ The Court also viewed with favor the testimony of several commentators, including Fred Rogers of "Mr. Rogers Neighborhood," who openly

¹³⁷ 464 U.S. at 449 (1983).

endorsed time shifting as a means of allowing the public greater opportunity to view the programming.¹³⁸ And the Court held that "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits."¹³⁹ None of these key elements which influenced the Court's decision can be said to apply to making permanent copies of prerecorded works for one's own enjoyment.

Furthermore, the OTA Report found that while the majority of permanent tapes were for the maker's use, seven percent of the tapings were made for another member of the household and nineteen percent were made for someone outside the household. The potential harm to the market for the copyrighted work is clear, and it would be difficult, if not impossible, to argue that such a practice is consistent with the principles established in Sony.

Although home audio taping resulting in permanent copies is harmful to the market for prerecorded copyrighted works, it is not true that all forms of home audio taping are not fair use. Time shifting of television broadcast programming is a recognized fair use, and the same would presumably apply to time-shifting of radio and digital broadcasting. Erasure of home tapes within a reasonable time period after their creation may also mitigate against findings of unfair use. And it may be the case that, at least for certain categories of works, copyright owners may actually encourage home taping of their works, similar to those copyright holders in Sony who sought further dissemination of their works. Ultimate guidance rests with the

138 Id. at 445.

139 Id. at 454.

judicial system as courts continue to address new activities and further develop the concepts and application of the fair use doctrine.

In summary, the Copyright Office views home audio taping as a practice consisting of varying activities for different purposes. Some reasons and activities may have legitimate claims to fair use, but a large amount of home taping is likely to have an impact on the market for prerecorded copyrighted works that will negate a fair use defense. While individual acts of taping may cause infinitesimal amounts of harm, the collective impact may be devastating. The copyright holder is often left without means of redress because the private nature of home taping makes the costs of identifying tapers great while the rewards are too small to be worth pursuing. The Copyright Office therefore concludes that an upfront royalty and monitoring system, as discussed in section IV infra, is the best solution to guarantee that in a rapidly advancing technological era, copyright owners are properly compensated for the use of their works.

D. ISSUES RELATED TO HOME TAPING.

The Copyright Office asked several questions in its Notice of Inquiry concerning issues tangentially related to home taping. The Office inquired as to whether or not digital audio broadcasters should scramble their signals; whether copyright owners or third parties could negotiate for compensation from digital audio providers; and posed several questions regarding carriage of subcode information on digital audio transmissions. The responses of the commentators are described below.

1. **Negotiation.** Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for

compensation for transmission of his/her works? If not, could representatives of copyright owners, such as performing rights organizations, accomplish this task? 140

The commentators were in general agreement that current negotiation methods would be adequate to deal with digital audio services. Although there was a difference of opinion as to the ability of individual copyright owners to negotiate license for their works, all parties agreed that the current performing right societies could adequately perform the task.

Some of the commentators aligned with copyright interests note that copyright owners are faced with practical difficulties in negotiating their own licenses. For example, ASCAP points out that the same problems which face copyright owners now--a large universe of potential licensees and limited resources on the part of the individual copyright holder--will face them in the digital audio age: "Although there are only three digital audio services now, there are likely to be thousands in the future when radio and television broadcasters generally begin digital transmissions." 141

All of the commentators who responded to this question agreed that the performing rights societies were up to the task of handling licensing negotiations on behalf of copyright owners for digital audio transmissions. ASCAP and BMI have already licensed existing digital cable services for the public performance of copyrighted musical compositions in their respective repertoires, and the licensing arrangements are expected to continue and grow. And at least one record label, Capitol Records, has entered into an

140 Question three in Notice of Inquiry.

141 Comments of the American Society of Composers, Authors and Publishers at 7. Accord Comments of the New York Patent, Trademark and Copyright Law Association at 2.

agreement with Digital Planet (a cable radio service) to showcase its artists. ¹⁴² It would appear, therefore, that current licensing systems will be adequate to cover digital audio transmissions.

2. Scrambling. Should digital audio broadcasters be forced to scramble their broadcasts so that listeners wishing to receive a signal containing copyrighted works would be forced to acquire special equipment, thereby becoming accountable for the possible copying of copyrighted works? ¹⁴³

The commentators responding to this question unanimously agreed that digital audio broadcasts should not be required to be scrambled or encrypted. Broadcasters were particularly adamant in their comments regarding continuation of a free over-the-air broadcast system. NAB contended that a scrambling requirement would conflict with current communications policy and "be the antithesis of the mandate of the Communications Act to 'make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and world-wide radio communication service....'" ¹⁴⁴ General Instrument Corporation noted that scrambling would not necessarily result in subscribers becoming accountable for their copying of copyrighted works, and the New York Patent, Trademark and Copyright Law Association alleged that scrambling of signals would

¹⁴² Nunziata, "Capitol Takes to the Airwaves Via Own Digital Cable Radio Channel," Billboard at 93 (June 30, 1990).

¹⁴³ Question number five in the Notice of Inquiry.

¹⁴⁴ Comments of the National Association of Broadcasters at 18 (citing 47 U.S.C. 151).

eventually be defeated by those interested in copying works. ¹⁴⁵ The New York Patent, Trademark and Copyright Law Association further concluded that the potential for copyright infringement posed by digital audio broadcasting was not sufficient justification to warrant the expense and difficulty of mandating a scrambled or encrypted nationwide digital audio broadcasting system. ¹⁴⁶

3. Subcode Information. Describe existing and contemplated digital audio transmission services, including a description of (a) encryption systems, if any; (b) the means of transmitting prerecorded digital signals; (c) any plans to compress digital signals; and (d) any proposals concerning transmission of digital subcode information embodied on prerecorded works. ¹⁴⁷

The Copyright Office devised this question primarily to gather information about existing and proposed transmission delivery systems, but it set off a controversy among the commentators regarding retransmission of digital subcode information. The debate reveals a split between copyright interests who insisted that all subcode information embodied in a prerecorded work must be included in any retransmission of the work, and broadcast related interests who opposed inclusion of the subcode information as an unwarranted and unnecessary burden.

Digital subcode information is coded information inserted into the master recording of prerecorded works. The subcodes are capable of

¹⁴⁵ Comments of General Instrument Corp. at 11; Comments of the New York Patent, Trademark and Copyright Law Association at 4.

¹⁴⁶ Id.

¹⁴⁷ Question number six in the Notice of Inquiry.

containing varying types of information, such as information identifying musical selections, performing artists, copyright owners, and record labels. Some subcodes are used to provide signals to play-back machinery to either perform or not perform certain functions (such as recording). In the broadcast area, subcode information would be transmitted in audio, providing the listener with the desired information, or, in the case of video, the information could be viewed in liquid crystal display readouts across the screen. It is generally acknowledged that digital subcode information is most usable as a means of providing viewers and listeners of prerecorded works with identifying information of those works, and as a device for monitoring the frequency in which those works are heard and/or viewed.

The Recording Industry Association of America (RIAA) urges that transmission of subcode information by broadcasters and cable services should be mandated on the grounds of public interest in access to the information. The RIAA also notes the importance of the transmission of subcode information to facilitate implementation of royalty legislation or compensation systems. Citing the Register of Copyrights' expressed interest in technological solutions to unauthorized taping of prerecorded works, RIAA concludes that such solutions "would be impossible without a system that mandates accurate transmission of digital subcodes." 148

Broadcasting interests strongly oppose mandatory inclusion of subcode information in all broadcasts of prerecorded works. With respect to subcodes containing consumer-based information, such as song titles or record labels, the HRRC and NAB argue that such information should be provided by

¹⁴⁸ Comments of the Recording Industry Association of America, Inc., at 21.

broadcasters, if at all, on a voluntary basis. They point out that if the public demands information typically carried in subcodes, then broadcasters will, according to market forces, respond to the interest. ¹⁴⁹ Regarding subcodes designed to monitor copying activity, HRRC and NAB argue that such codes are impractical, place additional expense on broadcasters, and are spectrum inefficient. ¹⁵⁰

The Copyright Coalition responded unenthusiastically regarding mandatory copy prevention subcodes, such as the Serial Copy Management System, noting that "[e]ven if digital audio services were required to transmit digital subcode information relating to SCMS,... the limits on unauthorized taping from such services would be inadequate and largely ineffective." ¹⁵¹ And Broadcast Data Systems, Inc., a radio monitoring service, argued that use of subcodes to monitor frequency and selection of prerecorded works broadcast over radio was unnecessary because the company already provided such monitoring services via a manual system. ¹⁵²

The Copyright Office takes no position with respect to mandatory inclusion of subcode information in digital audio transmissions. The Office did not ask whether transmission of subcode information should be mandatory or voluntary, but rather was seeking background information on planned subcode carriage. Those few commentators responding to the question brought forth the debate over whether transmission of digital subcode by

¹⁴⁹ Comments of the National Association of Broadcasters at Appendix A, pp. 8-9.

¹⁵⁰ Id.

¹⁵¹ Comments of the Copyright Coalition at 21.

¹⁵² See Comments of Broadcast Data Systems, Inc.

broadcasters should be done on a mandatory basis, demonstrating that a controversy has existed for some time. As the issue is obviously a complex one involving a number of telecommunications issues, the Office defers taking a position until the telecommunications and technical aspects of transmission of subcodes are more thoroughly clarified.

4. Single-Cut Rule.

The RIAA proposed in its comments adoption of a "single-cut" rule. Such a rule would prevent broadcasters and others from making digital transmissions of musical works from transmitting entire albums, sides of albums, or collections of works of a single artist. The purpose of the rule would be to prevent wholesale copying by home tapers of complete works of various artists, and thereby reduce the number of sales of prerecorded works lost to home taping. The RIAA has urged adoption of the single-cut rule by the FCC in its proceeding relating to allocation of spectrum for DAB services, and urges "that the Copyright Office make legislative recommendations to Congress" for adoption of such a rule. 153

The HRRC and the NAB oppose the single-cut rule on a number of

153 RIAA comments at 2, and note 1. Nimmer suggested that the absence of a performance right in sound recordings does not necessarily mean that recording companies are without recourse when radio stations perform record albums in their entirety. He felt that record companies may have a valid compilation claim in the selection and arrangement of the various songs on an album provided that such company has made (or is the assignee of one who has made) the selection and grouping of the particular songs. The copyright owner of a musical work compilation, unlike the copyright owner of a sound recording, is entitled the right to control the public performance of his or her work. Record companies, therefore, could prevent the entire presentation of an album by asserting their public performance right in their musical compilation. NIMMER ON COPYRIGHT, [8.14[A].

grounds. The NAB argues that the RIAA has failed to demonstrate the need for such a regulation:

Unfortunately, RIAA has provided neither the Commission nor the Copyright Office with hard facts to support its speculation that, absent its proposed rules, home recording of advertiser supported digital audio broadcasts will result in the imminent demise of the multi-billion dollar recording industry. To the contrary, the most current available data on home taping of prerecorded music off the air suggests that it is having little, if any, adverse impact on the recording industry and that any such impact is more than offset by the benefits obtained by the recording industry from the free exposure broadcasters provide for its products. ¹⁵⁴

NAB also asserted that OTA Report's finding that only twenty-seven percent of those surveyed, taped music from television or radio, provides "a compelling justification not to impose the 'one cut' limit...urged by the RIAA." ¹⁵⁵

The NAB and the HRRC argued that single-cut regulations are of questionable constitutional validity. A single-cut rule would limit broadcasters' freedom of expression and right to control their programming in such a way as to seriously infringe their First Amendment rights. ¹⁵⁶ Finally, the HRRC argued that a single-cut rule would hamper broadcasters' creativity and audience enjoyment by limiting the number of musical works played. Requiring additional license fees for broadcast of complete works would effectively operate as a tax against serious music stations which

154 NAB reply comments at 17-18.

155 Id. at 19.

156 Id. at 23; HRRC reply comments at 22.

attempted to provide listeners with anthologies and complete works of famous artists. 157

The Copyright Office is not convinced that OTA's finding that only twenty-seven percent of those surveyed make analog recordings from the radio or television will remain constant in the digital format. In fact the Office believes that home taping of entire works will increase, since digital technology will mean perfect copies can be made. The Office feels, however, that such a regulation of broadcasters is outside the ambit of copyright protection and the jurisdiction of the Copyright Office.

157 HRRRC reply comments at 20-22.

III. ALTERNATIVE COMPENSATION SYSTEMS

In the past decades technological advancements have made private or home taping easier and more economical; thus, the number of people who for various reasons are making their own copies of copyrighted works has increased. Legislatures of many countries have debated whether or not authors should be compensated for such copying¹⁵⁸ and if so, what the proper remuneration should be, whether it should apply to both the software and the hardware, whether it should take the form of a royalty or a tax, and how the monies generated should be allocated. These debates ultimately led to formulation of legislation in many countries. Review of the systems developed in other countries for compensating authors for home taping is helpful in evaluating whether or not the United States Congress should legislate in this area and, if so, in determining the specific legislative solution that would be best.

Compensation for home or private taping has also been the topic for discussion within the World Intellectual Property Organization, among members of the Universal Copyright Convention, and by various other groups representing countries such as the European Economic Commission (EEC).¹⁵⁹

A. ROYALTY.

The effect of unauthorized home taping on copyright proprietors has been discussed repeatedly during the last decades.¹⁶⁰ At the heart of these

¹⁵⁸ Dillenz, The Remuneration for Home Taping and the Principle of National Treatment, Copyright (June, 1990) pp. 186-193.

¹⁵⁹ See Statement of Ralph Oman Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 101st Congress, Second Session, June 13, 1990 at 31 for a discussion of the EEC position on compensation for digital home copying.

¹⁶⁰ OTA Report at 103-135.

discussions is the basic question of whether or not an author should be compensated for the unauthorized taping of copyrighted programs. Most of these discussions focused on analog duplication, and several countries have already determined that a royalty or tax should be imposed for the analog duplication of broadcast or cable programming or any sound recording for commercial or personal use. Some countries have already provided for digital copying in their compensation schemes.

Before the United States had answered the question about compensation for analog duplication, it was faced with the question of whether or not there should be a system to compensate copyright owners when an individual records or copies digital broadcast or cable programming, or a sound recording for personal use. The foreign experience with home taping and the compensation schemes developed to compensate for analog duplication in other countries may have some bearing on how the United States answers this basic question. Compensation could be made through voluntary licensing agreements, by means of a compulsory license, by providing a public performance right in sound recordings and/or placing levies on blank tapes and/or recording equipment.

1. Responses to Notice of Inquiry.

The Office posed two sets of questions in its Notice of Inquiry about compensation for copying in the context of digital audio broadcast and cable technology.

1. Would a copyright owner have the practical ability to negotiate with the owners/operators of digital audio services for compensation of his/her works? If not, could representatives of copyright owners, such as performing rights organizations, accomplish this task?

2. Should a royalty be placed on recording materials, such as blank tapes, or on digital recording equipment itself, to be distributed among copyright claimants? If so, who would be responsible for administering this process? ¹⁶¹

Commentators' replies took a variety of forms, some specifically answering the Office's questions, some offering more general discussion, and some not addressing royalty issues.

The American Society of Composers, Authors and Publishers (ASCAP) supported imposition of a domestic royalty system that could also be implemented internationally. ASCAP volunteered its services in administering such a system. In specific reply to the first questions set out above, ASCAP claimed it is not feasible for individual copyright owners to negotiate with audio service providers to compensate them for losses due to home taping. It also asserted that the performing rights organizations have "the ability to undertake the licensing and distribution activities on behalf of the creators and copyright owners of the works rendered, if asked and authorized to do so." ¹⁶² In addition, ASCAP states that it is not the DAB service providers that will be making unauthorized copies of works, but rather, home tapers, whose activity cannot practically be monitored. "[I]n all fairness, it is the listeners who are ultimately profiting from the recording and who should, therefore, pay for it." ¹⁶³

ASCAP believes that the fairest solution for all parties would be payment of royalties on taping equipment and blank recording tape. It notes

¹⁶¹ Question three and four in the Office's Notice of Inquiry. 55 Fed. Reg. 42,916, 42,917 (1990).

¹⁶² ASCAP comments at 7.

¹⁶³ ASCAP comments at 8.

that such systems are already in effect in many other nations, and have been suggested for establishment in the coming years for members of the European Community. Songwriters, performers, and music and sound recording rights owners would benefit from such a system. If approved by Congress, "existing music licensing groups could easily handle the collection and distribution of these royalties." 164

Broadcast Music, Inc. (BMI) also stated that copyright owners or representative performing rights organizations do and will continue to have the practical ability to negotiate with digital audio services' owners or operators. BMI has already completed negotiations with two digital cable audio services for payment to its clients for transmissions of their works, and similar agreements could be made with digital broadcast service owners. 165 BMI suggested that royalties "to account for whatever home taping is likely to result from DAB transmissions could be imposed upon either blank tape or digital recording equipment manufacturers or sellers to be remitted to the Copyright Royalty Tribunal or other appropriate agency for distribution..." based on an "industry-negotiated formula for division among participants." 166 In its reply comments BMI stated that compensating artists by placing a royalty on blank tape and/or recording equipment would encourage and compensate artists without placing unfair burden upon consumers. 167

164 ASCAP comments at 10.

165 BMI comments at 2.

166 Id.

167 BMI reply comments at 10.

In its comments the Copyright Coalition urged Congress to enact legislation to establish a home audio taping royalty system. A royalty system would not interfere with introduction of new recording technologies, nor would it unduly impede consumers' abilities to tape at home, according to the Coalition. Systems are in place internationally that seem to work, and could serve as models. If not a royalty, a compulsory license could be established to "authorizing the practice of home audio taping in exchange for a modest royalty on recorders and/or blank tapes. The rate could be set by the Congress, or by the Copyright Royalty Tribunal" ¹⁶⁸ to ensure fairness to all interested parties. Administration of the system could be conducted by existing performing rights societies. The Coalition stressed that the mechanical Serial Code Management System (SCMS) alone, even if implemented, could not curb home copying from digital sources, but that SCMS may be effective as part of an overall compensation framework.

The Recording Industry Association of America (RIAA) did not propose any particular royalty system in its comments, but instead lobbied heavily for a performance right in sound recordings, saying that "performance royalties from the countless broadcasts of these recordings (referring to recordings that don't become "hits", but continue to get airplay) would provide deserved and needed income to . . . artists and musicians." ¹⁶⁹ In general the AFL-CIO Department of Professional Employees, American Federation of Musicians, and American Federation of Television and Radio Artists supported RIAA's comments.

¹⁶⁸ Copyright Coalition comments at 19.

¹⁶⁹ RIAA comments at 15.

Strother Communications, Inc. (SCI), a proponent of a terrestrial, over-the-air digital audio broadcasting system, supported the idea that performers and copyright owners should be fairly compensated for transmission of works by DAB operators. However, SCI maintained "that the existing mechanisms by which such compensation is determined and paid by radio stations will continue to be adequate for that purpose. Thus, in the case of recorded music programs, performers and copyright owners' compensation can be handled under the auspices of ASCAP and other performing rights organizations, exactly as it is today." 170

CD Radio, Inc., a developer of integrated satellite and terrestrial delivery of digital audio services, also claimed that copyright owners and their representatives can negotiate for compensation for digital programming "exactly as is done today for AM, FM and TV transmission." 171 CD Radio, Inc. said that "royalties should not be placed on tapes or recording equipment if this discriminates against the development of digital audio radio." 172 General Instrument Corporation, a manufacturer and supplier of electronic products, systems and components, took a similar view regarding negotiations for compensation, commenting that it is too early to tell whether or not royalties on hardware or tape are needed.

Adamantly opposed to the concept of imposing royalties on recording media or digital recording equipment was the Home Recording Rights Coalition (HRRRC). Briefly, in response to question three, the HRRRC contended that as a practical matter, copyright owners or their representatives can

170 SCI comments at 2.

171 CD Radio comments at 3.

172 Id.

negotiate with DAB owners and operators for compensation for DAB transmissions. "Once mandatory government restrictions are out of reach, copyright holders will recognize many ways to license copyrighted materials-- some possible only because of DAB." 173

Regarding the Office's inquiries in question four, HRRC stated that royalties are not necessary. "Any royalty tax, whether collected through technical monitoring devices or through old-fashioned taxation, would be unwarranted and unfair and would impose costs on all consumers, whether they tape or not." 174 A cornerstone of anti-royalty arguments is the proposition that "digital media are no different from their analog counterparts in fact or as a matter of copyright law." 175 A system such as "smart card" would be prohibitively intrusive on a home listener's private activity, would be expensive to put into place, could be circumvented by motivated listeners, and may cripple digital technology. 176 HRRC adds that performance royalties for commercial users, such as broadcasters, dance club operators, and restaurant operators, should certainly be considered before placing a royalty on private home taping activity. 177

The New York Patent, Trademark and Copyright Law Association contended that although individual copyright owners generally don't have the practical ability to negotiate with digital audio service operators, performing rights organizations do. The Association stated that placing a

173 HRRC comments at 2.

174 Id.

175 HRRC reply comments at 2 (emphasis omitted).

176 HRRC comments at 20-25.

177 Id. at 36-37.

royalty on recording materials is not "an appropriate solution to the copyright infringement problem, if there is one," because "it imposes a tax on the purchasers or users of these devices (recording equipment) who do not violate copyright laws and that does not seem acceptable." 178

The National School Boards Association (NSBA) took no position on the points raised by the Office in question three, but did state that NSBA does not support royalties on blank tapes. In fact, NSBA continued, "we, in education, will demand an exemption from this tax." 179

CBS, Inc. took no particular view on any proposed royalty system, but instead merely noted that compensation arrangements can be made that "do not place requirements or restrictions on broadcasters" and would be "adequate to satisfy the concerns and needs of the recording industry, performers, and copyright holders." 180

In its initial comments the National Association of Broadcasters (NAB) stated that current data about copying of musical works and its effects on copyright owners is contained in the Office of Technology Assessment's 1989 study, and does not support creating a new royalty applicable to broadcasters that use digital technology. These points were reiterated in NAB's reply comments. NAB's sentiments were generally supported by Cox Broadcasting as well as stations KKYY-FM, KDKB-FM, KEGL-FM, and KLSY-AM-FM.

The National Association of Recording Merchandisers advocated no

178 New York Patent, Trademark and Copyright Law Association, Inc. comments at 4.

179 NSBA comment at 3.

180 CBS, Inc. comments at 6.

specific view about royalties, nor did the Cromwell Group, Inc. or Broadcast Data Systems.

As indicated above, not all of the commentators addressed the royalty issues raised by the Copyright Office. Of those who did ASCAP, BMI, and the Copyright Coalition strongly supported placing a royalty on blank tape and/or equipment. The Home Recording Rights Coalition opposed such a solution just as strongly. RIAA chose to discuss payments for performers instead of reiterating its past position on home taping royalties. Among those commentators falling in between were those who felt consideration of the topic was premature (General Instruments), felt any payments should be negotiated by the parties (CD Radio, Inc.; New York Patent, Trademark and Copyright Law Association), felt compensation could be handled by existing mechanisms (Strother Communications), or felt that their organization should be exempt from any such payment (NSBA, NAB.) Although the commentators who addressed the royalty issues did so from different perspectives, most of those who responded did feel that some kind of compensation was warranted. They simply did not agree on what that compensation should be.

2. Royalty Systems in Other Countries.

Uniformly, commentators advocating establishment of a royalty system or implementation of a public performance right in sound recordings pointed to the fact that many other nations have established such systems that could be used as models. Several recent studies provide insight into the bases for collection and distribution of performance royalties. In its initial comments the Copyright Coalition provided a report on home audio taping royalties, issued in January 1990 by the European Mechanical Rights Bureau. In addition, culture ministers from the European Community have

discussed recommendations for protecting performers' and producers' rights in their works. ¹⁸¹ Although as noted previously, the OTA Report observed that systems set up in other nations are tailored to the "political, legal, social and commercial/market differences that exist within the various societies," ¹⁸² examination of other systems may be helpful in determining the direction the United States should take.

The Copyright Office reviewed the compensation systems advanced in other countries and prepared a table that contains the following information:

- (1) Is there a royalty system that provides compensation to copyright owners for public performance or reproduction of their audio works, whether digital or analog, and if so, where are these royalties placed?
- (2) Who collects and distributes any such royalties?
- (3) Are there different or additional provisions for DAT from those applying to analog use?
- (4) Is there a royalty or negotiated fee for the broadcasting of sound recordings? ¹⁸³

As of August, 1991, seventeen countries had enacted legislation to compensate copyright owners for unauthorized private copying of their works. These countries are: Argentina, Australia, Austria, the Congo, the Federal

¹⁸¹ Clark-Meads and Hennessey, EC Ministers Hear Copyright Concerns, Billboard (Dec. 1, 1990) at 64.

¹⁸² OTA Report at 120 (footnote omitted).

¹⁸³ See Table 1, at pp. 161-162. Information for this chart came from the Report by European Mechanical Rights Bureau (BIEM), Distribution of Audio/Video Home Taping Royalties, January 1990; Survey by International Federation of the Phonographic Industry, 1990 Survey of Tariffs for the Public Performance of Phonograms, November 1990; WIPO, Copyright, Sept. 1990 at Text 1-01; 3 Copyright Laws and Treaties of the World, UNESCO, Supplement 1979-1980; 3 Copyright Laws and Treaties of the World, UNESCO, Supplement 1987-1988.

Republic of Germany, Finland, France, Gabon, Hungary, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and Zaire. Several other countries including Belgium, Denmark, and Italy, are considering such legislation. Recently the Electronic Industries Association of Japan preliminarily approved plans for home taping royalties for digital hardware. A royalty structure will reportedly be established in 1992. At that time Japan's copyright law will be amended to reflect the new agreement. 184

The countries that do add royalties or taxes to either the software or hardware have developed different schemes. A review of these schemes reveal that some countries, such as Austria, France, and Sweden, place the royalty on the tapes, some, such as Norway and Spain, on both the tapes and the equipment. As can be expected, both the amount of the royalty and the distribution schemes differ. But most of the countries which have developed royalty systems require that a significant part of the royalties goes to authors and other copyright proprietors. Distribution facts vary according to the formula a country chooses. 185

Most countries with a high level of intellectual property protection have realized that there is considerable loss to legitimate copyright owners when home tapers copy works without compensating the copyright proprietor. But only a few of these countries go beyond national interests and make distributions to foreign authors.

While no compensation system is perfect, some international organizations are now advocating harmonization of such systems, at least as

184 McClure, Japanese Hardware Group Supporting Digital Royalty, Billboard, (Sept. 14, 1991) at 5.

185 See Dillenz, supra note 159. See also Table 1, pp. 160-161. See text at pp. 135-136 infra for a discussion of distribution in the United Kingdom.

far as establishing a method to balance the interests of the authors of works and users of those works so as to encourage continued creation of new work as well as promoting international unity and distribution. The European Commission met in August 1991 to discuss, among other things, harmonization of copyright law in the European Community. Among the topics of discussion was the value of works lost to piracy of both U.S. and E.C. materials. Proposals are imminent for increasing copyright protection and stimulating commercial sales within the E.C. ¹⁸⁶ The European Commission already has before it two proposals. One would grant writers, performers, and producers the right to authorize or forbid the loaning or renting out of works protected by copyright. The second proposal would require adhesion by all the Members States before the end of 1992 to the Berne Convention for the Protection of Literary and Artistic Works as updated by the Act of Paris, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. The European Community has also stated that it will submit a proposal to "harmonize the national systems of remuneration for private copying of films, video cassettes, records, audio cassettes and compact discs by way of a levy on blank tapes by the end of 1991." ¹⁸⁷

Concluding that digital tape recorders would stimulate home taping since the technology would permit one to make perfect copies easily, the E.C.

¹⁸⁶ Riddell, Euro Commission Reports "Great Urgency" On Copyrights, Billboard, (Sept. 14, 1991) at 80.

¹⁸⁷ Commission sets out copyright work programme, Common Market Reporters, Release 672, Jan. 91, para. 95,690 at 51,989.

concluded in its 1988 Green Paper that urgent action was needed to protect copyright proprietors. 188

B. OTHER SYSTEMS.

1. Technological Solutions.

The various digital technology forms have met with great success in the consumer market; in terms of dollars, there is great incentive to enter the digital technology field. Compact discs became available in 1983, when consumer spending on recorded music was about 12 billion dollars worldwide. By the end of 1989 sales of recorded music were up to 22 billion dollars, with CDs making up about half the market's worth. 189

In 1987 digital audio tape (DAT) was introduced with hopes for enormous success. But acceptance in the United States was obstructed. The recording industry was concerned about piracy since first generation DAT machines could reproduce an infinite number of perfect copies. Writers and publishers advocated establishing royalty provisions to compensate copyright owners for unauthorized copying of their works. The recording industry urged the consumer electronics industry to fit equipment with special circuitry that would prevent unauthorized copying. Absent such a system RIAA promised that it would not allow DAT machines into the U.S. market without initiating copyright infringement litigation. 190

188 Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology--Issues Requiring Immediate Action, para. 3.91, p. 127 (June, 1988).

189 Cacophony, *The Economist*, (June 1, 1991), at 63.

190 Such a suit was brought but dismissed when the parties reached an agreement. See discussion at note 109 supra.

Home taping royalty legislation was not enacted; consequently, representatives of copyright interests directed Congress's attention to technological solutions. Congress considered a number of hypothetical copy prevention systems including the CBS Copycode system. That system removed a narrow band of frequencies from the audio signal, making possible the defeat of unauthorized listening.¹⁹¹ Many questions were raised about the efficacy of the copying system, leading to Congress's request for a study. The National Bureau of Standards (NBS) tested this copy prevention system and found that it did not achieve its stated purpose.¹⁹²

The Serial Copy Management System was proposed for the DAT recorder, allowing digitally perfect copies to be made from a CD, but not allowing further copies to be made from the copies. This system was endorsed by the recording industry and the consumer electronics industry, but not by songwriter and publisher groups. Bills proposing adoption of the SCMS system were introduced during the 1990 Congressional session, but did not pass.¹⁹³

¹⁹¹ The Copycode system consisted of an integrated circuit and a phonorecord with certain frequencies carved out of them. The purpose of the chip, placed inside the DAT recorder, was to scan the sound recording in search of "notches," or sound holes in a particular frequency range. The sound recording would contain no sound information at 3840 Hz. When the scanner sensed such a blank spot at this frequency, it would cause the recording mechanism to shut down for at least 30 seconds. As a result, a digital audiotape made under those circumstances would contain substantial sound gaps, rendering the DAT unusable, or spoiled, for uninterrupted listening. Statement of the Register of Copyrights on S. 2358 Before the Subcommittee on Commerce Science and Transportation, 101st Cong., 2d Sess. n. 7 at 7 (1990).

¹⁹² NBS observed that the encoding process changed the electrical signal, affecting other frequencies in the same harmonic series with those frequencies. In addition, the Copycode system was easy to bypass, using electronic components that were basic, off-the-shelf parts costing about \$100. Id. at 8.

¹⁹³ S. 2358 and H.R. 4098, 101st Cong., 2d Sess. (1990).

A so-called "smart card" was also suggested. This would be a prepaid royalty card that could read information digitally from the recording being taped. This method would operate similarly to the farecards used in the Washington, D.C. Metrorail system. No specific action has been taken to establish this type of system for recordings.

2. The Audio Home Recording Act of 1991.

On July 11, 1991, representatives of the audio hardware and music industries announced their agreement to seek legislation clarifying rights of consumers, manufacturers, and copyright holders in light of advancements in digital technology. If enacted, the legislation would require manufacturers and importers of digital audio recording equipment and those who distribute digital audio recorders and blank digital audio recording media to make special royalty payments.¹⁹⁴ The payment would be two percent for digital audio recorders, based on the manufacturers' price of the equipment, and three percent for blank digital audio media. The legislation also specifies payment caps and a floor. The fund would be administered by the Copyright Office and distributed to claimants by the CRT based on record sales and, in

¹⁹⁴ S. 1623 and H.R. 3204. Many of the parties taking part in this copyright proceeding have announced support for the proposed legislation. Such parties include: AFL-CIO-Department of Professional Employees; American Federation of Musicians; American Federation of Television and Radio Artists; American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and Recording Industry Association of America.

some cases, airplay. ¹⁹⁵ A figure of 100 million dollars has been used as an estimated initial annual royalty take. ¹⁹⁶

In addition to royalty provisions, the proposed legislation contains a provision applying to consumer protection for home copying, and a requirement to include the Serial Copy Management System in consumer digital audio recorders. Legal actions for copyright infringement based on private, non-commercial audio recording of either digital or analog product would be prohibited. The technical requirement regarding SCMS and the royalty provisions would apply to digital, not analog, audio recorders and blank digital audio recording media. Video recording equipment and media would not be affected, nor would dictation machines, telephone answering machines, or professional model digital audio recording equipment. Identical bills have now been introduced in both Houses of Congress. ¹⁹⁷ Passage of the Audio Home Recording Act would greatly affect the parties filing in this copyright proceeding, as well as American consumers themselves.

The proposed agreement has received solid support from interested

¹⁹⁵ Interested parties entitled to make claims on the royalty fund would be (1) an owner of the exclusive right to reproduce a sound recording of a musical work embodied in a phonorecord that has been distributed to the public, i.e., a record company, and (2) a legal or beneficial owner of, or the person that controls, the right to reproduce in a phonorecord a musical work that has been embodied in a phonorecord distributed to the public, i.e., a music publisher or songwriter. Proposed 17 U.S.C. 1001(a)(6).

¹⁹⁶ I. Lichtman, Digital Pact A Watershed Event, Says SGA's Weiss, Billboard, (July 27, 1991), at 28.

¹⁹⁷ Senator DeConcini introduced S. 1623 on August 1, 1991, and Representatives Brooks and Hughes introduced H.R. 3204 on August 4.

parties. 198 Edward Murphy, President of the National Music Publisher's Association, observed:

In short, we realized we are all in the same boat, and that unless we row together, we hazard drifting in circles....I view the resolution of the digital audio home-taping issue as a three-act play. We have successfully completed the first act of reconciliation and compromise, and received splendid reviews from the critics for having done so. The second act will be equally challenging: The U.S. Congress must be convinced that our compromise is not only fair to the parties involved, but will benefit the American consumer as well...The third act will consist of the careful implementation of the new law, and continued support of the Copyright Coalition for adoption of similar legislation in nations throughout the world...where no such protection currently exists. 199

198 See, e.g., E. Murphy, Self-Interest Led To Home-Duping Pact, Billboard, July 27, 1991, at 8; I. Lichtman, Digital Pact A Watershed Event, Says SGA's Weiss, Billboard, July 27, 1991, at 28; Compromise Reached on Digital Audio Recording Technology, News Release issued jointly by Electronic Industries Association, Recording Industry Association of American, and National Music Publishers Association, July 11, 1991.

199 E. Murphy, Self-Interest Led To Home-Duping Pact, Billboard, July 27, 1991, at 8.

IV. PROTECTION OF THE PERFORMANCE RIGHT IN SOUND RECORDINGS IN FOREIGN COUNTRIES

A. OVERVIEW

Protection of the performance right in sound recordings in foreign countries has two main sources: the national laws of each country, and the relevant international treaties and bilateral arrangements recognizing the existence of intellectual property rights in sound recordings, which may sometimes include the public performance right. The national laws may extend copyright protection to sound recordings or may create a so-called "neighboring right" or may be premised on another legal theory such as unfair competition law or the criminal law. Of those countries according copyright protection to sound recordings, many, including the United States, do not grant a public performance right in the sound recording itself, although an underlying musical, dramatic, or literary work would enjoy the right of public performance.

The international treaty regime for the protection of sound recordings is complex and characterized by several specialized treaties. Moreover, variant interpretations exist regarding subject matter protection of sound recordings under the two world-wide copyright conventions. Many countries apply the Berne Convention and the Universal Copyright Convention to protect sound recordings; other countries deny the applicability of these conventions. Two specialized conventions apply to sound recordings: the Geneva Phonograms Convention (1971) and the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (1961). The former does not include a public performance right; the latter

includes performers' rights and a public performance right in sound recordings, but allows reservations regarding the term and basic rights.

After decades of discussion about how to accommodate the often conflicting interests of performers, producers of phonograms (recordings), and broadcasters, the contracting states established the the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations in 1961. Known as the Rome Convention or the Neighboring Rights Convention, it provides an international regime for the protection of performers, producers of sound recordings, and broadcasting organizations. 201

The basic principle of the 1961 Rome Convention is that it provides protection in addition to, or neighboring on, the protection of copyright in literary and artistic works.

The performers are given the right to prevent unauthorized broadcasts and other communication to the public of their performance, unauthorized fixation of their performances and unauthorized reproduction of a fixation (recording) of their performances. 202

201 Diplomatic Conference on Neighbouring Rights, International Convention for the Protection of Phonograms and Broadcasting Organisations, 14 Copyright Bulletin 173-82 (1961).

202 The performers rights are set out in Article 7, as follows:

1. The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the broadcasting and the communication to the public, without consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation.

(b) the fixation, without their consent, of their unfixed performance;

The phonograph producers enjoy the right to authorize or to prohibit the direct or indirect reproduction and distribution of their phonographs or sound recordings. The broadcasting organizations enjoy the right to authorize or prohibit: (a) the rebroadcasting of their broadcasts, (b) the fixation of their broadcasts; (c) the reproduction of fixation of their broadcasts and (d) in some cases communication to the public of their television broadcasts.

Substantive provisions of the 1961 Rome Convention are found in articles 7-18 and 22. The Convention itself, however, is vague or ambiguous on a number of points and permits variations in certain of its important

(c) the reproduction, without their consent, of a fixation of their performance:

- (i) if the original fixation itself was made without their consent;
- (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
- (iii) if the original fixation was made in accordance with the provision of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

substantive provisions. The exceptions permissible under Article 15 of the Convention are quite broad giving a great deal of flexibility to the national laws of the member countries. 203 Moreover, there is a substantial divergence in the scope of protection between the performers on one hand, and the phonograph producers and broadcasting organizations on the other.

Although Article 4 of the Convention purports to protect performers under national treatment, the rights accorded producers of phonograms, and broadcast organizations are subject to reservations, or exceptions. For example, article 12 establishes a performance right in sound recordings:

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable

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- 203 The text of Article 15 of the Rome Convention reads in part:
1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
 - (a) private use;
 - (b) use of short excerpts in connexion with the reporting of current events;
 - (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
 - (d) use solely for the purpose of teaching or scientific research.
- * * * * *

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.

remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of the remuneration. ²⁰⁴

However, Article 16 of the text allows member nations to accede to the Convention without adopting Article 12, and allows reciprocity in certain cases. ²⁰⁵

Twenty states had ratified the Rome Convention as of September 1, 1977. Today that number has grown to thirty-five. Of the thirty-five member states, only five have specifically excluded application of Article 12. At the time the Convention was ratified the idea of giving performers and producers a performance right was fairly controversial. ²⁰⁶ It is, therefore, significant that only a few countries have excluded Article 12.

The United States is not a party to the Rome Convention. Reasons that the United States has not joined the Rome Convention include the short minimum term of protection (twenty years rather than the copyright standard of life plus fifty), and concern that the classification of rights as

²⁰⁴ Rome Convention, Article 12.

²⁰⁵ The text of Article 16 (1) reads, in part:

Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

(a) as regards Article 12: (i) it will not apply the provisions of that Article; (ii) it will not apply the provisions of that Article in respect of certain uses...

²⁰⁶ Memorandum on the Implementation of the Rome Convention, International Federation of the Phonographic Industry at 7-8 (1990). (Hereinafter IFPI memo.)

neighboring rights rather than copyright may result in inadequate protection. In addition, adherence to Rome raises the issue of a performance right in sound recordings under Article 12, should that provision be retained under accession.

The Rome Convention provides one avenue for protecting performers, producers of phonograms, and broadcast organizations. In addition to, or instead of the Rome Convention, many nations provide their own forms of national protection through copyright, neighboring rights, or other forms of law. In a recent report the International Federation of the Phonographic Industry (IFPI) concluded that "[t]o date, 94 countries worldwide protect producers of phonograms and 64 of them grant some performance rights..." to varying degrees. ²⁰⁷ The IFPI report observed that recent changes and amendments to countries' laws generally expand current rights and establish new rights. Changes "tend[ed] to modernize previous laws on intellectual property by including new rights such as rental rights, private copying royalties, performance rights or by strengthening existing rights by extending the period of protection or increasing penalties and remedies." ²⁰⁸

Countries vary both in the method of collecting and kind of compensation required for performances of sound recordings. For efficiency's sake, across-the-board tariffs are often established rather than individual licenses or contracts. This may occur in public performance arenas such as dance clubs, restaurants, retail shops, and business establishments, by

²⁰⁷ IFPI memo at 3.

²⁰⁸ Id. at 2.

jukebox, in hotels, aboard aircraft, and in motion picture theatres. 209 National laws may provide that in the absence of agreement on a tariff or rate, agreement will be fixed by a competent authority, tribunal, or arbitration board. 210

In the case of more widespread and penetrating commercial use of recordings, it is usually impossible for a performer to negotiate individually with each user, such as a cable system operator or a broadcast station. Therefore, it is the practice in an overwhelming number of nations recognizing performance rights to use collecting societies to represent artists, performers, and/or producers to enforce rights and administer a system of collection and distribution. Endorsement of this method of operation was announced in the United Kingdom in a 1988 report by the Monopolies and Mergers Commission, which concluded that "...collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly." 211

B. SURVEY OF PERFORMANCE RIGHTS IN SELECTED COUNTRIES

In the Register's 1978 Report on Performance Rights, the Office published results of its research into performance rights in other countries.²¹² At this time, the Office updates its 1978 Report by outlining systems for

209 See IFPI 1990 Survey of Tariffs for the Public Performance of Phonograms, outlining basis for calculating such tariffs in 12 countries.

210 See IFPI Memo at 11.

211 Id. at 9 (footnote omitted).

212 See, e.g., Report of the Register of Copyrights on Performance Rights in Sound Recordings, before the U.S. House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 95th Cong., 2d Sess., (1978).

collection and distribution of royalties for the public performance and broadcast use of recorded sounds in other nations.

In preparation for this report the Office surveyed proposed or recently enacted legislation in a number of countries. The Office reports on thirteen of these countries; Austria, Canada, Chile, the Federal Republic of Germany, France, Hungary, Japan, Malawi, the People's Republic of China, Portugal, Sweden, the United Kingdom, and Zaire. Countries were selected for discussion based on providing a representational field.

Our survey of protection for sound recordings reveals significant changes in the laws relating to a public performance right in sound recordings, since the completion of our comprehensive 1978 Report of the thirteen countries surveyed, only Canada does not provide some kind of performance rights protection in sound recordings. Seven of the countries, Austria, Chile, the Federal Republic of Germany, France, Japan, Sweden, and the United Kingdom belong to the Rome Convention. The other five countries, Hungary, Malawi, the People's Republic China, Portugal, and Zaire provide protection through copyright or neighboring rights legislation.

It is clear that during the last twenty years there has been a movement to increase protection in sound recordings, including granting a longer term and creating a performance right for performers and/or producers of sound recordings. The fees generated from a performance right may be distributed under the principle of national treatment ²¹³ or the principle of material reciprocity under Article 16(1)(a), (iv) of the Rome Convention.

Seven of the countries surveyed, Austria, Chile, the Federal Republic of Germany, France, Japan, Portugal, and the United Kingdom base

²¹³ Art. 4 and 5 Rome Convention.

international distribution on reciprocity. Canada has no fees, and the other five China, Hungary, Malawi, Sweden, and Zaire do not make distributions to other countries.

AUSTRIA

Austria, a member of the 1961 Rome Convention since 1973, protects performers' rights as a neighboring right.

In 1982 Austria amended the neighboring rights provisions of the Austrian Copyright Law with respect to sound recordings used for broadcasting or communication to the public. As amended Article 76(3) provides that the performer and the producer share the remuneration:

Where a sound recording made for commercial purposes is used for a broadcast (Article 17) or for communication to the public, the user shall pay equitable remuneration to the producer (paragraph (1)) subject to Article 66(7) and paragraph (2) above. The persons referred to in Article 66(1) may claim from the producer a share of such remuneration. In the absence of agreement between the entitled parties, such share shall be one-half of the remuneration remaining to the producer after deduction of the costs of collection. The claims of the producer and of the persons referred to in Article 66(1) may only be asserted by collecting societies or by one single collecting society.²¹⁴

With respect to the eligibility to claim neighboring rights, Article 99 was amended to read:

(1) Sound recordings shall be protected in accordance with Article 76, regardless of whether and how they are published, if the producer is an Austrian national. Article 98(2) shall apply by analogy.

²¹⁴ No. 295, of February 19, 1982, published in the Bundesgesetzblatt für die Republik Österreich, No. 124, of June 30, 1982. WIPO translation, Copyright, (Sept. 1982) p. 248.

(2) Other sound recordings shall be protected in accordance with Article 76(1), (2) and (4) to (6) if they have been published in Austria.

(3) Sound recordings of foreign producers that have not been published in Austria shall be protected under Article 76(1), (2) and (4) to (6), subject to international treaties, on condition that the sound recordings of Austrian producers are also protected in approximately the same way in the State of which the foreign producer is a national but in any event to the same extent as the phonograms of nationals of that State. Reciprocity shall be deemed to exist when it is determined in a Notice of the Federal Minister for Justice with respect to the legal situation in the State concerned. In addition, the competent authorities may conclude an agreement on reciprocity with another State where this appears appropriate to safeguard the interests of Austrian producers of sound recordings.

(4) Sound recordings of foreign producers that have not been published in Austria shall further be protected under Article 76(1), (2) and (4) to (6) if the producer is a national of a Contracting State of the Convention of October 29, 1971 (BGBI. No. 294/1982), for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms.

(5) Protection under Article 76(3) may be claimed by foreigners, in any event, only in accordance with international treaties." 215

The Austrian performing rights society that distributes income to performers and producers has reciprocal agreements with rights societies in six other countries, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, Japan and Sweden. 216

CANADA

Canada does not recognize any neighboring or related rights for performers, producers, or broadcasting organizations. Sound recordings are

215 Id. Art. 99.

216 IFPI memo, annex 4, Summary of National Laws and the Administration of Rights, at 7. (hereinafter IFPI memo, annex 4.

protected as copyright subject matter but do not enjoy a public performance right. Earlier court decisions construed the copyright law as including the public performance right, but this right was withdrawn by amendment of the law in 1971.

CHILE

Chile is a member of the 1961 Rome Convention, it protects performers' rights as a neighboring right. Chile grants a right to remuneration for public communication of sound recordings. Producers may share in that remuneration through contractual agreements.

On October 7, 1985, Chile amended its Copyright Act ²¹⁷ with respect to neighboring rights. Article 79 contains the following sanctions:

The following shall be committing an offense against intellectual property and shall be punished with the penalty of minor imprisonment (presidio menor) at its lowest level and a fine of five to 50 monthly accounting units. . . .

(b) those who, without being expressly authorized to do so, make use of the protected performances, productions and broadcasts of the owners of neighboring rights, for any of the purposes or by any of the means specified under Title II of this Law; . . .

(d) those who, being obliged to pay remuneration for copyright or neighboring rights derived from the performance of musical works, fail to make the corresponding performance schedules, and . . . ²¹⁸

²¹⁷ Law on Intellectual Property, Law No.18.443 of October 7, 1985, published in WIPO's Copyright, (June, 1987).

²¹⁸ Id. Art. 79.

FRANCE

In 1985, France passed a comprehensive and systematic law on neighboring rights,²¹⁹ and is now a member of the Rome Convention. Articles 16-28 of the 1985 Act formulate and define distinct neighboring rights.

1. Rights Granted to Performers

Article 16 of the 1985 Act defines performers as "persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works or variety, circus or puppet acts."

Articles 18, 19, and 22 define the economic rights of the performers. Article 18 requires the performer's written authorization for "[t]he fixation of his performance, its reproduction and its communication to the public and also any separate use of the sounds or images of the performance, where it has been fixed as regards both sounds and images." Thus the performer has the exclusive right to control the use a producer might make of his performance in its audio and visual aspects.

Article 17 recognizes qualified moral rights for performers. A performer has the right to respect for his name, his status, and his interpretation or performance. This right is inalienable and perpetual. The right continues in the performer's heirs in order to protect both his or her memory after death and his or her interpretation.

Articles 19 and 20 govern the performance contracts and the artist's remuneration. Pursuant to Article 19, signature of such a contract for the production of an audiovisual work is deemed to authorize fixation, reproduction, and public communication of the performance. The terms of the

²¹⁹ Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises, Law No. 85-660 of July 3, 1985.

performance contract can either be individually negotiated or collectively negotiated under Article 20. The terms of compensation are regulated. In this connection, Article 19 requires specific remuneration for each mode of exploitation but no proportional participation in receipts.

2. Rights Granted to Producers of Sound Recordings

Article 21 defines "producers" as any "natural person or legal entity who takes the initiative and the responsibility for the initial fixation of sounds." The producer is accorded the related right to control "any reproduction, making available to the public by way of sale, exchange or retail, or communication to the public, of his phonorecord, other than those in . . . Article [22]."

Article 22 governs the direct communication of a phonorecord in (1) public place except for purposes of entertainment, (2) in a broadcast, or (3) in the integral cable distribution of such broadcast. In all three cases remuneration must be paid and evenly divided between the performers and the producer. Articles 22(4), 23, 24, and 25 determine the conditions for establishing the basis, amounts, and means of payment of such remuneration, either by agreement, as with collecting societies, or by special administrative commission. Article 28 limits the right to remuneration for use of phonorecords first fixed in France, unless otherwise provided in relevant international conventions.

3. General Provisions

Article 15 of Title II of the 1985 Act underscores that the neighboring rights it covers shall not prejudice the author's right, nor shall the rest of Title II be construed to limit the exercise of copyright. Article 29 provides for the same limitation on neighboring rights as in the case of the

author's economic rights. These limitations are: performance and reproduction for private use, the latter subject to remuneration for home recording; quotation and similar press and media uses; and parody.

Remedies for infringement of neighboring rights are governed by Article 56 of the 1985 Act applying sanctions similar to those applied in the case of violations of copyrights.

The neighboring rights established under the 1985 law endure, pursuant to article 30, for fifty years from January 1 of the year of the first communication to the public or, the first performance or production of the work or program.

The 1985 law provides detailed rules for the contractual relationships undertaken in the production of phonograms and videograms. These contracts are generally executed by collective societies representing different interests. Article 42 states that these contracts are deemed "private acts." Article 43, moreover, underscores that the overriding objective of the collective societies is to exercise collectively the rights prescribed under the law and to facilitate the dissemination of phonograms and videograms, as well as to promote technological and economic progress.

The collective societies are likewise deemed to be private organizations. Their membership consists of authors, performers, and producers of phonograms and videograms or of those individuals succeeding to their rights. Properly constituted societies have the standing to enforce and defend the rights of their membership. The collective societies must make available to possible users the complete repertory (a blanket license) of the French and foreign authors and composers that they represent. Producers and performers get an equal share of performance rights income. 220

FEDERAL REPUBLIC OF GERMANY

Germany has been a member of the 1961 Rome Convention since 1966. Germany has a well developed neighboring rights law. ²²¹ Technical and organizational achievement are the basis of protection rather than artistic creativity. These rights are often called the rights of protection of accomplishments. [Leistungsschutzrechte]. They embrace not only the protection of performers and organizers of performances in the form of their special right of consent under Article 81 but also the special protection of rights of film producers, or broadcasting organizations, and of publishers of posthumous works.

1. Rights Granted to Performers

Article 73 defines performers as persons who recite, perform, or represent a work or else participate in an artistic manner in the recitation, performance, or representation of the work. Performers are granted the following rights: (1) to communicate publicly their performance by technical means beyond the location where their performance takes place²²² (2) to fix their performance on visual or sound recording, as well as reproduction of such sound recording, ²²³ and (3) to broadcast their performances. ²²⁴ A performance which has been lawfully recorded may be broadcast

²²¹ (1) An Act dealing with Copyright and Related Rights of September 9, 1965; of amendatory laws: June 25, 1969; June 23, 1970; June 26, 1970; November 20, 1972; August 17, 1973; March 2, 1974; March 23, 1985 (hereafter "Copyright Statute"). Official German text of basic law published in Bundesgesetzblatt I, No. 52, June 20, 1969; p. 808 et seq., No. 58, June 25, 1970; p. 839, No. 59, June 26, 1970; p. 2081, No. 120, November 15, 1972; Bundesgesetzblatt I, 1974, p. 475; CLTW Supplement 1975-1976; Bundesgesetzblatt I, 1985, 21 Copyright (Nov. 1985), 368-374.

²²² Id. at Art. 74.

²²³ Id. at Art. 75.

²²⁴ Id. at Art. 76.

without the consent of the performer if the sound recording has previously been published. In such circumstances, however, the performer must be paid an equitable remuneration. ²²⁵ A right to such equitable remuneration also arises under Article 77 when a performance is publicly communicated by means of recordings or a broadcast, as, for example, through jukeboxes or radio loudspeakers in public places. The performer, however, shares the remuneration with the producer of the audio or videogram. The producer has the right to an equitable participation in the remuneration received by performer. ²²⁶

In practice, however, these remuneration rights are enforced by the relevant rights society, GVL, which represents performers and record producers. GVL pays out the remuneration directly to the two groups according to an agreed upon schedule. The enforcement of the right to equitable remuneration runs parallel with the enforcement of the author's right spelled out in Articles 21 and 22 of the German Copyright Act. ²²⁷

The rights of performers and of any organizer of the event terminate twenty-five years after the publication of the relevant video or sound recording, or, if there has been no previous publication, twenty-five years after the performance itself. ²²⁸

Article 83 gives the performer qualified moral rights protection by granting performers the right to prohibit distortion or alteration of their performances that would injure their prestige or reputation as performers. This moral right of integrity of the performance terminates upon the death of

²²⁵ Id. at Para. 2.

²²⁶ Id. at Art. 86 (Pursuant to Art. 76, para. (2) and Art. 77.

²²⁷ Id. at Arts. 21 and 22.

²²⁸ Id. at Art. 82.

the performer. If the performer dies before twenty-five years after the performance have elapsed, the right goes to the next of kin until twenty-five years from the performance. 229

Finally, all limitations of the copyright law except the Article 61 compulsory license provision are also applicable to the neighboring rights of performers and organizers. 230

2. Rights Granted to Producers of Phonorecords.

Pursuant to Article 85, producers of sound recordings are granted the exclusive rights of reproduction and distribution of sound recordings. If the sound recording is produced by an enterprise, "the proprietor of the enterprise shall be regarded as the producer." The right of producer, however, cannot arise by reason of the mere reproduction of an already existing sound recording. In other words, the right always presupposes a live performance or occurrence and first fixation of the sound recording.

With the exception of the compulsory license provision in Article 61 of the Act, the neighboring right of producers is subject to the same limitations as the rights under copyright.

HUNGARY

To date Hungary has not joined the Rome Convention. Its Copyright Act, nonetheless, accords limited protection to performers and producers of sound recordings and full protection to broadcasting organizations. 231 There have been some initiatives to broaden neighboring rights to include

229 Id. at Art. 83.

230 Id. at Art. 84.

231 Copyright Statute, Act No. III of 1969, Official Hungarian text published in Magyar Kozlony, April 26, 1969, CLTW (Supplement 1970). Articles 49 and 50 are covered in the 1978 Performance Rights Report.

secondary uses. Although the term "secondary uses" has not been defined in the Rome Convention, it is generally understood to mean the use or exploitation of sound recordings in broadcasting and communication to the public.

In February 1979, the Ministry of Culture set up a special committee to study the feasibility of providing for new rights to embrace the secondary uses. The committee submitted its findings and recommendations to the Ministry of Culture in May 1980. The report contained these major conclusions:

1. . . . [I]t would be justified to give new rights to performing artists in the case of secondary uses too, because such uses are becoming more and more prevalent under the influence of galloping technological progress, and because without such new rights certain justified basic interests of artists might be endangered.
2. The . . . introduction of such rights would represent a substantial new burden for certain users (such as radio and television). In a climate of increasing economic problems, they would be able to cover those new expenses only by cutting others, including the cost of copyright fees. However, the committee did not recommend the introduction of any new right if that should entail restriction of the practical value of other, existing ones. In that case there would be only one acceptable solution: a special subsidy from the central State budget.
3. . . . [E]ven if there were temporary economic obstacles to the introduction of new performers' rights the question should remain on the agenda and should be solved as soon as was practicable. ²³²

To date, the government has not considered any concrete legislation on this question.

²³² M. Ficsor, "Letter from Hungary", Copyright, (Nov. 1983), p. 324, at p. 330. See also, Istvan Timar, "The New Hungarian Copyright Act," Copyright, (Dec. 1969), p. 242, at p. 246.

JAPAN

Chapter IV of the Copyright Act establishes neighboring rights for performers, producers of phonorecords, and broadcasting organizations. ²³³ The Japanese neighboring rights do not affect in any way the rights of the author/creator accorded by the copyright statute. ²³⁴ Japan joined the 1961 Rome Convention in 1989.

1. Rights Granted to Performers.

Pursuant to Articles 91 and 92, performers are granted the exclusive right to record, broadcast, and transmit by cable their performances. Performers' rights do not apply to performances which have been incorporated in cinematographic works. ²³⁵ Moreover, there is no public performance right to equitable remuneration for broadcasting or other public communication of the recording of a performance. ²³⁶

2. Rights Granted to Producers of Phonorecords.

Producers of phonorecords or sound recordings have the exclusive right to reproduce their phonorecords. ²³⁷ The secondary use of broadcast works is limited to the broadcasting of commercial phonograms (except broadcast or diffusion by cable made upon receiving such broadcast). ²³⁸ The producers of such phonorecords are entitled to the secondary use fees. ²³⁹

²³³ Copyright Law, Law No. 48 of 1970, as amended.

²³⁴ Id. at Art. 90.

²³⁵ Id. at Art. 91, para. 2.

²³⁶ Id. at Art. 92, para. 2.

²³⁷ Id. at Art. 96.

²³⁸ Id. at Art. 97.

²³⁹ Id.

Under the Japanese Copyright Act, producers of phonorecords have the exclusive right to offer their phonorecords to the public by lending commercial phonorecords in which their phonorecords are reproduced. ²⁴⁰ Producers are also entitled to fees for secondary uses, i.e., for broadcast or diffusion by cable of their phonorecords. ²⁴¹ This right is generally administered by an association or society designated by the Commissioner of the Agency for Cultural Affairs. ²⁴²

3. General Provisions.

Article 101 sets 30 years as the term of neighboring rights for performers, producers, and broadcasting organizations, running from the dates of performance, fixation of sounds in phonorecords, and broadcast, respectively. The minimum term increases to fifty years on January 1, 1992.

Neighboring rights are subject to the same limitations and exceptions as prescribed for exploitation of copyright. ²⁴³ Similarly, the Japanese Copyright Act regulates the vesting, recordation, and transfer of neighboring rights. ²⁴⁴ Chapters V and VI of the Act govern the settlement of disputes through mediation, ²⁴⁵ and civil and criminal infringements of the neighboring rights. ²⁴⁶

²⁴⁰ Id. at Art. 97 bis.

²⁴¹ Id. at Art. 97.

²⁴² Id. at Para. 2.

²⁴³ See id at Art. 102.

²⁴⁴ Id. at Arts. 103 and 104.

²⁴⁵ Id. at Art. 105.

²⁴⁶ Id. at Arts. 112, 113, 115, 121.

Japan has reciprocal agreements with collecting societies in sixteen other countries. ²⁴⁷

MALAWI

Malawi is not a member of the 1961 Rome Convention. Its recently amended Copyright Law ²⁴⁸ contains well-formulated, modern provisions regarding neighboring rights.

I. Rights Granted to Performers.

Performers have the exclusive right --

- (a) to broadcast or distribute by cable of their performances except where the broadcast by cable --
 - (i) is made from fixation of the performance, other than a fixation made under the provisions of section 39; or
 - (ii) is a broadcast or distribution by cable of the performance, and is made or authorized by the organization initially broadcasting the performance;
- (b) to communicate to the public their performance, except where the communication --
 - (i) is made from a fixation of the performance; or
 - (ii) is made from a broadcast or distribution by cable of the performance;
- (c) to fix their unfixed performance;
- (d) to reproduce a fixation of their performance, in any of the following cases --
 - (i) where the performance was initially fixed without their authorization; or

²⁴⁷ IFPI memo, annex 4 at 35.

²⁴⁸ Copyright Act, 1989 (No. 9 of April 26, 1989, as amended by the Statute Law No. 2, 1989). Text communicated to WIPO by the Malawian authorities. Copyright (Oct. 1990) at Text 1-01.

- (ii) where the reproduction is made for purposes different from those for which the performers gave their authorization; or
- (iii) where the performance was initially fixed in accordance with the provisions of section 39, but the reproduction is made for purposes different from any of those referred to in that section.

(2) In the absence of an agreement to the contrary --

- (a) the authorization to broadcast or distribute a performance by cable does not imply --
 - (i) an authorization to license another organization to broadcast or distribute the performance by cable;
 - (ii) an authorization to fix the performance;
 - (iii) an authorization to reproduce the fixation; and
- (b) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast or distribute the performance by cable from the fixation or any reproduction of such fixation. ²⁴⁹

Where performers have authorized the fixation of their performances by the broadcaster and the broadcast or distribution by cable of that fixation, the performer is entitled to receive equitable remuneration in respect to any such broadcast or distribution by cable whether or not such fixation has been used commercially. By contractual arrangements, performers can enter into more favorable arrangements with respect to any such broadcast or distribution by cable of their performance. ²⁵⁰

²⁴⁹ Id. at Article 32.

²⁵⁰ Id. at Para. 3. To exercise the foregoing rights, a performer or his duly appointed representative may give a "binding authorization." Id. at art. 33, para. 1.

2. Rights Granted To Producers Of Phonorecords.

Producers of phonorecords or sound recording enjoy the following exclusive rights:

- (a) direct or indirect reproduction;
- (b) importation for the purpose of distribution to the public;
- (c) distribution to the public of copies of [their] sound recording; or
- (d) communication to the public of the sound recording by performance or other means.²⁵¹

Where a sound recording is published for commercial purposes or a reproduction thereof is used for broadcasting or for any other form of communication to the public, both the performer and the producer are entitled to an equitable remuneration.²⁵²

3. General Provisions.

The rights accorded to performers, producers of phonorecords, and broadcasting organizations subsist for twenty years computed from the end of the year in which performance and broadcasting took place or in which the sound recording was first published.²⁵³

The neighboring rights are subject to the following exceptions;

- (a) private use;
- (b) the reporting of current events, except that no more than short excerpts of a performance, sound recording or broadcast are used;

251 Id. at Art. 34, para. 1.

252 Id. at para. (3).

253 Id. at Arts. 32, para. 5; 38, para. 2; 34, para. 4.

- (c) teaching or research;
- (d) quotations in the form of short excerpts of a performance, sound recording or broadcast, which are compatible with fair practice and are justified by the informative purpose of those quotations.²⁵⁴

PEOPLE'S REPUBLIC OF CHINA

On September 7, 1990, the Government of the People's Republic of China promulgated the long-awaited Chinese Copyright Law.²⁵⁵ The law which came into force on June 1, 1991 accords copyright protection to "literary, artistic, and scientific works as well as copyright-related rights and interests."²⁵⁶ Other rights and interests related to copyright include performers' rights, rights of producers of sound and video recordings, and rights of broadcasting organizations.

In relation to their performances, performers have the following rights:

- (1) to claim performership;
- (2) to protect the image inherent in the performance from distortion;
- (3) to authorize others to make live broadcasts;
- (4) to authorize others to make sound recordings and video recordings for commercial purposes, and to receive remuneration thereof.²⁵⁷

²⁵⁴ Id. at Art. 39.

²⁵⁵ Author's Rights Law of the People's Republic of China, Decree No. 31 of the President of the People's Republic of China, September 7, 1990. English translation provided by the National Copyright Administration of China. Copyright (Feb. 1991) Text 2-01.

²⁵⁶ Id. at Art. 1.

²⁵⁷ Id. at Art. 36.

Producers of sound and video recordings have the right to authorize others to reproduce and distribute those recordings and the right to receive payment for such duplication and publication. Producers are granted these rights for a term of fifty years, the term to end on December 31 of the fiftieth year following the first publication of the recording. 258

Producers or makers of sound recordings and video recordings are directed to compensate copyright holders and performers "according to administrative regulations that will be formulated." 259

PORTUGAL

Portugal is not now a member of the 1961 Rome Convention. It has detailed neighboring rights provisions, however, in a separate title of the copyright law.

The revised and consolidated Code of Copyright and Related Rights of 1986 260 affords copyright protection to original works of "intellectual creations" in whatever mode of expression. Copyright protection covers both economic rights and personal or moral rights. 261

Title III of the Copyright Code prescribes neighboring rights for performers, producers of phono and video recordings, and broadcasting organizations. 262 The grant of related rights does not affect the copyright protection of authors. 263

258 Id. at Art. 39.

259 Id.

260 Code of Copyright and Related Rights, Decree No. 45/85 of September 17, 1985. Diario do Governo, No. 214 of September 17, 1985; WIPO translation in Copyright, (April, 1986) pp. 124-139.

261 Id. at Art. 9, para. 1.

262 Id. at Art. 176, para. 1.

263 Id. at Art. 177.

The actors and/or beneficiaries of the neighboring rights are defined as:

- (1) performers shall mean the actors, singers, musicians, dancers and others who perform, sing, recite, declaim, interpret or execute literary or artistic works in any manner.
- (2) producers of phonograms or videograms shall mean the individual or collective persons who, for the first time, fix the sounds coming from a performance or other sounds, or images of any origin, whether or not accompanied by sound.

1. Rights Granted To Performers

Performers are granted the exclusive right to:

- (a) fix or record a performance;
- (b) reproduce a performance; and
- (c) to broadcast or communicate by any means to the public of a performance.²⁶⁵

An authorization to broadcast a performance "shall imply authorization to fix it and to broadcast and reproduce subsequently the performance fixed, as well as authorization to broadcast performances lawfully authorized by other broadcasting organizations."²⁶⁶

The performer, however, has the right to additional remuneration where the following operations are carried out:

- (a) a new broadcast;
- (b) retransmission by another broadcasting organization;

²⁶⁴ Id. paras. (2) and (3).

²⁶⁵ Id. at Art. 178.

²⁶⁶ Id. at Art. 179, para. 1.

(c) commercialization of the performance fixed for broadcasting purposes. ²⁶⁷

Unauthorized retransmission, new broadcasts, and commercialization give the performer the right to payment of twenty percent of the sum received from the purchaser by the broadcasting organization fixing the performance. ²⁶⁸

Protection of the performer lasts for a period of forty years from the first day of the year following the performance. ²⁶⁹ Performances which are, however, distorting, misrepresenting its text or prejudice the performer's honesty or reputation are illegal. ²⁷⁰

2. Rights Granted To Producers.

A producer of an audio or video recording has the following exclusive rights:

- (a) to reproduce and distribute copies to the public, as well as for its export; and
- (b) the right to verification pursuant to Article 143. ²⁷¹

²⁶⁷ Id. at para. (2).

²⁶⁸ Id. at paras. (3),(4),(5).

²⁶⁹ Id. at Art. 183.

²⁷⁰ Id. at Art. 182.

²⁷¹ Id. at Art. 184, paras. (1) and (2).

(1) The author shall have the right to verify establishments printing and duplicating phonograms and videograms and stocking material carriers, the provisions of paragraph (7) of Article 86 and any necessary amendments being applicable.

(2) Persons importing, manufacturing and selling material carriers for phonographic and videographic works shall inform the General Directorate of Entertainment and Copyright of the quantities imported, manufactured and sold. The authors may also verify material carrier stocks and factories."

The neighboring rights of producers last twenty-five years from the first day of the year following the date of fixation. ²⁷² The producer's protection is subject to a notice requirement. ²⁷³

The provisions on modes of exercise of copyright "shall, where appropriate, apply to the forms of exercise of related [neighboring] rights."²⁷⁴

The rights can be applied retroactively; ²⁷⁵ and "[w]here the owners of related rights, through legal [private] provisions [arrangements], benefit from a longer period of protection than that provided for in the present Code, the latter shall prevail." ²⁷⁶

SWEDEN

Sweden has been a member of the 1961 Rome Convention since it came into force in 1964. In June of 1986, Sweden amended its Copyright Laws to broaden and extend the term of protection of neighboring rights. ²⁷⁷ The term of protection for performers, producers, and broadcasting organizations has been increased from twenty-five to fifty years.

²⁷² Id. Art. 186.

²⁷³ Id. at Art. 185.

²⁷⁴ Id. at Art. 192.

²⁷⁵ Id. at Art. 194, para. (1).

²⁷⁶ Id. at para. (2).

²⁷⁷ Act Amending the Act on Copyright in Literary and Artistic Works, Law No. 367, of June 5, 1986, published in Svensk Forfattningssamling, June 12, 1986; WIPO translation Copyright, (Dec. 1986) p. 415.

1. Rights Granted To Performers

Article 45 of the Copyright Act has been amended to include the exclusive right of direct communication to the public of a performance. The amended Article reads:

A performing artist's performance of a literary or artistic work may not without his authorization be recorded on phonographic records, films, or other material supports from which it can be reproduced, nor may it without such authorization be broadcast over sound radio or television or made available to the public by direct communication.

When a performance has been recorded on a material support as mentioned in the previous section, such recording may not be re-recorded on another such support without the authorization of the performer until fifty years have elapsed from the year in which the first recording took place.

The foregoing rights are subject to the exceptions of private and fair uses as prescribed by Articles 17, 20, 21, 22, first section 22a-22d, 24, 24a, 26, 27, 28, 41 and 42. In this connection, the 1986 amendment includes a new Article 22d:

Anyone who, on the basis of an agreement with an organization representing a substantial number of Swedish authors in the particular field, has acquired the right to distribute to the public, simultaneously and in an unchanged form, by wireless means or by cable (retransmission), works forming part of a sound radio or television broadcast, has the right to retransmit, in the same way, also works of authors who are not represented by the organization. Such retransmission may take place only as regards the same kind of works as those which are covered by the agreement. The terms of the agreement apply also in other respects to the retransmission.

Any author whose work is retransmitted on the basis of the preceding section shall, as regards remuneration resulting from the agreement and as regards benefits from the organization which are principally paid for from the remuneration, be placed on an equal footing with authors represented by the organization. The author has, however, regardless of what has been said now, always a right to claim remuneration for the retransmission, if

such a claim is made within three years from the end of the year in which the retransmission took place. Claims relating to such remuneration may be directed only towards the organization.

Only organizations mentioned in the first section of this Article are entitled to put forward claims for remuneration towards persons who rediffuse works on the basis of this Article. All such claims must be forwarded at the same time.

2. Rights Granted To Producers Of Phonorecords.

The 1986 amendment also broadens the exclusive rights of the producers of audio or video records to include the right to the public performance of a phonorecord and the right to equitable remuneration.

The pertinent article reads:

A phonographic record, a film or other material support on which sounds or cinematographic works have been recorded may not be reproduced without the authorization of the producer until fifty years have elapsed from the year in which the recording was made. Re-recording on another material support shall be regarded as reproduction. ²⁷⁸

The right of reproduction is subject to the exception of private and fair uses as prescribed in Articles 6-9, 11, first section, 14, first section, 17, 21, 22, first section, and 22a-22c, 24 and 24a and 26, second section.

Similarly, with respect to the right of broadcasting of phonorecords and the right of a public performance of a phonorecord, the amendment provides:

If a sound recording or other material support on which sounds have been recorded is used in a sound radio or television broadcast or in other public performance for commercial purposes, and the broadcast or the performance takes place within fifty years from the year in which the recording was

²⁷⁸ Id. at Art. 46.

made, a remuneration shall be paid to both the producer of the recording and to the performers whose performances are recorded. If two or more performers have participated in a performance, their right may only be claimed jointly. As against the person who has used the recording the performers' and the producers' claims shall be made at the same time.

The provisions on sound radio or television broadcasts in the first section of this Article apply also when a wireless such broadcast is distributed to the public, simultaneously and without changes, by wireless means or by cable (retransmission). As against the person who carries out the retransmission the claim for remuneration may be made only through organizations representing a substantial number of Swedish performing artists or producers. The organizations shall make their claims at the same time as the claims referred to in Article 22d. ²⁷⁹

Finally, it is worth noting that the statutory neighboring rights are intended only for the benefit of Swedish citizens and/or domiciliaries and for the benefit of performances by records and radio and television retransmissions which take place in Sweden. ²⁸⁰ The amendments, as a general rule, have retroactive effect. ²⁸¹ The 1986 amendment entered into force on July 1, 1986.

The Swedish collecting society has reciprocal arrangements with societies in Austria, Denmark, Finland, the Federal Republic of Germany, Italy, Czechoslovakia, Switzerland, Japan, Colombia, Brazil, Argentina, Uruguay, and Chile. ²⁸²

²⁷⁹ Id. Article 47. The foregoing rights are subject to the fair-use exceptions of articles 8, 9, 14, first section, 20, 21 and 24 and article 26, second section. Moreover, the provisions of Article 47 do not apply to sound films.

²⁸⁰ Art. 61 establishes that the performance rights granted apply to those in Sweden by Swedish citizens or Swedish organizations or companies.

²⁸¹ Id. at Art. 61, paras. (2),(3),(4),(5).

²⁸² IFPI memo, annex 4 at 44. 129

UNITED KINGDOM

The United Kingdom is one of the founding members of the 1961 Rome Convention.

Prior to the 1988 Copyright Designs and Patents Act ²⁸³ however, only certain aspects of neighboring rights were accorded protection under the Performer's Protection Acts of 1958 and 1972. ²⁸⁴

Part II of the 1988 Act provides a new code of protection for a more expansive scope of neighboring rights, protecting producers of audio and video recordings, as well as performers.

1. Rights Granted To Performers

Under the Act, "performance" means:

- (a) a dramatic performance (which includes dance and mime),
- (b) a musical performance,
- (c) a reading or recitation of a literary work, or
- (d) a performance of a variety act or any similar presentation, which is, or so far as it is, a live performance given by one or more individuals. ²⁸⁵

Moreover, to be protected, the performance must be performed by a "qualifying individual" or take place in a "qualifying country". ²⁸⁶ A

²⁸³ Copyright, Designs and Patents Act of November 15, 1988, c. 48; published in WIPO's Copyright, (Nov. 1989).

²⁸⁴ Basically, it provided penal provisions for the unauthorized performance of a protected right.

²⁸⁵ Id. at Sec. 180.

²⁸⁶ A "qualifying country" is

- (a) the United Kingdom,
- (b) another member State of the European Economic Community, or
- (c) to the extent that an Order under section 208 so

"qualifying" performance is protected against the person who, without consent of the performer --

- (a) makes, otherwise than for his private and domestic use, a recording of the whole or any substantial part of a qualifying performance; or
- (b) broadcasts live, or includes live in a cable program service, the whole or any substantial part of a qualifying performance; ²⁸⁷
- (c) shows or plays in public the whole or any substantial part of a qualifying performance; or
- (d) broadcasts or includes in a cable program service the whole or any substantial part of a qualifying performance, by means of recording which was, and which that person knows or has reason to believe was, made without the performer's consent; ²⁸⁸
- (e) imports into the United Kingdom otherwise than for his private and domestic use; or
- (f) in the course of a business possesses, sells or lets for hire, offers or exposes for sale or hire, or distributes, a recording of a qualifying performance which is, and which that person knows or has reason to believe is, an illicit recording. ²⁸⁹

"Recording" in relation to a performance means a film or sound record--

- (a) made directly from the live performance;
- (b) made from a broadcast of, or cable program including, the performance; or

provides, a country designated under that section as enjoying reciprocal protection...

Id. at Sec. 206.

287 Id. at Sec. 182.

288 Id. at Sec. 183.

289 Id. at Sec. 184.

(c) made, directly or indirectly, from another recording of the performance. ²⁹⁰

Innocent infringers are either excused or assessed reduced damages. ²⁹¹ The neighboring rights part of the 1988 Act does not apply retroactively. In other words, nothing "done before commencement, or in pursuance of arrangements made before commencement [of the Act], shall be regarded as infringing those rights." ²⁹² Also, the neighboring rights conferred by the 1988 Act are independent of any other rights in intellectual property. ²⁹³

2. Rights Of Persons Having Recording Rights.

The rights of a person having recording rights in relation to a performance (i.e., under an exclusive recording contract with a performer) are infringed by a person or entity who does any of the following --

- (a) makes, otherwise than for private and domestic use, a recording of the performance, without the consent of the person having recording rights, or the consent of the performer; ²⁹⁴
- (b) presents in public, broadcasts or includes in a cable program service, a recording of a performance; without
 - (i) the consent of the person having recording rights; or
 - (ii) if the performance was a qualifying one, the consent of the performer;
 - (iii) if the person responsible for the public presentation,

²⁹⁰ Id. at Sec. 180.

²⁹¹ Id. at Sec. 184.

²⁹² Id. at Sec. 180, para. (3).

²⁹³ Id. at para. 4.

²⁹⁴ Id. at Sec. 186, para. (1).

broadcast or cable use
knew, or had reason to believe,
that the making of the
recording had not been
authorized; 295

- (c) imports or trades in, the recording of a performance, the making of which is known not to have been authorized. 296

Section 185 defines the "person having recording rights in relation to a performance" as a person --

- (a) who is party to and has the benefit of an exclusive recording contract to which the performance is subject; or
(b) to whom the benefit of such a contract has been assigned, and who is qualifying person.

An "exclusive" recording contract means --

- (a) contract between a performer and another person under which that person is entitled to the exclusion of all persons (including the performer) to make recordings of one or more of his performances with a view to their commercial exploitation. 297

The foregoing neighboring rights last for fifty years from the end of the calendar year in which the performance takes place. 298 These rights are not assignable or transmittable except that --

- (a) a person entitled to performers' rights may by will specifically direct that some designated person may exercise the rights;
(b) and, if there is no such direction, the rights may be exercised by his personal representatives. 299

295 Id. at Sec. 187.

296 Id. at Sec. 188.

297 Id. at Sec. 185, para. (1).

299 Id. at Sec. 191.

299 Id. at Sec. 192.

3. Infringement Liability and Remedies.

An infringement of the foregoing neighboring rights is committed in relation to the whole or a substantial part of the performance. ³⁰⁰ Moreover, any infringement of the neighboring rights is actionable as a breach of statutory duty. ³⁰¹ In addition, the following special remedies may be invoked --

- (a) a person entitled to rights under this Part may apply to the Court for an order that any illicit recordings in the possession of someone in the course of business be delivered up; ³⁰²
- (b) where a person entitled to rights under this Part finds illicit recordings exposed or otherwise available for sale or hire in circumstances which would justify him applying for an order under (a), he may seize the recordings, subject to certain safeguards, i.e., advance notice of the proposed seizure must be given to the police; only premises to which the public have access may be entered; and force may not be used. ³⁰³

The related or neighboring rights granted by the 1988 Act are subject to the "fair dealing" limitation and similar exceptions corresponding broadly to the exceptions to copyright. ³⁰⁴

The 1988 Act provides for a Copyright Tribunal with the power to grant a compulsory license to "a person or entity wishing to make a recording from a previous recording of a performance in cases where --

³⁰⁰ Id. at Secs. 182, paras. (1)(a) and (b); and 186.

³⁰¹ Id. at Sec. 194.

³⁰² Id. at Sec. 195.

³⁰³ Id. at Sec. 196. See also Sec. 197, paras. (2) and (3).

³⁰⁴ Id. at Sec. 189.

- (a) the identity or whereabouts of a performer cannot be ascertained by reasonable inquiry, or
- (b) a performer unreasonably withholds his consent.

305

In giving consent, the Tribunal shall take into account the following factors:

- (a) whether the original recording was made with the performer's consent and is lawfully in the possession or control of the person proposing to make the further recording;
- (b) whether the making of the further recording is consistent with the obligations of the parties to the arrangements under which, or is otherwise consistent with the purposes for which, the original recording was made.

306

The Copyright Tribunal may not give consent for the making of a new recording unless it is "satisfied that the performer's reasons for withholding consent do not include the protection of any legitimate interest [of the performer]." 307

4. Collecting Societies.

The Phonographic Performance Limited (PPL) is the collecting society for producers of phonograms. Other performing rights are administered by the Performing Rights Society (PRS). PPL sets a tariff for the public performance of phonograms. After deducting administrative expenses (approximately 10 percent), PPL distributes the collected remuneration as follows:

305 Id. at Sec. 190.

306 Id. at Sec. 190, para. (5).

307 Id. at para. 4.

- Eight percent is paid to the Mechanical Copyright Protection Society (MCPS) on a voluntary basis that goes back to 1934;
- Twelve and a half percent is paid by contract to the performer's union;
- Twenty percent goes to individual performer's as a matter of practice or custom;
- Sixty-seven and one half percent goes to producers of phonograms. ³⁰⁸

ZAIRE

Zaire is not a member of the 1961 Rome Convention.

Title II of the 1986 Law on Protection of Copyright and Neighboring Rights ³⁰⁹, however, lays out general and specific provisions for the protection of neighboring rights. Protection is extended to performers, producers of phonograms or videograms, and to broadcasting organizations to ensure an equitable remuneration for their creative endeavors, without prejudice to the exclusive rights of the author of the work under the copyright law. ³¹⁰

1. Rights Granted To Performers.

Without the authorization of the performers, ³¹¹ no person shall carry out any of the following acts:

³⁰⁸ International Federation of the Phonographic Industry, (IFPI). Memorandum on the Implementation of the Rome Convention, London, Dec. 9, 1990, pp. 46-47.

³⁰⁹ Ordinance--Law on Protection of Copyright and Neighboring Rights, No. 86-033, of April 5, 1986, Copyright (Sept. 1987), p. 9.

³¹⁰ Id. at Art. 83.

³¹¹ "Performers shall mean the actors, singers, musicians, dancers and other persons who in any way perform sing, recite, declaim, play a role in or perform literary or artistic works in any way whatsoever." Id. at Art. 84.

- (a) broadcasting and communication to the public of their performance when it has not previously been fixed or broadcast;
- (b) embodying their performance in a fixation of sounds or images or both when it has not previously been fixed;
- (c) reproduction of a fixation of their performance made for purposes contrary to those for which the authorization for fixation was given.³¹²

Moreover, such a person "shall be required to pay the performers a remuneration whose amount and method of payment shall be fixed by agreement between the users and the body responsible for the protection and administration of copyright." 313

2. Rights Granted To Producers Of Phonograms And Videograms.

Producers of phonograms and/or videograms have the exclusive right to authorize or prohibit the following:

- (a) the direct reproduction of their phonograms or videograms or copies thereof;
- (b) the export or import of their phonograms or videograms or copies thereof with a view to selling them or distributing them to the public.³¹⁴

Any authorized use of a phonogram or videogram is subject "to payment of a fee by the user to the producer of the phonogram or videogram or to the performers." 315 Unless agreed otherwise, fees collected for the use of audio or video recordings produced in Zaire are to be divided in the proportion of 60 percent for the performers and 40 percent for the producers.³¹⁶

312 Id. at Art. 85.

313 Id. Art. 86.

314 Id. at Art. 90.

315 Id. at Art. 92.

316 Id. at Art. 94.

Conversely, fees collected for the use of audio and/or video recordings produced by foreign producers "shall be remitted to the body responsible for the administration and protection of copyright and shall be used to promote cultural and artistic activities in the Republic of Zaire." 317

The term of protection granted to producers of phonograms and videograms is twenty years "calculated from January 1 following the calendar year during which the phonogram or videogram or the copies thereof were made." 318

C. PERFORMANCE RIGHTS IN SOUND RECORDINGS: THE BERNE CONVENTION, THE MODEL LAW, AND THE BERNE PROTOCOL

The United States became a member of the Berne Convention for the Protection of Literary and Artistic Works in 1989. 319 The extent to which sound recordings qualify as literary or artistic works under Berne has been sharply debated at several international meetings.

The effort by the World Intellectual Property Organization (WIPO) to develop an international consensus on a so-called Model Copyright Law has served as the triggering mechanism for full-scale debate on the classification of sound recordings as literary or artistic works. If sound recordings are not works, they would be protected as neighboring rights rather than enjoy protection under the copyright law.

The Copyright Office supports inclusion of sound recordings as copyright subject matter in WIPO's proposed model international copyright law. Inclusion of sound recordings in unbracketed form unambiguously would

317 Id. at Art. 93.

318 Id. at Art. 95.

319 Accession was made possible by passage of the Berne Convention Implementation Act of 1988, October 31, 1988, Pub.L.No.100-568, 102 Stat. 2853.

indicate that copyright protection for sound recordings is appropriate and receives the support of member nations.

The major economic argument supported by the Register and by U.S. trade representatives is that U.S. record companies and performers, legitimate copyright owners of works of creative authorship, are denied access to hundreds of millions of dollars in royalty pools in overseas markets where U.S. sound recordings constitute a significant percentage of recordings broadcast or otherwise publicly performed.

United States advocacy of copyright protection for sound recordings is effectively undermined when, in negotiations such as WIPO meetings and GATT ³²⁰ talks, U.S. credibility is questioned: how can the United States argue strenuously for protection for sound recordings equal to that for other copyrighted works when the United States itself does not extend to sound recordings rights equal to those of other, more traditional, works? Discussions about the proposed Model Law and a possible protocol to Berne will continue, but it is unclear at this time whether or not sound recordings will, indeed, be granted full copyright protection either in the Model Copyright Law or in a Berne protocol.

The first session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works will meet in Geneva, November 4-8, 1991. The document prepared by the WIPO staff for the first session discusses several questions concerning a possible protocol to Berne. Chapter III of the WIPO memorandum concerns

³²⁰ General Agreement on Tariffs and Trade. For several years, the United States has sought the establishment of intellectual property protection and enforcement standards as part of the GATT framework. These are the so-called "TRIPS talks" (i.e., trade related intellectual property standards).

protection for the producer of sound recordings under Berne and/or a separate protocol. It is proposed that the producer of a sound recording be the legal entity in which copyright protection vests, and that the possible protocol provide for protection of the rights of reproduction, distribution, imortation, broadcasting, public performance, and commmunication to the public by wire. The minimum term would be fifty years. If these rights are considered too generous by the governments, the WIPO memorandum proposes an alternative:³²¹ the rights of broadcasting, public performance, and communication to the public by wire, will be recognized among countries party to the protocol on the basis of reciprocity. ³²²

321 Memo at 21.

322 Id., at 23.

V. SHOULD A PERFORMANCE RIGHT BE LEGISLATED?

Sections 106 and 114 of the 1976 Copyright Act define the scope of protection granted copyright owners of sound recordings ³²³ under U.S. law. ³²⁴ The exclusive rights are limited to those described in §106(1), (2) and (3), that is, the rights to reproduce, distribute, and prepare derivative works from copyrighted works. Congress intentionally excluded sound recordings from the performance right granted in §106(4) during the copyright revision in 1976, but asked the Copyright Office to study the question of whether or not Congress should grant performance rights to copyright owners of sound recordings.


After holding hearings, researching the issue and examining the comments made by interested parties, the Copyright Office concluded in its 1978 Report that a performance right in sound recordings was warranted. However, to date no such rights have been legislated in the United States.

In this part of our 1991 Report, the Office first summarizes the points raised by parties responding to the current Notice of Inquiry, revisits the conclusions of the 1978 Report, and finally reaches its conclusions on the public performance right in 1991. In its Notice the

³²³ Sound recordings are defined in 17 U.S.C. §101 as:

...works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

³²⁴ The rights of reproduction and distribution were first officially recognized by passage of the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).



Copyright Office announced that this proceeding is conducted in response to a congressional inquiry as to whether or not delivery of digital audio programming, transmitted in various formats, is likely to affect copyright owners' rights, and if so, in what manner. ³²⁵ Programming services have announced plans to transmit, by terrestrial and/or satellite broadcast systems, and by cable system, audio services, comprised in large part of works fixed in sound recordings. ³²⁶ Should there be likelihood of unauthorized copying of sound recordings because of the vastly increased quality and availability of product embodied in sound recordings and transmitted to the public via digital audio services, it may be that a remedy should be structured to compensate copyright owners of the recordings for the use of their works.

The goal, as always, is that copyright law protect the interests of authors and the public by encouraging creation of new works as well as providing the public with access to those works.

A. RESPONSES TO NOTICE OF INQUIRY

The Copyright Office received fifteen comments in response to its Notice of Inquiry, and twelve reply comments. Texts of comments and reply comments received in this proceeding are contained in a separate volume. ³²⁷ Performance rights in sound recordings was by no means the predominant topic of discussion in the majority of these comments. Answering within the parameters of questions concerning the effect of such digital transmissions on copyright proprietors, most parties commented about, among other things,

³²⁵ 55 Fed. Reg. 42,916 (1990).

³²⁶ See, e.g., RIAA comments at Appendices 3 and 4.

³²⁷ Appendix I.

the possibility of establishing royalty systems for reproduction of works rather than establishment of a new performance right.

However, there was considerable discussion of the performance right issue. Respondents generally aligned with the arguments of either the Recording Industry Association of America (RIAA), favoring enactment of a public performance right for sound recordings, or the National Association of Broadcasters (NAB), opposing enactment of such a right.

1. Initial Set of Comments.

a. Pro Public Performance Right for Sound Recordings. The RIAA spearheaded the movement for enactment of public performance rights in sound recordings. It requested that the Copyright Office:

1. Reiterate its support for a performance right in sound recordings and advance that recommendation to Congress;
2. Recommend legislation to require broadcasters and cable operators to transmit accurate and complete digital subcode information embodied in prerecorded digital recordings; and
3. Endorse legislative and/or administrative restrictions on the broadcast or transmission of multiple selections from the same album or by the same artist within a specified period of time so as to prevent abuses of the performance right. ³²⁸

RIAA correctly notes that "the Copyright Office does not have authority to implement such proposals on its own." It urges, however, that the Office support RIAA's position in its recommendations to Congress on these points. ³²⁹

³²⁸ RIAA comments at 2.

³²⁹ Id. at 2, n.1.

RIAA also calls for enactment of a performance right in sound recordings to provide "protection that will bring revenue into the U.S. by accessing foreign performance royalty pools," 330 and to strengthen the ability of the United States to press for improved international protection for intellectual property. 331 In addition, RIAA rejected the validity and worth of broadcasters' arguments that added exposure of product by new technological delivery services increases sales, thus actually helping performers and the recording industry. This, says RIAA, is "irrelevant to the granting of a Performance Right in Sound Recordings," and "is no ground for denying the copyright owner the right to best market . . . its work to the public." 332

RIAA receives general support for its positions in comments filed by the AFL-CIO Department of Professional Employees, American Federation of Musicians, and American Federation of Television and Radio Artists. These groups also assert that exclusion of a performance right for sound recordings is unfair to those responsible for creating copyrighted sound recordings. 333 They agree with RIAA's point regarding international implications 334 and also support RIAA's proposals for limits on multi-track retransmission and required transmission of digital subcodes contained in digital tracks. 335 The labor unions also assert that the Office should recommend to Congress

330 Id. at 5-6.

331 Id. at 17-18.

332 Id. at 8.

333 AFL-CIO comments at 2.

334 Id. at 3.

335 Id. at 4.

that it pass legislation granting a performance right in sound recordings. 336

b. Opposed to Public Performance Right in Sound

Recordings. Several parties opposed enactment of a performance right in sound recordings in their initial comments. One group that has traditionally taken such a stance is the National Association of Broadcasters (NAB). 337

Regarding the Office's current inquiry into the effects digital audio delivery systems may have on copyright owners' rights, NAB makes the general statement that the Office is premature in its activity, and that any attempt the Office may make to recommend proposals to change the 1976 Copyright Act to Congress are "precipitous." 338 If the Office concludes that a performance right should be enacted for sound recordings, or that another form of compensation such as a royalty should be established to compensate copyright owners of sound recordings for new uses of their audio works, NAB comments that "any adjustments...should be narrowly drawn and crafted so that those who directly benefit from home taping in connection with the use of such advanced technology compensate those who are directly harmed by it." 339 This comports with the NAB's fundamental goal of protecting broadcasters (commercial users) as opposed to protecting parties such as individual home tapers. According to the NAB, "a more equitable proposal than imposing a home taping penalty on broadcasters would be the use of a debit or credit card system." 340

336 Id. at 2, 5.

337 See NAB's comments in 1978 Performance Right Report at 151.

338 NAB comments at 2.

339 Id. at 3.

340 Id. at 15.

The NAB says imposition of new financial burdens on broadcasters would be "grossly unfair," 341 and that broadcasters cannot afford the expense of paying copyright owners of sound recordings for use of their works. The NAB also claims there is promotional value in the exposure a copyright owner gets for his/her work when it is played on the air for free. And it claims broadcasters already pay enough for use of a sound recording when they pay performance rights organizations, who represent songwriters, for airing musical compositions embodied in sound recordings.

The National School Boards Association (NSBA) submitted comments in this proceeding advising that "[t]he Copyright Office is probably well advised to leave the issue of performance rights alone." 342 The NSBA reasons that proponents of such rights have never "been able to show a need, based on a public policy basis, or evidence of irrefutable damage under the current system." 343

The Cromwell Group, Inc. begins its comment with the assertion that "Performances on Sound Recordings Should Not be Copyrighted." 344 Cromwell finds nonsensical a situation where "performers want radio stations to 'play the record for free'. Performers don't want to pay to have their record played. However, they want broadcasters to 'expose the performer's record for free' plus 'pay the performer'." 345

341 Id. at 11.

342 NSBA comments at 3.

343 Id.

344 Cromwell Group, Inc. comments at 1.

345 Id.

c. Other Comments. The remainder of the initial comments were: (1) neutral regarding a new public performance right, (2) addressed copyright owners' rights by suggesting enactment of royalty systems to compensate artists for reproduction of their works, or (3) suggested copyright owners work through established performance rights organizations to achieve adequate compensation.

Parties taking no position about performance rights in sound recordings include the National Association of Recording Merchandisers (NARM), CBS, Inc., and the Home Recording Right Rights Coalition (HRRRC). Those advocating establishment of royalties on blank tapes or hardware include the Copyright Coalition and the American Society of Composers, Authors and Publishers (ASCAP). Parties suggesting that copyright owners and users of their creations work through their representatives or through established performance rights organizations include Strother Communications, Inc. (SCI), CD Radio, Inc., Broadcast Music, Inc. (BMI), General Instrument Corporation, and the New York Patent, Trademark and Copyright Law Association.

2. Reply Comments.

a. Pro Public Performance Right for Sound Recordings. Here, too, the RIAA is the leader in making the argument that a performance right for sound recordings should be enacted. The association repeats points made in its first set of comments, emphasizing the equities of changing the law, and the need to make the legal correction now. Specifically addressing NAB's comments, RIAA responds:

[T]he broadcasting industry undeniably and unjustifiably profits from the use of our members' product without paying for it. ...
[C]opyright owners of sound recordings should

receive compensation for the public performance of their works regardless of any 'exposure' or promotion that broadcasters believe may be afforded by digital audio...services. 346

Broadcast Data Systems (BDS) also openly favors a public performance right for sound recordings. Its position is stated simply. However, the comments focus on technology rather than law. As Broadcast Data Systems notes, it differs from RIAA in the manner in which performance information would be acquired. Instead of legislation to require digital audio subcodes, as RIAA suggests, BDS says "technology exists today which can identify songs for the purposes of compensating copyright owners for transmission of their works." 347 BDS currently provides such service, and describes it in detail in its comments. The Office's discussion of subcoding appears earlier in this report.

b. Opposed to Public Performance in Sound Recordings. In reply comments, the broadcast interests again strongly oppose enactment of a performance right in sound recordings. The NAB outlines both procedural and substantive reasons it believes the Office should not take up the issue at this time. 348 The NAB claims the Office exceeds the scope of its Inquiry, thus violating "due process" concerns, by considering the performance rights for sound recordings issue rather than restricting its consideration to home taping issues. The NAB also declares that RIAA's assertions lack merit.

In addition, the NAB refutes RIAA's arguments via a paper prepared for the NAB by Professor Peter Jaszi. Citing to Professor Jaszi's work, the

346 RIAA reply comments at 3.

347 Id.

348 See NAB comments at 4-16.

NAB declares that Congress has made reasoned decisions not to enact a performance right in sound recordings, and no new evidence has been raised to warrant reconsideration. ³⁴⁹ The paper criticizes the argument that the United States must create a performance right in order to improve its position regarding intellectual property rights abroad. ³⁵⁰ Jaszi reasons that each nation has its own carefully crafted set of laws, and to make the broad assertion that a performance right in the United States would put this country's producers and performers on a par with those in other nations is inaccurate.

The NAB repeats its claim that the exposure generated by free over the air broadcast of sound recordings more than benefits the associated performers and musicians involved. ³⁵¹ The NAB's reply comments are endorsed by Cox Broadcasting. ³⁵²

Several individual broadcasters filed reply comments in the form of one page letters in opposition to enactment of a new performance right. Each party uses the same language, saying, in part:

We oppose any effort to expand the scope of this proceeding to consider performance rights in sound recordings. The Congress has consistently refused to amend the copyright laws to create such a performance right and there is no reason to do so. The recording industry is very healthy and they, together with performing artists, benefit greatly from the free airplay that we give to recordings. ³⁵³

³⁴⁹ Id. at 2-3.

³⁵⁰ Id. at 3.

³⁵¹ Id. at 3-4.

³⁵² See Cox reply comments at 1.

³⁵³ See reply comments of broadcast stations KKYY - FM, San Diego, CA; KDKB - FM, Mesa, AZ; KEGE - FM, Irving, TX; KLSY - FM, Bellevue, WA.

c. Other Comments. The National Association of Recording Merchandisers (NARM), the Copyright Coalition, the Home Recording Rights Coalition (HRRC) and Broadcast Music, Inc.(BMI) refrained from taking a stand on the performance right issue in their comments. NARM proposed to study the issue further and provide the Office with its response. BMI supported creation of a royalty system to compensate for home recording, but was not specifically behind enactment of a public performance right in sound recordings. The Copyright Coalition generally supported RIAA. However, its discussion focused on home taping, not performance rights. The Coalition supports imposition of a royalty system to compensate for hometaping. HRCC opposed any system of compensation that could be interpreted as a tax on home taping.

B. SOUND RECORDING ACT OF 1971. 354

This is not the first time the Office has been asked to explore the scope of rights to be accorded copyright owners of sound recordings. The history of such inquiries is well documented and available. 355 The 1971 Sound Recording Act established copyright protection for sound recordings as "writings of an author" within the meaning of the statute and the U.S. Constitution. 356 This legislative amendment was needed because it was not

354 Pub. L. No. 92-140, 85 Stat. 391 (1971).

355 See, e.g., Report of the Register of Copyrights on Performance Rights in Sound Recordings, before the U.S. House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, 95th Cong., 2d Sess., (1978); B. Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26, see also note 218 infra 1 Copyright Law Revision, Studies for the U.S. Senate Subcommittee on Patents, Trademarks and Copyrights of the Committee of the Judiciary, 86th Cong., 2d Sess., (1961).

356 U.S. Const. art. I, §8.

clear before 1971 what the status of sound recordings, a new product of technology and art, was under the 1909 Copyright Act. The 1971 Sound Recording Act provided limited protection for sound recordings; the legislative history shows that protection was mainly intended to proscribe unauthorized copying, known worldwide as piracy of phonograms.³⁵⁷ The 1971 Sound Recording Act was enacted to create uniform federal protection against unauthorized duplication of sound recordings rather than continue to fight piracy in fifty state courts.³⁵⁸ Passage of the Act also strengthened efforts to smooth U.S. entry into the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. Subsequent court decisions affirmed the constitutionality of the 1971 Sound Recording Act.³⁵⁹

Passage of the 1971 Sound Recording Act did not quiet the controversy over the extent of protection that sound recordings deserve. The RIAA continued to lobby for increased rights, including performance rights, but broadcasters and others continued to oppose performance rights. Representatives of performers, manufacturers, publishers, jukebox interests, and motion

³⁵⁷ Legislative reports on the Act made clear that it was directed only at tape piracy and did not "encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes." S. Rep. No. 72, H.R. Rep. No. 487, 92d Cong., 1st Sess. 3 (1971). Piracy was addressed by the United States on an international scope by its ratification of the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971).

³⁵⁸ H.R. Rep. No. 487, 92d Cong., 1st Sess. 2 (1971). See also Schrader, Sound Recordings: Protection Under State Law and Under the Recent Amendment to the Copyright Code, 14 Ariz L. Rev. 689 (1972).

³⁵⁹ See Shaab v. Kleindienst, 345 F.Supp.589 (D.D.C. 1972)(sound recordings qualify as writings of an author that may be copyrighted): Goldstein v. California, 412 U.S. 546 (1973)(the term "writing" can be broadly interpreted by Congress to include sound recordings).

picture-interests were also vocal. The concerned parties emphasized the adverse economic effects passage, or nonpassage, of further legislation might cause them.

These issues were debated during the effort to pass a comprehensive copyright revision bill in the 1970's.³⁶⁰ When the general revision bill passed in 1976, Congress directed the Copyright Office to study the issue of a public performance right in sound recordings. The House Report stated that:

[t]he Committee considered at length the arguments in favor of establishing [sic] a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyright to submit to Congress, on January 3, 1978, "a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners...any performance rights" in copyrighted sound recordings.³⁶¹

C. THE REGISTER'S 1978 REPORT ON PERFORMANCE RIGHTS IN SOUND RECORDINGS.

In the introduction to the 1978 report, the Register of Copyrights stated:

Our investigation has involved legal and historical research, economic analysis, and also the amassing of a great deal of information through written comments, testimony at hearings, and face-to-face interviews. We identified, collected, studied, and analyzed

³⁶⁰ See 1978 Performance Rights Report at Chapter IV. See also Olson, The Iron Law of Consensus, 36 J. Cop. Soc'y 126-27 (1989); D'Onofrio, In Support of Performance Rights in Sound Recordings, 29 UCLA L. Rev. 169,70 (1981); H. Craig Hayes, Performance Rights in Sound Recordings: How Far To the Horizon? 22 Copyright L. Symp. (1977), p. 127.

³⁶¹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 106 (1976).

material dealing with a variety of constitutional, legislative, judicial, and administrative issues, the views of a wide range of interested parties, the sharply contested arguments concerning economic issues, the legal and practical systems adopted in foreign countries, and international considerations, including the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (adopted at Rome in 1961).³⁶²

The Copyright Office followed the philosophy it had declared earlier that copyright legislation must ensure the necessary balance between giving authors the necessary monetary incentive without limiting access to an author's works.³⁶³ After weighing the arguments of the commentators participating in the proceeding and assessing the impact of the information presented to the Office in an independent economic analysis, the Register outlined the Office's conclusions.³⁶⁴ In essence the Office concluded that:

Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into

³⁶² 1978 Performance Rights Report at (1).

³⁶³ "In a narrow view, all of the author's exclusive rights translate into money: Whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions." Copyright Law Revision, Part 6. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 89th Cong., 1st Sess. House Comm. Print, at 13 (May 1965). Emphasis added. (As quoted in 1978 Performance Rights Report at 174).

³⁶⁴ 1978 Performance Rights Report at 174-177.

parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances.³⁶⁵

In the 1978 Report, the compensation scheme contemplated was a compulsory licensing system. The goal was to benefit "both performers (including employees for hire) and ...record producers as joint authors of sound recordings."³⁶⁶ Although legislation was introduced following publication of the 1978 report, it was not enacted by Congress.

The previous inaction by Congress forms the basis for many of the arguments made by parties in the current proceeding who oppose enactment of a performance right in sound recordings. In order, however, to assess whether or not change is warranted now, one must examine the context in which Congress failed to enact legislation earlier, and must consider whether technological advancements provide a new basis for legislative change.

D. THE COPYRIGHT OFFICE POSITION ON A SOUND RECORDING PERFORMANCE RIGHT IN 1991.

Thirteen years have passed since the Copyright Office formally recommended to the Congress the enactment of a public performance right in sound recordings. Technological changes have occurred that facilitate transmission of sound recordings to huge audiences. Satellite and digital technologies make possible the celestial jukebox, music on demand, and pay-per-listen services. The music performing right gives composers and lyricists an important basis for obtaining compensation for performance of

³⁶⁵ Id., at 177. (Emphasis added).

³⁶⁶ 43 Fed. Reg. 12,763 (1978) at 12,766.

their music by satellite and digital means, as well as traditional performances. The advent of these new technological means for disseminating copyrighted sound recordings clearly raises questions about fair compensation to authors and proprietors of sound recordings for the widespread commercial exploitation of their creativity. Without a music public performance right, composers and lyricists would be seriously deprived of their just compensation for their creativity. Sound recording authors and proprietors are harmed by the lack of a performance right in their works.

Broadcasters counter with the argument that free airplay promotes the sale of records. The Copyright Office does not find this argument persuasive. Broadcasters choose to play pre-recorded music: it is a relatively cheap form of programming. Broadcasters could program live music, or they could prepare their own original recordings. They generally do neither because playing pre-recorded music is economically cost-efficient and popular with the public. There is no valid copyright policy reason to deny authors and owners of sound recordings of the right to compensation for the public performance of their works. The United States, as a world leader in the creation of sound recordings, should delay no longer in giving its creators of sound recordings the minimum rights that more than sixty countries give their creators.

As discussed above many countries base royalty payments on reciprocity. Consequently U.S. performers and producers will continue to lose out unless a performance right is legislated. RIAA asserts that in 1989 American recording artists and musicians were excluded from royalty pools that distributed performance royalties in excess of \$100 million dollars. 367

367 RIAA comments at 16.

A recent article noted that the UK Performing Rights Society (PRS) which collects and distributes royalties earned through the public performance and broadcast of copyrighted music had a gross income of one hundred and thirty-one million pounds in 1990. This represents a twelve percent increase over the 1989 income. The figures include revenue from Great Britain and Ireland and also from affiliated performing rights societies in other countries. Overseas income increased by fifteen percent during this period to thirty-seven million pounds. The report attributes this increase to the continued popularity of UK music. 368

As discussed above, a majority of countries give the performer and/or producer a performing right in sound recordings. No one contests the continued popularity of American music. It is also clear that even those countries that make distributions to performers and producers from other countries do so on the basis of reciprocity.

Sound recordings have been protected as copyright subject matter since 1972. They represent the only subject matter category capable of performance which is, nevertheless, denied a right of public performance. Sales of records are the only source of revenue under existing law, yet technological developments such as satellite and digital transmission of recordings make them vulnerable to exposure to a vast audience based on the sale of a potential handful of records. Even if the widespread dissemination by satellite and digital means does not depress sales of records, the authors and copyright owners of sound recordings are unfairly deprived by

368 Record Income and Investment in New Technology. PRS Release. Organ Universal News Service (July 12, 1991).

existing law of their fair share of the market for performance of their works.

We can see the enormous importance of a performing right in the case of musical works. Revenues from licensing the music performing right represent a major income source for composers and lyricists. Creators of sound recordings should have a similar revenue source.

The Copyright Office recommends amendment of the 1976 Copyright Act to extend a public performance right to sound recordings, without diminishing or limiting the public performance right for musical works.

VI. COPYRIGHT OFFICE CONCLUSIONS AND RECOMMENDATIONS

Throughout the course of this study, it was evident to the Copyright Office that the precise future and direction of digital audio transmission services is uncertain. In the cable arena, a small group of firms have begun to offer digital music services to cable subscribers in limited areas, but the ultimate success and expansion of these services remains to be seen. The future of digital audio broadcasting is even more unclear as the FCC wrestles with questions of frequency allocations, technical standards, and regulatory framework. It is hoped that the digital format will be the medium of audio transmission both in cable and broadcasting by the turn of the century, but at present it is little more than a budding industry.

With the widespread appearance of digital audio services still years away, the task of gauging their eventual impact on the interests of copyright owners is a difficult one. The Office realizes that it is premature and somewhat speculative to attempt an exact measure of any increase in home taping attributable to digital audio services. It is clear, however, that digital technology will not reduce current levels of home taping. The Office notes that present levels of home taping in analog format, shown to be statistically significant in recent studies, are likely to at least remain the same in the digital era. The Office also notes the conclusion reached by the European Community that home taping will increase with digital technology, which enables production of perfect copies cheaply and easily.

The Office arrived at a similar conclusion with respect to the likelihood of an increase in a displacement of sales of prerecorded works by

digital audio services. Again the evidence of a significant jump in lost sales caused by digital audio transmission services is speculative, but there is also no evidence suggesting that sales currently lost in analog format would decrease in the digital era. The Office rejects the notion that home taping stimulates purchases of other prerecorded works so as to offset the economic harm to copyright owners for loss of sales of the taped works.

The Copyright Office concludes that home taping will continue to occur in statistically significant amounts in the digital era. It is, therefore, necessary to examine the legality of home taping under the copyright law. The Office rejects the position that a specific exemption or "safe harbor" for home taping exists in the Copyright Act of 1976, and concludes that specific acts of home taping must be evaluated under the traditional section 107 fair use analysis. The Office notes that some forms of home taping of prerecorded works, such as the practice of "time-shifting," may qualify as fair use, but not all home taping activities are permissible. The various forms and purposes of home taping make it impossible to draw any firm conclusions about their fair use nature, and individual determinations must remain with the courts.

Since the Copyright Office does not agree that current law permits unauthorized home taping without the occurrence of infringement, it supports efforts to construct a royalty system that fairly compensates authors, producers, and performers for private or commercial uses of their works. The proposed Audio Home Recording Act of 1991 presents a solution to royalty issues with which interested parties are reportedly satisfied. Congress can settle the issue by addressing this proposed legislation and putting the matter to rest.

As part of its investigation into the effects of new digital audio technology on the rights of copyright owners, the Copyright Office found it appropriate to revisit an issue studied in the past: should a performance right for sound recordings be legislated? The issues now are quite similar to those considered in the past, but in the last twenty years technology has advanced dramatically. The question now is whether or not the change in technology creates an even more urgent need to make legislative changes.

In 1978 after a great deal of study the Register of Copyrights concluded that sound recordings do merit a public performance right. Since 1978, as detailed in the IFPI study and our own, more countries have decided to give greater protection, including performance rights to sound recordings. Consequently, despite continued reluctance on the parts of some commentators to grant full protection to sound recordings, the Register agrees with the position taken in our 1978 study. The Office supports enactment of a public performance right for sound recordings.

The Office concludes that sound recordings are valid works of authorship and should be accorded the same level of copyright protection as other creative works. In fact, as advanced technology permits more copying and performing of American music, the Office is convinced that a performance right and compensation for home taping are even more essential to compensate American artists and performers fairly.

TABLE 1

full text of questions appears at end of chart

COUNTRY	1. Royalty System?	2. Collection/Distribution?	3. DAT Specific?	4. Broadcast Fee?
ARGENTINA	levy on: recording equipment, blank tapes	performing rights society: SADAIC	not available	no
AUSTRALIA	levy on: blank tapes	joint gov't/music industry group: AUSMUSIC	not available	yes
AUSTRIA	levy on: blank tapes	perf. rts. soc'y: AUSTRO-MECHANA	no	yes
CONGO	levy on: blank tapes	perf. rts. soc'y: BCDA	not available	no
FINLAND	levy on: blank tapes	perf. rts. soc'y: TEOSTO	no	yes
FRANCE	levy on: blank tapes	perf. rts. soc'y: SORECOP, SACEM	no	yes
GABON	royalty on: blank tapes	Nat'l Artistic & Cultural Promotion Agency	no	no
GERMANY (FGR)	levy on: recording equipment, blank tapes	perf. rts. soc'y: ZPU	(proposed to be 4 times higher for digital)	yes
HUNGARY	levy on: blank tapes	perf. rts. soc'y: ARTISJUS	not available	no
ICELAND	levy on: recording equipment, blank tapes	perf. rts. soc'y: IHM	no	no
NETHERLANDS	levy on: blank tapes (proposed)	perf. rts soc'y: STEMRA	yes (proposed)	no

NORWAY	tax on: audio recording equipment, blank tapes	Collected by customs authorities & Ministry of Finance. Distributed by: Norsk Kassetav Giftsfond (NKAF)	not available	yes
PORTUGAL	levy on: recording equipment, blank tapes	perf. rts. soc'y SPA	not available	no
SPAIN	levy on: recording equipment, blank tapes	perf. rts. soc'y SGAE	yes (proposed)	yes
SWEDEN	tax on: blank audio tapes	Collected by: customs authorities for imports & central authority for collecting tax. Distributed by: gov't	not available	yes
TURKEY	tax on: blank tapes	Ministry of Culture and Tourism	not available	yes
ZAIRE	levy on: recording equipment, blank tapes	not available	not available	no

- (1) Is there a royalty system that provides compensation to copyright owners for public performance or reproduction of their audio works, whether digital or analog, and if so, where are these royalties placed?
- (2) Who collects and distributes any such royalties?
- (3) Are there different or additional provisions for DAT from those applying to analog use?
- (4) Is there a royalty or collectively negotiated fee for the broadcasting of sound recordings?