PERFORMERS' AND PERFORMANCE RIGHTS IN SOUND RECORDINGS

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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PERFORMERS' AND PERFORMANCE RIGHTS IN SOUND RECORDINGS

THURSDAY, MARCH 25, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, Mike Synar, Barney Frank, Howard L. Berman, Jack Reed, Xavier Becerra, Carlos J. Moorhead, Howard Coble, Hamilton Fish, Jr., F. James Sensenbrenner, Jr., Bill McCollum, and Steven Schiff.

Also present: Hayden W. Gregory, counsel; William F. Patry, assisant counsel; Veronica L. Eligan, secretary; and Thomas E. Mooney, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning and welcome to the subcommittee's first oversight hearing in the 103d Congress on international copyright issues and their domestic impact.

The market for copyrighted works, especially U.S. works, is truly global. Foreign markets play an increasingly important role in the profitability of the U.S. copyright industries. Gone are the days when these markets were subsidiary.

Technology has been a two-edged sword in achieving a global market. The advent of digital technology, especially in the audio field, has brought compact disks, and now digital transmissions. As Mr. Nicholas Garnett of IFPI notes in his written statement, consumers' response to this technology has caused a phenomenal growth in worldwide record revenues. In the 10 years from the introduction of the compact disk, those revenues have doubled to $25 billion for 1991 alone.

At the same time, Mr. Garnett observes that the near-perfect quality of digital reproductions has led to significant piracy problems. He estimates that worldwide losses to the phonographic industry from piracy were $1.5 billion in 1991.

There are also concerns that unrestricted home taping of digital products will displace a significant part of the retail market.

Last year, the Congress passed the Audio Home Recording Act of 1992 in response to those particular concerns. Today we will hear testimony that digital transmission services, in the form of digital audio cable and digital broadcasting, may pose a similar threat.

Unlike last year's audio home recording legislation, however, today's hearing is an oversight hearing. Specifically, we are beginning the process of examining the impact on domestic U.S. law that may result from the initiatives currently underway at the World Intellectual Property Organization to conclude a protocol to the Berne Convention and to establish a new convention for the protection of the rights of performers and producers of phonograms.

This week the WIPO sent out memoranda on these particular issues. Next week WIPO is hosting a seminar at Harvard University on the impact of digital technology on copyright and neighboring rights. And early this summer, there will be a committee of experts meeting in Geneva on the protocol and the new instrument.

As an Israeli politician once remarked about Middle East negotiations, "If you are not talking about land, you are not talking."

In the context of the WIPO new instrument, it might be said, "If you are not talking about changes to the United States Copyright Act, you are not talking."

If you are talking about changes in the United States Copyright Act, I believe it is imperative that the subcommittee be involved at the ground floor. We want to know beforehand what the issues are and what their domestic consequences might be. We want to be involved in helping to shape the position of the U.S. Government before that position is placed on the table in Geneva, rather than being presented, after the fact, with a package worked out by others.

Today's hearing is a first step in that process. We expect to hold additional hearings in the next few months on the Berne protocol.

We have an impressive list of witnesses today who will help us understand the issues so that we may formulate what we believe to be the appropriate policy. I look forward to their testimony.

The Chair recognizes the gentleman from California.

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

I would like to commend you for scheduling these important hearings. The issue of a performance right in sound recordings has a long history with this subcommittee. It goes back at least to 1962. It was one of the few questions we left unresolved in the 1976 copyright revision.

In order to expedite the general revision of 1976, we specifically put aside this issue and called on the Register of Copyrights to report back to the Congress by January 3, 1978. At that time, the Register issued a 1,200-page report. During that same year this subcommittee held 4 days of public hearings, 2 days of which were held in Beverly Hills, followed by 3 days in 1979, and again in 1983.

It has been over a decade since this subcommittee has looked closely at this issue. During that time, our country, and certainly our economy, has become more global. American-produced music is probably the most listened to music in the world. More countries have come to recognize performers' rights in sound recordings, but

these same countries refuse to permit our performers to share in the millions of dollars collected, even though a good part of that money is collected in their good name and because of their good performance. The reason given for this anomaly is because the United States has refused to recognize a performance rights in sound recordings.

In addition to the changing global climate for recorded music, we have had ever-changing technology. Will digital transmissions replace the traditional methods of distributing prerecorded music? And what effect will this have on incentives to create new products? That is the issue we need to explore today.

Again, I would like to commend our chairman for these timely hearings and look forward to this morning's testimony.

Mr. HUGHES. I thank the gentleman.

The Copyright Office has long been involved in the question of performers' rights. Register of Copyrights Abraham Kaminstein was the reporter for the 1961 Rome Convention. Register of Copyrights Barbara Ringer and her staff prepared a voluminous report in 1978 on the issue and testified before Congress in 1978 and again in 1979 on bills introduced by Representative George Danielson, who coined the phrase "celestial jukebox."

In 1991, the Copyright Office, under the leadership of Register of Copyrights Ralph Oman, prepared a report for the Congress on the copyright implications of digital transmission services.

Ralph Oman is our next witness, and we would appreciate your coming forward to the witness table. As always, we look forward to your testimony on these most complicated issues.

Ralph, we have a statement from you which we will put in the record in full. We hope you can summarize for us, and we will get right to questions, but you may proceed as you see fit and we welcome you once again.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, ACCOMPANIED BY MARYBETH PETERS, POLICY PLANNING ADVISER TO THE REGISTER OF COPYRIGHTS

Mr. OMAN. Thank you, Mr. Chairman. And thank you for the invitation to appear before the subcommittee on these two important issues.

The first issue involves the longstanding question of whether or not to grant a performance right in sound recordings. The second involves performers' rights.

I propose to the Congress to filter both questions through the lens of our unique legal tradition, ongoing technological advances, and our desire to participate in an international regime that protects both creators and users.

The Copyright Office has studied the question of a performer's right in sound recordings several times over the course of the 20th century. You have made mention of them in your opening statement, Mr. Chairman.

The issue, as was observed, proved to be too controversial back in 1976 for inclusion in the copyright revision bill, and Congress threw it over the side and requested us to do a monumental study.

That 1978 report was a milestone in the development of this issue. In the report, we searched the historical, economic, and legal roots of the idea. We hired an outside consultant to prepare a special analysis of the economic impact of a performance right in sound recordings. The Office also looked at the legal and administrative systems adopted by foreign countries and surveyed international treatment of performance rights.

At the end of the day, we concluded that sound recordings should have a public performance right and that recognition of that right squared completely with the basic principles that undergird the copyright law.

At hearings in 1979 and 1982, the Office voiced support for the performance right. In October 1991, I reiterated the Office's historic support of this right in my report on digital audio broadcasting. The new space-age technologies make it apparent that the United States needs a performance right to compensate American authors and performers fairly.

As we reported in the 1991 study, these new technologies, and the new services they make possible, will change dramatically the way the public now enjoys sound recordings. So we anticipate the questions that will confront authors, performers, and users will be complex. We hope that we can help the subcommittee frame the questions that need to be asked and answered.

At the outset, I see three questions that we should address: First, will digital transmissions by satellite, radio station, or cable replace the traditional method of distributing prerecorded music to the public? In other words, will what you call the "celestial jukebox" replace Tower Records and the corner outlet stores and their glitzy stock of CD's, tapes, and records?

How we accommodate this new environment in a way that protects the interests of record producers, performers, composers, and lyricists is the second question, Mr. Chairman.

And the third question will be how to preserve the incentives that people need to create new sound recordings.

Having looked at the traditional arguments with an eye on the changing technology, I make two suggestions: First, U.S. law should provide a public performance right for sound recordings; and, second, if you cannot crack the tough political nut and recognize broad public performance rights or if you have to water down that recognition to a mere right of remuneration, then Congress should consider treating digital transmissions differently and create a digital transmission right that grants the owner of the sound recording the exclusive right to authorize or prevent the transmission.

Congress recognized the unique qualities of digital technology and the mortal threat it poses to creativity in the music industry when you passed the Record Rental Act back in 1984 and when you passed the DART legislation last year, and you can do so again here.

In looking at the questions, we have to keep sight of the underlying purposes of copyright: to reward creativity and encourage individual effort through economic incentive.

We could also bear in mind another basic principle of copyright, and that is that copyright owners should control the commercial

use of their work. The key here is the ability to license or prohibit the intended use.

Before leaving performance rights, let me mention one other angle, if I might. Many countries treat the rights of record producers and performers under a neighboring rights regime; that is close to, but outside, of copyright. You mentioned the importance of the international markets in your opening statement, Mr. Chairman; and this difference in treatment around the world has important consequences for American rightsholders.

These neighboring rights regimes I referred to frequently grant rights to foreigners only on the basis of reciprocity. U.S. performers will not receive royalties unless foreign performers receive royalties in the United States. In 1989, the royalty pool worldwide was over $100 million. And even though American music dominates the airwaves, we didn't receive a penny or a sou or a pfennig, or a yen, for that matter.

If you were to enact a performance right, because the music that is performed here is predominantly American, far more money would flow into the United States than would flow out.

That is my point on the performance rights issue, Mr. Chairman. Let me mention briefly, in conclusion, the performers' rights.

I am delighted that you are looking at performers' rights at this juncture. Your timing is, as always, impeccable. As you mentioned, the World Intellectual Property Organization is now working on a new treaty to improve international protection for both performers and producers of sound recordings. The United States is actively taking a part in these discussions.

As you mentioned, Mr. Chairman, we will meet in Geneva in June to try to hammer out a draft treaty. And your subcommittee will play a key role in helping shape the treaty to meet the needs of all creators and users.

The issue of performers' rights deserves an indepth study. Our copyright law already recognizes sound recording performers, at least those whose contributions are not made for hire, as authors, and they get full rights under U.S. law. In addition to Federal copyright law, State law provides other forms of protection for performers: under criminal statutes, under common law copyright, under unfair competition, and under rights of publicity.

At this point, it is possible, maybe even preferable, to consider performance rights in sound recordings apart from the general issue of performers' rights. By doing so, you would not impair the prospects of action on the longer-term question of performers' rights. In fact, the incremental approach is probably the best approach.

One thing is now clear: You should craft a public performance right in sound recordings in a way that benefits performers as well as producers and other creators.

I would be happy to answer any questions, Mr. Chairman, at this point. And I thank you very much for the opportunity to be heard.

Mr. HUGHES. Thank you very much, Mr. Oman.

[The prepared statement of Mr. Oman follows:]

PREPARED STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS

I. INTRODUCTION

I am Ralph Oman, Register of Copyrights, Copyright Office of the Library of Congress. I thank you for the opportunity to appear at this hearing re-examining the long standing question of whether to grant a performance right in sound recordings.

Performers whose contributions become part of a sound recording that was first fixed on or after February 15, 1972 are recognized as authors under the United States copyright law.[1] Thus, their rights are determined by that law, which may be altered by contract or a collective bargaining agreement.

The Copyright Act of 1976[2] grants authors five exclusive rights "to do and to authorize" the following with respect to the copyrighted work: to reproduce it in copies or phonorecords, to distribute copies of it to the public, prepare derivative works based upon it, perform the work publicly, and to display the work publicly. In 1976 Congress intentionally denied authors of sound recordings the public performance right granted authors of other types works. The performance right for sound recordings was extremely controversial, and as the Register of Copyrights noted in his 1965 Supplementary Report, "We are convinced that under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired."[3] However, in Section 114(d) of the 1976 Act Congress directed the Copyright Office to undertake a study on the issue of performance rights in sound recordings. That study concluded that sound recordings should enjoy the public performance right; however, despite the introduction of bills to provide such a right and extensive hearings on the subject, such a right has yet to be enacted. Now once again, the issue is being revisited.

II. CONSTITUTIONAL ASPECTS

The U.S. Constitution grants to Congress the power:

> To promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;[4]

The work of an author must be a "writing" in order to be eligible for copyright protection. Section 4 of the 1909 Copyright Act stated that "all the writings of an author" were subject to copyright. But recorded performances or what we now call sound recordings were not treated as "writings" in the early part of this century, largely based on the result in *White-Smith* v. *Apollo.*[5] This narrow reading of what constituted a "writing" underlaid the consideration given legislation proposed between 1909 and 1971 which might have defined recorded aural works as the writings of an author.[6] Commentators and certain judges recognized that the contributions of performers rose to the level of a writing; yet they agreed that without an amendment to the copyright act, they could not have been copyrighted under the 1909 Act.[7] In the 1970's there were a number of cases dealing with unauthorized duplication of pre-1972 sound recordings; these cases either assumed that the performers' contributions were protectable property, or simply stated the principle with little discussion.[8]

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[1] Sound recordings fixed before February 15, 1972 may be protected under state law until December 31, 2047. 17 U.S.C. 301(c). Thus, unfixed performances, unlawfully fixed performances and pre-February 15, 1972 sound recordings may be protected by state statutes, unfair competition, or common law.

[2] 17 U.S.C. §§ 1-810 (1976).

[3] Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 86th Cong., 1st Sess. (Comm. Print 1965), p.52.

[4] U.S. Const. art I, § 8, cl. 8.

[5] 209 U.S. 1 (1908). The Court held that since the perforations on a piano roll were not visually intelligible, the recording was not a copy of the underlying music, and the author of the composition had no control over the use of such a recording.

[6] See, Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2d Sess. (Comm. Print 1961).

[7] See, e.g., *Warin* v. *WDAS Broadcasting Station Inc.*, 327 Pa. 433 (1933), *RCA Manufacturing Co.* v. *Whiteman.* 114 F.2d 86 (2d Cir.), cert. denied, 311 US 712 (1940), and *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

[8] See e.g., *United Artists Records Inc.* v. *Eastern Tape Corp.*, 19 NC App. 207 (1973), and *Mercury Records Productions, Inc.* v. *Economic Consultants Inc.*, 64 WIS 2d 163 (1974).

III. LEGISLATIVE HISTORY

Over the years many copyright reform bills were introduced to the Congress that included extension of a public performance right to copyright owners in sound recordings.

Opponents argued that a performance royalty would be unconstitutional and would represent a serious financial burden to users. Proponents felt that such a royalty would be constitutional, that users had the ability to pay, and that performers and record producers deserved compensation for the use of their creative efforts for the commercial benefit of others.

In 1971 Congress recognized sound recordings as writings by enacting the Sound Recording Act of 1971. However, the legislation was aimed primarily at eliminating record piracy, i.e.,unauthorized copying, which had become a significant problem.[9]

Nearly all of the 50 states had enacted penal statutes protecting recorded performances against unauthorized reproduction, but they had not proved to be effective. Thus, performers, record producers, and music publishers pushed for federal copyright protection to combat piracy.[10] This law 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 Act.[11]

The 1971 Act essentially granted only reproduction and distribution rights to recordings fixed on or after February 15, 1972. Congress by this act recognized the contributions of performers as the writing of an author and established that, unless they were employees for hire, the performing artists whose performances are reproduced in sound recordings are authors of those recordings.[12]

Passage of the 1971 Sound Recording Act did not quiet the controversy over the extent of protection that sound recordings deserve. The Recording Industry Association of America (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 picture interests were also vocal. The concerned parties emphasized the adverse economic effects passage, or nonpassage, of further legislation might cause them.

Additional legislation was eventually overshadowed by concern about passage of a comprehensive copyright revision bill. Congress was troubled by unsuccessful attempts to reach compromises not only on the performance rights issue, but also difficult cable and photocopying issues.[13]

Section 114(a) of the Copyright Act of 1976 provides that copyright owners of sound recordings are granted only the exclusive rights of reproduction, distribution and the right to prepare derivative works; that section also specifically states that the rights do not include any right of performance under section 106(4). Authors of other works receive the full complement of § 106 exclusive rights. 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 amend-

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[9] 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). International piracy was addressed by the United States when it ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms in 1974.

[10] H.R. Rep. No. 487, 92d Cong., 1st Sess. 2 (1971).

[11] 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).

[12] Most sound recordings are registered as works made for hire; therefore, under U.S. law, the employer (i.e., the record company) would be considered the author. 17 U.S.C. 201(b) and 101.

[13] See *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) hereafter "The Register's 1978 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?" 127 (1977)(ASCAP).

ed to provide for performers and copyright owners... any performance rights" in copyrighted sound recordings.[14]

In the study, issued in 1978, the Copyright Office strongly supported public performance rights for sound recordings.

IV. 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 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).[15]

The Copyright Office followed the philosophy it had established earlier: copyright legislation must ensure the necessary balance between giving authors the necessary monetary incentive without limiting access to an author's works.[16] 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.[17] 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 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.[18]

At the time the 1978 Report was published, discussion of performance rights in sound recordings included thoughts of a compensation scheme structured as a compulsory licensing system. The goal was to benefit "both performers (including employees for hire) and... record producers as joint authors of sound recordings."[19] Although legislation was introduced following publication of the 1978 report, it was not enacted by Congress. To this day, previous inaction by Congress forms the basis for many of the arguments still made by parties who oppose enactment of a performance right in sound recordings.

V. THE REGISTER'S 1991 REPORT ON COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES

In October 1991 the Register delivered a report on the legal and policy implications of digital audio broadcasting technology. While the performance right issue was not the predominant topic in that report, it was the most controversial. Once again lines were clearly drawn between broadcasters and the recording interests.

After weighing all of the evidence, the Copyright Office again concluded that there were strong policy reasons to equate sound recordings with other works protected

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

[15] The Register's 1978 Report at (1).

[16] 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).

[17] The Register's 1978 Report at 174-177.

[18] *Id.* at 177. (Emphasis added).

[19] 43 Fed. Reg. 12,763 (1978) at 12,766.

by copyright and to give owners of sound recording a performance right. The Office stated that it:

> 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... [is] even more essential to compensate American artists and performers fairly.[20]

VI. CURRENT ISSUES

To assess whether or not a performance right should be granted to sound recordings or whether some other new right should be created, one must examine the context in which Congress chose not to enact such legislation and what changes, if any, have taken place. These include the current legal, political, social, economic and philosophical arguments as well as technological advancements.

In reviewing the subject, one must remember that one of the underlying purposes of copyright is to reward creativity and encourage individual effort through economic incentive. Another key component of copyright is that copyright owners, as creators or beneficial owners, should be able to control the commercial uses of their work. Here the key is the ability to license or prohibit intended uses.

A number of things have changed. The international copyright community in general believes that the rights of record producers should be enhanced to be essentially equivalent to the rights granted to literary and artistic works in the Berne Convention. To this end the World Intellectual Property Organization (WIPO) is convening a Committee of Experts on a Possible Instrument on the Protection of Rights of Performers and Producers of Phonograms. This committee, which will meet from June 28 through July 2 in Geneva, will discuss all questions concerning the effective international protection of the rights of performers and producers of phonograms. The International Federation of Actors (FIA) has already gone on record as stating that it does not believe that there should be a provision in any agreement "which provides for the cession of rights by the performer to the producer once a contract is entered into."[21] It goes on to state "[t]he realities of the unequal bargaining relationship between producers and performers guarantees that this would be simply another means of enriching the producer at the expense of the performer."[22] In addition to the possible new instrument, WIPO has an ongoing project to produce a model law for sound recordings.

Second, although the United States and many countries of the world protect sound recordings as copyrightable subject matter and grant national treatment to foreigners, many countries, including many industrialized countries, protect producers of sound recordings and performers under neighboring rights regimes. These regimes frequently do not grant national treatment; rather they grant rights to foreigners only on a basis for reciprocity.[23]

Third, digital reproduction and diffusion are changing the way the music and record industries operate. Key rights include the right to broadcast and communicate with the public, or what we in the U.S. call public performance rights. In some countries, these are exclusive rights; in others, they are only a right to remuneration. A third category of countries provides no such rights to record producers and performers; the United States is in the latter category.[24]

New technology continues to raise a number of questions. These include: will digital transmissions replace the traditional method of distributing pre-recorded music by retail sales to the public? How will the interests of record producers, performers,

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[20] U.S. Copyright Office, "Copyright Implications of Digital Audio Transmission Services" 160 (October 1991). (Hereafter "The Register's 1991 Report").

[21] Letter from Michael Crosby, General Secretary, to "The Government Representatives to The Stockholm Group" (December 4, 1992).

[22] *Id.*

[23] For a review of the international situation concerning performance rights in sound recordings see The Register's 1991 Report at Chapter IV. Since many countries which grant a performance right will pay royalties only to performers and producers from countries having reciprocal rights, enacting performance right legislation would pave the way for U.S. recording artists to benefit from the extensive use of their works abroad.

[24] It is ironic that the United States, which is a major exporter of audio recordings, is one of the few industrialized countries which fails to afford any protection for commercial performance. In 1989 the pool of performance royalties was 100 million dollars; the U.S. was denied a share even though U.S. audio recordings were widely performed throughout the world.

composers and lyricists be protected? What incentives will there be to create new product?

Record producers believe that they must have exclusive rights that allow them to control all forms of storage, reproduction and distribution. They have suggested in a number of fora, that there may need to be a general diffusion right, e.g., the International Federation of the Phonographic Industry's submission to the European Community.[25] The definition of such a right, as well as its relationship to other rights, they admit will need careful study.

We agree; careful study will be necessary. Broadcasters and other commercial users have performed sound recordings for many years without permission or payment. There is no doubt that sound recordings offer a major commercial benefit to these users. Yet these commercial users argue that they should not be required to pay for their use because airplay and other public performances benefit creators and record producers by increasing record sales and popularizing artists. Such promotion benefits only certain recordings and certain lead artists. It does not benefit all. But even if assertions by commercial users are true, this does not, in the view of the Copyright Office, justify denying compensation for public performance of recordings from which the user enjoys financial gain.

Moreover, in the digital world, such uses are capable of disrupting the normal distribution chain. There is no valid copyright policy reason to deny authors and copyright owners of sound recordings public performance rights.

If broad public performance rights cannot be recognized, or if the recognition would only consist of a right of remuneration, Congress should consider treating digital transmissions differently, e.g., by creating a digital transmission right that grants the owner of the sound recording the right to authorize such diffusion.

It should be noted that one of the effects of new technology is the recognition of the necessity for collective administration of rights to protect both the interests of rights owners and to facilitate the users in respecting and discharging their copyright obligations. Public performance rights in sound recordings would seem to require collective administration.

Finally, in light of the digital revolution, Congress may wish to consider making some adjustments in the law. For example, it may wish to consider amending the law to broaden the definition of sound recording. Analog sound recordings always include fixations of sounds. This is not necessarily true in the digital world where sound waves are converted into a series of binary numbers which can then be stored electronically and then may be manipulated to create a new series of binary numbers which are digital representations of the corresponding sounds, but which are not fixations (in the sense that no such sounds actually existed which then would have been fixed). Since no fixation of sounds has taken place, WIPO, in its Memorandum on "Questions Concerning A Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms",[26] suggests broadening the definition to include not only sounds that have been fixed, but also "digital representations thereof."

In this same document WIPO also suggests that the definition of publication may need to be expanded to include "making the sounds fixed in a phonogram or the digital representations thereof available to the public through an electronic retrieval 'digital delivery' system."[27]

VII. PERFORMERS' RIGHTS

Finally, you have asked us to comment on relevant aspects of performers' rights. Many states have undertaken to provide specific statutory remedies against the unauthorized fixation and reproduction of the sounds of a live performance unless such sounds were simultaneously fixed with the consent of the performer.

As of May, 1992, there were twenty-six states that had criminalized the unauthorized fixation of live performances, or the reproduction, distribution or sale of such fixations made without the consent of the performer. These include the critical states of New York, Illinois, Tennessee, Texas and California. At that time interested parties targeted an additional fourteen states for legislation during 1992. The twenty-six states with existing statutes constitute nearly seventy percent of the population in the United States, and an even larger percentage of the record buying

[25] Letter from Nicholas Garnett, Executive Director, International Federation of the Phonographic Industry, to Mr. Riccardo Parissich, Director General, DG III-F-4, Commission of the European Communities (January 29, 1993).

[26] INR/CE/I/2, March 12, 1993.

[27] *Id.* at p. 10.

public. If laws are passed in the fourteen targeted states, they would cover an additional twenty-six percent of the U.S. population.

In addition to these statutory provisions, there is a burgeoning body of law emanating from principles of common law copyright, unfair competition and rights of publicity, that recognizes a property interest of a performer in the sounds of his or her voice and his or her physical likeness, and to control the commercial exploitation of these interests. Recent cases, including decisions concerning the performers Bette Midler and Tom Waits, have expanded this property interest to include misappropriation of the likeness of a performer's voice, even when the actual sounds have not been created by the aggrieved performer.

Two underlying principles of the protection of performers' rights in the United States deserve mention. The first is that the ability of a performer to prevent unauthorized fixations and reproductions of his or her live performance is deemed to be so fundamental that legislators and courts alike are willing and prepared to find creative solutions to ensure basic fairness and justice. The second, in many respects related to the first, is that because such protection is so fundamental, it is not tied to reciprocity or obligations under existing international conventions. The nationality of the performer and the location of the performance have no relevance to any determination under United States law. Under the statutes, the analysis is simple. If a person fixes the sounds of a live performance, or reproduces, distributes, or sells such a fixation, he or she commits an offense that in many states is punishable by up to five years imprisonment and/or a fine of up to $250,000. United States law would obviously have no application to acts committed outside the jurisdiction of United States courts, but it would give rise to a cognizable offense if the reproduction, distribution or sale were committed in territory within the jurisdiction of a relevant court, even if the actual fixation was lawful but nonconsensual under the relevant law of the place where that act occurred.

Many observers in the international community wrongly attribute the non-adherence of the United States to the Rome Convention as deriving from some substantive incompatibility of our law, and cite such non-adherence as evidence of lack of concern with respect to performers. This is not the case. Not only is the United States virtually alone in treating performers as eligible to be joint authors of a sound recording under our copyright law and thus foreign performers are entitled to national treatment under Article 5 of the Berne Convention, but our state courts and legislators have taken strong steps to protect performers against the unauthorized fixation of their performances without regard to our international obligations—thus extending the protection of United States law to performers of all nationalities regardless of where the performance took place, provided that some restricted act occurred within the jurisdiction of a relevant court.

Mr. HUGHES. If the proposals in the memorandum which you supplied to us become the text of the new treaty, what changes would be required in the U.S. law, in your judgment?

Mr. OMAN. We have not had a chance to discuss and consider the WIPO proposals in great detail. They just came in on Monday. But they do contemplate several major changes in U.S. law that include performers' rights, a performance right, and very detailed provisions for moral rights for performers, all of which would be controversial in the United States.

Let me ask Marybeth Peters, the Policy Planning Adviser to the Register of Copyrights, to further elaborate on that point.

Mr. HUGHES. Ms. Peters.

Mr. PETERS. I also have not had an indepth opportunity to study the document. And it probably is premature to actually guess where we would come out.

It is clear that a performance right in sound recordings would be required. This document also suggests that perhaps some changes with respect to the definition of a sound recording, to include digital fixations that are different from the way that the sounds originally are fixed, should be considered.

It proposes a change in, or broadening of, the definition that we have in the United States with regard to publication so that merely

making the work available to the public, like through celestial jukeboxes, should fall within the definition of publication.

We would be more than happy to provide you with an indepth analysis of what we believe, if certain parts of the treaty were to go forward, would be required in U.S. law. But the way I read this document, nothing is set in stone.

It is really more a discussion document. It raises questions about what a possible instrument should have. Before we can even figure out what that might look like, I think what other countries are going to say and what our allies are going to be saying will affect the ultimate document that WIPO puts forward as a draft.

So this document is mostly questions as opposed to actual—it has some proposed language, but it is language just for mere consideration. But we would be happy to do an analysis for you.

Mr. HUGHES. That would be very much appreciated. Thank you.

[The information follows:]

CHANGES IN U.S. LAW WHICH WOULD BE REQUIRED UNDER THE PROPOSED BERNE PROTOCOL

Currently, ten items are under consideration for inclusion in a possible Berne Protocol. They are as follows: (1) computer programs; (2) databases; (3 rental right; (4) non-voluntary licenses for the recording of musical works; (5) non-voluntary license for primary broadcasting and satellite communication; (6) distribution right, including importation right; (7) duration of the protection; (8) communication to the public by satellite broadcasting; (9) enforcement of rights; and (10) national treatment.

Many of the items being discussed are controversial in the United States. The focus of this paper is limited to a consideration of whether current U.S. law would have to be changed if a Berne Protocol were implemented along the lines of W.I.P.O.'s proposal. There will be no discussion as to the advisability of supporting or opposing given proposals from a political or foreign policy perspective.

1. COMPUTER PROGRAMS

The current W.I.P.O. proposal regarding computer programs closely tracks the policies of the EC Directive on computer programs. U.S. law would not have to be amended to implement the W.I.P.O. proposal.

The proposal require that computer programs be recognized as copyrightable "literary works" within the meaning of that phrase in Article 2 of the Berne Convention, and that both application and operating programs be protectable. This position clearly tracks U.S. law. The exemptions provided for in section 117 of the copyright law are also embodied in the proposal, although in different language. The controversial matter involves decompilation. Under the proposal, "it would be a matter for national legislation" to provide for a limited right of decompilation in order to achieve interoperability. Arguably, an explicit right of decompilation would not necessarily have to be delineated in the copyright law, but could be left to a fair use analysis by the courts.

2. DATABASES

The W.I.P.O. proposal would clarify certain matters relating to collections and databases, such as their coverage by Article 2(5) of the Berne Convention, based on authorship in the "selection, coordination, or arrangement..." of the components. The proposal is consistent with current U.S. Law. Section 103 of the U.S. copyright law specifically provides protection for compilations, and the definition of compilation in section 101 identifies a copyright test of selection, coordination, or arrangement.

3. RENTAL AND PUBLIC LENDING RIGHTS

The proposal authorizes a "rental or public lending" right for six categories of works: (i) audiovisual works, (ii) works, the performances of which are embodied in phonograms (sound recordings), (iii) computer programs, (iv) databases, (v) sheet music, and (vi) works stored in an electronic format. U.S. law only prohibits unauthorized commercial rental of sound recordings and computer programs (subject to

sunset in 1997), and there are no public lending rights. Any protocol mandating recognition of any public lending rights, or requiring the recognition of rental rights in audiovisual works, data bases, sheet music or works stored in an electronic format would require changes in U.S. law. Also the rental right for sound recording and computer programs would have to be made permanent.

4. NON-VOLUNTARY LICENSES FOR THE RECORDING OF MUSICAL WORKS

The Berne Convention, under Article 13(1), authorizes compulsory licenses of musical works for the purpose of making and distributing of sound recordings. Due to this provision, section 115 of the U.S. copyright law does not violate the Berne Convention.

The W.I.P.O. draft proposes abolishing the authority to permit compulsory licensing systems in this area. If this provision was adopted, section 115 of the current copyright law would have to be repealed.

5. NON-VOLUNTARY LICENSE FOR PRIMARY BROADCASTING AND SATELLITE COMMUNICATION

W.I.P.O.'s draft proposes that countries party to the Protocol which do not provide for compulsory licensing of primary broadcasts under Article 11bis(2) of the Berne Convention will continue not to provide for such licenses; and any country that now has such a compulsory licensing system will phase it out within five years.

The public broadcasting compulsory license of section 118 would have to be eliminated within five years of the adoption of the Berne Protocol.

6. DURATION OF PROTECTION

The W.I.P.O. draft proposes consideration of two changes with respect to duration. First, the term of protection for photographic works would be elevated to the governing Berne Convention standard, which is currently life of the author plus fifty years. Second, consideration would be given to extending the current Berne standard of life of the author plus fifty years to life of the author plus seventy years.

Current U.S. law establishes a uniform duration of life of the author plus fifty years. If the term of duration were increased to life-plus-seventy, the new longer term would have to be implemented.

7. COMMUNICATION TO THE PUBLIC BY SATELLITE BROADCASTING

The W.I.P.O. draft proposes to recognize direct broadcasting by satellite as falling within the protection for broadcasting as provided in Article 11bis(1). The draft also proposes a rather complex formulation governing the circumstances where signals from an emitting country pass through a direct broadcasting satellite and are appropriated by an entity in a receiving country. Under the W.I.P.O. draft, there would be many circumstances where the copyright law of the emitting country would govern.

Treating direct broadcasting by satellite as broadcasting appears consistent with U.S. copyright law, which would treat the broadcast as a public performance. The provision requiring the application of foreign law in instance where a U.S. entity appropriated a foreign signal and committed an infringement in the United States might require implementing legislation, unless the courts could apply this provision of the treaty on the basis that it is a self-executing provision. Under current U.S. law, the situs of the infringement normally governs which law applies, which means that U.S. entities appropriating foreign signals would in most cases be subject primarily to U.S. law.

8. DISTRIBUTION RIGHT, INCLUDING IMPORTATION RIGHT

The W.I.P.O. draft proposes to clarify the copyright owner's exclusive public distribution right and the importation right. We have already discussed the rental and public lending proposals at 3. With respect to the right of importation, the W.I.P.O. proposes a right of parallel importation. This is where the copies or phonorecords are legitimate but the importation of them is unauthorized by the copyright owner or the licensee. Although our law provides this right, courts have had some difficulty in applying it. However, there are cases that serve as effective precedent to support judgments for copyright owners in parallel import cases. Thus, at this time, it would appear that no change in U.S. law is required.

9. ENFORCEMENT OF RIGHTS

The most detailed of W.I.P.O.'s draft proposal concerns enforcement of rights. In general terms, the proposal tracks closely the enforcement policies of U.S. law. However, on some of the details, there appears to be a departure from U.S. practice.

The proposal includes a definition of "infringement" which covers a violation of any right protected under the protocol, whether it be moral, exclusive, or economic. The U.S. currently provides limited moral rights protection for visual artists in the copyright law and for other authors under a variety of non-copyright laws, including state laws. The proposed definition of "infringement" probably does not require a more extensive recognition of moral rights within the U.S. copyright law. The legal rights underlying moral rights protection in the U.S. are available to foreign authors on the same terms as they are available to U.S. nationals. The normal judicial remedies associated with torts apply.

The proposal requires that judicial remedies include preliminary injunctions and seizure. Utilization of these remedies may require a bond from the copyright owner. Under U.S. law, the posting of a bond is discretionary with the judge. Paragraph 69 of the W.I.P.O. proposal is arguably consistent with U.S. law since it applies "as a rule." Therefore, the judicial authorities have reasonable discretion in carrying out the provisions.

The proposal specifies certain civil remedies, such as "damages adequate to compensate for the prejudice suffered," legal fee, and rights of forfeiture, which are now available under United States law.

The proposal concerning criminal sanctions authorizes judges in a criminal proceeding to apply the civil remedies if a civil proceeding has not been undertaken.

This proposal in paragraph 73(c) would apparently require a change in our law since there appears to be no provision in U.S. law for applying civil remedies in criminal copyright proceedings.

The proposal requires that certain customs remedies be provided to help thwart the importation of infringing copies. The proposal requires a bond "unless exceptional circumstances warrant otherwise." Under U.S. practice, the bond appears to be discretionary with the Customs Department. The proposal provides for the revocation of the seizure if the applicant does not initiate a civil proceeding. Some adjustment in U.S. enforcement practices may be required under the protocol, but legislation is probably not necessary to enforce the importation provisions.

The entire section on "proposals concerning measures against abuses in respect of technical devices" is bracketed, meaning the proposal is highly tentative. If the Protocol includes provisions like those in paragraph 75, United States law would have to be amended to provide relief against the disabling of anti-copying devices and interference with encryption systems.

10. NATIONAL TREATMENT

W.I.P.O.'s draft on national treatment restricts the circumstances where adhering nations could claim exceptions to the principle of national treatment. This proposal does not require any change in U.S. law.

WIPO NEW INSTRUMENT PROPOSAL: AMENDMENTS TO UNITED STATES LAW

If the United States should choose to be bound by the existing text of the Proposed New Instrument relating to the protection of performers and record producers, we would have to amend our law as discussed below. The paragraph numbers listed below are from the Memorandum prepared by the International Bureau titled "Questions Concerning A Possible Instrument On the Protection of the Rights Of Performers and Producers of Phonograms," 7987D/COP/0570D.

Generally, the major amendments required by this text are: to provide a conforming definition of publication, to protect moral rights and unfixed performances, to provide rights to authorize performance of analog or digital phonograms, and to extend a right of remuneration for private copying of analog phonograms.

Some of these proposals are highly controversial in the United States. On either political or substantive grounds, some of the pending proposals would not be acceptable in this country. This mere list of potential amendments omits any analysis of their acceptability by U.S. interests.

DEFINITIONS

1. *Publication and electronic dissemination:* At (ii) of paragraph 28(e), the public availability of a phonogram's sounds, or their digital representations through an electronic retrieval system, constitutes publication. Since making the *sounds* publicly available can occur as a performance without transfer of any material embodiment of the phonogram, our law should be clarified, perhaps by an explicit amendment to the second sentence of the definition of publication.

MORAL RIGHTS OF PERFORMERS

2. At paragraph 31(a): a performer's right of attribution (the right to be named on fixations of performances and in connection with public use of their performances or fixations) would require an amendment to U.S. law.

3. At paragraph 31(b): a performer's right of integrity (right to object to distortion, mutilation or other modification of performances that would be prejudicial to his or her honor or reputation) would require an amendment to U.S. law.

ECONOMIC RIGHTS OF PERFORMERS IN LIVE PERFORMANCES

4. At paragraph 35(a): a performer's right to authorize public communication of live performances would need to be incorporated into U.S. law.

5. At paragraph 35(b): a performer's right to authorize fixation of live performances would presumably require amendment of our law to ensure a federal right.

ECONOMIC RIGHTS OF PERFORMERS AND PRODUCERS IN PHONOGRAMS

6. At paragraph 56(e): a performer's and producer's right to authorize the communication to the public of a phonogram requires an amendment to U.S. law, perhaps at 17 U.S.C. 106(4) and 114(d).

7. At paragraph 56(f): a performer's and producer's right to authorize the public performances of the phonogram would call for a similar amendment.

8. At paragraph 57(a): the text permits a country the option of legislating to apply the first sale doctrine to copies of phonograms except in the case of a rental. (See the next item.)

9. At paragraph 57(b): the text provides that the first sale doctrine cannot apply to rental (and public lending in brackets). The sound recording rental right of Section 109 would have to be made permanent legislation.

10. At paragraph 58: a performer's and producer's right of remuneration for private copying to compensate for reproduction on recording equipment or blank recording material, or both, would require amendment of Chapter 10 to cover analog copying.

ELIGIBILITY CRITERIA

11. Paragraph 91(a): Section 104 would have to be amended to allow performers to claim protection under federal law based on performance in another country party to the instrument.

12. Paragraph 91(b): Section 104 would have to be amended to allow performers to claim protection under federal law where the performance is fixed in a phonogram protected by the new instrument.

13. Paragraph 91(c): We must protect performers under federal law for broadcasts of certain live performances.

14. Paragraph 92(a): We must amend section 104 to make producers of phonograms eligible for protection under the criterion of headquarters in another country party to the new instrument. The amendment should also probably specify that habitual residence in another country party to the new instrument entitles the producer to claim protection.

15. Paragraph 92(b): We must amend section 104 to establish first fixation in another country party to the new instrument as a criterion for a producer's eligibility.

16. 92(c): Section 104 should be amended to provide protection to producers of phonograms of member states where the work is published in another country sometime after a phonogram's actual first publication day but within thirty days of its first publication day.*

Mr. HUGHES. Mr. Oman, you support the performance right for sound recordings but observe, if broad performance rights cannot be recognized or if the recognition would only consist of a right of remuneration, Congress should consider treating digital transmissions differently.

What is your recommendation? Should an exclusive right be granted to all performances, digital and analog? Should it be a compulsory license, a right of equitable remuneration?

Mr. OMAN. Mr. Chairman, I am reminded of the old saw that perfect is the enemy of the good.

The Copyright Office would support a broad public performance right in sound recordings and would continue to urge that that be done. But if you make the political judgment that that cannot be done, we would favor a lesser measure as a step in the right direction.

The right of remuneration in the digital environment does not adequately compensate the creators and I think would not be desirable because it does have a clear impact on the marketability of their product.

I would hope that if you did proceed with a focused solution to the digital transmission problem, it would be more than a right of remuneration, would give exclusive rights to authorize or prohibit the use of the materials.

Mr. HUGHES. OK, thank you.

Finally, you also raise a question of alienability of rights. I know you are aware of the passion that these issues raise with some groups, such as the Directors Guild, the Screen Actors Guild, among others, to say nothing of the MPAA, and I just wonder, what is your position in the context of the performance rights for sound recordings?

Mr. OMAN. What would be the——

Mr. HUGHES. What is your position in the context of that performance right for sound recordings?

Should all rights, including the right to receive royalties, be freely alienable?

And whose law applies to interpretation of the contract, the country where the contract is made or the country in which the royalties are distributed?

Mr. OMAN. We believe in freedom of contracts. And in this country, we do certainly allow the parties to negotiate their rights under contracts; and individuals can freely alienate their rights for an adequate compensation.

* Section 83, Enforcement, was not examined. This section refers to GATT/TRIPS enforcement provisions in the Memorandum on Protocol to Berne prepared for Committee of Experts, third session.

The Europeans are more concerned about the unequal bargaining power than we seem to be. In our view, the artists are able to hold their own; the creators are able to hold their own against the record companies. And we have a regime of work for hire in this country that has worked well and continues to make us the dominant force, culturally, around the world.

I venture that if you decide to get into the issue of work for hire and unequal bargaining power, you will be wading into a Serbonian bog that will probably stop this process in its tracks because the issues that are raised are too controversial to be dealt with at this point and in this context.

Mr. HUGHES. So you would advise that we stay away from it altogether?

Mr. OMAN. Yes.

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman. If you believe in the right to negotiate and the right of contractual rights between the parties, how would the change of the law in respect to this affect the parties?

Wouldn't the record companies insist upon that kind of an agreement in their contract when they brought new recording artists into their studios?

Mr. OMAN. You probably want to ask that question of Mr. Berman, who will be up here in just a few minutes.

It is our experience, as complete outsiders that the artists are able to hold their own in these negotiations and that, on balance, they will be able to get more money from the producers in exchange for relinquishing certain rights related to these new rights that you are about to create.

Mr. MOORHEAD. The purpose of copyright is to promote the progress of science and the useful arts by rewarding authors. How will we be promoting a useful art by providing an additional copyright for performers?

Mr. OMAN. The act of creating a sound recording is extremely creative. They need economic incentives to undertake the investment. Artists need protection for the use of their works. The artist makes a very important creative contribution to the musical work that underlies the sound recording.

Back when I cut my copyright teeth on performance rights in hearings held on the Senate side under the auspices of Senator Javits and Senator Scott, we had Julie London, the sultry vamp singer from the fifties and sixties, come in and sing the Mickey Mouse Club theme song. It was not the rendition that Annette Funicello would have given the music, but it demonstrated clearly the creative input of the artist. And that is a contribution that should be rewarded and encouraged. And a performance right in sound recordings for performers as well as the producers will encourage that creativity.

Mr. MOORHEAD. Most of Europe has some performance rights in sound recordings. What has been the effect on European broadcasting having these rights?

Mr. OMAN. Again, we speak only on anecdotal evidence. The European broadcasters seem to do quite well in the environment that requires a payment for the use of the sound recordings. It is a well-

established tradition and one that they have been able to accommodate.

At a meeting in Geneva, a luncheon meeting, I was sitting next to the senior copyright expert from Finland; and on my other side was a senior governmental relations lawyer for the National Association for Broadcasters. The NAB man asked the man from Finland what was the rationale for a performance right in Finland. And his answer was: "Simple justice." The man from the NAB said: "Well, it is going to take more than that in the United States."

They have been able to accommodate that added burden, and the radio industry seems to be thriving in Europe.

Mr. MOORHEAD. Has there been any serious administrative difficulties, domestically or extraterritorially in these countries that have these rights?

How are you going to divide the money? How are you going to enforce it?

Mr. OMAN. They have strong collective rights societies that enforce the rights of the various parties. And they are able to work out their arrangements in a way that seems to please all the parties.

We have not heard of any strong battles that are continuing to be waged between the parties in Europe. And I would think they have worked it out amicably. Of course, the big injustice is that Americans don't share in those royalty pools. That is something we hope we can correct with this legislation.

Mr. MOORHEAD. I have no further questions, Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. BECERRA. Which one?

Mr. HUGHES. Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chair. I am very pleased that the Chair has called for this hearing. I am glad, as you mentioned in your statement, you are ahead of the ball. And I thank the witnesses who are here to testify, all those who are here in advance.

Mr. Oman, a question for you. You have mentioned you believe that exclusive rights should be the way we should go versus some right to equitable remuneration.

Given that, and given the longstanding policy we have had in this country of not granting rights and along with the existing structure where broadcasters have been accustomed to not having to pay for those rights, do you think we can jump from what we have now to a system where we have exclusive rights?

Or is there some intermediary step we can take? And, if so, what step would that be?

Mr. OMAN. The broadcasters don't have complete freedom now to use this material. They have to arrange for the rights in the underlying music. In other words, they pay ASCAP, BMI, and SESAC; and that is an important precedent that I think could be expanded to include the performance rights in sound recordings as well. It is certainly a precedent that has not, apparently, hurt the broadcasters. And they have been able to cope with it.

The difference that might make it possible to accommodate more easily and less painfully is to limit the rights in the analog environment to a right of remuneration, but to expand the right, the exclu-

sive rights, in the digital environment, which poses such a serious threat to the music industry.

Mr. BECERRA. If you were to take a position on whether or not the onus of the change should fall on broadcasters or on the performers in increasing the amount that would be paid or received, which side would you want to look at it from? On what side would you fall?

Mr. OMAN. Neither side really bears the ultimate burden. In terms of the payments of royalty by the radio stations or the cable companies, those would be passed on to the consumer or to the advertiser and would just be another cost of doing business.

I think that, if I may say so, "simple justice" requires us to come down on the side of the performers and the producers in this case.

Mr. BECERRA. If simple justice is enough in this country; right? Thank you very much.

Mr. HUGHES. The gentleman from new Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. Oman, many, many years ago I worked on a copyright. When I found out there was a cash prize for writing a paper on copyright in every law school, it persuaded me to get interested in copyright law. But that has been a few years and a lot of legal water under the bridge, so I have to bring myself up to speed.

I believe I understood you, but I would be grateful for a clarification. Are you saying there is not now an international agreement that protects performances between different countries in existence? Do I understand that correctly?

Mr. OMAN. There is an international agreement that protects the performance right in sound recordings. It is called the Rome Convention, and it is a treaty that has been in effect for 30 years. The United States has not been able to join because of the inadequacies of its own law.

It is, in many ways, an outmoded treaty that is not serving the interests of most of the parties as effectively as it should. And for that reason, the WIPO is proposing major revision of the whole concept under the new instrument that will be negotiated over the next few years in Geneva.

Mr. SCHIFF. We are not even a participant under the Rome treaty?

Mr. OMAN. We cannot be because of the deficiencies in our own law.

Mr. SCHIFF. That seems to me the opposite of what I often hear in various areas of protection of various interests, that the United States has protections but the world won't protect what we recognize, whether that is trades or whether that is intellectual protection.

Here, if I understand you correctly, you are basically saying the opposite. You are saying, however inadequate the Rome agreement might be at the present time, we don't even participate in that.

Do I have that right?

Mr. OMAN. You have that right, Mr. Schiff. And it is one of the great mysteries to all of our trading partners around the world why the United States will not put its house in order to allow it to exploit its strong suit, which is the trade in these cultural works.

We do dominate the world. And they cannot understand why we don't maximize our advantages by doing things that seem to be so much in our own self-interest. But it has been a political conundrum we have been trying to deal with now for over 30 years.

Mr. SCHIFF. I thank you for clarifying that for me.

I yield back, Mr. Chairman.

Mr. HUGHES. The gentleman from California, Mr. Berman.

Mr. HOWARD BERMAN. Thank you, Mr. Chairman. We cannot blame this one on 200,000 French farmers.

Give a little bit of a refresher course—you have given several over the past 10 years, since I have been on the Judiciary Committee—to me.

In Berne, Berne does not cover what? In other words, why does the Berne Convention not apply to records?

Mr. OMAN. The Berne Convention has its roots in the traditional forms of creativity: writings, fine arts, music. The finer things in life.

Victor Hugo, when he organized the committee to write the Berne Convention back in the 1880's, was not thinking of the technological advances, and that tradition has carried forward.

Mr. HOWARD BERMAN. But it does apply to movies?

Mr. OMAN. It does apply to movies.

Mr. HOWARD BERMAN. Was Victor Hugo thinking of that?

Mr. OMAN. They are, in some people's opinion, the ultimate creation of the human mind; and they do enjoy full copyright protection.

There are many works that are more technology-based than others that do not receive protection under the Berne Convention. Sound recordings is one of them.

Mr. HOWARD BERMAN. Sound recordings are not covered, basically?

Mr. OMAN. Sound recordings are not covered.

Mr. HOWARD BERMAN. Even though audiovisual recordings, in effect, are covered.

Mr. OMAN. That is the historic case. And we have been trying to change that over the years, but we have not been successful.

Mr. HOWARD BERMAN. Rome deals with sound recordings. Berne, essentially, says, with respect to issues like authors rights, apparently it says national treatment is enough?

If you say you are providing authors' rights in your own country, we consider that compliance with Berne. And that is an oversimplified version, but for some people, it is the bottom line.

Mr. OMAN. We do. Under Berne, the requirement is national treatment; if you give protection to your own nationals, you have to give it to the foreigners as well, if they are nationals of countries that are members of the Berne Convention.

Mr. HOWARD BERMAN. Right.

Mr. OMAN. The Rome Convention is also based on national treatment. But if we don't give an analogous right, if we don't protect sound recordings, we do not get that protection in the other countries.

Mr. HOWARD BERMAN. That was the point I was getting at, then. So to join Rome—it is not that we cannot join Rome, it is that we

will get nothing from joining Rome because we don't give anything to the rest of the world's owners of sound recordings?

Mr. OMAN. Most treaties have certain minimal rights you have to comply with before you are allowed to join the club, and I don't think we could even join the club at this point without changing our own laws to bring them up to the minimum standards.

Mr. HOWARD BERMAN. Right.

Just moving real quickly to another subject, remind me what the U.S. law is. A record company produces a record; a radio station goes out and buys that record and plays it on the radio station; the record company has received compensation for that record; it gets no compensation from the performance of that record on the radio station.

Mr. OMAN. That is correct.

Mr. HOWARD BERMAN. But the songwriter and the composer do get compensation based on a—not a performance. What is that called? What is that right called? The right of the songwriter?

Mr. OMAN. It is the public performance right in the underlying musical work.

Mr. HOWARD BERMAN. For the underlying musical work.

And that is done through this blanket license and the agreements between the performing rights societies and the broadcasters?

Mr. OMAN. It is negotiated and overseen by the rate court in New York.

Mr. HOWARD BERMAN. Now, the performers get—do they get some compensation? They don't get any compensation either?

Mr. OMAN. No, sir, no further compensation for their performances.

Mr. HOWARD BERMAN. You spoke about something in U.S. law which does compensate the performers on a sound recording; is it for the sale of a record?

What is the mechanical license?

Mr. OMAN. The mechanical license is different. When a record company uses music that is embedded in the sound recording, they have an automatic access to that underlying music; and they pay a fixed fee for each record that is produced.

That is called a mechanical royalty. It is a compulsory license and one that has a long history in the United States.

Mr. HOWARD BERMAN. I thought in your initial testimony you made some reference to some law that deals with compensation of performers. Did I misunderstand?

Mr. OMAN. Under the legislation that you passed last year, the Audio Home Recording Act, performers do share in the royalty pool that is collected in that environment.

Mr. HOWARD BERMAN. So that is just this newly created right from last year's legislation?

Mr. OMAN. Yes, sir.

Mr. HOWARD BERMAN. And otherwise it is simply a matter of contract between the record company and the performer?

Mr. OMAN. They negotiate their financial arrangements at the front end.

Mr. HOWARD BERMAN. Thank you, Mr. Chairman

Mr. Hughes. The gentleman from New York.

Mr. FISH. Mr. Oman, at present, today, American music writers and publishers enjoy a copyright under U.S. law. My first question is how much do American writers and publishers receive from foreign countries in royalties?

Mr. OMAN. Their answer would probably be "not enough." They are constantly negotiating with their analogous societies in foreign countries in hopes of increasing their percentage of the royalty take for the music that is performed on radios and elsewhere in Europe and around the world.

They always receive a respectable portion, since they do have such a popular repertoire, but I suspect, if asked, they would all say they should receive a larger percentage of the revenue. But it amounts to millions of dollars.

Mr. FISH. In those foreign countries is there a public performance royalty provided to their own composers and publishers?

Mr. OMAN. In those other countries, the composers and songwriters share the royalty that is paid by the broadcasters. They have a performance right in the sound recordings that is shared with the record producers and performers.

But as far as I know, the songwriters do not share, actually, in that revenue stream.

Let me ask Ms. Peters if she has any further thoughts on that subject?

Ms. PETERS. Not particularly. I think that our composers do very well from foreign sales. Music publishers complain with respect to the amount of money that is kept in the foreign country for administrative costs and things like that. But, on the whole, it is our music that is being played and money does come back here.

Mr. FISH. But in the case of a foreign composer, foreign publisher composing and producing their own music, not our music, is it is customary in foreign countries to have a public performance royalty to their own composers.

Ms. PETERS. Absolutely. Absolutely.

Mr. FISH. OK, Mr. Oman, given your experience in negotiating international intellectual property agreements, assuming we did adopt a public performance right in sound recordings, do you believe other countries would allow hundreds of millions of dollars in royalties to begin being paid to the U.S. recording interests?

Mr. OMAN. In the current environment, where we are able to impose trade sanctions for blatant attempts to limit the rights of American rightsholders, I would think we would have tremendous leverage to get a significant portion of the sum that was owed to us.

We do have more leverage than we had back in the days when trade in copyright works didn't rise to the level that it rises to today, in terms of dollar amount and importance culturally and socially.

Mr. FISH. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from Florida.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

I have a question about the difference between how we treat a foreign performer, someone born abroad, and how an American performer is treated. In other words, lets's take the Frenchman, for example.

If a Frenchman—and I looked at some of what you said in here, but I am not sure I fully understand—if a Frenchman comes to the United States and gives a performance, a recorded performance, then our laws apply and he gets some fair share, I guess, under the new act. But if an American goes abroad to France, French law, there is no international application?

Is there a difference or are they treated the same; how does it work?

Mr. OMAN. If the French artist came to the United States and made a recording, U.S. law would apply. If it was a recording fixed in the United States, I assume that there would be protection for the French artist. Equally, I would think that if the American artist went to France and cut a record in Paris, then French law would apply and the compensation would be paid as appropriate under the terms of the contract and otherwise.

I hear some discussions on either side of me, let me ask them to clarify the point.

Ms. PETERS. I was going to add that with respect to the French performer who came here, he would be assimilated to a U.S. national under the principle of national treatment, you treat foreigners like you treat your own citizens.

So that with respect to the recent Digital Audio Recording Act that was passed, where performers get a share, that French performer would be entitled to a share here.

Mr. MCCOLLUM. OK, but French law, I guess each country would be different, so I am not trying to dig into French law particularly, but our American performers would be treated the same as the French treat a Frenchman, presumably?

Are we treated differently in other countries than the natives of that country are treated?

Ms. PETERS. It depends on what the country's law is. We have had a real issue with Germany, whereby the way the German law, as I understand it, works—and the record industry can correct it—is that, basically, it is German performers who are protected, and when a U.S. performing artist goes into Germany and gives a concert, somebody will fix that performance, tape it, and start selling tapes, and our performers have no remedy.

We in the United States have asked Germany to issue an order recognizing American performers so that they can stop the unauthorized duplication and sale of their recordings. That is an open issue between the countries.

Mr. MCCOLLUM. But if it was a German artist performing in Germany in a concert and somebody recorded that, the German Government would protect them; they would have protection?

Ms. PETERS. Yes.

Mr. MCCOLLUM. That is what I wanted to determine, the kind of distinction that exists out there, and get a clear understanding of it.

Thank you, Mr. Chairman, that's all I have.

Mr. HUGHES. I just have a couple of more questions.

It seems to me that a couple of things are happening that requires us to look at the current situation very seriously. Number one, technology is changing so rapidly that we have all new services being provided; the subscription services, for instance. Even

though I realize there is a dispute as to what impact they are going to have, there is some suggestion that they could have a profound impact on retail sales.

That is one thing that is happening. The second thing that I see happening is that we have another serious effort at negotiating a new treaty, a new treaty that will require us to make a decision as to whether we are going to be a participant or not.

I was looking at some of the figures on performance revenues as opposed to mechanical revenues, and it is mostly two-to-one in many countries, but much of the revenue is in the performance area, and American music is still a very important part of overseas markets.

I understand that would leave us, if, in fact, we do not participate and attempt to bring our laws basically in compliance vis-a-vis performance rights, that we will be at a disadvantage even more in years ahead than we have been to date?

Mr. OMAN. The countries around the world are recognizing the tremendous threat these new technologies pose to the creative process, and they are working to upgrade their laws. If the United States is not going to participate in that upgrading of their laws, we will be left out in the cold.

Mr. HUGHES. Well, because we will have the same situation we have with Rome right now, where reciprocity is supplied, as I understand it?

Mr. OMAN. That is correct, Mr. Chairman.

Mr. HUGHES. So we have to make a decision as to how important the loss of those revenues are going to be in the years ahead, and some kind of determination as to what type of damage would be done to the American industry if we did not participate in the process that is evolving in Geneva.

Mr. OMAN. It is a matter of balancing the pros and the cons and seeing how much revenue you generate and how much it costs in this country. And I think if you make that analysis, it will be clear that the United States will benefit tremendously by extending protection into the area so we are able to claim our fair share of the royalty pots abroad.

Mr. HUGHES. Which is something we cannot do today simply because our laws are not adequate. They do not address the performers' rights issue.

Mr. OMAN. Exactly.

Mr. HUGHES. OK, well, thank you very much, I appreciate your testimony. As always, it has been most helpful to us, Ralph. We thank you.

Mr. OMAN. Thank you very much, Mr. Chairman.

Mr. HUGHES. Our first panel this morning consists of Nicholas Garnett, director general of the International Federation of the Phonographic Industry, known as IFPI, and Jay Berman, president of the Record Industry Association of America, known as RIAA.

Mr. Garnett joined IFPI in 1983 as legal assistant and was quickly promoted to posts of increasing responsibility. From 1984 to 1991 he served as IFPI's regional director for Asia and the Pacific, where he gained firsthand experience in piracy and the operation of collecting societies.

Mr. Garnett is well known for both his practical knowledge and his creativity. Legend has it that he tried to get the Government of Hong Kong to stamp out unlicensed karoke bars by arguing they were a hotbed of civil unrest. That is interesting.

We appreciate your traveling here from London to be with us today, Mr. Garnett, and we thank you for both your excellently written statement and the detailed and professional background documents which you have submitted to this subcommittee.

Without objection, your statement and Mr. Berman's statement will be made a part of the record.

Jay Berman is no stranger to the subcommittee. His zeal for this legislation is probably only matched by his determination to provide comebacks to Jack Valenti's colorful aphorisms before this committee.

We welcome both of you this morning and we hope you can summarize, because we have read your statements.

Why don't we begin with you, Mr. Garnett.

Welcome.

STATEMENT OF NICHOLAS GARNETT, DIRECTOR GENERAL AND CHIEF EXECUTIVE, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY

Mr. GARNETT. Thank you, Mr. Chairman, my name is Nicholas Garnett, I am the director general of IFPI, the International Federation of the Phonographic Industry. The organization was founded in 1933 to promote and protect the interests of the recording industry worldwide.

We now have some 1,000 members in over 70 countries, ranging from major international corporations and their affiliates, to small independent producers. We operate a number of offices worldwide in Asia, in Brussels, and in the Middle East.

We enjoy a very close working relationship with the RIAA and have a number of members in common. I operate from IFPI's head office in London.

Given the importance which the recording industry attaches to the issues before this subcommittee and the importance of U.S. copyright law to the functioning of the industry worldwide, IFPI is deeply honored by the invitation to participate in these proceedings.

In 1986, I was summoned to appear before a Singaporean Parliamentary Select Committee which was considering the country's new copyright bill. The recording industry's main concern in Singapore, at that time, was piracy, and the bill contained a series of new measures addressed specifically at that problem.

They also reflected the extensive input of the U.S. Government representatives, whose influence, both in trade and legislative dialog, had been decisive in the move to a new copyright regime.

Indeed, such was the success of the bill in addressing piracy, my concern before the select committee was more to discuss what it did not contain: Any provision for performance rights in sound recordings.

I delivered a long list of grounds for establishing such rights, reciting many of the arguments which are being addressed to your

subcommittee. At the end of my delivery, the chairman of the select committee, Professor Jayakumar, turned to me and asked one question: Is it not correct that U.S. copyright law does not provide any performance rights in sound recordings? That is correct at present, I replied.

There was no further deliberation on my submission, and the only sound recording right which finally emerged in the Singapore copyright law was the right of reproduction.

The Singaporeans who made that law had no illusions about Singaporean performers and record producers being denied broadcasting revenue in the United States; they simply legislated to the lowest level which the United States could accept and happily assumed that in U.S. perceptions, performance rights in sound recordings were not essential.

I watched that process repeat itself to a greater or lesser extent elsewhere in Asia, in Korea, in Taiwan and in China. As U.S. Government representatives contributed vitally and fundamentally to the introduction of new laws in those territories to eradicate piracy, they simultaneously and unintentionally impeded the creation of appropriate regimes for the post-piracy environment as the performance right was consistently absent.

Ironically, these developments contrasted markedly with the trend in other parts of the world where there was growing recognition of the need for performance rights in sound recordings. That trend has continued, and now some 70 countries provide some form of performance rights in sound recordings, in favor of producers and performers in their own copyright laws.

Performance rights have traditionally been constituted in a number of ways in the different jurisdictions. As a general proposition, common law jurisdictions tend to provide a regime of exclusive rights; that is the right to authorize or prohibit a particular act in respect of broadcasting and public performance.

By contrast, in civil law jurisdictions, the more common proposition is the right to receive equitable remuneration for the use in the broadcasting of sound recordings.

A feature of the latter system is the statutory provision for division of the remuneration between producers and performers. Furthermore, a right to remuneration does not allow the producer to withdraw any recording from performance.

It must be noted that these are general propositions and there are clear exceptions to these rules. The recently enacted Indonesian copyright law, for example, issued within a civil law jurisdiction, clearly provides a regime of exclusive performance rights in favor of producers.

The recording industry has, for a number of years, promoted the proposition that producers of sound recordings should enjoy the exclusive rights to authorize or prohibit the performance of those recordings. At the international level, that mission now involves the following elements: First, that performance is a form of commercial exploitation, control over which, in common with other forms of commercial exploitation, should be reserved by law to the producer.

Second, the thesis of primary and secondary commercial exploitation, that is the distinction between the retail markets on the one hand and the performance or broadcasting market on the other, is

no longer relevant, particularly with the advent of digital transmission systems.

Third, these propositions must be established as the basis for international standards for implementation worldwide.

In recent years, this message has been focused on the copyright harmonization program of the European Communities and on the WIPO initiatives to upgrade the protection for sound recordings through international conventions.

In both contexts, a further message is systematically conveyed: The need for performance rights becomes daily more pressing as digital technology progresses. This is detailed in my written testimony, but the fundamental proposition can be simply stated here: Digital technology is revolutionizing the ways in which consumers can access the world's stock of commercial sound recordings. For the music industry to survive, new ways must be found for copyright laws to continue to perform their traditional function in relation to the creation of new recordings. That means they must facilitate control to the producer over all forms of primary exploitation.

I am convinced that this message is being sympathetically received at the Commission of the European Communities and at the WIPO headquarters in Geneva. My mission here is to assist in achieving a similar response in Washington.

WIPO has prepared a draft text for a possible new international instrument dealing with the rights of performers and producers of sound recordings. The text addresses specifically the question of digital transmission, reserving the exclusive rights to the producer to authorize or prohibit the use of sound recordings in digital transmission systems for communication to the public.

Parties to this instrument will not be permitted to derogate from this right as formulated. Rights to equitable remuneration will remain an option only in respect of analog broadcasting.

While this proposal is extremely welcome, there is obviously concern that the time factor involved in establishing a new international standard only by way of convention renders the response somewhat unrealistic in relation to the problem addressed. On the other hand, this determined move to a new legal order would benefit fundamentally from the impetus which a major development at the national level could bring.

I have seen the impact of standards promoted by U.S. Government representatives in a bilateral context on the copyright laws of a number of territories, and I have seen how those laws have transformed cultural wastelands dominated by piracy into fertile areas of creativity.

The response to the issue of record rental—another problem created by technology—in the U.S. copyright law has played a major part in the development of similar responses worldwide. Again, the recent U.S. legislation on domestic digital recording has already provided the key to the establishment of corresponding provisions in Japan.

In the formation of the new legal order on performance rights, I believe the United States can and should take the lead internationally, as it has in many ways on other issues relating to changes in technology—in piracy, in rental, in domestic digital recording. In the context of the performance right, it can and must

lead by example and provide first in its own copyright law the necessary means for producers and performers to control the use of recordings through electronic delivery.

Once those provisions are created and their implementation appropriately organized, I believe the impact worldwide of the changes will be immense. Then and only then can one predict a certain future for the recording industry as we now know it.

Mr. Chairman, I would like to close with one last anecdote. It concerns a discussion I had earlier this year with the European counsel for the DMX Organization, which is, as you know, a cable audio diffusion service. They are planning to launch in Europe.

They approached IFPI to sort out the necessary licenses. Their system into Europe is uplinked from Atlanta, GA, through the Intel-Sat satellite and fed into cable head end in Europe.

I asked them, therefore, what arrangements they had made with the U.S. recording industry to provide this service. They answered: None whatsoever; we buy our records from Tower Records. There are no performance rights to clear in the recordings under the U.S. law.

Thank you, Mr. Chairman, for this opportunity to address this subcommittee.

Mr. HUGHES. That is a vote in progress and we are going to recess for about 10 minutes.

[Recess.]

[The prepared statement of Mr. Garnett follows:]

PREPARED STATEMENT OF NICHOLAS GARNETT, DIRECTOR GENERAL AND CHIEF EXECUTIVE, INTERNATIONAL FEDERATION OF THE PHONOGRAPH INDUSTRY

Mr. Chairman and members of the Subcommittee, my name is Nic Garnett and I am the Director General of the International Federation of Phonographic Industries. IFPI is an umbrella organization with affiliated national groups in 71 countries and over 1,000 individual recording company members.

I appreciate the opportunity to testify here today and I am pleased to provide the Subcommittee with an international perspective on the important issues you are considering at this hearing.

In my remarks, I will attempt to provide you with an overview of the state of the international recording industry and our relationship to emerging digital technologies. As you already know, U.S. law with respect to sound recordings has been the subject of much discussion internationally particularly because of the lack of a public performance right. I will obviously leave the policy implications of U.S. law to my American colleagues and this Committee to explore, Mr. Chairman. However, I hope that my remarks on the direction of technology and the laws of other countries are helpful to you as you embark on that discussion.

A discussion of public performance rights in 1993 and beyond must consider the drastic changes brought about as a result of digital technology. Digital technology has had an enormous impact on the music industry in the last 15 years and will continue to bring significant changes well into the next century. The impact has been in two areas: first, in the creation or remastering of pre-recorded music programmes and second, in the storage and transmission of those programmes. Respectively, production and delivery.

This testimony focuses on the second of these processes, the electronic delivery of pre-recorded music programmes (hereinafter referred to as "phonograms") via digital transmission systems. In the first part, my testimony provides an outline of the state of the music industry in the last decade of the 20th century and sets out in some detail the various dimensions of existing or projected delivery systems destined to become a principal medium for the dissemination of music. The second part attempts to outline a response to the challenge of technology through the combination of technical and legal measures.

The word "attempts" is used advisedly. The task of addressing this complex issue is greatly complicated by two recurrent and related themes. While the technical parameters of electronic delivery are for the most part known, the specific applications

and functions of the systems in practice are not. Accordingly, no analysis to date—whether of the technology, the economics, or the law—of electronic delivery has provided any convincing description of likely scenarios. The factor governing these two themes is the absence of information about probable consumer practices; these in turn are extremely difficult to predict given the interplay of consumer economics and demographics in an ever-wider multi-media environment.

Notwithstanding, however, the impossibility of predicting specific applications of electronic delivery, the technical and legal systems proposed in Part 2 of this paper to enable the music industry to respond to the technical challenges must adhere closely to the principles upon which intellectual property laws have been traditionally constructed. Furthermore, the systems must support the creation of new cultural material by facilitating the function of a market for that material. They must therefore preserve the balance between the interests of creators and the interests of the public—the core of copyright systems.

PART I: THE MUSIC INDUSTRY AND ELECTRONIC DELIVERY: THE CHALLENGES

A. The Music Industry

The music industry has flourished in recent years due to the advent of new technology, in particular a new digital carrier, the compact disc (CD). In the last ten years (the compact disc is now almost ten years old as a commercial carrier) worldwide retail revenues from the sale of phonograms have virtually doubled, standing now at a figure of some $25 billion for 1991.

There are a number of reasons explaining this phenomenal growth, but most reflect the positive consumer response to the phonographic industry's enormous investment in CD technology and the quantum leap in the quality of phonograms supplied thereby. The CD has revitalized the market for recorded sound, whether as a medium for disseminating new forms of expression made possible by digital technology or as the perfect carrier for carefully retrospective and comprehensive collections of old recordings. This positive response from the public has, once again, reaffirmed the function of the producer in creating and disseminating important cultural material, free from spatial or temporal limitations.

A consequence of this process has been a re-evaluation of the phonogram in the marketplace and it's direct benefits to all sectors of the music industry as a result. However, while digital technology has precipitated a re-evaluation of the phonogram in the markets of the world, it has not, in any significant fashion, improved the general environment for the achievement of legitimate revenues from the production and distribution of phonograms; indeed, it has in some respects exacerbated the problems facing the phonographic industry.

Sales of phonograms around the world have been restricted over the past 25 years by the market distortion caused by piracy and by the phenomenon of private copying. Given the ready availability of professional CD production facilities and domestic digital reproduction equipment, digital technology has now taken a firm hold in both these problem areas. Losses to the phonographic industry in 1991 from piracy worldwide are estimated at $1.5 billion; the picture is a depressing one.

At the inception of the CD era, it was widely believed that piracy of phonograms using digital technology would not occur; first, because the patents controlling the systems were owned worldwide by two major corporations, both with important stakes in a legitimate market for phonograms. Second, the establishment of the necessary manufacturing facilities was thought to be too expensive as an investment and too sophisticated in operational terms. Not so. From about 1989 onwards, markets throughout the world have been systematically penetrated by quantities of counterfeit or pirate CDs manufactured principally in the Far East or Eastern Europe, usually on second-hand pressing equipment, and often in breach of relevant patent restrictions.

For the purposes of this analysis, however, the most troubling statistical proposition for the phonographic industry is to compare its worldwide sales revenue with the income from traditional public performance usage.

Total sales worldwide 1991—$25 billion.

Total performance income worldwide 1991—$125 million.

A breakdown of this analysis in the world's principal markets gives even greater cause for concern.

	Sales Revenue 1991 ($Million)	Performance Income 1991 ($Million)
USA	9793*	——
EC	8742	80
Japan	4236	6

*N.B. Estimated Retail Price based on Published Price to Dealers (PPD) plus 25%.

A similarly striking contrast in the growth patterns of sales and performance revenue over the past ten years suggests that the phonographic industry now finds itself in a somewhat paradoxical situation. The digital revolution has afforded enormous growth in the retail sector, permitting a fundamental re-evaluation of recorded music which in turn has fostered significantly higher levels of investment. This investment translates not only into higher technical and cultural standards but also into heightened material expectations in all sectors of the industry. Now, at a time when the music industry is better organized, better funded and more creative than at almost any time in its history, that same digital revolution threatens to bring substantial changes to the retail distribution market well in advance of comprehensive systems for the phonogram producer to control the distribution of phonograms by means of electronic delivery.

B. Electronic Delivery

One of the recurrent problems faced by the recording industry in its struggle against piracy around the world has been the need to explain, often to highly qualified lawyers, that copyright protection in phonograms extends not to a physical object but to the aggregate of the sounds fixed and carried in a particular medium. A similar consideration is equally important to this analysis of electronic delivery because it helps to illustrate why the notion that the existing market for phonogram carriers could be replaced by alternative, non-physical means of delivery is not so unthinkable. Recognition of protection in the sound recording rather than its physical embodiment also has a bearing on the copyright responses which will, as explained below, need to less closely track existing performance right concepts and have more in common with provisions relating to reproduction and distribution rights.

The term "electronic delivery" is used here principally to contrast with the traditional process of distributing phonograms via the manufacture and sale of phonogram carriers—tapes and discs. More particularly, reference to electronic delivery contemplates the field of digital transmission systems which is predicted to have an increasing importance in our society, both in the workplace and at home.

Many of the technical aspects of the new transmission systems are already well established. Satellite and cable networks have recently been undergoing major technical changes with, in the case of satellite reception dishes, major advances that virtually eliminate the distinction between communication (FSS) and broadcasting (DTH) satellites. Terrestrial wireless digital broadcasting, also known as digital audio broadcasting (DAB), is likely to become a reality in many parts of the world within the next five to ten years. Perhaps the most fundamental development is the prospect of the combination of telecommunications and entertainment services in broadband digital cable networks becoming increasingly prevalent in the developed world by the end of this century.

The future availability of ever more comprehensive digital transmission systems should not mask the capacity of existing cable systems. Take, for example, a partially interactive cable television service available to subscribers in London, a relatively underdeveloped cable environment. In addition to multi-channel terrestrial and satellite television, it offers the following:

1. *Video Games*—The service allows the subscriber to select a video game from a menu. The software is then downloaded from the headend to the set top converter and the subscriber may then play.
2. *Electronic Mail*—The service allows subscribers to communicate with one another through electronic mail.
3. *Database Access*—The subscriber can access a number of news databases.
4. *Multimedia Audio/Visual Catalogues*—This service is effectively classified advertising with voice and pictures. For instance, subscribers can access a catalogue of houses and cars for sale.
5. *Home Banking*—Subscribers can use the service to access their bank accounts and organize payments and transfers.

6. *TVI—Interactive Television*—The service can allow the subscriber the option to modify the course of television programmes or the coverage of live sports events. During the 1992 Barcelona Olympics the subscribers were offered the capability to select their preferred camera angle at any time in a number of events.

These services, while useful to the subscriber, in no way indicate the full potential of cable, particularly as technology advances. The convergence of television, telecommunications and computer technology will be the focal point of advances to be made in the 1990s. This convergence of technologies will lead to an increasing demand for a high capacity data transmission infrastructure, capable of delivering a wide range of data—in video, audio or textual—to homes and businesses alike. By the end of the century broadband Integrated Services Digital Network (ISDN) will be very much a reality in many parts of the world.

Existing cable television networks are, for the most part, constructed with high capacity coaxial cable which is very efficient at transmitting large amounts of data over short distances. Coaxial cable has a potential capacity of 1 billion hertz (1 gigahertz) compared with a capacity of 4,000 hertz (4 kilohertz) for twisted copper pair telephone wires. In other words, a standard broadband cable network has 250,000 times the capacity of a standard telephone wire. This enhanced capacity allows broadband cable to transmit a large amount of data, whether in video pictures, audio data or computer data.

The potential for technological advance centers around the prospects for increasing the capacity of cable, thereby expanding the number of channels offered to viewers. There are currently two technological factors influencing the potential capacity of cable: Fibre optic cable. Digital compression.

Fibre optic cable leads to a significant reduction in the degree of signal loss. Optical fibre can carry a signal for twenty miles without amplification; reducing the need for amplifiers reduces the incidence of noise and distortion. As a result, the channel capacity of the system is significantly enhanced.

In the USA, Time Warner is testing a system in Queens, NY which utilizes optical fibre from the headend to clusters of 200-500 homes. This configuration means the system can utilize the full 150 TV channel capacity of the coaxial cable running into the home. Consequently, the system is capable of providing 96 channels of regular programming and 54 channels of Pay-per-View (PPV). Essentially, the PPV channels carry recent hit movies with 4 channels carrying the same movie with staggered starting times every half an hour. The subscriber does not have to wait an hour and forty minutes if he or she arrives twenty minutes after a movie has started.

Digital compression also increases the number of channels available for use. In the field of video data transmission, current progress with digital compression technology suggests that it may be possible to compress 6 to 8 channels into the current bandwidth required for one channel.

A vital consequence of this enormous capacity, particularly in relation to the far lower requirements of audio data transmission, is the ability of cable operators to release sufficient channel space to render the service entirely interactive. This combination of two way communication and digital compression opens up a whole new market for cable operators: audio and video on demand. And for the consumer, this means transmission of the phonogram whenever the customer desires, with identical quality to the original fixation in the recording studio.

Again, it must be stressed that while the technology is still advancing, the functions described above are already a reality. At present, Tele-Communications Inc. (TCI), the largest U.S. cable operator, is test marketing the concept of video-on-demand in Denver. Its test, "Take One," allows consumers to choose a selection from a library of 1,000 film titles and play almost instantaneously. Time Warner, the second largest cable operator, has also announced plans to commence experiments with a similar system. The "Electronic Superhighway," in Florida by early 1994.

Of particular relevance to the international music industry's concerns are the digital cable audio services currently operating in the USA, at least one of which is proposing to launch in Europe.

The configuration is fairly straightforward for the consumer who, upon payment of a monthly subscription of around $10.00, has access through the existing domestic television cable link to upwards of 30 channels of digital audio transmissions of original commercial sound recordings, divided by channel into different categories of music: jazz, classic, symphonic, chamber, heavy metal, etc. The recordings are transmitted without interruption from disc jockeys, news or weather reports and are running on a 24-hour basis in the categories advertised. A decoder in the home links the cable feed with the subscriber's existing hi-fi system, the end result being a running supply of CD quality music combining the best of commercially available phonograms.

It is worth pausing here to examine the current capability of this system. Assume it offers its subscribers 32 channels of digital recordings, each channel running for 24 hours a day. Assume in addition an average running time for one entire CD programme of 1 hour. This guarantees the consumer access during the course of one day to the equivalent of up to 768 CD programmes—way beyond the average existing domestic CD library. Consider further that a major international recording company's catalogue may hold at any one time up to 10,000 CD programmes; each one of these could be transmitted by one cable operator in under two weeks. The entire worldwide inventory of phonograms currently available on CD could be thus delivered by one cable operator in well under six months.

An important element of the particular cable digital audio system currently attempting to penetrate the European cable market is that it is fed from a satellite link from a base in Atlanta, Georgia. Let me share a story with you. In initial negotiations with the recording industry in Europe, representatives of this particular system were asked by IFPI what arrangements had been made with American record producers for the supply of material to feed the European systems. "None whatever" came the reply, "there is no requirement under relevant U.S. laws to obtain authorization from the producers for the uplink of their sound recordings; the material is taken from CDs purchased in Tower Records." This U.S. company is, in effect, coming to Europe, willing to pay European record companies and performers for the material they use but feel little regard for their American counterparts.

Within the next year or so, this particular system will become directly available to non-cabled households on a subscription basis via the Astra satellite, which supplies a considerable quantity of television programming in Europe. It will join other existing satellite radio services which are poised to make increased use of digital audio capacity on satellite transponders currently used for television transmissions.

The phenomenon of Digital Audio Broadcasting was described in a recent announcement by the UK government as follows:

> Digital Audio Broadcasting (DAB) is a new transmission technique for sound broadcasting. It offers the prospect of CD-quality stereo sound, improved reception in car radios and portable receivers, a greater number of services within the same amount of radio spectrum and additional features and types of services.
>
> DAB has been developed in a project under the EUREKA umbrella, the European industry-led collaborative RED programme. The consortium is made up of broadcasters, consumer electronics manufacturers, research institutes and universities and includes the BBC, Philips, Grundig and Thomson. The project has produced a preliminary specification for DAB which has gone before the European Telecommunications Standards Institute (ETSI) for standardization.
>
> DAB employs two novel techniques for delivering high-quality sound, even to portable or car receivers: a means of bit-rate reduction which allows a high quality audio signal to be transmitted using about one-sixth the bit rate of a compact disc; and a transmission system called COFDM (Coded Orthogonal Frequency Division Multiplex) which overcomes the problem of interference by spreading the signal over hundreds of carriers rather than just one.
>
> The first commercial terrestrial DAB broadcasts are expected in 1995. It has been generally agreed that the 87.5–108 MHz frequency band (Band II) will be the eventual home of DAB, replacing the existing and planned FM sound broadcasting transmissions. However, as with all new broadcasting systems, a transition period on the order of 15 to 25 years can be expected before it is possible to switch off the old services which are being replaced. Until there is sufficient market penetration of DAB receivers to allow the withdrawal of FM services from Band II, DAB transmissions will occupy a temporary "parking band," yet to be decided.

Note the repeated references to CD quality; such quality is not necessary for weather or traffic reports.

As stated earlier, it is important to regard the situation as one dominated by a developing technology, which aim to increase capacity and quality of the transmission as well as the consumer's choice. It is difficult to predict consumer practices in response to the various systems with any certainty. It is also difficult to develop any notion of how the different services offered via satellite, cable and DAB will interact—or, indeed—compete with each other. With a multitude of electronically delivered music sources available, will the consumer ultimately require an interactive system? Will interactive capability and the convergence of telecommunications and entertainment services be the determinant factors, leading to the de-

cline of wireless systems in a static domestic environment? Even if this latter scenario were to come about, one can already predict a growing demand for satellite and terrestrial digital transmission services in a mobile environment, particularly for in car information and entertainment.

One proposition can, however, be safely advanced at this stage; it would be contrary to all logical expectation if, in the long term, electronic delivery did not substantially supplement, if not replace, the existing retail systems for marketing phonograms.

PART II: ELECTRONIC DELIVERY AND COPYRIGHT: THE RESPONSE

Before examining the regime of copyright required to enable the music industry to function in the electronic delivery market, it is worth examining a number of technical systems developed in response to the digital revolution which may be used in the future in concert with new legislative proposals.

A. Technical systems

Digital recordings as embodied in CDs or other digital carriers (DAT, DCC, MD) contain a great deal more information than merely the data incorporating the music programme. Information is required to guarantee the correct response of the playback system. In the most recent digital carriers—Digital Compact Cassette (DCC) and MiniDisc (MD)—information is carried to identify song titles and performers for the benefit of users. This information is carried in what is known as the subcode to the recording and capacity exists which can be used to protect the interest of rights owners in the recorded music programme.

SCMS

The first application of this subcode capacity in the copyright field was adopted in relation to the problem of serial digital copying, and was developed through cooperation between the hardware and audio software industries. This came about after extensive discussion in Athens in 1989 which led to broad agreement on standards proposals on electronic circuitry to limit the copying capability of domestic digital reproduction equipment, commonly referred to as the Serial Copying Management System (SCMS). SCMS has been used as a model for legislation adopted by the U.S. Congress and in Japan. Prior to this, the development of non-professional digital recorders caused the music industry particular concern on two principal grounds:

First, with second generation domestic DAT recorders facilitating direct digital transmission of data at the same sampling frequency (44.1 kHz) from CD players to digital recorders, the primary function of the new medium was likely to dramatically increase the already grave problems of private copying.

Second—and most importantly—the digital reproduction system of digital copying equipment meant that there would be virtually no measurable drop in quality from one generation of copy to the next, thus increasing the dangers from private copying. Indeed, this last phenomenon, serial digital copying, transformed the problem of private copying into one of private cloning.

The SCMS system in essence reads and writes in the space provided in the subcode of a digital recording information, and determines whether or not a further generation of copies can be made from that source. It is a highly complex system which does not warrant detailed description here. So far, it has proved effective as a response to serial digital copying. It must be fully understood, however, that it does not and was never intended to comprehensively address the problems of either digital transmission or electronic delivery.

ISRC

A second use of the sub-code capacity is for inclusion of the International Standard Recording Code (ISRC). ISRC has been developed over the past few years under the auspices of the International Standards Organization and is now administered by IFPI through its approved national agencies. It functions to provide each individual recording with a unique international identification code; it includes information as to the original producer and the country of origin. The system is already in general use in certain territories—for example, in Japan—and in time will provide the music industry with an extremely efficient method for automatically identifying and quantifying the usage of particular recordings in an electronic delivery environment. The advent of the digital transmission systems discussed herein was clearly taken into account in the development of the system. Furthermore, with cross-referenced data bases to interpret the ISRC number and proper rules governing the trans-

mission of these subcodes, the public and the music industry will benefit from accurate returns on usage in all electronic broadcast or delivery systems.

SCMS or ISRC provide only a part of the response to the problems posed to the music industry by electronic delivery. They are simply tools, and when combined with the force of copyright law, they establish the appropriate balance between the interests of the producer and the user. This balance has to be constantly readjusted in response to technological advance.

B. Copyright proposals

It should be apparent from the technological developments discussed above that innovative legal solutions are required to enable the music industry to function in the electronic delivery market. In discussing possible solutions there are two overriding considerations. First, as noted above, the impossibility of predicting in advance precisely what form the applications of the new technology in practice will take, and hence the impossibility of designing legislation which will specifically apply to each practical situation. The other consideration is the speed with which this technology is being developed and applied. These two considerations lead to the conclusion that legislation must be framed now, in general terms, which will enable rights owners to protect their interests as new applications of the technology appear. This means that, in the music industry, phonogram producers must have exclusive rights of control over all forms of storage and transmission of digital audio data irrespective of the means by which these activities are carried out. An international framework is urgently required to achieve this; and such a framework cannot permit the intrusion of policies of reciprocity.

Private Copying Legislation

There is no international law on this subject, nor any prospect of any, at the present time. This explains the varied legislative provisions which have been adopted at the national level and also reflects the limited structure and function of these measures. They vary from digital only provisions (USA and Japan) to analogue and digital measures elsewhere. They involve, in some cases, varying levels of unallocated general payments; some are limited to royalty payments on blank media, some to both media and recording equipment. There is no common position as to the appropriate division of proceeds between beneficiaries.

The justification and need for these systems is long established. Let me take this opportunity to commend you, Mr. Chairman, and the members of your Subcommittee, for your leadership in the recently enacted U.S. law. It is clear, however, that the laws passed to date were never intended to provide a solution to the music industry's requirements relating to electronic delivery as discussed herein. This is confirmed by the fact that royalty levels introduced around the world as part of these measures are entirely remote from appropriate primary remuneration levels, and by the fact that in many cases the benefits of the system are extended internationally on a de facto or de jure reciprocal basis. It must be clear from this that in our view there is no place for the same kind of compromise in establishing the new legal framework for the electronic delivery of copyrighted material.

Again, reverting to a theme which runs through this testimony, while private copying of electronically delivered phonograms is likely to rise dramatically in the short term, it is entirely possible that in the long term the choice of material available from digital cable or wireless systems may dispense with the need for copying at all. It is important, therefore, to ensure that in devising the appropriate legal regime for electronic delivery, the existing provisions on private copying are totally disregarded from a structural point of view and not permitted to detract from the search for measures to facilitate control over a primary use of phonograms.

Digital Diffusion: An Exclusive Right

In its submissions to WIPO and national governments in relation to the work on a new international instrument on the rights of producers and performers in sound recordings, IFPI has called for the introduction of an exclusive right to authorize or prohibit the digital diffusion of phonograms. Digital diffusion is defined in those submissions as follows:

> "digital diffusion" means any transmission of sounds by the use of digital signals for reception by a member of the public.

This is distinguished from traditional analogue broadcasting techniques which are defined as follows:

> "broadcasting" means any transmission of sounds by wireless means for reception by a member of the public.

This definition is very much in line with Article 3, paragraph (f) of the Rome Convention.

Two elements therefore distinguish the digital diffusion right: first, it applies equally to wireless or cable transmission systems; second, it applies strictly to the transmission of sounds by the use of digital signals.

It would be premature to predict the adoption of the provision in precisely this form, but the intent behind its proposal is evident. The various systems of electronic delivery discussed above have many factors in common, in particular, the facility to transmit to the consumers the sounds constituting a phonogram in an identical manner to their original fixation in a recording studio. Combined, they have the potential to supply the consumer with all his requirements in terms of recorded musical performances, whether in a static or mobile reception environment.

It will be argued in a number of sectors that the "digital diffusion right" as proposed by IFPI is, at best, only artificially distinguishable from a broadcasting right as defined in the Rome Convention. Perhaps so in its current formulation; certainly not in its intent and scope.

Consider the simple description of the broadcasting right by Stewart under the heading, "Secondary uses of phonograms—Article 12".

> The expression "secondary use" is not used in the Convention, but it is used in the chapter heading of the Report to make the point that the primary use of a phonogram is in the home, that is a private use with an audience of a few people, whereas the use of a phonogram in public places with an audience of hundreds or thousands or on the air with an audience of millions, is not the use for which it was primarily intended. It is a "secondary use." Therefore, in accordance with the general principle of copyright it involves a performance right and therefore remuneration. The "secondary uses" regulated in Article 12 are the use of phonograms in broadcasting and communication to the public.

Over thirty years on, this "secondary use" approach to the broadcasting of phonograms is still being perpetuated at the international level. The European Communities' Council Directive 92/100/EEC of 19th November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property provides in its preamble the following:

> Whereas the adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, reproduction right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the Community's economic and cultural development...
>
> Whereas copyright and related rights protection must adapt to new economic developments such as new forms of exploitation...

The Directive then provides in Article 8(2) the following:

> Member states shall provide a right in order to ensure that single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

The position at the national level is equally alarming. Ringer and Sandison (in Stewart, ibid) describe the situation in the USA as follows:

> The triumph represented by the statutory recognition of sound recordings as copyrightable works is a qualified one. Section 106 (of the 1976 Act) excludes sound recordings from the categories of works accorded exclusive rights of public performance, and Section 114 states explicitly that the exclusive rights of the owner of copyright in a sound recording do not include any right of performance under Section 106(4). Radio broadcasts and discotheques, among others, are thus left free to perform copyrighted records publicly, as long as they have licences from the owners of the copyright in the musical composition performed on the records. This obvious inequity did not go unnoticed, and the 1976 Act left the legislative door open for further consideration of performing rights in records.

Even in the UK, where phonogram producers have enjoyed exclusive broadcasting and public performance rights since the early 1930's, the position is now somewhat unclear. The combined effect of the Broadcasting Act 1990 and the Copyright Designs and Patents Act of 1988 appears to provide that where the performance rights in a phonogram are collectively administered, broadcasters have the possibility of taking a statutory licence, at a level to be determined by agreement or, failing that, by the Copyright Tribunal. The digital cable audio operator referred to in the first part of this paper has announced its intention to do precisely that.

Clearly the question of performance rights needs urgent re-examination in response to the new transmission technology both at the international and national levels. The proposition that broadcasting and other communication to the public represent merely "secondary" uses of phonograms, if it was ever valid—which is doubtful—is now somewhat outmoded.

As described in the first part of this paper, the modern phonographic industry is a highly creative and complex enterprise, involving production, marketing and distribution systems serving a global market. Its investment decisions are taken first, upon its contractual relations with performers and second, upon its ability to organize the manufacture and distribution of carriers for its phonograms on a worldwide bases. The latter process depends almost entirely on the correct national application of reproduction and distribution rights as elements of copyright legislation.

The exclusive right to authorize or prohibit the reproduction of a phonogram is therefore fundamental to the functioning of the industry, which fact is now generally recognized worldwide. It must also be noted in this era of constant technological advance that this progress has greatly extended the commercial life of a phonogram giving rise to the need for a term of protection of at least 50 years from the date of first publication. Furthermore, the very concept of the reproduction right is worthy of re-examination against the background of the technical possibilities of digitally encoding, storing and transmitting recorded sound.

A growing number of national laws recognise an exclusive right of distribution, or measures related thereto, such as exclusive rental and importation rights. These rights have developed in recognition of the global market for cultural materials (importation) and in response to incidental commercial enterprises made possible by new technology (rental).

Rental of phonograms first surfaced as a commercial threat in Japan in 1980. It spread rapidly as an enterprise and in the space of a few years severely prejudiced the normal exploitation of phonograms through retail outlets. Recognising this unfortunate development as counterproductive to the future of the phonograph industry a number of countries, i.e. USA, France, UK, hurriedly introduced the necessary legislation enabling producers to control the commercial uses to which copies of their phonograms were put, notwithstanding the exhaustion of the reproduction right therein and the placing of the copies on the market. Japan has now extended similar provisions, on a limited basis, and the EC Directive referred to above includes a specific right to control rental in favour of authors, performers and producers.

The right to control importation is an increasingly important compliment to the producer's exclusive reproduction right in order to operate in a global market. While production and manufacturing operations become increasingly centralised (to achieve greater efficiency), economic conditions and legislation vary enormously in the diverse markets which the phonograph industry services around the world. Currency fluctuations exacerbate these differences even in the more developed markets and some mechanism must therefore be instituted to enable rights owners to operate in markets undistorted by freeloading competitors. This can be done by providing in national copyright laws that as an element of the copyright created thereunder, the owner (or his exclusive licensee) is entitled to authorise or prohibit the importation of copies of a phonogram so protected regardless of whether they were lawfully manufactured or not. An increasing number of countries are realising that the absence of such a provision subjects the laws in the country of importation to the lowest common international denominator in terms of protection. Accordingly, an exclusive importation right guarantees the territorial and thereby the functional security of the other rights extended to the copyright owner.

The principles embodied in the exclusive rights of reproduction and distribution are equally relevant to the electronic delivery market. Here, the producers will need the appropriate mechanisms to:

i. establish price structures for the phonogram;

ii. control the ways in which individual phonograms are released into the market—for example, by restricting the content and rotation of program-

ming within the service to ensure a balanced exposure of a wide range of material;

iii. correct distortion of the market from unauthorised diffusion; and

iv. coordinate releases of phonograms between different markets around the world.

Clearly, these objectives fall well beyond the scope of existing provisions on broadcasting and communication to the public and it is clear that the digital diffusion right will have to function in relation to electronic delivery in the same manner as do exclusive reproduction and distribution rights in relation to the retail market.

Where performance rights exist in phonograms they are normally administered on a collective basis. It is not possible to discuss the question of collective administration here except to note the need for considerable ingenuity in adapting its functions to the electronic delivery market where general competition laws will be as relevant as they are in the retail market.

A more immediate question, particularly as work progresses on the WIPO initiatives on a possible Protocol to the Berne Convention and the New International Instrument, is to consider once again the interrelationship of the exercise of rights extended to the different sectors of the music industry.

At the first session of the Committee of Experts on a possible protocol to the Berne Convention in November 1991 the theory was advanced that the exercise of the producer's rights must be subjugated to the exercise of the author's rights. This, it was argued, is the meaning of the Article 1 of the Rome Convention ("the safeguard clause"). It is submitted, with respect, that these propositions are ill-founded and incorrect. They can be overturned on two grounds. The first basis for rejection is grounded in history. The second reason is based upon practicality.

First, the initial version of the safeguard clause which was the object of the discussions at the Rome Conference was Article 2 of the Hague draft. The text read as follows:

> The protection granted under this Convention shall leave intact and shall in no way affect the protection of rights of authors of literary and artistic works or of other copyright proprietors. Consequently, no provision of this Convention may be interpreted as prejudicing such rights.

According to the report of the Rapporteur-General, the aim of this provision was to establish that the Convention would have no effect upon the legal situation of copyright proprietors. The different participants at the meeting disagreed as to the importance of this provision. Some delegations considered the provision superfluous while others stressed its importance. The French and Italian delegations, in order to make sure that the exercise of rights be included in its scope, presented a proposal to amend the provision as follows:

> The protection granted under this Convention shall leave intact and shall in no way affect the right of the author and the exercise of that right over the work interpreted, performed, recorded or broadcast. No provision of this Convention may be interpreted as prejudicing that right.

The amendment was supported by Mexico, Tunisia, Spain and Yugoslavia. It was rejected by the delegations of the Federal Republic of Germany, the United Kingdom, Austria, the Netherlands and the United States. The German delegation considered the amendment dangerous as it might have given rise to the idea that only the author's consent was necessary in cases where the producer's or performer's rights were also involved, i.e. for the reproduction of a phonogram or the broadcasting of a performed work.

According to the Dutch delegation, in speaking of the "exercise of rights", the amendment exceeded the scope of the original text. The aim of Article 1 was to guarantee the existence of copyright. The wording proposed by the French and Italian delegations could have given rise to the conclusion that as soon as the author had given his consent, the artist was deprived of the possibility of refusing his own authorisation. Such consequence was considered as depriving the performer or producer of his rights as granted under the Rome Convention.

In view of the possibility of endangering the protection granted by the Rome Convention, the Franco-Italian proposal, when put to a vote, was rejected and the Hague text, modified mainly on a Swiss proposal, became Article 1 of the Convention as it currently stands.

It is therefore clear from the discussions and the adopted version of the safeguard clause in Article 1 of the Rome Convention that this provision does not concern the exercise of rights.

The second ground for rejecting the theory that exercise of producers' rights must be subjugated to the exercise of authors' rights is one of practicality which in turn suggests that if a hierarchy exists in the exercise of exclusive rights it is organised to facilitate exploitation of a work by the producer. The WIPO Guide to the Rome Convention explains the situation in this way:

> This Article 1 is limited to safeguarding copyright. It does not proclaim its superiority by laying down that neighbouring rights may never be stronger in content or scope than those enjoyed by authors. Indeed, there are a number of examples showing that neighbouring rights are not necessarily inferior. The Rome Convention gives record makers and broadcasting organisations the right to forbid the reproduction of phonograms and the rebroadcasting of their broadcasts respectively. The Berne Convention is less firm: Copyright in the cases in point may be the subject of compulsory licences.

At the meeting of the Governing Bodies of WIPO in Geneva in September 1992 it was decided by the Assembly that one of the issues to be discussed by the Committee of Experts on a possible Protocol to the Berne Convention would be the question of nonvoluntary licenses for the sound recording of musical works. In the present context the following passages from the meeting report (B/A/XIII/2) are relevant:

> ...The Delegation (of Mexico) stressed that during the preparatory work on the Possible Protocol to the Berne Convention, the priority of rights of authors vis-a-vis the beneficiaries of neighbouring rights should be preserved.
>
> 12. The Delegation of Hungary also advocated the maintenance of a balance between the interests of authors and those of the beneficiaries of neighbouring rights and said that the principle laid down in Article 12 of the Rome Convention should serve as the basis for the preservation of the said balance in any new instrument on neighbouring rights.

It is submitted that proposals to establish a priority for authors rights in a possible Protocol to the Berne Convention as a kind of defence mechanism to improved protection for producers and performers are inappropriate. What is required, clearly, is a full examination of the interrelationship between the various sets of exclusive rights necessary to enable the music industry, in all its dimensions, to function in the electronic delivery market. As explained, Article 1 of Rome is neutral in this respect; likewise, any examination of Article 13.1 of the Berne Convention, undertaken in advance of work on improved protection of the rights of producers and performers would be likely to prove incomplete and therefore counterproductive to the achievement of the necessary regime.

Conclusion

City of London stockbrokers Hoare Govett, in their recent World Music Industry Report (subtitled "Let the Good Times Roll"), present a picture of continued health for the music industry based on continuing growth of the existing retail structures:

> We are not predicting any "revolution" in the music business over the next few years. However, we feel that the longer term merits of what remains a global growth business have become obscured by a flurry of concerns specific to individual markets that have little bearing on the global picture. Having examined a number of such issues in some depth we remain convinced that the "good times" which the industry has enjoyed for the last six years will extend into 1993 and beyond as continued CD growth and recovery in markets such as the US and the UK more than offsets deteriorating (but much smaller) Continental markets.

This positive prognosis contrasts markedly with a headline in the Financial Times of 27th February 1993:

> Digital Killed the Audio Star

The article reviews many of the systems discussed in the first part of this paper and likewise attempts to assess their possible impact on the fortunes of the music industry.

From a legal point of view it is important to remember that laws too frequently change more slowly than people's behaviour and that in the case of electronic delivery, such a delay could prove fatal to the music industry as presently constituted.

The current inadequacy of provisions worldwide on performance rights in sound recordings give a measure of the task to be accomplished. The proliferation of record

rental in Japan and other examples of the damage caused by the failure of copyright law to stay abreast of technology confirm the need for caution—and for the advancement of the necessarily complex studies to produce a workable and equitable legal framework for the music industry in the age of electronic delivery.

Thank you for the opportunity to present my views. I'll be happy to respond to any questions you may have.

STATEMENT OF JASON S. BERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., ACCOMPANIED BY NEIL TURKEWITZ, VICE PRESIDENT

Mr. HUGHES. Mr. Berman, thank you for your patience, and you may proceed as you see fit.

Mr. JASON BERMAN. Thank you, Mr. Chairman and members of the subcommittee, I applaud your leadership in deciding to hold this important hearing concerning performance rights in sound recording, and I look forward to working with you, staff, and other members of this subcommittee in finding ways to harmonize copyright protection with the challenges raised by advances in technology, and in the efforts to modernize the international legal framework for protecting sound recordings.

No one is more pleased than we are, Mr. Chairman, to use your own phrase, that we are talking. I stand before you today with a simple fundamental question directed both at the subcommittee and at all the interested private parties in the music community.

Will we collectively manage to get past the historical political hurdles and our own internal differences so that U.S. copyright law can be updated to keep pace with technology?

To do so requires extending to copyright owners of sound recordings the same rights of public performance enjoyed by all other copyright owners under U.S. law.

If I may offer my own observation, the answer to that question must be yes; if not, the consequence over time will surely be less recorded music being produced.

Mr. Chairman, I know that you are familiar with this book, it is the copyright law of the United States of America, and in section 106, entitled "Exclusive Rights in Copyrighted Works."

Item number four: "In the case of literary, musical, dramatic, choreographic works, pantomimes and motion pictures, and other audiovisual works, there exists an exclusive right to perform the copyrighted work publicly."

Unfortunately, there is in that a glaring omission: The omission is for sound recordings, the subject matter of our discussion here this morning.

Some 15 years ago, following the last major revision of U.S. copyright law, the Register of Copyrights delivered a report to Congress calling for the introduction of performance rights in a sound recording and suggesting that there were no viable policy justifications for failing to address this most glaring remaining inadequacy in U.S. law.

At that time, the register pointed out that this gap in U.S. law was extremely prejudicial to the interests of America's recording community and proposed granting record producers a public performance in the sound recording.

As Mr. Becerra pointed out earlier, unfortunately, simple justice is neither simple nor enough. In the 15 years that have passed, the

question of whether to grant performance rights to the copyright owner in the sound recording is no longer a question of providing additional rights or sources of additional revenue.

Advances in digital technology that permit the transmission of CD quality sound to the home threaten to completely change the way in which consumers get their primary access to prerecorded music.

Please understand that under existing U.S. copyright law, record companies and the performers who record for them have no rights in respect of the broadcasting or other public performance of their works. Songwriters, music publishers and composers deservedly get paid for the use of their works.

No payment is made to the record company or the performer, for there is no right. It is for this reason that I suggest that the issue of a performance right in a sound recording is not really about extending new rights.

On the contrary, by providing for a public performance right, we will merely be maintaining the status quo. And I want to take a moment, Mr. Chairman, to explain this seeming dichotomy. The reason is that what has traditionally been only an ancillary source of income and a right secondary in nature may soon become the means of making music accessible to the public, thus the eroding and perhaps even one day eliminating the sale of recorded music.

And, remember, it is only through the sale that the record producer, the performer and the musician gets paid. Unlike other works, an audiovisual work, for example, which has many markets: A motion picture is released theatrically, it goes to network television, it goes to pay television, it goes to videocassette.

We must sell the recorded product at retail. That is the single revenue stream. That stream is being jeopardized.

When one considers the international implications of the lack of a performance right in the country that produces approximately 60 percent of the world's recorded music, it is even more difficult for us to grasp the rationality of our existing law.

More than 60 of our trading partners have legislated public performance rights in favor of the rights owner in the sound recording, and the list continues to grow as countries upgrade their copyright laws. Most of them, interestingly enough, under pressure from the United States.

The European Commission has called for such rights in its draft broadcasting directive. And now you know that the WIPO document calls for an exclusive right. In 1989, nearly $120 million was collected in approximately 20 countries for the public performance of sound recordings. That number is much larger today and is expected to double within a few years.

U.S. repertoire accounts for approximately 60 percent of that music being broadcast, yet too frequently U.S. rights owners are denied payment by countries who choose to distribute money only to nationals of countries having a reciprocal right of public performance. The use of reciprocity to deny U.S. record companies and performers their deserved compensation is not an accident of history but a deliberate public policy that is designed to shortchange U.S. rightsholders. And under the terms of the long-outdated Rome

Convention, it is entirely permissible from an international legal standpoint.

The United States has undertaken major initiatives since 1968 to upgrade the levels of copyright protection around the world. It is in our self-interest to do so.

Mr. Chairman, I can personally attest, as Ralph has, to the fact these efforts have been severely hampered, even undermined by this glaring inadequacy in our own law. The lack of a public performance right in a sound recording. This omission is continually raised by our trading partners.

Ironically, the United States, who has the most to gain, was recently forced to block an agreement in the GATT that would had have created a new international obligation to extend public performance rights to sound recordings. This same foot shooting has occurred in drafting a model law in the World Intellectual Property Organization in the past.

As you pointed out, there is a new negotiation about to take place in Geneva, designed to create new copyright rules for the 21st century. And I am pleased, Mr. Chairman, at your desire and willingness to be in on the ground floor in helping to draft those rules.

Two protocols will be negotiated side by side, one for sound recordings and one for Berne subject matter. I don't think we can afford to be three-time losers.

As the country with the most at stake, U.S. negotiators must be armed to go out and fight for the establishment of these rights and not to fight against their adoption. It is long past the time that the United States joins the majority of its trading partners and ensures that U.S. nationals can secure access to foreign revenue pools, consisting in large measure of money that would be generated by the use of U.S. works.

If we fail to the gain access through this new round of international negotiations, or, in fact, if we fail to ensure the ability of copyright owners in sound recordings to control the transmission of their work in the digital domain, we run a great risk of completely undermining the financial rewards available to U.S. companies and of undercutting U.S. competitiveness. No one had a more poignant example of this than Mr. Schiff's own example of how the incentive system works as he described his law school career.

Every dollar lost to the lack of a performance right in the United States operates, in a way, as a direct subsidy to our foreign competitors. It is time we stopped being so generous and start giving this most productive U.S. industry the tools it needs to continue its market performance which results in billions of dollars being returned to the United States every year.

Mr. Chairman, in conclusion, I have here a listing of a survey of 102 countries around the world regarding performance rights in a sound recording. These are countries that have broadcasting rights, countries with public performance rights, countries with the right of performance via cable, and then, in this last sad category, countries with no sound recording performance rights. And the United States is joined in this ignominious group by the Congo, Cyprus, Ecuador, Gabon, Hungary, Iran, Lebanon Luxembourg, Malta,

Monaco, Nepal, Rwanda, Saudi Arabia, Singapore, South Africa, Sri Lanka, Syria, and a host of other countries.

I would like to submit this for the record, Mr. Chairman.

Mr. HUGHES. Without objection it will be so received.

[The information follows:]

SOUND RECORDING PERFORMANCE RIGHTS AROUND THE WORLD

COUNTRIES WITH BROADCASTING RIGHTS
Argentina*
Australia*
Austria
Bahamas*
Bangladesh*
Barbados
Belize*
Bolivia*
Botswana*
Brazil*
Burkina Faso
Burma*
Cameroon
Chile
Colombia
Costa Rica*
Czech Republic*
Denmark
Dominican Republic*
Egypt*
El Salvador*
Estonia
Fiji*
Finland
France
Germany
Ghana
Grenada*
Guatemala*
Guinea
Guyana*
Holy See
Honduras
Iceland
India*
Indonesia*
Ireland
Israel*
Italy
Jamaica*
Japan
Kenya*
Korea (South)*
Lesotho
Malawi
Malaysia*
Mexico
New Zealand*
Nigeria*
Norway
Pakistan*
Panama
Paraguay*
Peru
Philippines
Portugal*
San Marino*
Sierra Leone*
Slovak Republic*
Spain*
Sudan
Sweden
Switzerland
Taiwan*
Thailand*
Togo
Trinidad & Tobago
Turkey*
United Kingdom*
Uruguay
Zaire

COUNTRIES WITH PUBLIC PERFORMANCE RIGHTS (i.e., stores, nightclubs, etc.)
Antigua & Barbuda*
Argentina*
Australia*
Austria
Bahamas*
Bangladesh*
Barbados
Belize*
Bolivia*
Botswana*
Brazil*
Burkina Faso
Burma*
Cameroon
Chile*
China*
Colombia
Costa Rica*
Czech Republic*
Denmark
Dominican Republic*
Egypt*
El Salvador*
Estonia
Fiji*
Finland
France
Germany
Ghana
Grenada*
Guatemala*
Guinea
Guyana*
Holy See
Honduras
Iceland
India*
Indonesia*
Ireland
Israel*
Italy
Jamaica*
Kenya*
Lesotho
Malawi
Malaysia*
Mexico
New Zealand*
Nigeria*
Norway
Pakistan*
Panama
Paraguay*
Peru
Philippines
Portugal*
San Marino*
Slovak Republic*
Spain*
Sudan
Sweden
Switzerland
Thailand*
Togo
Trinidad & Tobago
Turkey*
United Kingdom*
Uruguay
Zaire

COUNTRIES WITH DISTRIBUTION BY CABLE RIGHTS
Argentina*
Austria
Bangladesh*
Barbados
Bolivia*
Brazil*
Burkina Faso
Cameroon
Chile
Colombia
Costa Rica*
Dominican Republic*
Estonia
Finland
France
Germany
Ghana
Guatemala*
Guinea
Ireland
India*
Ireland
Japan
Lesotho
Malaysia*
Nigeria*
Paraguay*
Philippines
Portugal*
San Marino*
Spain*
Sweden
Switzerland
Taiwan*
Thailand*
Trinidad & Tobago
Turkey*
United Kingdom*

COUNTRIES WITH NO SOUND RECORDING PERFORMANCE RIGHTS
Canada
Congo
Cyprus
Ecuador
Gabon
Hungary
Iran
Lebanon
Luxembourg
Malta
Monaco
Nepal
Niger
Russian Republic
Rwanda
Saudi Arabia
Seychelles
Singapore
South Africa
Sri Lanka
Syria
Tanzania
Uganda
United States
Venezuela
Zambia
Zimbabwe

Total Countries with Rights	75
Total Countries without Rights	27
Total Countries	102

* Exclusive right to authorize or prohibit

Mr. JASON BERMAN. Mr. Chairman, thank you very much.
Mr. HUGHES. Thank you very much, Mr. Berman.
[The prepared statement of Mr. Jason Berman follows:]

PREPARED STATEMENT OF JASON S. BERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Mr. Chairman and members of the Subcommittee, my name is Jason S. Berman, and I am the President of the Recording Industry Association of America. RIAA is the trade organization representing the interests of American record companies. Our members create, manufacture and distribute over 95 percent of the prerecorded music sold in the United States and 60 percent of all sound recordings created worldwide.

I am pleased to have the opportunity to appear before you today to address issues of paramount importance to the recording industry and its performers—the manner in which our industry will be able to operate in the new technological environment of digital audio transmissions, whether via broadcast, cable, telephone, satellite, or other means. I commend you Mr. Chairman and Mr. Moorhead and your staff for your leadership in examining these issues.

The current copyright law, long inadequate in its failure to recognize a performance right in sound recordings, does not provide the needed protections to create incentives in this new environment; legislative changes are required now, while these services are still in their formative stages. We have seen time and time again the difficulties of adjusting copyright rules after extensive business investments in new technologies have been made and consumers have begun to rely on them. Failure to act now may foreclose our ability to do so in the future. If the U.S. recording industry is to continue to be one of the shining stars of our nation's economy and cultural heritage, as well as the primary source of audio programming, this fundamental unfairness must be remedied.

Our nation's copyright law is intended to provide authors and publishers the incentive to create and disseminate new works of authorship for the public benefit. A U.S. copyright is, in actuality, a "bundle of rights," generally providing copyright owners with the exclusive rights of reproduction, adaptation, distribution, public performance, and public display. Unlike the owners of all other works protected under U.S. copyright law, however, U.S. copyright owners of sound recordings are not currently afforded the right to control the public performance of their works. Because of this historical anomaly, recording companies, those they employ, and their performing artists and musicians have no right to authorize, and receive no compensation for, such performances.

The right of public performance is recognized for every other copyrighted work capable of being performed, including motion pictures, books, computer software and musical compositions. Sound recording copyright owners are thus in the ironic position of being able to control the public performance of their works as embodied in music videos, but not the performance of the very same recorded music, without the visual images, over radio, digital cable audio services, or any other audio transmission services.

On the international front, it is now more important than ever for Congress to press forward for such legislation. Over the course of the past 8 years, the United States has been at the forefront of efforts to improve protection for intellectual property rights internationally. It is time to close this glaring gap in our own copyright law—the absence of a performance right in sound recordings—by granting this protection, which will bring revenue into the United States from foreign performance royalty pools and will preserve all the integrity of copyrights in sound recordings.

I. U.S. LAW UNFAIRLY AND UNREASONABLY PREJUDICES RECORD COMPANIES AND PERFORMERS

U.S. copyright law contains one glaring omission. Nowhere in Title 17 can you find a provision that grants to the copyright owner of a sound recording the right to authorize the public performance of his or her work. The sound recording is the only category of copyrighted work that does not enjoy this right. As a result, unlike the songwriter and music publisher who properly get paid every time a recorded song is played on the radio, the record company and performer receive absolutely nothing.

The creative contributions of those who are responsible for putting sound recordings into the hands of the public are no less valuable to transmission entities and no less worthy of recognition than are the efforts of those who create works that are protected by a performance right. For example, a performing artist's interpreta-

tion of a song is no less a contribution to, or an integral part of, the recorded product than is the composer's score and lyrics. Consider the various renditions of the song "Pink Cadillac" as recorded by Aretha Franklin, Natalie Cole and Bruce Springsteen, among others. Each rendition is a distinct and unique product because of the creative contributions of the principal vocalist and the supporting artists and musicians who breathe life into the musical composition.

The bundle of rights enjoyed by the copyright owner of a sound recording does not include a right enjoyed by all other copyright owners—the right to license public performances. This disparate treatment and injustice have always harmed record companies and performers. It is particularly harmful to older performers whose recordings are still popularly broadcast but whose records no longer sell. Current advances in digital technologies threaten to take this existing gap and turn it into a chasm. We urge this Subcommittee to act quickly to establish the exclusive right necessary to protect record companies and performers in this brave new digital world. It has always been patently unfair that broadcasters are free to use the recording industry's product to enhance their own revenues without payment for that use. This unfairness is exacerbated in the digital domain.

II. DEVELOPMENTS IN DIGITAL TECHNOLOGY THREATEN TO UNRAVEL EXISTING COMMERCIAL RELATIONSHIPS

Digital transmission systems have advanced to the stage where acts of broadcasting can be more akin to a means of distribution and less like our traditional notion of broadcasting. Digital transmission offers the opportunity to replace our traditional forms of distributing information. Everything capable of being reduced to zeros and ones, whether literary text, audio or audio-visual signals, or other information, can be delivered to the home digitally without the transfer of a physical product.

The ability to transmit "CD quality" digital audio signals challenges our assumptions about the means of delivering musical entertainment as we approach the 21st Century. Traditionally, the recording industry has looked upon the sale of prerecorded music on disc or tape as the primary form of delivering sound recordings to the public. The copyright law currently limits us to deriving our income solely from this form of distribution. As we will see, this limited scope of rights is outdated and will not provide sufficient incentive to invest the vast sums of money required for new musical productions.

The new digital audio broadcast, cable, and other transmission services take us far beyond traditional terrestrial analog radio broadcasting. With their ability to offer CD-quality music for "free" or for a marginal cost to the consumer as a result of the current inadequate legal environment, it does not take a great deal of imagination to foresee what choices consumers will make. Indeed, one need only listen to what these services say about themselves, plan to offer, and in some cases, are already offering.

For example, the programming of digital audio cable services, such as Digital Music Express (DMX) and Digital Cable Radio (DCR), involve multichannel offerings with a number of features that are designed to make performances of sound recordings in consumers' homes a viable substitute for album purchases. As one DCR brochure puts it, there will be "no need to spend a fortune on a CD library." How true that statement is! A DCR subscriber, paying less per month than the cost of one compact disc, can receive more than forty continuous, uninterrupted, CD quality channels of prerecorded music.

Moreover, one proposed digital audio broadcast service, Satellite CD Radio, itself has announced its intent to charge subscribers directly for listening to our members' product and to offer program guides, album hours, etc. Digital audio cable services also have the unfettered right under current law to do the same.

Patterned after the evolution of cable television services, they all can also further close the gap between transmissions and record store purchases by offering pay-per-listen services which, like current cable pay-per-view services, will enable listeners to obtain a direct, time-certain transmission of an album of their choice with a pricing structure likely to be cheaper than that of record stores. And just beyond that is the advent of on-line electronic delivery services, what some have called "audio on demand" or the "celestial jukebox," which will enable consumers to select music to listen to at their convenience without ever making an actual copy.

And where do the record companies and their artists fit into these new schemes? Satellite CD Radio President Robert Briskman said it best when, in an attempt to allay the fears of local analog radio broadcasters, stated that those who should worry are the makers of CDs and cassettes. Needless to say, the recording industry has heeded Mr. Briskman's message—we are worried!

Some may say that these services simply enhance consumer access to music and to increase the choices available. The emergence of niche marketing of diverse entertainment may be made possible on an unprecedented scale. The term "narrowcasting" could take on a whole new meaning in terms of music delivery systems.

Suppose, however, that rather than leading to increased investment in the production of recorded music these new services operated outside the control of the company producing the recordings and resulted in little or no financial return to the record company, the artist, and others who are involved in the creation of a recording. In this case, digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings. Over time, the uncontrolled messenger would strangle its host, as investment in the production of recorded music dried up in the absence of record sales.

III. THE INTERNATIONAL IMPLICATIONS OF THE ABSENCE OF A PERFORMANCE RIGHT IN SOUND RECORDINGS

The unfairness of this discriminatory treatment is all the more glaring since the United States, the world's leader in the creation of sound recordings, is one of only a very few developed nations that fail to recognize a performance right in sound recordings. Approximately 60 nations, including at least nine European Community member states, grant public performance rights in sound recordings. The failure of U.S. law is depriving our performers, musicians and recording companies of foreign revenues because many nations will not pay sound recording royalties to nationals of countries that do not have reciprocal performance rights. American recording companies, artists and musicians have thus either been excluded in part from royalty pools that distribute performance royalties in excess of $120 million in 1991, or are at risk of losing any current entitlement to these monies. And the size of these pools will grow exponentially over the coming years as the number of countries that recognize a performance right in sound recordings increases. Unless U.S. law is changed, American recording companies, musicians and artists can continue to be carved out of royalty pools.

The absence of a performance right in sound recordings also prejudices the position of the U.S. government in international trade and copyright discussions. Promoting high levels of intellectual property protection within both multilateral and bilateral fora is a major trade policy goal of the United States. However, our trading partners naturally question our commitment to such standards when we fail to accord sound recordings the basic protection of a performance right. Just as the United States' reluctance to accede to the Berne Convention once placed U.S. trade negotiators in the awkward position of asking for more copyright protection in the international arena than afforded at home, the absence of a performance right in sound recordings now similarly frustrates and embarrasses U.S. negotiators.

The lack of a performance right in a sound recording under U.S. law, and the consequent inability of the United States to credibly or forcefully argue that sound recordings are "copyright works" like books and motion pictures, have also been used effectively by our trading partners that wish to maintain a low level of protection for sound recordings. This low level of protection can take several forms—including short term of protection, no retroactivity, application of reciprocity rather than national treatment, and broad limitations on exclusive rights (e.g., exemption for "personal use"). Whatever the inadequacy, there is a common thread—the ability to reproduce, distribute or perform U.S. sound recordings without payment.

The current situation completely undercuts U.S. credibility by forcing the U.S. to take positions on international obligations with respect to sound recordings to protect our industry throughout the world that differ from our own law. Our position is often incoherent and the confusion is unnecessary. The American recording industry is too important to our nation's balance of trade to allow this situation to continue. The negative international consequences resulting from the status quo are but another reason why sound recording copyright owners should now be granted the long-overdue right of public performance.

IV. THE U.S. NEEDS TO MOVE QUICKLY IN ESTABLISHING A PERFORMANCE RIGHT IN A SOUND RECORDING

The present existence and announced future plans of digital transmission systems require us to establish a proper legal framework for assuring that our copyright law does not become antiquated and overtaken by technology.

It is not necessary, in my view, to know how consumers will respond to alternative delivery systems question before addressing the public performance aspects of this technology.

A central concept of copyright protection is that copyright owners, as creators or beneficial owners, should be able to authorize the commercial uses of their works. The theory being that the public benefits most when the copyright owner is granted the necessary incentive to invest in the creation of artistic works. Therefore, Congress should act now, before consumers and businesses rely too heavily on free and unfettered access to copyrighted sound recordings.

V. THE RELATIONSHIP BETWEEN PERFORMANCE RIGHTS AND THE AUDIO HOME RECORDING ACT

I want to briefly touch on one remaining subject before I end my remarks. I have focused exclusively on transmission of signals and have not addressed technology as it relates to the ability to control unauthorized reproduction by the consumer. There are a number of reasons for this—primarily that no consumer hardware solution presently exists nor is it likely that one will be developed that will function without broadcaster cooperation, whereas digital transmission systems are fully operational today—but I apologize for leaving such a void.

I will make two quick points about copy management systems and private copying levies. The first is that we very much appreciate the leadership shown by you Mr. Chairman, Mr. Moorhead and members of your committee in enacting the Audio Home Recording Act and the United States should encourage every country to immediately adopt similar laws to mitigate the prejudice due to unauthorized home copying. As consumer home taping has increased, providing such rights has become a critical ingredient in maintaining a copyright system in which the legitimate interests of creators are not prejudiced and a normal exploitation of the work is permitted.

The second point that I would like to make is that this law has never been, and should never be, mistakenly understood to be a complete solution to the problems raised by digital technology. All private copying legislation is premised upon the belief that it will serve to mitigate only some of the prejudice due to private copying, but not that it will be the way copyright owners get fully compensated for the electronic delivery or digital transmission of their works. It is premised on being an adjunct to the primary commercial exploitation of the work—whether that exploitation is the licensing for broadcast or the sale of a copy. Songwriters and music publishers benefit from these dual rights and record companies and their artists deserve to as well. The need for record companies to have the legal ability to license acts of public performance is thus separate and apart from the issue of private copying legislation. It would be too cruel an irony were the existence of private copying levies used to justify the failure to meaningfully address the underlying issues relating to primary commercial activity. I trust that this will not happen.

VI. CONCLUSION

Obviously, the digital transmission of recorded music has transformed the debate and underscored the need for public performance rights in a sound recording. Unlike traditional broadcasting, which is centered on transmitting performances in analog form, digital transmission also can act as a method of making works available to the public, on an individualized basis thus implicating distribution and rights. That this particular kind of performance represents something of a hybrid becomes even clearer when one considers, for example, that recorded music may be electronically delivered in a scrambled, high-speed form, thus not capable of being audibly perceived until it is paid for by the service subscriber.

The means of delivering the product should not affect the essential property interest even though the product may be delivered electronically and may never take the form of a physical copy. Some may suggest that a solution for governments would be to establish the level of remuneration to be derived from this primary commercial exploitation by establishing royalty rates rather than by giving the copyright owner the ability to license the use of his or her work.

Digital transmissions that are in effect electronic deliveries may well be viewed in a different manner than digital services that more closely resemble their existing analog counterparts. It may be, for example, that record companies will attempt to recoup investment for production of recorded music vis-a-vis subscription services, while simply seeking agreement from digital over-the-air broadcasters to not publish schedules or play more than a certain number of tracks from a particular recording.

I am reminded, Mr. Chairman, of the prescient remarks of Congressman Moorhead in 1984, announcing his support for the bill that created exclusive rental rights for copyright owners of sound recordings in the United States Congressman Moorhead commented that:

> The problems which creators and inventors face today is more than a clash between titan commercial interests. The larger and more difficult problem is the adaptation of old concepts of copyright law, to new and rapidly changing technologies. The problem today is that the public has access like it has never had access before but the creator is not receiving his just compensation. New technologies have brought the concert into the living room but not the box office...Nowhere is this more apparent than in attempting to adapt the present day use of phonorecords to the old copyright concept of the first-sale doctrine. The first-sale doctrine was never intended to be used as a means to create a secondhand rental market that, left alone, would eventually replace a primary sale market.

Ten years later, digital transmissions of recorded music give new meaning to the idea of technology bringing "the concert into the living room but not the box office." We must quickly close the gaps in U.S. legislation and international treaties that permit a party who has merely acquired a copy of a sound recording from thereafter transmitting the sounds contained therein without the authorization of the copyright owner. Failure to do so, and to do so quickly, will have dramatic consequences not just for those interested in copyright, but for society at large.

Thank you for the opportunity to appear before you today, and thank you again, for your leadership on this important issue. I would be happy to respond to any questions you may have.

Mr. HUGHES. Mr. Garnett, I wonder if you would explain, from a practical standpoint, the difference between an exclusive right and a right of equitable remuneration as applied to public performance right for sound recording?

Mr. GARNETT. Yes, Mr. Chairman.

The division between the two rights is essentially a historical one as it is formulated from a legal point of view. From a practical point of view, if one is focusing on the question merely of remuneration, then the practical differences are fairly minimal.

The process of collecting and distributing performance royalties in different parts of the world is a fairly mechanical process. Once the remuneration has been negotiated upon whatever basis, whether equitable or exclusive, then there are various options that one has in distributing that money.

But I would stress that the practical significance lies more in the nature of the exclusive right in relation to the problems that we are facing, and that is the ability of the owner of that right to authorize or prohibit the use of a particular recording in a particular environment. And that can have very practical consequences.

For example, there are many reasons why a producer would wish to withhold a particular sound recording at any point in time in a particular broadcasting environment. If, for example, it conflicts, as we have been told, that there is the possibility of promotional value in broadcasting, then that must be a ground for withholding a recording at any particular time.

So that the ability to control the use of the recording is the crucial element of the exclusive right.

Mr. HUGHES. Mr. Garnett, the March 12 WIPO memorandum on the new instrument recommends there be an exclusive right for digital transmissions and a right of equitable remuneration for analog transmissions. IFPI proposed to WIPO that a right of digital diffusion be provided for in the new instrument.

It seems to me the rights proposed in the March 12 WIPO memorandum come out to be, roughly, the equivalent, in practice, of your proposal; does its not?

Mr. GARNETT. That is correct, Mr. Chairman. The reason for that simply is that when we were submitting those proposals, we had very much in mind a response to the situation created by this new technology.

I would also stress that in submitting those proposals for a digital diffusion right, our eyes were as much on Washington as on Geneva. Because we believe this new instrument should provide an international framework which would accommodate the necessary rights throughout the world.

You correctly state that, as formulated, the WIPO proposal does not actually adopt the specific structure we proposed, but the end result is virtually identical.

Mr. HUGHES. Do you support the end result?

Mr. GARNETT. We do, indeed.

Mr. HUGHES. Mr. Berman, if a performance right was established in the United States along the lines you recommend, would this solve your present inability to receive royalties in the countries of the European Community?

Mr. JASON BERMAN. Mr. Chairman, it would certainly change the dynamic in our relationship with our trading partners.

Mr. HUGHES. How about in France?

Mr. JASON BERMAN. Well, 200,000 French farmers might not be interested in this, but Jacques Lang and others are. I suspect that we would have a very serious and difficult negotiation if, in fact, the nature of the right in the United States differed in any respect from the right in France.

Now, as you know, the French, among all else, take great pride in being able to deny U.S. rightsholders levels of compensation, and so we don't collect performance rights in France; we don't collect royalties in France, but there is a movement afoot to harmonize rights in the EC, and one of the rights likely to be harmonized would be this one.

Unfortunately, I would have to report to you that everything we know about that process leads us to believe that it would apply only to the European rightsholders.

So we would have a negotiation ahead of us, but, on the other hand, as we move forward through the new instrument, we may be in a position to set ground rules that would be applicable to all of us, and I think would, in the final analysis, benefit U.S. record producers and performers.

Mr. HUGHES. But there is no question the French would insist, as they have, that the performance be first fixed in France?

Mr. JASON BERMAN. The criteria for fixation is a principle, unfortunately, embodied in the Rome Convention. We talked earlier with the Register about the Rome Convention. I don't want to leave the impression that the only thing wrong with the Rome Convention is the fact that it provides for reciprocity in regard to public performance.

It has incredible deficiencies in regard to term of protection, in regard to the absence of a rental right. So I don't think we should be looking back at Rome in regard to principles of first fixation or first publication.

But in response to your question about France, I firmly believe we would have a negotiation.

Mr. HUGHES. The written statement of the National Association of Broadcasters claims, I don't know whether you have read it or not, their claim is that if past experience is any guide, precious little if any of the new sound recording performing royalties would flow to artists and performers. Record companies have established contracting patterns, they suggest, that maximize the benefits to them as opposed to artists.

What do you have to say about that?

Mr. JASON BERMAN. Sounds to me like a script written in Hollywood for the broadcasters.

First of all, I am deeply impressed by the sensibilities that the broadcasters have for the performers. I would hope it would extend to granting a public performance right in a sound recordings. The performers will speak for themselves, Mr. Chairman.

I will say that the ability of contractual parties, and particularly in regard to record companies and performers, is one that has worked very, very well; that performers, in the event there is a public performance in a sound recording in the United States, will be able to claim money, will be better off at the end of the day.

Mr. HUGHES. We ran into the same question in the DART legislation that we enacted last year.

My followup question would be, then, what protection should, if any, be put in the legislation to ensure that there is such an equitable distribution?

Mr. JASON BERMAN. We would be happy to work with the committee in that regard, Mr. Chairman. I think a lot of it would depend on the right that the committee would provide.

I think in the case of an exclusive right, my own view at this moment, would be that contractual arrangements would be sufficient.

In the case where we are dealing with another form of that right, and that is to say the limited aspect of performance being ancillary to sale, we would be happy to explore with the committee the nature of a statutory right of some sort.

Mr. HUGHES. Interestingly, the broadcasters also referred to Time Warner and Sony's $20 million investment in the Digital Cable Radio Co., an investment that gave them, I think, a 35-percent interest in the company. I believe after that investment DCR began to pay licensing fees to Time Warner and Sony.

I have three questions: First, since DCR has no obligation under the copyright law to pay a license fee for the performance of sound recordings, why do you think it agreed to the licensing fee?

Mr. JASON BERMAN. I suspect, Mr. Chairman, it agreed to the licensing fee in exchange for the equity interest. I would say that this is a peculiar set of circumstances, represented by the fact that two very large corporations had the ability to make an investment. It does not protect our member companies.

And I would also point out, Mr. Chairman, that I cannot believe that the record divisions of those two companies feel comfortable enough that this is the solution that they should be taking forward into the future. It is a measure of self-help. I don't know how else to describe it.

Mr. HUGHES. Do you know if DCR is paying licensing fees to record companies other than Time Warner and Sony?

Mr. JASON BERMAN. I cannot say with certainty, but my guess is it is not and will not.

Mr. HUGHES. It is my understanding that Digital Musical Express, a large digital audio cable company, wants an industrywide agreement. Does this willingness in the DCR agreement indicate that contractual arrangements can take care of your problems, at least domestically?

Mr. JASON BERMAN. I don't believe so, Mr. Chairman. A contractual arrangement based on what?

Yes, I have actually spoken to DMX and I have spoken to Mr. Rubenstein, and Mr. Rubenstein has made statements about his desire to not alienate the recording industry, and so forth, and those are very pleasant and very welcome. But in the absence of a statutory right, I don't know what obligations, on a continuing basis, they would be willing to incur or how we could enforce them contractually.

Mr. HUGHES. I understand that.

In the February 2d issue of Billboard, Sony Software's president is quoted as saying: "All the initial studies that we have seen show that the first tier of people who are subscribing to Digital Cable Radio, once they get the service into their homes, actually increase the purchase of music; that the people who are the early adopters of DCR are also the heavy purchasers of prerecorded music at retail."

Do you want to comment on that statement?

Mr. JASON BERMAN. Personally, I don't accept the judgment of the Sony Corp.'s marketing geniuses, and, second, if in fact it is true, then I think the rightsholder ought to be in the position to make that judgment for himself.

I am always leery of somebody else telling me what is in my best interest; what promotes the use of my product; why it is good for me.

Mr. Chairman, record companies are not that stupid and broadcasters not that smart that we could not establish that relationship if we had the right. And if, in fact, it had all of these promotional qualities, I imagine record companies would be happy to license it. Maybe for a penny, maybe for a nickel, maybe fee-free.

If, in fact, these things were right, it would be in the interest of the owner to do that.

Mr. HUGHES. The gentleman from California.

Mr. HOWARD BERMAN. Well, along those lines, I guess, in addition to the fact that there were other issues on RIAA's legislative agenda over the last 5 or 10 years, my guess is the reason this was not a front and center concern was the fact that the broadcasting, the performance of records in the traditional format by radios, probably did help to stimulate sales of records.

It is in this new format where all of a sudden it seems like a very logical assumption that over any serious period of time this will have the opposite impact of replacing the purchasing of sound recordings.

Mr. JASON BERMAN. As the chairman pointed out earlier in regard to how many times this issue has been around, if at first you don't succeed, try and try again. It was on our agenda a few years ago, quite frankly, when we saw at the very beginning the possible

impact that the digital cable might have on our business. It was, unfortunately, also at the very same time the DART legislation began to move.

And in discussion with our partners in that legislation, and with the committee, we made a conscious choice to say, OK, this one will be deferred; let's move forwards on the other one. But we are at a point now—and this committee will know better than anyone else the difficulties inherent in having the law catch up to technology. It was the beauty of what this committee did in regard to record rental.

Unfortunately, there we had the experience of Japan to point to. We don't have to have another experience. But the advent of these services, Congressman, do present that kind of danger, a qualitative difference, yes.

Mr. HOWARD BERMAN. Well, I won't get into the question of——

Mr. HUGHES. Would the gentleman yield to me?

Mr. HOWARD BERMAN. Sure.

Mr. HUGHES. Do you think we would have had the ease with which that legislation was adopted if the industry had grown to what it is today?

Mr. JASON BERMAN. No.

Mr. HOWARD BERMAN. The record rental industry, yes.

Mr. JASON BERMAN. No, Mr. Chairman, at the time the committee first adopted its modification of the first sale doctrine in 1984, there might have been 100 or so record rental shops in the United States. And, of course, you had the perfect example contrasting it with the video situation, where there were tens of thousands.

The answer is no.

Mr. HOWARD BERMAN. Except in the video, the question may be now that that particular format was not so bad?

Mr. JASON BERMAN. Right, but it is a totally different environment. A totally different marketplace.

Mr. HOWARD BERMAN. And we did not ban the audiovisual rentals when we banned the record rentals?

Mr. JASON BERMAN. But we have the example of Japan in regard to record rental. Since the imposition of the 1992 copyright law in Japan, which grants foreign rights holders for the first time a right in rental in regard to Japan, rentals are down and sales are up, and they are down in regard to the U.S. repertoire.

Mr. HOWARD BERMAN. I am not going to be able to come back after this vote, because of a budget caucus, and so I am going to ask you the question I was going to ask one of the last witnesses.

Could you imagine that an organization that successfully convinced the Congress last year to provide, in a sense, an exclusive right to protect the retransmission of programming that they didn't own, would come back this year and oppose a performance right for the people who did own the copyrighted work?

Mr. JASON BERMAN. No, Mr. Berman, it boggles my mind how the principle that the broadcasters were so successful in getting the Congress to adopt in regard to their relationship to cable, namely, retransmission consent, does not have some applicability to our relationship to radio.

I want to add to that, because of that right of retransmission consent, which the broadcasters so successfully secured last year, it

has now been extended by the FCC to radio. I want to read here from the March 27th Billboard:

"The FCC, in its March 11 meeting, included radio in its new cable regulations, giving back to the broadcasters the right to control the distribution of their product."

Mr. HOWARD BERMAN. Surely there was a stream of revenue for the owners of that product in that the——

Mr. JASON BERMAN. Not to my knowledge.

Mr. HOWARD BERMAN. Oh.

Mr. HUGHES. That is a vote in progress and we thank you for your testimony.

As always, you have been very helpful.

Mr. Garnett, thank you for coming such a long distance to be with us today to provide those invaluable insights.

Mr. JASON BERMAN. Thank you, Mr. Chairman.

Mr. HUGHES. The subcommittee stands in recess for about 15 minutes.

Mr. HUGHES. Apparently, we have a series of votes, so rather than starting and stopping again, let's take a lunch recess and come back at, let's say, 1:15.

[Recess.]

AFTERNOON SESSION

Mr. HUGHES. The subcommittee will come to order.

I want to apologize for the delay, but as you probably have noticed from the bells and lights, we have a series of votes, all of which are essential, and I expect that we are going to continue to have votes the rest of the afternoon, so you can expect additional interruptions, and I apologize for that.

Our next panel consists of Mark Tully Massagli, president of the American Federation of Musicians; and Bruce York, the national executive director of the American Federation of Television and Radio Artists.

The AFM represents instrumentalists who appear on records, while AFTRA represents the vocalists who appear on records.

Mr. Massagli—am I pronouncing that correctly?

Mr. MASSAGLI. Massagli.

Mr. HUGHES. Mr. Massagli was elected president of AFM in 1991 and previously served as an AFM vice president and is a member of the International Executive Board. He was born in Perth Amboy, NJ, no less, and has been a professional musician for most of his life.

Mr. York has been the national executive director of AFTRA since 1990. Previously, he served as an attorney for the Air Line Pilots Association. He received his law degree from George Washington University.

We welcome both of you, and we have your statements, which, without objection, will be made a part of the record.

You may proceed as you see fit, but I would appreciate it if you would try to summarize for us so that we can get right to the questions.

Mr. Massagli.

STATEMENT OF MARK TULLY MASSAGLI, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL–CIO–CLC, ACCOMPANIED BY ART LEVINE, COUNSEL, AMERICAN FEDERATION OF MUSICIANS AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Mr. MASSAGLI. Thank you, Chairman Hughes.

For the purposes of introduction here, the gentleman to my right is Mr. Art Levine, who is counsel to both AFM and AFTRA in this matter before us.

I am the president of the American Federation of Musicians of the United States and Canada, a labor organization that represents approximately 180,000 professional musicians in approximately 400 affiliated locals, located in every State in the Union, the District of Columbia, Puerto Rico, and Canada.

Because the time is so important to these hearings, I have reduced the comment that is before you and will try to summarize and be very brief.

I would like to, first of all, enter into the record with the permission of the Chair, the following excerpt in the AFL–CIO policy resolutions on performance rights, and it reads as follows: "Under current copyright law pertaining to sound recordings, the holders of copyright are the composers of the music and the producers of the sound recordings, but the performers of the music in a recording have no copyright status.

"After an exhaustive study in 1978 of the equities among authors/composers, performers and producers of sound recordings, the Register of Copyrights and the Librarian of Congress recommended to the Congress that the copyright laws should be amended to provide performance rights, subject to compulsory licensing in copyrighted sound recordings, and that the benefits of this right be extended both to performers, including employees for hire, and to record producers as joint authors of sound recordings.

"The basis for this recommendation was that the performers of sound recordings are as much a creator of the sound recording as the author or producer and should be entitled just as much to the fruits of their labor." And that resolution was adopted at the 1991 Convention of the AFL–CIO.

With your permission, we would like to have this entered into the record.

Mr. HUGHES. Without objection, so ordered.

[The information follows:]

PERFORMANCE RIGHTS

Under current copyright law pertaining to sound recordings, the holders of copyright are the composers of the music and the producers of the sound recordings, but the performers of the music in a recording have no copyright status. After an exhaustive study in 1978 of the equities among authors/composers, performers and producers of sound recordings, the Register of Copyrights and the Librarian of Congress recommended to the Congress that the Copyright Law should be amended to "provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended both to performers (including employees for hire) and to record producers as joint authors of sound recordings." The basis for this recommendation was that the performers of sound recordings are as much a creator of the sound recording as the author or producer, and should be entitled just as much to the fruits of their labor; therefore, be it

RESOLVED: That the AFL–CIO urges its affiliates to work for the introduction of legislation to amend the Copyright Law to provide for performance rights in sound recordings.

Mr. MASSAGLI. Thank you very much.

We would like to thank you, Mr. Chairman, for what you did by way of the introduction of and the passage ultimately of the DART legislation, which for the first time in the U.S. history, provides recognition of performers in copyright legislation. We think that is a marvelous piece of legislation, long overdue, and much needed, and it is as an adjunct to what is before this committee today.

The American Federation of Musicians vigorously supports a change in the Copyright Act of 1976 to provide a performance right in sound recordings. Current copyright law grants the composers of works the performance right in the sound recordings so that they receive compensation for the exploitation of their creative work when it is publicly performed, but the creative work of the recording musicians and vocalists breathing life into the musical composition is not similarly compensated.

The distinction is inequitable and unfounded, as the Register of Copyright correctly recognized 15 years ago.

The need for a change in the law is even more important now than it was then. Musicians repeatedly have been displaced by technological change in the use of recorded music.

Now technological change endangers us again, this time in the form of new digital delivery systems that threaten the income we receive from recording and even the recording industry itself.

Moreover, the current state of our law deprives U.S. companies and citizens of foreign royalties and will likely keep us from playing a leadership role in current international negotiations on performance and performers' rights. This highlights the need for immediate congressional action.

With that, Mr. Chairman, I will not go further in the interest of the very important time that must be spent on the balance of the testimony today.

Thank you.

Mr. HUGHES. Thank you very much.

[The prepared statement of Mr. Massagli follows:]

PREPARED STATEMENT OF MARK TULLY MASSAGLI, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL–CIO–CLC

Good morning, Chairman Hughes and members of the Subcommittee. I am Mark Tully Massagli. I am the President of the American Federation of Musicians of the United States and Canada, a labor organization that represents approximately 180,000 professional musicians in approximately 400 affiliated locals located in every state in the Union, the District of Columbia, Puerto Rico and Canada.

I speak to you today from the vantage point of forty years of experience in the musical entertainment industry. I first went on the road as a professional musician in 1952, and spent nearly fifteen years as a full time performing musician on the road and in Las Vegas. My concern over the difficulties musicians face in earning a living led me to get involved in the Las Vegas local of the AFM, where I served as an officer for over twenty years before taking over the Presidency of the AFM in 1991. In these various roles, I have witnessed the economic problems musicians face in all their spheres of employment—whether it be performing live music in the casual engagement field, in symphony orchestras or with touring shows, or recording music in the record, movie or television industries.

I want to thank the Subcommittee for this opportunity to explain why the AFM supports—vigorously—a change in the Copyright Act of 1976 to provide a performance right in sound recordings. As you know, under current copyright law, the

owner of the copyright in a play, movie or musical composition has the exclusive right to perform that work publicly or to authorize another to do so, but the owner of the copyright in a sound recording has no such right. The result is that while the author of a play or composer of a song receives payment when his or her creative work is publicly performed by others, the artists and entitities that create records and CD's—the musicians and vocalists who perform the music on the recording, and the record companies that make the records—receive no remuneration for the public performance of their product.

We long have believed that situation to be inequitable, and my predecessors have appeared before Congress numerous times in the past to express the view that musicians—who, as I will explain further in my testimony today, have experienced a decades-long decline in work opportunities caused by technological change—especially suffer from the lack of compensation for the repeated performance of their creative product. That is even more true today, because, once again, technological changes threaten to reduce even further our ability to earn a living as musicians. And, paradoxically, the state of U.S. law prevents musicians from receiving royalty payments from other countries that would in some measure ease their economic situation. Our failure to provide artists with any right to receive compensation for the public performance of the sound recordings on which they play keeps American musicians from receiving performance royalties from many foreign countries based upon the performance of American records and CDs in those countries.

The history of professional musicians and the entertainment industry in this century contains a tragic irony at its core: the use of recorded performances increasingly replaced the demand for live performances, and as a result, musicians were driven out of work by their own product. For example, in the early days of radio, local radio stations, and later the network radio stations, often employed full time staff orchestras—some of which, like the NBC Symphony conducted by Maestro Toscanini, became quite renowned—as well as casual musicians to perform live music over the air. But increasingly the radio stations and networks decided, instead, to fill their needs by playing records, with the accompanying decrease in radio employment for musicians. Throughout the 1930's and 1940's, the AFM fought hard to preserve radio employment, but by the early 1950's, radio employment of musicians was nearly nonexistent. A musician who had performed live music on the radio for many years as part of the NBC Symphony could listen to himself or herself on the radio while he or she sat home, unemployed, and the radio station played records on which those musicians had performed. Similarly, the advent of "talking pictures" destroyed the employment of musicians in movie theaters in the 1930's. And, early on in the development of television, live musicians faced the increasing use of "canned" music to accompany programming.

Musicians still suffer from the displacement of work opportunities by the public performance of records and CDs. It no longer seems realistic to contemplate widespread radio employment of musicians. But, hotels, lounges and other establishments that until very recently employed musicians to provide live musical entertainment increasingly are switching to the use of recorded music, and musicians continue to lose work opportunities in the live entertainment field to the expanded use of recorded music. As recently as 1989 in my home town of Las Vegas—which bills itself as the live entertainment capital of the world—AFM Local 369 fought a bitter struggle, including a lengthy strike, over the replacement of musicians by recorded music in many entertainment rooms.

Mr. Chairman and members of the Subcommittee, I know of no other industry where technological change brings not only loss of employment, but also a loss of employment resulting from competition with your own product. But that is exactly what has happened in the past, and regrettably continues to happen, to musicians. The creative efforts of performers in a recording session breathe life into a musical work—which consists of mere notes on paper until the moment of performance. Then, users are allowed to exploit that recording commercially by playing it publicly instead of hiring live musicians, and, moreover, they are entitled to do so without even any obligation to compensate the perfomers whose talent created the work. Musicians as a group take a double hit: our opportunities for live performance jobs dwindle, and as recording musicians we are never compensated for the exploitation of our product by those who play it publicly.

And, the situation is about to get worse. Once again, new technology has appeared that threatens the livelihood of musicians and the very industry they work for. In the past few years digital audio music services have appeared that, unlike radio, can offer CD-quality music in the home. For a monthly subscription fee, these services will provide commercial-free, deejay-free, CD-quality music digitally transmitted into the home over coaxial cable. Under current law, these digital audio subscription services—like radio stations and other users of recorded music—will be

able to exploit commercially the creative efforts of performers on sound recordings without any compensation to them or to the record companies. But unlike radio broadcasts, these digital audio subscription services have the potential ultimately to deeply undermine or even replace record and CD sales, because the subscriber will be able to enjoy CD quality music at home without having had to buy CDs in the first instance. Reductions in record and CD sales will adversely affect recording musician income. Worse, if we reach the point where new music delivery technologies replace the sale of records and CDs, record company employment of musicians could end just as radio employment ended in the past.

When the issue of performance and performers' rights in sound recordings has arisen in the past, critics argued (among other things) that such compensation was unnecessary because musicians and other performers already were well compensated by royalties from record sales. That claim was false in the past—as the 1978 Report of the Register of Copyrights indicated—and it is false today.* In order to show you why that is so, I will explain the basic structure of compensation for the average musician in the recording industry.

First, despite the popular image of wealthy recording artists, only a very few musicians reach stardom and the ability to command high paying recording contracts. The vast majority of recording musicians—even the very gifted ones—remain unknown to the public and simply work for collectively bargained scale wages and trust fund payments. Moreover, most of them do not work steadily as regular, year-round employees of a particular record company, but only episodically whenever they are hired for a particular recording session. A few individual musicians with sufficient leverage can, in addition to receiving scale wages or, on rare occasions, double scale, bargain with the record companies for some rights to royalties from the sales of the records upon which they perform. Again, the number of these "royalty artists," as we refer to them, is extremely small. And usually, the royalties they receive from sales are quite small as well—first, because their individual contracts invariably allow the record company to recoup its development costs before paying any such royalties, and second, because not all recordings are hits. Finally, please keep in mind that any royalties that do result from sales drop off when sales drop off. A recording may be publicly performed extensively for many years after its sales have dwindled, but that commercial exploitation does not result in any sales royalties or any other income to the performers.

A moment ago I referred to certain trust fund payments received by musicians in addition to scale wages. Since the early 19609, the Phonograph Record Labor Agreement has required signatory employers to make contributions to an independently administered fund known as the Phonograph Record Manufacturers' Special Payments Fund. A phonograph recording company's contributions are based on its sale of records in the calendar year, calculated in accordance with a collectively bargained formula. The Fund is then distributed by the administrator to individual musicians, based on a formula that gives each musician a share of the total distribution that is proportional to that musicians share of all scale wages that were paid out over the previous five-year period. Obviously, these payments are not sales royalties—the formula does not provide a musician with compensation based on the sales success of the specific recordings on which he or she performed. But the Special Payments Fund was itended to, and does, provide recording musicians with some share of the benefits of record company sales success.

Scale wages and Special Payments Fund checks do not make recording musicians rich—far from it. The 1978 Report of the Register of Copyrights found that although a few musicians who work in the recording industry do very well, most were clustered in the lower levels of the income ladder, with many near the poverty level. Nothing much has changed since then. And, obviously, the threat posed to record company sales and profitability by the new digital audio delivery technologies also poses a threat to musician income and even to the existence of recording jobs for musicians.

Mr. Chairman and members of the Subcommittee, professional musicians are beleaguered in nearly every area of endeavor open to them. As I have already said, live music performance opportunities decrease every year. Symphony employment is under threat all over the country by the scarcity of public and private funds. And now, recording income and even the recording industry are threatened by new technology.

It has never been just for the creative work of musicians on sound recordings to be treated differently than the creative work of composers. It has never been just

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*Staff of Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 2d Sess., Report on Performance Rights in Sound Recordings (Comm. Print 1978).

to allow the former to be exploited by users who are allowed under our law publicly to play those recordings for profit with no attendant obligation to compensate the performing artists. That loss of income over the years has been one that recording musicians could ill afford. *All* of these conclusions were reached by the Register of Copyrights fifteen years ago, but musicians are still waiting for Congress to act on the Register's recommendation to enact a performance right in sound recordings. While Congress may not be able to solve all the problems of musicians and the arts in America, this injustice of our copyright law can, and should, finally be corrected.

Moreover, for Congress to correct this situation would be of enormously significant benefit to U.S. trade. The United States lags far behind many other major producing nations in its copyright treatment of sound recordings. At least sixty other countries provide some form of performance and/or performers' rights in sound recordings, but refuse to pay royalties on the performance of U.S. sound recordings because their sound recording products would not receive reciprocal treatment here. In this balance of trade issue, the United States is the big loser, because U.S. sound recordings are the majority of those produced and performed worldwide. From the point of view of professional musicians, it represents a significant loss of income that we can not afford to forfeit. There is a compelling need for Congress to address this issue now. As I know you are aware, international negotiations for a new international instrument dealing with performers' rights are now underway. The United States will be unable to achieve a leadership position in those negotiations while its domestic copyright law remains far behind that of the international community.

I have not come before you today advocating specific details of any proposed performance or performers right. I hope that this hearing represents the early stages of Congressional action on this issue, and I simply have tried to share with you the history, economic reality and concerns of professional musicians. We stand ready to work with Congress and industry in the design of appropriate domestic legislation to meet the needs of artists, industry, and the United States as a whole in its international trade relationships. Thank you very much for your time and attention.

Mr. HUGHES. Mr. York, welcome.

STATEMENT OF BRUCE A. YORK, NATIONAL EXECUTIVE DIRECTOR, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO

Mr. YORK. Thank you.

Good afternoon to you and members of the committee.

On behalf of myself and Reed Farrell, our president, and the 80,000 members of the organization, I would like to also summarize or highlight a couple of portions of our written statement for you.

AFTRA representing news persons, broadcasters, deejays, announcers and the like, operating as extensively as it does in the broadcast business, and with a 160 contracts with record labels, I think is in a unique position to assess the issues that are in front of us today. We operate extensively in both the broadcast and recording industries.

Experience leads us to conclude that the legislative framework has to change and it has to do it as quickly as we can manage to get there. Anyone who looks objectively at the issues in front of us, including the history of the creation and the distribution and the private copying of sound recordings, would have to ask why performers are, along with the producers of sound recordings, treated differently than others.

Unlike the other copyright owners, of course, we are not permitted to control or authorize or receive compensation for the distribution of that work, and that anomaly in these days is profoundly unfair. For example, the most financially successful radio station in this country in New York plays a steady stream of oldies, that is 1950's and 1960's rock and roll.

There are few sales, if you look at the actual sales of this material, any more, and yet despite the financial success and the repeated playing of those works, performers who brought life to those works get no compensation from that.

AFTRA's written comments make a very detailed effort to recount the history and predict what is coming, and we think that is important. I won't repeat it here, but we think with that historical perspective, you can paint a very stark picture of how much the world is changing and why there is an urgency or an immediacy to the work this subcommittee is doing.

And just to sum up that history, analog recordings, no matter how advanced, could not record sound as precisely as it was played live, and the transmission of music by broadcast stations, likewise, suffered from physical and economic constraints. Home recording equipment, despite all its advances, still could not capture the sound as accurately as if you would go out and purchase the actual recording. And, as a consequence, consumers were generally able to possess the recordings only if they went and purchased a copy.

By the end of the 1970's, 500 million copies of long playing and singles were sold each year. Throughout that time, however, as those sales grew, along with our system of radio broadcasting, vocalists and musicians, naturally, became very much more concerned with the extensive use of their performance by radio stations, and it was in contrast to the schemes that were in place for other people who contributed to that work.

Whatever the differences artists had with their record labels, we realized it would be difficult for us to receive any benefit if those labels were not also receiving a benefit from the repeated distribution of that product. Our most recent phase, and it is revolutionary, makes that problem even worse.

We are taking a quantum leap forward in technology. A digital linear code of 16 ones and zeros, when it is played back, will represent almost precisely the same sound as when it was recorded.

One author, kind of comically said, without question CD wins the award for the best audio technology not invented by Thomas Edison. I think that was particularly apt.

Let me go quickly, in the next minute or so, to four profound differences between digital technology and everything that came before: First, the prerecorded CD, CD–ROM, CD–I formats offer perfect digital sounds.

Second, the distribution system will allow users to access the information, the recording, on demand without ever buying a copy.

Third, digital recording media allows people to record it perfectly.

And, fourth, something we have not talked about too much today, but we should talk about in further meetings, and this is a vast difference from anything before, the end-line consumer will be able to manipulate and use that recorded information or recorded music in any way they want in the future.

Just to sum up. Although the work of the performer really contributes to the end product, this is the worst of all possible worlds. Not only can consumers listen to perfect copies, or obtain perfect copies, but that consumer can now manipulate the work as well. Therefore, performers suffer the double indignity of not being paid

for their work and having someone else be able to pirate their creative efforts.

The new technology will, I think, be very exciting. It will entertain us and inform us in ways we never dreamed possible. But it is our strong position that we have to get a start on protecting the creative efforts, in this case, the vocalists and musicians who make it all possible, and we cannot waste time in doing it.

I would like to thank you for your attention today and the opportunity of appearing, and as Mark did, thank you very much for the work that this committee, the effort and the energy that went into taking care of one piece of this puzzle, the Audio Home Recording Act of last year.

Mr. HUGHES. Thank you, Mr. York.

[The prepared statement of Mr. York follows:]

PREPARED STATEMENT OF BRUCE A. YORK, NATIONAL EXECUTIVE DIRECTOR, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL–CIO

Good morning Chairman Hughes and members of the Subcommittee. On behalf of myself, Reed Farrell the National President of AFTRA, and the 80,000 members of our organization, thank you for the opportunity to address you this morning.

As most of you know, AFTRA is the national labor organization representing news persons and performers employed in broadcasting, entertainment, recording and the advertising industries. AFTRA has approximately 400 collective bargaining agreements with the networks, FOX, and broadcast stations—both television and radio—approximately 160 contracts with record companies and producers that cover both background vocalists and featured artists, around 500 contracts with advertising agencies and advertisers, and thousands of contracts with independent producers of entertainment programming, advertising, and educational or industrial material.

Our National President, Reed Farrell, brings the perspective of a professional who has worked in the musical entertainment and broadcasting business, especially radio, for almost 40 years. While I have come to this business more recently, I am charged with the responsibility of advising our members and governing bodies on all issues of collective bargaining, labor relations, policy, strategy, and legislation, among other things. I have therefore had to familiarize myself with the three areas I believe most helpful in understanding any area. Those are the economic, legislative/regulatory, and technological frameworks of the areas in which our organization functions. This process has allowed me to study to some extent the historical developments in the industries in which we work, and contemplate the changes that will occur in the future in each area.

This combined experience leads AFTRA to conclude that the legislative framework must change to address changes in economics and technology that have already arrived. That is why AFTRA and its members strongly support amendments to the Copyright Act that would provide a performance right for sound recordings.

I would like to share AFTRA's perspective by looking briefly at the history of the creation, distribution and private copying of sound recordings in our country.

The late 1800's saw the advent of a lively recording industry. Early recordings, first cylinders and then flat shellac discs, were relatively poor quality due to the materials used and the acoustical methods of recording and reproduction of sound. In short, a pattern of sound energy was mechanically transmitted to a stylus through the vibrations of a diaphragm. The stylus cut a corresponding pattern on the disc or cylinder.

Production of sound simply reversed the recording procedure. A steel needle riding in the record's grooves transmitted its vibrations through mechanical linkage to a diaphragm which set the air in motion in a resonating chamber such as the famous "morning glory" horn seen on old "victrolas" made by the Victor Talking Machine Company founded in 1898 and other companies.

The broadcasting of sound recordings had equally inauspicious beginnings. Dr. Lee DeForest, generally regarded as the father of radio broadcasting, transmitted phonograph music from the Eiffel Tower in 1908. It's doubtful that this experimental broadcast was heard by more than a handful of people since radio receivers had yet to be mass produced. He also built and operated an experimental radiotelephone station in this country in 1916 with which he "broadcast" phonograph records and announcements. In his announcements DeForest credited the Columbia Gramaphone Company for the recordings and described the products of his own

company to constitute the first commercial messages. Shut down during World War I, DeForest resumed broadcasting in 1919 only to be forced off the air by a government radio inspector who told him that "(t)here is no room in the ether for entertainment".

Developments in recording technology accompanied the growth of the broadcasting business in the late teens and early 1920s. Electronic components were substituted for the crude mechanical or acoustic parts of early "talking machines". A microphone and pickup head replaced the mechanical linkage to translate minute mechanical vibrations into electrical impulses that could be amplified with far less distortion. Around the same time technology made receivers widely available for the first time in the shape of "radio music boxes". Quickly, the radio industry began to gain momentum.

Over the early years of sound recordings, improvements in recording fidelity and dynamic range came as a result of refinements in recording technology as well as electronic and mechanical components. However, recordings still relied on the same acoustic principles—a needle vibrating in a groove. Dynamic range was limited and high and low frequencies were not reproduced well or at all.

The broadcasting of sound recordings was equally limited. While there is some dispute as to the very first broadcasting station, credit is generally given to KDKA which went "on the air" from the roof of the Westinghouse factory in Pittsburgh on November 2, 1920 playing a mix of banjo music, phonograph records and providing Harding-Cox election results. No matter which station properly claims the distinction of being first, suffice it to say that the distribution system that existed in the 1920's and 1930's was exceedingly small by today's standards. In 1945, twenty years after the start of commercial radio broadcasting, there were fewer than 1000 commercial radio stations licensed to operate in the United States compared to ten times that number today.

Of course, it still was not possible for ordinary citizens to copy sound recordings for themselves since mass produced recording technology was many years away. Those who wanted their own copy of a recording had to buy it for their collection.

The late 1940's ushered in a new period for the creation, dissemination, and, for the first time, the private copying of sound recordings and transmissions. It was 1948 that recording technology evolved significantly with the commercial introduction of "microgroove" recordings for home use.

"LP" (long play) and "EP" (extended play) recordings represented several major improvements in the creation of sound recordings. Old shellac records were thick, heavy and brittle. New recordings used vinyl plastic, a much lighter, cheaper, more durable material. Old records operated at 78 RPM, a rate with little significance except that it was fast enough to provide relatively uniform turntable speed with inexpensive motors and equipment. New microgroove recordings with 2-3 times as many grooves to the inch, operated at 33⅓ or 45 RPM. Importantly, the new 33⅓ RPM recordings were also easily adaptable to the broadcasting business since they permitted the recording and replay of a full fifteen minute radio program on one side of a 16 inch disc.

These new LP and EP records were coupled with improved pickup heads which allowed much lighter needle pressure and, consequently, less wear and noise from the record. Put together these developments represented substantial strides towards higher fidelity recordings at lower price. The noise inherently created by the mechanical action of the needle riding in the groove of the record could not however be eliminated.

Magnetic recording tape technology, commercially developed at the same time, was seen as a remedy for much of this problem. Now the recording medium could be any sort of flexible metallic substance such as wire or tape which could be passed over a recording or pickup head. In the early 1950's a plastic tape with a thin metallic coating was introduced and quickly replaced all metal recording media. This technology also facilitated the advancement of motion pictures when a magnetic strip for sound was added to motion picture film.

The development of magnetic tape was profound for reasons other than the creation of recordings. For the first time in history the end line consumer could record or duplicate sound recordings or transmissions at home in addition to purchasing pre-recorded music on tape. Of course, tape machines, no matter how advanced, could only record the sounds that were forwarded to it. They still suffered from having to record music that was created or transmitted in a form that was far from perfect.

During the 1960's and 1970's the technology of creation and dissemination of sound recordings continued to improve and grow more sophisticated with stereo and FM broadcasting. For the first time, consumers were able to purchase what marketers described as "concert hall" sound. In the late 1960's tape technology allowed ma-

chines to become smaller, lighter and less complicated with the introduction of cassette players and recorders. The new opportunity to record and carry your favorite music with you in the car without commercial interruption popularized the home recording of music. Compared to what existed before, the sound was remarkable but a new and even more dramatic development was about to come.

Before going on it is important to stop for a moment and discuss the impact of this system of sound recording, distribution and copying on performers.

As discussed, analog recordings, no matter how advanced, could not record sound as precisely as it was played live. The transmission of music by broadcast stations likewise suffered from physical and technological limitations as well as the constraints of the commercial marketplace. Home recording equipment, despite its continuing improvement, was not capable of capturing sound as accurately as the disc produced from a master recording and purchased in a store. As a consequence, consumers were generally able to own quality copies of sound recordings only if they were willing to purchase copies of recordings at a retail outlet. In fact, by the end of this period there were over 500 million copies of LP/EP's, cassettes, and singles sold each year.

As our domestic system of radio broadcasting grew, vocalists and musicians naturally became more and more concerned with the extensive use of their performance by radio stations without compensation in contrast to others who contributed to the recordings creation. Performers were only partially assuaged by the persistent claim that broadcasting of their work promoted the sale of that work at the retail outlet. Although star artists' contracts typically provided for royalties from the sale of recordings, the recoupment of production and marketing costs along with the use of creative accounting principles meant that few recording artists saw any money from the sales of recordings. The size of a royalty artists' advance was also typically tied to the level of sales of past records. While background vocalists are also contractually entitled to additional payments when sales of recordings reach certain levels, these payments have likewise been few and far between. The sales statistics outlined above, however, were used as powerful arguments by broadcasters.

The creation and distribution of compact discs (CD's) in the early 1980's resulted in a quantum leap forward for recording technology. A digital linear code consisting of a series of sixteen zeroes and ones, when reproduced, represents almost precisely the same sound as when it was recorded. True concert hall sound was now possible in the home and limited not by the recording, but rather by other equipment such as speakers. One author said that "Without question, CD wins the award for best audio technology not invented by Thomas Edison."

The impact was immediate. In 1985 three times as many LP's were being sold as CD's. In 1992, only a few years later, over 400 million CD's a year were sold (a 20% increase over the prior year) and the sale of vinyl discs has dwindled to an almost non-existent 2 million units per year. In 1992 the sale of CD's also exceeded the sale of pre-recorded cassettes for the first time in history. There are now almost 100,000 titles recorded on digital compact disc and the number is growing every day.

Our distribution system for sound recordings is fast approaching the day when it too fully embraces digital technology. Known as digital audio broadcasting (DAB) or digital audio radio (DAR), it offers the advantage of transmitting high quality digital sound without any of the problems associated with present technology (transmission interference, limited geographic reach, or the high power demands of present transmission technology). Digital audio radio can be broadcast from terrestrial towers, satellites, or through cable wired to the home. A few cable systems, Digital Cable Radio, Digital Planet, and Digital Music Express, have already started service offering as many as 50 channels of commercial free, digital sound, from soft rock to classical music, in different parts of the country for a relatively small monthly subscriber fee. Everyone from traditional broadcasters to the telephone companies have expressed interest in participating in this part of the business and, as recently as February, 1993, Time Warner Cable and Sony Software Corporation paid $20 million to buy a piece of Digital Cable Radio. Satellite services, expected to commence service in 1995, offer even more flexibility and choice for the consumer. They will permit us to get in our automobile in New York and drive 2500 miles to Los Angeles without ever losing reception of 50 channels of perfect digital sound.

In its 1991 report entitled "Copyright Implications of Digital Audio Transmission Services", the Registrar of Copyrights concluded properly that the combination of digital audio recordings and DAB was very likely to impact the retail sale of sound recordings adversely. The President of Satellite CD Radio, Robert Briskman, states that "(b)roadcasters have little to fear from Satellite CD Radio...It will have only minimal effect on its land-based counterparts because its revenues will come from

subscriptions, not advertising," he says. "Those who should worry are the makers of CD's and cassettes."

As if the digital creation and distribution of sound recordings isn't revolutionary enough, a few months ago consumers were offered the first opportunity to digitally duplicate or record music in their homes with the introduction of Digital Compact Cassettes (DCC) by Philips, Digital Audio Tape (DAT), and the digital Mini Disc (MD) from Sony. All of these formats offer pre-recorded CD equivalent sound and the ability to use blank media to record copies of one's favorite music at home.

As discussed above, compensation of both star and background vocalists is generally tied, in one manner or another, to the sale of recordings. The impact to performers of technology which allows consumers to avoid the retail purchase of recordings should be painfully obvious. For the first time in history consumers have the ability to duplicate perfect recordings at home without ever buying a copy of that recording.

The march of technology is not stopping or slowing. New competing digital technologies now allow the purchaser of that technology to interact with and/or manipulate data stored on the product that they purchase. I'm speaking, of course, of multimedia technologies such as CD-ROM (Compact Disc-Read Only Memory) and CD-I (Compact Disc-Interactive).

These latest versions of digital technology function in many respects like the floppy computer discs that many of us are now familiar with except that these discs hold much more information. A typical CD-ROM disc is capable of storing as much information as approximately 1,000 floppy discs or roughly 50 text books. CD-I's allow the viewer not only to call up information, but also, interact with or become a part of that presentation.

The digital recording technology of these formats, massive storage, and interactive capabilities take these technologies far beyond the ordinary computer, and make them particularly attractive for use in the entertainment world, including many applications in the sound recording area. Let me highlight a few products that are already available or will be shortly.

The CD-I, "So You Want to be a Rock and Roll Star," allows a user to manipulate the recorded vocal and musical portions of rock classics such as "Sittin' on the Dock of the Bay" or "Stand by Me" so that he or she can sing or play along with those songs. Sheet music can be displayed on a monitor along with other visual images.

CD-ROM music videos by SONY reportedly permit users to make their own videos with artists like Kriss Kross and C+C Music Factory, incorporating concert footage as well as movie and video clips.

Upcoming multimedia CD's by artists such as U2, Peter Gabriel, and others are supposed to allow the user to listen to perfect digital recordings of songs played at concert and, at the same time, view video footage of the concert, words to songs, and/or any other interesting information.

The CD-I "Golden Oldies Jukebox" is advertised as follows:

Top tunes of the '50s and '60s are remastered in digital audio. Watch related videos and lyrics cued in sync with the music. Create a custom playlist for parties or for personal listening. The "Gerswhin Connection" states that you can "(j)oin pianist/composer Dave Grusin and jazz greats Gary Burton and Chick Corea to celebrate Gershwin's fascinating rhythms and melodies in this CD-I adaptation of the Grammy award-winning album 'The Gershwin Collection'".

What distinguishes this new world of CD, CD-ROM, and CD-I entertainment from the past? First, all formats offer perfect digital sound. Second, the coming distribution system will allow users to access this entertainment on demand from broadcasters, cable companies, telephone companies, or satellites without ever buying a "hard copy" of the product from a retail store. Third, new digital recording equipment allows the user to make perfect copies of the recording. And fourth, the user can retrieve, manipulate and add the information stored on these recordings to other recordings to create "new" works for the future.

Although dependent on the work of the performer, the new technology potentially offers the worst of all worlds for the performer. Not only can consumers obtain perfect copies of recordings without purchasing them, but also, the same consumer can use that work or pieces of it, in any combination of its parts, to create a "new" work of his or her own. In short, performers suffer the double indignity of not being paid for their work and having someone else pirate their creative efforts.

New technology will educate, entertain, excite, and inform us in ways that we never dreamed possible. The Herculean task will be to see that the people who make it all possible through their creative efforts, in this case vocalists and musicians, are rewarded and protected. Now is the time to start.

Again, thank you for your attention and the opportunity to appear here today.

Mr. HUGHES. In the last few years, Mr. Massagli, there has been a lot of publicity about digital sampling of sound recordings. I believe that this too has had an impact on employment opportunities for musicians. How has your union been dealing with that particular problem?

Mr. MASSAGLI. A committee is being struck now for the purpose of trying to deal with that very subject, to see if we can put that subject into a posture where it can be a negotiated provision as to the recording of that product, with those who would record that product, to find out what the limitations would be, how it would be used, what would the costs be for the use of such a product for a session to be called specifically for dealing with the recording of that product, because we know it is there.

Mr. HUGHES. Do you believe that the issue of performance rights in sound recordings should be dealt with in the context of a treaty?

Mr. MASSAGLI. We believe that a new instrument ought to be drawn, if that is the question. I hope that is responsive.

Mr. HUGHES. Yes, that is.

Mr. MASSAGLI. OK.

Mr. HUGHES. Mr. York, or Mr. Massagli, maybe you would both like to respond. Under current U.S. law, many recording artists are regarded as work-made-for-hire employees of the record company. The record company, not the recording artist, actually owns the copyright. In other cases, recording artists may be treated as joint authors and the record company can own all rights or contractually transfer.

Do you have an opinion as to how a new performance right should be treated?

Should the work-made-for-hire doctrine apply? Should the right to receive royalties be freely transferable?

Mr. York.

Mr. YORK. I think all of those are important issues in terms of crafting a statute and there are issues which concern us very much. Our concern, I think, is certainly, with all due respect to previous speakers, is that there is not an equality of bargaining, at least in the individual to company bargaining relationship.

Collective bargaining agreements perhaps offer more comfort as to whether there is an equality of bargaining relationship.

I don't think it is our position to upset present copyright law, but it is our desire, I think in some way, to find a way that people are fully protected, and there can be an interplay, in my mind, of statute and other protections.

I guess there are some tough issues on which all the parties will still have to grapple, and I think you are driving to one of them, which is what level of protection and who does it run to specifically? I think, though, that we would like to work with the subcommittee to craft that and structure it.

At this point, we agree on a lot more than we disagree on, which is the need for new protection, and probably 90 percent of the substance of what would appear in any bill. And with your help and the guidance of this committee and the participation of all parties, we think we can bridge whatever other gaps there may be there.

Mr. HUGHES. Mr. Massagli, would you want to comment?

Mr. MASSAGLI. I echo the words of my associate.

Mr. HUGHES. OK, thank you very much.

I appreciate your testimony and your patience here today.

Mr. HUGHES. I am going to ask the next two witnesses to come up also as a panel, Mr. Murphy and Mr. Fritts.

The next witness is an individual well able to hold his own in this debate or any other, Edward Murphy, president of the National Music Publishers' Association. Mr. Murphy is an old friend of the subcommittee and his experience with the Harry Fox Agency and with G. Schirmer Music Publishers will be of great value in the debates on a possible public performance right in sound recordings.

We welcome you once again.

Mr. Fritts, is also no stranger to the committee, and we are delighted to have him back with us. He, in fact, appeared before the subcommittee on H.R. 4511, our cable reform bill, and in the intervening year went through the great cable war, which he came out of in very, very good shape, I might say.

We welcome you here today, to what my staff says will be a kinder, gentler hearing. We have both your statements and, without objection, they will be made a part of the record in full.

Before you proceed, why don't we just break, let me catch that vote, and I will come right back. I suspect that we will have these interruptions periodically, but we will try to finish in due course.

We will stand recessed for 10 minutes.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

I think we are ready to proceed at this point.

Mr. Murphy, welcome, you may proceed as you see fit.

STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

Mr. MURPHY. Thank you, Mr. Chairman, good afternoon.

I thank you again for all the work that this committee has done, and particularly the work the chairman has done, on the DART audio home recording bill, and I want to express publicly once again our sincere gratitude.

Mr. HUGHES. Thank you.

Mr. MURPHY. In this matter that comes before us today, I want to make a brief statement. It all begins with a song. This statement, acknowledged as simple truth by all facets of the music business, is tribute to the essential creative role of the songwriter in the music industry.

NMPA's music publisher members share the interest of their songwriter partners in preserving and promoting copyright in musical works. Because the issues before the subcommittee also affect music copyrights, I am pleased to have the opportunity to present the music publisher community's perspective.

The advent of the electronic digital delivery systems for music raises an even more significant challenge for our legislators: to make such systems "copyright friendly." Digital music delivery systems present a range of fundamental questions about the legal and economic relationships between rights owners and commercial users of music.

As the subcommittee approaches this question, we urge you: to consider carefully the degree to which existing rights extend to digital delivery systems; to promote agreement that any amendment of domestic law or international obligation addressing digital delivery systems expressly recognize that the digital delivery for reproduction constitutes an exercise of the distribution right in musical works and sound recordings; and to avoid measures which would compromise existing rights and sources of income for music copyright owners and beneficiaries.

This is the first point: It is only reasonable that any adjustments of the law or policy to deal with digital delivery systems be based upon a careful assessment of how and to what extent these systems relate to existing rights.

From a business standpoint, all of us in the industry have to take an immediate and hard look at how these rights can be exercised to protect our interests as well as those of the creative individuals who have entrusted their interests to us.

Music publishers, generally speaking, own and exercise copyrights in musical works or administer music copyrights on behalf of copyright owners. By authorizing uses of musical works, publishers generate income in the form of royalty payments for their own behalf and for that of their songwriter partners.

In the United States and worldwide, the primary sources of publisher and songwriter income flow from public performances and the reproduction and distribution of our works in the form of phonorecords.

Until now, that is until the advent of the digital music delivery systems, the distinction between uses of music that trigger the reproduction and distribution rights and those that trigger the public performance right has been easy to draw. Musical works have been recorded and distributed in the form of compact disks-CD's-cassettes and albums by record companies. They have been broadcast for public enjoyment by radio and television stations.

Today, however, distinguishing between distribution and communication of music requires a closer scrutiny. But even at this early stage of development and implementation, it is clear not all systems should be licensed in the same manner.

Digital audio broadcasting, DAB, will significantly improve the quality of terrestrial broadcasting systems. The DAB technology is expected to eliminate interference problems that plague traditional AM and FM broadcasts, enabling radio signals to be transmitted and received with CD quality. These crystal-clear transmissions will be available, free of charge, over-the-air to the general public.

Mr. MURPHY. While DAB is still on the horizon, cable-delivered systems that provide 24-hour digital music are already here. These services are offered to consumers for a monthly subscription fee and deliver multiple channels of CD-quality music into the home. Digital Music Express, DMX, for example, offers, as you know, 32 channels of nonstop music. Digital Cable Radio, DCR, a second force in this new field, alone boasts 55,000 subscribers and is available to 5 million homes.

Although digital broadcasting and "cable-radio" services have been licensed by music copyright owners via their performing rights societies, these services have the potential for inadvertently

providing not just performances but also for functioning as a delivery system for recorded music—an exercise of the copyright owner's distribution right. Accordingly, both the methods of licensing and the nature of rights being licensed must be carefully evaluated.

For its part, the recording industry has stated today and at other times that DAB and DCR-type systems threaten their interest in two ways: First, under U.S. law, they stand to receive no public performance payment. Second, the prospect of digital transmission of entire CD's or the body of work of a particular artist could cut dramatically into record sales.

Whatever policymakers decide with regard to the public performance issue, there may be several approaches to addressing the second concern. For example, in a recent agreement between the partnership comprising Warner Music Group and Sony Software Corp. and the cable service DCR, DCR agreed to limit the number of consecutive cuts it would play from any particular CD or artist. There is also the possibility of requiring technical measures that render such systems "listen-only" services. These and other options may warrant further consideration.

Beyond DAB and radio-format cable music systems, there is the "electronic record store." These cable-delivered systems, when introduced, will enable consumers to select music to be electronically distributed to their homes, in real time or at the speed of data transfer, to be copied on recording equipment they own or rent. In essence, subscribers will be able to purchase music from their armchairs.

We believe that, over time, these delivery-for-reproduction, or "home shopping" services, will become an increasingly important part of the subscription music market and of the larger recorded music business. Let me assure you, music publishers have no desire to block or slow the introduction of these services.

Although the jury is still out, subscription delivery has the potential to stand in the place of CD and cassette sales, and may well represent the future of our reproduction and distribution stream of income. What is important to publishers and to songwriters, whose works are the spark that ignites our industry, is that our rights, and incentives to create that their exercise provides, are not impaired.

In our view, established and worldwide recognized rights for reproduction and distribution give record companies and music publishers alike a firm basis upon which to seek and receive compensation for the use of their works on subscription delivery-for-reproduction systems. In other words, these systems could be effectively licensed today without the creation of any new right or new obligation; rather, the clarification and reaffirmation of the existing rights of reproduction and distribution is all we believe is needed.

For this reason, we urge the subcommittee, in our second point, to promote agreement that any amendment of the domestic law or international obligation addressing digital delivery systems expressly recognize that electronic delivery for reproduction constitutes an act of distribution of a musical work or sound recording. Such action would serve to clarify the rights and responsibilities of owners and users of works at a time of transition in the industry.

As I indicated, publishers have greeted the prospect of home-shopping and delivery services with some interest. In fact, NMPA's licensing subsidiary, the Harry Fox Agency—on behalf of its publisher-principals—has already licensed one such service, currently in the development stage. In the future, we would expect to license service providers directly, that is, independent of any agreement between the service and a record company.

This brings me to my third and final point. As you consider the ramifications of digital delivery systems, we urge you, in the strongest terms, to guard against approaches that can establish a hierarchy of interests by giving record companies exclusive rights where songwriters and their publisher partners receive only a limited right of remuneration. And we see significant danger in looking to the record rental provisions of the Copyright Act as a model for this very different area of use.

The record rental provision's proportional reduction of royalties formula was reluctantly accepted by music publishers, in large measure because it was believed that individual record companies would have little, if any, incentive to authorize rental. And, in fact, no record rental market has developed in the United States. It is clear that such a formula would be unfair and wholly inappropriate if applied to a potentially significant system of distribution, such as subscription delivery for reproduction.

Parity and fairness demand that owners of the separate and distinct copyrights in the musical works embodied in phonorecords retain the opportunity to license their works separately and at rates which reflect their own, independent business judgment.

As we struggle with sound recording rights, performers' rights, and digital delivery issues in the United States, copyright interests abroad are doing so as well.

In closing, I want to note that a recent hearing convened by the European Commission to examine so-called "neighboring rights" revealed many of the points of view we have heard today and will hear in the future, and that we look forward to answering any questions that the committee may bring to us either today or tomorrow or any time you wish.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Murphy.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

Good morning. I am Edward P. Murphy, president and chief executive officer of the National Music Publishers' Association, Inc. ("NMPA").[1]

"It all begins with a song." This statement, acknowledged as simple truth by all facets of the music business, is tribute to the essential creative role of the songwriter in the industry. NMPA's music publisher members share the interest of their songwriter partners in preserving and promoting copyright in musical works. Because the issues before the Subcommittee also affect music copyrights, I am pleased to have the opportunity to present the music publisher community's perspective.

[1] NMPA, founded in 1917, is a professional trade association representing more than 500 members. Its principal mandate is to protect and advance the interests of the music publishing industry in matters relating to the domestic and international protection of music copyrights. Since 1927, NMPA has maintained a wholly-owned subsidiary, The Harry Fox Agency, Inc. ("HFA"), to provide licensing and royalty collection services for its publisher clients. HFA provides such services to more than 10,000 publishers.

Much of today's testimony has centered on the impact of new systems for the digital delivery of music. As the Chairman and members of the Subcommittee know well, the music business was forced to face the friction between the copyright law and digital technologies early. Last year's enactment of the Audio Home Recording Act[2] resolved a nearly decade-long controversy over the use of digital audio recording devices to copy music for private, noncommercial use. We thank you, Mr. Chairman and members of the Subcommittee, for your leadership and support in making this breakthrough possible.

The advent of electronic digital delivery systems for music raises an even more significant challenge for our legislators to make such systems "copyright-friendly." Digital music delivery systems present a range of fundamental questions about the legal and economic relationships between rights owners and commercial users of music. As the Subcommittee approaches these questions, we urge you:

to consider carefully the degree to which existing rights extend to digital delivery systems;

to promote agreement that any amendment of domestic law or international obligation addressing digital delivery systems expressly recognize that digital delivery for reproduction constitutes an exercise of the distribution right in musical works and sound recordings; and

to avoid measures that would compromise existing rights and sources of income for music copyright owners and beneficiaries.

EXISTING RIGHTS AND DIGITAL DELIVERY SYSTEMS

As to the first point, it is only reasonable that any adjustment of law or policy to deal with digital delivery systems be based upon a careful assessment of how and to what extent these systems relate to existing rights. From a business standpoint, all of us in the industry have to take an immediate and hard look at how those rights can be exercised to protect our own interests, as well as those of the creative individuals who have entrusted their interests to us.

Music publishers, generally speaking, own and exercise copyrights in musical works or administer music copyrights on behalf of the copyright owner. By authorizing uses of musical works, publishers generate income in the form of royalty payments for their own benefit and that of their songwriter partners. In the United States and worldwide, the primary sources of publisher and songwriter income flow from public performances and the reproduction and distribution of our works in the form of phonorecords.[3]

Until now—that is, until the advent of digital music delivery systems—the distinction between uses of music that trigger the reproduction and distribution rights and those that trigger the public performance right has been easy to draw. Musical works have been recorded and distributed in the form of compacts discs ("CDs"), cassettes and albums by record companies. They have been broadcast for the public's enjoyment by radio and television stations. Today, distinguishing between a distribution and a communication of music requires closer scrutiny. But, even at this early stage in development and implementation, it is clear that not all systems should be licensed in the same manner.

Digital Audio Broadcasting ("DAB") will significantly improve the quality of terrestrial broadcast systems. DAB technology is expected to eliminate interference problems that plague traditional AM and FM broadcasts, enabling radio signals to be transmitted and received with CD quality. These crystal-clear transmissions will be available, free of charge, over-the-air to the general public.

While DAB is still on the horizon, cable-delivered services that provide 24-hour digital music are already here. These services are offered to consumers for a monthly subscription fee and deliver multiple channels of CD-quality music into the home. Digital Music Express (DMX), for example, offers 32 channels of non-stop music. Digital Cable Radio Associates (DCR), a second force in this new field, alone boasts 55,000 subscribers and is available to 5 million homes.[4]

Although digital broadcasting and "cable-radio" services have been licensed by music copyright owners via their performing rights societies, these services have the potential for inadvertently providing not just performances, but also for functioning

[2] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001–1010).

[3] Copies of NMPA's "1990-91 International Survey of Music Publishing Revenues" have been made available to the Intellectual Property Subcommittee for distribution to panel members. Others interested in obtaining a copy of the report should write to NMPA at 205 East 42nd Street, New York, New York 10017.

[4] P. Verna, Time Warner Breaks New Cable Ground, "Billboard," p. 1, 80 (Feb. 13, 1993).

as a delivery system for recorded music—an exercise of the copyright owner's distribution right. Accordingly, both the method of licensing and the nature of the rights being licensed must be carefully evaluated. For its part, the recording industry has stated, today and at other times, that DAB and DCR-type systems threaten their interests in two ways. First, under U.S. law, they stand to receive no public performance payments. And second, the prospect of digital transmission of entire CDs or the body of work of a particular artist could cut dramatically into record sales. Whatever policy- makers decide with regard to the public performance issue, there may be several approaches to addressing the second concern. For example, in a recent agreement between a partnership comprising Warner Music Group and Sony Software Corporation and the cable service DCR, DCR agreed to limit the number of consecutive cuts it would play from any particular CD or artist. There is also the possibility of requiring technical measures that render such systems "listen-only" services. These and other options may warrant further consideration.

Beyond DAB and radio-format cable music systems, there is the "electronic record store." These cable-delivered systems, when introduced, will enable consumers to select music to be electronically distributed to their homes—in real-time or at the speed of data transfer—to be copied on recording equipment they own or rent. In essence, subscribers will be able to purchase music from their armchairs.

We believe that, over time, these delivery-for-reproduction or "home shopping" services will become an increasingly important part of the subscription music market and of the larger recorded music business. Let me assure you, music publishers have no desire to block or slow the introduction of these services. Although the jury is out, subscription delivery has the potential to stand in the place of CD and cassette sales, and may well represent the future of our reproduction and distribution stream of income. What is important to publishers—and to the songwriters whose works are the spark that ignites our industry—is that our rights, and the incentives to create that their exercise provides, are not impaired.

DELIVERY FOR REPRODUCTION AND THE DISTRIBUTION RIGHT

In our view, established and world-recognized rights of reproduction and distribution give record companies and music publishers alike a firm basis upon which to seek and receive compensation for the use of their works on subscription delivery-for-reproduction systems. In other words, these systems could be effectively licensed today without the creation of any new right or new obligation; rather, the clarification and reaffirmation of the existing rights of reproduction and distribution is all that is needed. For this reason, we urge the Subcommittee, in our second point, to promote agreement that any amendment of domestic law or international obligation addressing digital delivery systems expressly recognize that electronic delivery for reproduction constitutes an act of distribution of a musical work or sound recording. Such action would serve to clarify the rights and responsibilities of owners and users of works at a time of transition in the industry.

As I indicated, publishers have greeted the prospect of home-shopping and delivery services with some interest. In fact, NMPA's licensing subsidiary, The Harry Fox Agency—on behalf of its publisher-principals—has already licensed one such service, currently in the development stage. In the future, we would expect to license service providers directly—that is, independent of any agreement between the service and a record company.

PRESERVING A BALANCE OF RIGHTS

This brings me to my third, and final, point. As you consider the ramifications of digital delivery systems, we urge you, in the strongest terms, to guard against approaches that can establish a hierarchy of interests by giving record companies exclusive rights where songwriters and their publisher partners receive only a limited right of remuneration. And we see significant danger in looking to the record rental provisions of the Copyright Act as a model for this very different area of use.

The record rental provision's proportional reduction of royalties formula was reluctantly accepted by music publishers, in large measure, because it was believed that individual record companies would have little, if any, incentive to authorize rental. And, in fact, no record rental market has developed in the United States. It is clear that such a formula would be unfair and wholly inappropriate if applied to a potentially significant system of distribution, such as subscription delivery for reproduction. Parity and fairness demand that owners of the separate and distinct copyrights in the musical works embodied in phonorecords retain the opportunity to license their works separately and at rates which reflect their own, independent business judgment.

As we struggle with sound recording rights, performers' rights and digital delivery issues in the United States, copyright interests abroad are doing so as well. In closing, I'd like to note that a recent hearing convened by the European Commission to examine so-called "neighboring rights," revealed many of the points of view you have heard—and will hear—today, brought into even sharper relief by divide between authors' and producers' protection under the laws of some EC countries.

NMPA looks forward to the Subcommittee's further examination of issues raised by the international Berne Protocol talks, and we look forward to providing our views on matters of shared concern, including proposals to extend the duration of copyright to the life of the author plus 70 years.

Again, on behalf of the members of the National Music Publishers' Association, I thank you for the opportunity to appear before you today. I would be pleased to respond to your questions.

Mr. HUGHES. Mr. Fritts, welcome.

STATEMENT OF EDWARD O. FRITTS, PRESIDENT AND CEO, THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman. Good afternoon to you and to Congressman Coble.

First, I appreciate your kind remarks at the outset of the hearing and pledge to you we look forward to working with you and the committee relative to this subject. As you know, we have great concerns about it and would like to work with you relative to future proceedings.

Some 60 years now, Congress has periodically debated and rejected the need to establish a performance right in sound recordings. And, frankly, we don't see any change that has been effectuated to this well-balanced relationship between music and performance interests and broadcasters in the U.S. marketplace.

In your deliberations on this issue, perhaps the best question is why? Why should the Congress consider upsetting the mutually beneficial framework within which the record companies and broadcasters have operated for the public's ultimate benefit for so many years? What has changed in the marketplace that would prompt Congress to consider extending a new exclusive right under the Copyright Act when it has consistently rejected repeated attempts to do so over the past 60 years?

It is a well documented fact that record companies, performers, and broadcasters all benefit from the airplay of music. As an executive of Warner Records once said, and I quote, "What would happen to our business if radio died? If it were not for radio, half of us in the record business would have to give up our Mercedes leases." Jack Lameier, vice president of Epic Records, addressing radio programmers this month at a country radio seminar in Nashville stated, "We are in this business to sell product. Our exposure of this product is controlled by the people in this room and in this industry. Without the airplay, nobody knows what it sounds like... the more exposure, the more likely someone is likely to buy the product."

Let me remind you and members of the committee that we pay for the music we play. The broadcast industry currently pays $300 million a year to music composers, authors, and publishers for the performance of sound recordings. Now, radio stations currently pay over 3 percent of every dollar they take in in revenues to ASCAP, BMI, and SESAC. Much of this money goes to performers who, in-

deed, are also composers. Much of it goes to the record companies who own the music publishing subsidiaries.

Now, as a former radio broadcaster, I can tell you that these payments make the difference between profit and loss for many small and medium market stations. In recent years, there has been a trend of stations going off the air so that today over 300 signals have disappeared, denying their communities the local service they have come to expect.

In 1991, almost 60 percent of the 11,000 local radio stations lost money. For roughly a thousand of these stations, the 3 percent that they pay for music has meant the difference between profit and loss.

By comparison, the radio industry, recording industry, continues to be very successful and, frankly, we believe has no demanding need for more broadcaster money. Six large conglomerates control 93 percent of the market. The recording industry has seen enormous increases in the dollar value of shipments, a 47-percent increase between 1985 and 1989, and today the total dollar value of shipments is approaching $9.1 billion.

It has been suggested that digital technology provides a reason to reevaluate the issue of performance rights in sound recordings. While digital audio is available today as a cable service, it is unclear how or when the radio industry will make use of digital transmission. However, we fully expect that the historic, well served, and mutually reinforcing relationship among radio and record companies and performers will continue, even if digital is employed by your local radio station.

The RIAA has expressed concern about digital cable or satellite services and its impact on the sale of prerecorded music. One response to that concern is a nonlegislative one, which has been mentioned here earlier today, where Warner and Sony have teamed up to employ marketplace solution and invested $20 million in this new service. And they have cited studies that subscribers actually purchased more recorded music after subscribing.

Separately, you and members of the subcommittee should be aware that the NAB and the RIAA met over the last year on several occasions to try to determine if we could develop a mutually agreeable proposal to bring to your subcommittee for your review and for your examination. While those discussions ended without a resolution, with the subcommittee's encouragement, we are open to further discussion with the RIAA and with others.

And finally, my prepared statement addresses some of the international concerns which have come up in recent years. Let me summarize them by pointing out that even with the advent of privatization, many foreign broadcast outlets are government supported. Hence, a performance right is merely a transfer from one government entity to another and has no significant impact on the business of broadcasting in those countries.

Second, the lack of a performance right in the United States, we think, is a convenient rationale for foreign authorities to deny revenues to U.S.-based record companies. Enactment of such a right in the United States will only require these nations to find other methods to continue to deny revenue flows to this country.

Again, Mr. Chairman, thank you for your time and for allowing us to participate in this process.

Mr. HUGHES. Thank you, Mr. Fritts.

[The prepared statement of Mr. Fritts follows:]

PREPARED STATEMENT OF EDWARD O. FRITTS, PRESIDENT AND CEO, THE NATIONAL ASSOCIATION OF BROADCASTERS

PERFORMANCE AND PERFORMERS' RIGHTS

Mr. Chairman, I am Eddie Fritts President and CEO of the National Association of Broadcasters (NAB), which represents the interests of those who own and operate America's radio and television stations, including most major networks. I appreciate the opportunity to appear before the subcommittee for this oversight hearing. Discussions concerning the establishment of a performance right in sound recordings is a matter of gravest concern to the over 12,000 local radio and television stations in the United States.

Mr. Chairman, American broadcasters have long played a central role in bringing music to the American people. We have done so within a framework that provides huge benefits to the music industry as well as to broadcasters and the public. Although no bill has been introduced to date, we are here today to oppose in the strongest possible way the destruction of that settled framework, for the sole benefit of the record industry, through the creation of a new public performance right in sound recordings.

This is by no means the first time that Congress has been asked to consider this proposed radical dislocation of our American system. Indeed, such proposals have surfaced periodically for more than 60 years.[1] But each and every time Congress has considered such a proposal, it has been reject. The case for rejecting the proposal is even stronger now than it has been in the past.

Let there be no mistake about what the proposal truly is: a bold attempt to force the redistribution of money from thousands of broadcasters, along with perhaps hundreds of thousands of other American businesses, into the bank accounts of the handful of giant, mostly foreign-owned record companies that control what was in 1992 a profitable *$9 billion* business. At worst, the scheme could: 1) deprive the American public of broadcast music, not only by pushing many broadcasters over the brink into economic failure, but by limiting the scope of the music the surviving broadcasters could play, and 2) result in a reduction in news sports, weather and public affairs programming as broadcasters would be required to reallocate resources for such programming to pay additional music licensing fees.

And the justification for this radical proposal? There is none that will withstand scrutiny, much less meet the stringent standard the Congress has applied in considering one-sided requests to extend monopoly interests under the Copyright Act. The Congress has heard the arguments before, and has rejected them. The result should be no different this time around.

The extraordinary benefits the current system provides the record industry are unquestionable. Exposure of musical recordings to the buying public through free broadcasting is a critical part of the promotion of records, tapes, CDs, music videos a concert tickets, not to mention "spin off" goods and services marketed under the name of star performers. Absent such free exposure, sound recording and music video sales, concert revenues, and the sale of endorsed goods and services would plummet. This is confirmed by many sources in the music industry. For example:

> (1) Pam Tillis, country music star, commenting on the importance of "radio tours" where artists tour the country making personal appearances at radio stations: "They are unbelievably important;" "invaluable;" "I only regret I couldn't do it more and do it longer;" "You guys are so important to us."
>
> Also commenting on the importance of radio tours, BNA recording artist, Lisa Stewart added "...I'm really glad I had the opportunity to do that (go on radio tours). Because I feel that it has really, really helped me..."[2]

[1] The history of performance rights proposals is described in "The Case Against Performance in Sound Recordings" by Professor Peter Jaszi, which was first presented to the Copyright Office in connection with its proceedings on the issue in 1991, and which is attached to this testimony as Exhibit A. Professor Jaszi is an eminent copyright scholar who teaches at the Washington College of Law of The American University.

[2] "Meet and Greet and More: Enhancing Artist-Label-Radio Relationships", Country Music Seminar. Nashville, TN, March 3-7, 1993.

(2) Jack Lameier, Vice President/Promotion, Epic Records (a 30 year veteran of the recording industry) commenting on the importance of radio airplay—"We are in this business to sell product. You sell product by airing it, liking it and going out and buying it. Our exposure of this product is controlled by the people in this room (at the Country Music Seminar, Nashville) and in this industry. Without the airplay nobody knows what it sounds like. If they don't know what it sounds like why would they want to buy it? Certainly not because they've read about it or they might have enjoyed the video. I really don't know what video does for it. It is the repetition that's the reason for the chart numbers (a ranking of records receiving airplay), the heavier the rotation, the more exposure the more likely someone is to buy the product."[3]

(3) The value broadcasters provide the recording industry was conceded in a lawsuit filed in 1991 by Motown Records against MCA alleging MCA's failure adequately to promote Motown's records, in which Motown states that: "sales of new records to the public are generated largely by air play on various radio stations throughout the United States" and that "pop radio air play is a critical factor in the success of a record label."[4]

(4) The 1991 Country Music Awards included six awards to disc jockeys and radio stations for their contribution to the success of country music, and radio was acknowledged by the winner of the "entertainer of the year" award.

(5) The recording industry spends millions of dollars promoting their product to broadcasters, including distribution of free copies of their recordings, in an attempt to encourage air play. The critical importance of this effort sometimes has led to abuses, which in turn engendered the payola laws of the 1960's.

(6) Bob Sherwood, the President of Phonogram/Mercury Records: "I, like every other head of a record company, need and want radio to play our records. Without airplay, we'd all be in the door-to-door aluminum siding sales business."[5]

(7) Stan Corman, a former Warner Records Executive: "What would happen to our business if radio died? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases... we at Warner won't even put an album out unless it will get airplay."[6]

(8) Bobby Colomby, drummer in the rock group "Blood, Sweat & Tears" (in answer to the question, How important is radio to you?): "Well, that is *it*... what you're doing is... you're advertising." (emphasis added).[7]

(9) One record manufacturer's survey found that over 80 percent of rock albums are purchased because people have heard cuts off the album over the radio. A 1984 Office of Technology Assessment study verified this finding.[8]

(10) The attached advertisement for a country music album (Exhibit B) says it all: "Country radio heard it: Country radio liked it. Country radio played it. Country music fans heard it. Country music fans Loved It! And on May 6, 1991 Country music fans can Buy It."

Under these circumstances, it simply makes no sense to require broadcasters to pay record companies for the right to "perform" sound recordings.

Indeed, broadcasters already pay approximately $300 million annually to composers and publishers for the rights publicly to perform the music incorporated into the sound recording. These royalties frequently go to performing artists who are also composers and to record companies, who also often have music publisher subsidiarie.[9] Accordingly, payments to many artists and record companies under the guise of securing a performance right in their sound recordings often would result in a double payment for the same public performance.

Performance rights in sound recordings would impose significant additional financial burdens on broadcasters at a time when they are experiencing serious declines in revenues in an advertising market that is increasingly fragmented. Broadcasters' precarious financial condition is already being further threatened by various proposals that would impose spectrum and user fees and would eliminate the tax deduction on advertising. The FCC reported in 1991 that 197 AM and 30 FM stations

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[3] "Hot Seat: Real Answers to the Question You Always Wanted to Ask", Country Music Seminar, Nashville, TN, March 3-7, 1993.

[4] *Motown Record Company* v. *MCA Inc.*, Superior Court of the State of California, filed May 14, 1991 (Complaint, §§ 20-21).

[5] Billboard, December 22, 1979, p. 20.

[6] Daily Variety, March 4, 1975.

[7] Radio Program "The Politics of Pop"—June 5, 1975.

[8] Office of Technology Assessment, "Copyright & Home Copying: Technology Challenges the Law," OTA-CIT-422 (October 1984) (hereinafter OTA Study") at Table 8-11.

[9] Thorn-EMI and Warner/Chappell alone own the rights to over one million songs.

were "dark".[10] Those numbers have now worsened, with over 300 radio stations off the air in 1993.[11] Over half of all radio stations lost money in 1990, as did almost 60 percent in 1991.[12]

The recording industry, on the other hand, experienced a 47 percent increase in the total dollar value of shipments between 1985 and 1989 and another 15 percent increase between 1989 and 1990.[13] The dollar value of shipments, described by some as relatively flat in 1990 and 1991, continued its upward trend in 1992 with a 15.2 percent gain over 1991, reaching *$9.024 billion*.[14] There is clearly no economic need or justification for transferring wealth from broadcasters to the recording industry by establishing a performance right in sound recordings.

To make the comparison even clearer. 1992 revenues for the 9,746 radio stations on the air were approximately $8.766 billion or just under $900,000 per station.[15] The record industry's $9 billion in revenues from U.S. sales, by contrast, went primarily to just six huge conglomerates, who together control well over 90% of the market,[16] which translates into average revenues for each company of roughly $1.5 billion. The grip of these record industry "overlords"[17] on the market tightened significantly in 1992 with the acquisition by Thorn-EMI of Virgin Music Group, the last big independent company left after the acquisition frenzy that began in the late 80's. Five of the six are foreign owned. As one American record industry executive bemoaned, "You can't make any deal without first checking with somebody in London or Tokyo or Holland or Frankfurt."[18]

Creating a new public performance right in sound recordings would give the owners of those rights—the record companies—the power to refuse to allow any radio station (or jukebox owner or other business establishment) to play particular records, tapes, music videos or CDs without paying their price. To whatever extent this resulted, because of the self-perceived self-interests of the six "overlords," in a constriction of the current availability of music in America, it would be harmful to the public.

But even if the *only* effect of this radical proposed change in American law were to further enrich the record companies at the expense of broadcasters and thousands of other businesses, it would hurt the American people. The imposition of a sound recording royalty burden on broadcasters, given the trends in and financial state of the radio industry, could drive more stations over the financial brink and off the air. Moreover, many stations would have to reallocate resources devoted to news and public affairs programming to pay for additional music license fees. It cannot be assumed that radio stations could simply pass on the additional expense to advertisers. The local advertising market is highly competitive, and is made more so by the increase in local spot advertising sales by cable operators, for whom it is a low-cost supplementary revenue stream, at or below radio spot prices. No, the new added wealth for the six extraordinarily wealthy record companies would come directly out of the bottom lines of American radio stations and, as more of them fail, at the expense of the American listing public.

The question, Mr. Chairman, is why?

> Why should the Congress consider upsetting the mutually beneficial framework within which record companies and broadcasters have operated for the public's ultimate benefit for so many years?
>
> Why should the Congress consider a one-sided change in our law to enrich the foreign-dominated $9 billion record industry at the expense of American broadcasters and businesses?

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[10] *In re Revision of Radio Rules & Policies.* MM Dkt. No. 91–40 (56 Fed. Reg. 26365, June 7, 1991) at paragraph 2.

[11] FCC Report "AM and FM Stations Silent For Six Months or More as of January 1, 1993" (88 FM stations silent as of 1/1/93); FCC Memorandum "AM Stations Silent as of March 4, 1993" (220 AM stations).

[12] 1991 NAB/BFM Radio Financial Report at pp. 27, 32, 43 & 65; 1992 NAB/BFM Radio Financial Report at pp. 27, 31, 42 & 64.

[13] OTA Study at 92; Billboard, March 24, 1990 Oct. 30, 1990 at 1, 87.

[14] TV Digest, March 15, 1993, at p. 14 (Source: RIAA).

[15] Marketing Guide and Factbook for Advertisers 1993–1994 (Radio Advertising Bureau) p. 25.

[16] *See* New York Times, March 19, 1990, p. 2–17; Billboard, December 8, 1990; Los Angeles Times, November 4, 1990; The London Times, March 6, 1992.

[17] *Rock's New World Order: There's a Whole Lotta Shakin' in the Business, But the Action is Taking Place Inside the Boardroom, Not the Recording Studio, as the Dominance of a Handful of Global Conglomerates Has Put the Bottom Line Before Creative Risk-Taking,* Los Angeles Times, November 29, 1992, at Calendar p. 7.

[18] *Id.*

> Why should the Congress consider extending a new monopoly under the Copyright Act when it has consistently rejected repeated attempts to do so over the past 60 years?

Mr. Chairman, I suggest that if you look closely at the arguments raised by the proponents of this change, you will conclude that there is no justification for the change.

Some argue, for example, that the new right would benefit artists and performers whose work is embodied in the sound recordings to which they contribute. But if past experience is any guide, precious little if any of a new sound recording performance royalty would flow to artists and performers. Record companies have established contracting practices that maximize the benefits to them as opposed to the artists. A 1992 *Billboard* article written by an attorney in the wake of Art Buchwald's litigation victory over Paramount described them as follows:

> Contractually mandated royalty accounting methods and recoupment practices used in the recording industry raise questions similar to those in Buchwald. While superstars like Madonna or Michael Jackson have the bargaining power to negotiate favorable economic terms, aspiring acts and even ascending stars lack the clout to negotiate many standardized royalty and accounting terms.
>
> The royalty rate for newcomers (including the producer's royalty) is typically 10%–12% of retail sales, as opposed to a range approaching twice these rates for established talent. Royalty escalations based on domestic-unit sales are also often significantly less for new artists. Advances made by record companies to performers for recording costs usually must be fully recouped before the performers see any distribution of royalties. If an artist's first recording does not recoup its production costs, the losses are usually carried over and deducted from royalties earned on the next recording. No other business, including the film industry, requires the cost of creating to be fully recouped by the creator.
>
> The royalty calculations in standard record industry contracts, as in the film industry, contain numerous clauses guaranteed to assure profits or minimize financial exposure to the company before payment to the artist. For example, through so-called "packaging deduction" clauses, record companies generally reduce the base price on which the artist's royalty is calculated by 25% for the cost of producing CDs and up to 20% for producing cassettes. Recording contracts also frequently require a lower royalty to performers on CDs (35%–85% of normal rates) to reflect increased manufacturing costs incurred when CDs were first introduced as a new technology. In light of Buchwald, serious consideration must be given to whether these clauses can be economically justified as being based on actual costs.
>
> So-called "free goods," promotional recordings, and reserves also raise contractual questions. Record companies pay royalties on less than 100% of their sales to reflect discounts given to distributors; therefore, performers' royalties are often paid on only 85%–90% of records sold. Additional promotional copies of recordings may be deducted before royalties are calculated. Royalty reserves as high as 25%–35% of sales are withheld from the artist for as long as two years, interest free, against possible record returns from distributors. Standard contracts require artist/writers to be paid writers' royalties on no more than 10 songs per-unit released, although CDs often contain more than 10 songs, or provide for a mechanical royalty at less than the statutory rate established by Congress. Finally, contracts generally do not obligate the company to promote recordings and provide that the performers themselves are financially responsible for touring costs, which are essential to record promotion.[19]

Given the extraordinary wealth generated by the recording industry, if there is any current imbalance in the compensation for studio musicians and lesser known artists, the answer is a redistribution of the wealth within that industry, not the imposition of a new royalty payment structure for the benefit of the record companies. There would be no assurance that such royalties would not simply make the rich richer, leaving the struggling artist's lot unchanged. If record company megadeals, such as the 1991 deals reportedly netting Michael Jackson a $65 million guarantee for six albums plus a share of profits, his own record label and other compensation, and his sister Janet Jackson's $40 million for three albums plus a 22 per-

[19] *Buchwald Case Has Stern Message For Labels,* Billboard, April 18, 1992, at p. 8.

cent royalty on retail sales,[20] are not trickling down to backup musicians and others contributing to those albums, the remedy should lie within the industry.

A second major argument by proponents of change—that the U.S. should create a new right because certain other countries have allegedly also done so—is equally unpersuasive on close scrutiny. Circumstances in the United States do not warrant enactment of public performance rights. Such laws are most often found in countries where broadcasting organizations are owned by governments. When such government owned broadcasters pay into a fund for public performance, it is in effect a transfer from the accounts of one government entity to that of another. These payments are often intended as a subsidy to encourage *domestic, not foreign,* cultural activity. We do not see this as a policy that should be imitated in the United States. In the United State broadcasters are private commercial enterprises. We do not believe that our member should be asked to subsidize U.S. cultural industries. If such subsidies were determined to be appropriate, it would be fundamentally unfair to require broadcasters to bear the costs.

In short, we believe that importing public performance rights from abroad into the United States, rights which are essentially alien to ways we have conducted our business for over 60 years, would be enormously disruptive and harmful.

We understand that American advocates of performance rights in sound recordings claim that the absence of such rights in our law places the United States both out of step and at a disadvantage internationally. These advocates argue that unless we enact a public performance right, foreign monies due to U.S. recording interests will continue to be denied to them. And in order to collect the monies due to these interests we must enact a public performance right.

We find this reasoning unconvincing and flawed for several reasons. First, some countries already make these monies available to U.S. recording interests. Among these are several of the major European countries. Second, I believe that foreign countries may well be unprepared to distribute these monies to U.S. persons under *any* circumstances, and the mere enactment of a public performance right will not change their policies.

Let me give you an example. In 1992 the Congress enacted the DART bill. Part of the logic for its enactment was that U.S. persons would not be permitted to collect from foreign private copying levy schemes unless we enacted a system in the United States. Well, we did. Our system is, however, limited to digital format, because the Congress determined that is the area where the advent of new technologies posed a threat. Despite these legislated changes, in recent weeks a number of senior European officials have stated that U.S. interests may *none-the-less* be denied benefits under certain European levy systems because our system is not "the same" as theirs in that it does not cover *both digital and analog* formats.

We raise these examples to illustrate the point that many other countries realize that full recognition and distribution of funds to U.S. recording interests in the same manner that their own nationals are treated would result in a considerable negative trade balance and, accordingly, will always find loopholes to avoid this result. So-called "cultural integrity" provisions are but one example. Simply stated, if foreign countries do not want to provide benefits to U.S. interests, it does not matter what we do, they will find a way to deny us the money.

Third, many countries recognizing performance rights in sound recordings are also much less generous than this country in protecting sound recordings in other respects. For example, while U.S. law generally protects sound recordings for anywhere from 75 to 100 years,[21] France generally protects them for only 50 years and Germany for only 25 years. Moreover, U.S. law prohibits unauthorized rental of sound recordings and the laws of many other countries do not. The point here is that you cannot simply and fairly extract a public performance right in sound recordings from the intellectual property rights scheme of another country, and insert it in U.S. copyright law without considering the context in which such right fits into the entire intellectual property scheme of both countries.

Some advocates of public performance rights argue that we need to enact these rights in the United States to successful negotiate new international law in the areas of copyright and neighboring rights. As I understand it, these matters are now under consideration in the World Intellectual Property Organization, and its ongoing work on a protocol to the Berne Convention and the possible drafting of a new treaty on rights of performers and sound recording producer. These new international laws will, the advocates of public performance rights argue, substantially advance the interests of U.S. authors, producers and performers.

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[20] *Keeping Up With the Jacksons,* Los Angeles Time, June 16, 1991 at Calendar, p. 8.
[21] 17 U.S.C § 302(c).

We are not convinced. The WIPO deliberations, and the issues now pending, would not advance in any way the interests of U.S. broadcasters. Our industry operates primarily domestically. While some NAB members have international operations, the vast majority of our member operate and serve in local communities. We cannot see how any of the issues now pending in these international fora would in any way advance our members interests. Moreover, certain of the changes being considered, such as a requirement to enact a public performance right, would cause U.S. broadcasters great economic harm.

We also doubt that these international discussions would unequivocally advance overall U.S. interests. Here is an example. One of the matters pending in these discussions would require the elimination of the so-called "mechanical" compulsory license under U.S. law, which permits recording companies to use a musical composition without obtaining the specific permission of the composer. I understand the elimination of this license is vigorously opposed by the sound recording industry because doing so would substantially increase its operating costs. Moreover, the recording industry argues that no U.S. public interest would be advanced by its elimination, nor have the circumstances which led to its initial enactment changed sufficiently to warrant a reexamination of the issue as a legislative matter.

We have great sympathy for these arguments: we feel the same way about the current U.S. policy on the public performance right in sound recordings.

We raise these points, Mr. Chairman, to illustrate that enacting a public performance right in sound recordings will not be sufficient for the United States to negotiate successfully new international law in these areas. Moreover, adoption of such a right will provide no assurance that the intended result of greater recognition in other countries of performing rights in U.S. sound recordings will be achieved. Finally, the notion that the entire well-established U.S. allocation system among music composers, publishers, record companies, recording artists, performers and broadcasters should be reconfigured to accommodate foreign copyright and neighboring rights laws would be the classic example of the tail wagging the dog. To ask U.S. broadcasters to pay new royalties to the recording industry so that it can go abroad to obtain still more royalties is unfair and inequitable. Overall U.S. interests are more likely to be harmed than helped.

Advocates of performance rights in sound recordings also express concern that the advent of digital broadcasting (DAB), with its enhanced sound quality, will result in massive individual copying of prerecorded music. There is, of course, no evidence that this phenomenon will occur. Similar unfounded fears were expressed with the advent of FM stereo, cassette recorders and other technical advancements. Moreover, the implementation of DAB for broadcasters is years away at best. Finally, the Audio Home Recording Act of 1992 imposes royalties on the sale of digital recording equipment to be paid to record companies and artists, and is designed to redress digital copying concerns.

Concern has also been expressed about the emergence of commercial-free digital quality audio subscription services offered via cable or satellite which are suitable for copying music. The recording industry claims these business operations pose a direct threat to the soundness of the recording industry, specifically the retail sale of prerecorded music. First, the Audio Home Recording Act provides redress for such concerns.

Second, Sony and Time Warner recently entered into a joint venture with Digital Cable Radio. Digital Cable Radio is one of the cable subscription services that, according to the RIAA, presents the greatest threat to the music industry. Digital Cable radio and other similar services provide the subscriber with the ability to tape digital transmissions of music on prearranged schedules. These two recording companies have invested $20 million which provides a 35% interest in Digital Cable Radio.[22] Contradicting the claims of the recording industry that these services threaten the retail sale of prerecorded music, Sony Software's President stated:

> All of the initial studies that we've seen show that the first tier of people who are subscribing to Digital Cable Radio, once they get the service into their homes, actually increase the purchasing of music, and that the people who are the early adopter of DCR are also the heavy purchasers of prerecorded music at retail.[23]

Third, NAB has been, and continues to be, amenable to negotiating over the terms of legislation that would create a limited performance right that could be applied only to such subscription services.

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[22] *Investor's Business Daily,* March 3, 1993, by Dan Stroud.

[23] *Billboard,* "Time Warner Breaks New Ground: Enter Cable Venture with Sony", by Paul Verna, 2/6/93.

Mr. Chairman, we believe it is clear that the proposed creation of a new public performance right in sound recordings would cause severe dislocations and injury to American business and the American listening public, without any countervailing public benefits. It would wreak this havoc for the sole private benefit of the foreign-dominated record industry. Mr. Chairman, we strongly oppose this proposal and urge Congress to reject it, just as it has done every other time it has considered the proposal over the last 60 years.[24]

EXHIBIT A

THE CASE AGAINST PERFORMANCE RIGHTS IN SOUND RECORDINGS

By: Peter Jaszi,* Professor of Law, Washington College of Law, The American University, Washington, D.C.

I. INTRODUCTION

DAB has the potential to improve the quality of the broadcast signals enjoyed without charge in millions of American homes. "Free broadcasting" long has functioned as one of the principal means by which prerecorded performances of musical (and to a lesser extent non-musical) works are disseminated to the public. It gives that public an opportunity to "preview" new music; it stimulates and renews interest in existing works; and it allows the public to make informed decisions about which recordings they will purchase. It also provides access for those members of the public who lack the means to purchase recordings for home use. Notably, even after "sound recordings" were afforded protection aganst unauthorized duplication under federal copyright laws, the performance of those recordings over the airwaves remained firmly entrenched in the "public domain." Seen in the light of the importance afforded to promoting the dissemination of protected works as a goal of copyright law, this result appears to be neither an accident nor a political compromise. Rather, it reflects a balancc struck over time, and confirmed in the Copyright Act of 1976, among the various competing interests which have a stake in the operation of the copyright system—including the ultimate interests of the consuming public.

In effcct, Congress' decades-long refusal to restria broadcasting of sound recordings represents a choice—a decision to promote certain fundamental copyright goals by particular means. While providing record producers with legal recourse against unauthorized, "piratical" interference with the orderly public dissernination of their recordings (and the musical works they incorporate) through sales, the Congress has itself resisted interfering in any way with the dissemination of recorded music by way of "free broadcasting." This result should be placed in the context of copyright history and policy. As Professor L Ray Patterson has noted, the Anglo-American copyright system is rooted in the efforts of publishers to secure protection for their investment in the dissernination of texts:

> To protect the right to exclusive distribution, publishers created copyright. From this protection the author who created the work gained at best a reward secondary to that of the publisher. Copyright, therefore, originally functioned to encourage not creation, but distribution. In this regard, copyright's function is essentially the same today."[1]

Over time, copyright has come to protect authors' interests as well, and to function as an incentive to creativity in the public interest. But from its inception, copyright has served the public in another way—by providing the legal preconditions for the widest possible dissemination of works of the imagination. One need not assert that the encouragement of dissemination is the only legitimate goal of a copyright system in order to rank it among the most important of such goals. Congress has chosen to legislate (and not to legislate) so as to maximize the dissemination of sound recordings (and the underlying works they embody) to the public. In terms of fundamental considerations of copyright policy, this choice was anything but an arbitrary or irrational one.

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[24] *Billboard*, February 6, 1993, p.1; *New York Times*, February 1, 1993, Section D, p. 6.

* A copy of Professor Jaszi's Resume is attached. A copy of Professor Jaszi's Resume has been retained on file in the Subcommittee and will be made available for review upon request.

[1] "Free Speech, Copyright, and Fair Use," 40 Vanderbilt L. Rev. 1, 8 (1987) (citations omitted). Prof. Patterson's understanding of the origins of Anglo-American copyright is consistent with that of Professor Benjamin Kaplan in *An Unhurried View of Copyright* 8–9 (1967); in particular, it is borne out by the recent investigations of Professor John Feather, detailed in "The Book Trade in Politics: The Making of the Copyright Act of 1710," 8 Publishing History 18 (1980).

The benefits of DAB to the ultimate consumer are obvious, while any costs to copyright owners are speculative, at best. Those who would invoke the introduction of this technology to advocate the imposition of new copyright restrictions on the broadcasting of prerecorded material must bear a heavy burden of justification. That burden cannot be discharged by means of assertions that "sound-reeordings" are entitled to "equal" treatment with other copyrighted works, as a matter of natural justice. In the republic of copyright, not all works are created equal. Nor can the proponents of change make their case by pointing to the treatment of sound recordings in legal systems other than the United States. Not only are such systems animated by assumptions different from those which underlie American copyright, but each national system's treatment of sound recordings represents a "balancing act" in its own right: We cannot borrow an isolated feature of such a system while ignoring the context in which it is embedded.

In sum, more than legal rhetoric or references to non-analogous foreign laws should be required before new copyright interests are created in favor of the owners of sound rccording copyright, and at the expense of the "public domain." Proponents of change must do more than show that they would benefit from the imposition of new restrictions; they must demonstrate that those restrictions would not unnecessarily disrupt settled economic and cultural arrangements built on the foundation of vested expectations.

II. SOUND RECORDINGS IN PERSPECTIVE: STRIKING THE BALANCE

Long before rights in sound recordings received any legal recognition in federal law, there were those who advocated copyright restrictions on the broadcasting of prerecorded music, so as to provide record producers with a greater return on their investments.[2] By contrast, other advocates of sound recording copyright soon urged such restrictions in the interest of providing additional compensation to musical performers.[3] As the issue of copyright protection for sound recordings matured, it became apparent that it would be difficult (to put it mildly) to generate consensus around it. Not only were additional interest groups heard from, but reprsentatives of other groups revised their iniial positions.

One student of the subject has summarized the history of the issue in Congress through 1951 as follows:

> Before the impact of radio broadcasting was really felt, these [proposals] attracted very little attention. As the importance of radio in the music publishing and recording industries grew, there was a proportionate increase in thc pressure to secure copyright in sound recordings, and in the concerted opposition to such proposals on the part of author and user groups. The performers and manufacturers each sought protcctions for themselves

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[2] Although the first efforts to amend the copyright laws to provide protection or sound recordings date from the 1920's, the campaign did not acqulre much momentum until the early 30's, see B. Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2nd Sess. (Comm. Print 1961) [hereinafter "Ringer Study"] at 21–37. *See also* General Revision of the Copyright Law: Hearings Before the House Comm. on Patents, Trademarks and Copyrights, 72d Cong, 1st Sess. 19 (1932); and *see generally* Diamond, "Sound Recordings and Copyright Revision," 53 Iowa L. Rev. 839 (1968) [hereinafter "Diamond"].

[3] Advocacy of behalf of performcrs began as early as 1936, in connection with a proposcd General Revision of the Copyright Act. *See* Ringer Study at 29. But it should be noted that conferring new rights on sound recording copyright owners would do little, in itself to benefit musicians. Although it may be argued that performers as well as producers contribute relevant "authorship" to sound recordings, *see* House Judiciary Comm., Copyright Law Revision, Report to Accompany S.22 (No. 94-1476), 94th Cong., 2d Sess. (1976) at 56, the "work for hire" doctrine operates to constitute recording companies as the "authors" of those recordings, as a matter of law. As one commentator has observed, the "principal impact of [existing law] is that record companies, unlike songwriters, cannot collect royalties from radio and teleision stations for the broadcast of sound recordings," Olson. "The Iron Law of Consensus," 36 J. of the Copyright Soc'y of the U.S.A. 109, 126 (1988) [hereinafter "Olson"]; just so, the principal impact of a change in law would be to benefit those same companies. It has been proposed that recording companies could be directed by statute to share royalty income realized from performance rights with performers, *see, e.g.,* Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 2d Session, Performance Rights in Sound Recordings (Comm. Print 1978) [hereinafter "1978 Report"] at 1069 (Addendum to the Report of the Register of Copyrights on Performance Rights in Sound Recordings, Draft Bill § 7(c)(14), discussed in D'Onofrio, "In Support of Performance Rights in Sound Recordings," 29 U.C.L.A. L. Rev. 168, 192 (1981). But it is difficult to see how any legislation could guarantee that performers' gains from new income sources would not be offset, or even eliminated, by changes in recording industry contracting practices.

> and opposed it for the others. The author-publisher groups claimed that the proposals would unfairly discriminate against the and the broadcasting and jukebox interests were strongly opposed to additional payrnents and licenses. The motion picture interests were favorably inclined toward limited protection for recorded performances. The AFM [American Federation of Musicians] backed away from its original support of the proposals, and later expressed no opinion on the question.[4]

Thus, the particular balance struck with respect to sound recording copyright in the general revision of tbc copyright laws which led up to (and away from) the Copyright Act of 1976 must be understood against this background of dissension and confusion.

Although a measure of agreement emerged early in the revision process on the desirability of providing record producers with copyright protection against the unauthorzed duplication of their recordings,[5] none emerged with respect to other issues. As the Register of Copyrights put it in his 1965 Supplementary Report:

> Representatives of record companies have argued that there are no valid reasons in principle for placing sound recordings in a different category from all other works, and the American Federation of Musicians has recently adopted a formal position opposing the 1965 bill because it would deny performers "a modicum of economic incentive and participation in the vast profits derived from the public performance of records...." On the other side, proposals to this effect are strenuously opposed not only by those users who would have to pay additional royalties, but also by the owners of copyright in musical compositions who would probably get a smaller slice of the pie.... Underlying these arguments is further concern that, since performers contribute substantially to the aggregate of sounds fixed in a sound recording, the recognition of a performing right could introduce new and unpredictable factors of bargaining with performers into an already crowded and complicated copyright structure.
>
> Section 112(a) of the [proposed revisionl bill would...specifically exclude "any right of performance under section 106(a)(4)...." We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired.[6]

In fact, not even the recording companies lobbied seriously for a public performance right in the 1965 House hearings on thc new legislation,[7] and its was not until 1967 that the issue was pressed in earnest,[8] still to no avail. In 1971, the Congress avoided consideration of thc broader issues of copyright for sound rccordings in order to enact limited protection against their unauthorized duplication.[9] The Copyright Act of 1976 carried forward this limited copyright for sound rccordings, and 114(d) dirccted the United States Copyright Office to undertake a study of the legality and desirability of additional copyright protection for this new class of works.

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[4] Ringer Study at 37. The opposition of musical authors and publishers to the extension of protection for sound recordings, and in particular to the articulation of a performance right in such recordings, was based on a concern that, as one commentator has put it, "any performance fees paid for the use of sound recordings would compel a reduction in the fees they receive for the performance of musical works." Diamond at 867 (designating this the "pie theory.") The internal policy disputes which causcd the AFM to cease, at one point early on, its lobbying on the issue are described in Countryman, "The Organized Musicians," 16 U. Chi. L. Rev. 229 (1949).

[5] *See* 1978 Report at 28.

[6] Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision ot the U.S. Copyright Law: 1965 Revision Bill, 86th Cong., 1st Sess. (Comm. Print 1965) at 51-52.

[7] *See* Helfer, "Copynght Revision and the Unauthorized Duplication of Phonograph Records—A New Statute and the Old Problems," 14 Bull. of the Copyright Soc'y of the U.S.A. 137, 167-68 (also detailing support for performance right by industry witness in individual capacity).

[8] *See generally,* Hearings on S. 597 Before Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st. Sess. (1967) and the account in Diamond at 866-67. Among the issues most hotly debated was the question of whether recording companies and artists already were compensated, in effect by thc free exposure which their records received as the result of airplay.

[9] *See* H.R. No. 92–487, 92d Cong., 1st Sess. (1971), reprinted in 2 U.S. Code Cong. and Admin. News 1566 (1971). The legislation was strongly influenced by the international negotiations toward the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, which was concluded later in 1971 and ratified by the United States in 1973.

Completed in 1978,[10] this study recommended the extension of performance rights to sound recordings, and was the subject of extensive hearings in the course of which many by-now familiar positions were restated.[11] In any event, no new legislation on the subject was enacted. Nor has it been since.

A. Sound recording protection and copyright policy

If the legislative record just outlined were no more than a history of inattention and indecision, one might argue that the time for action on expanding copyright protection for sound recordings was at hand. In fact, however, the provisions of present law were the result of a well-developed and comprehensive legislative process. More generally, it is easy enough, after the fact, to see how particular features of tbe 1976 Copyright Act could be revised to the advantage of one interest group or another,[12] or improved on from a technical standpoint. To do so, however, would be to ignore the fact that the content of the 1976 Act was the result of a process of negotiation and interest-balancing. In fact, neither arguments from self-interest nor arguments from expertise should be a sufficient basis to set aside significant legislative choices incorporated in the 1976 Act—unless they are arguments of the most compelling and urgent kind.

The ultimate decisions about sound recording copyright described in the preceding section were made in the context of a systematic general revision of American copyright law. The revision process wove an intricate pattern of compromises among competing interest groups into the new copyright law, and we should move cautiously in attempting to disentangle any one strand from the resulting fabric.[13] In particular, Congressional decisions about the scope of copyright protection must be understood as interdependently related to choices about how to define exceptions to the law's protective reach. Absent necessity, those choices should not be reconsidered outside of the special legislative context in which they were made. In general, the Congress approached copyright revision with a bias against change unless change could win the support of what one writer has called "all 'respectable' interest groups."[14] Indeed, throughout the revision process the Congress consistently urged those interest groups to compromise their differences, and to present the agreed-upon results in the form of legislative proposals.[15] Where agreement could bc achieved, through compromises accomodating the interests of copyright owners and copyright users, changes in copyright principles were the result.[16] Where there was no agreement, as in the case of performance rights in sound recordings, there was no change. These negative choices, along with many affirmative ones, became part of the overall balance of interests which is represented by the Copyright Act of 1976. And in the case of performance rights in sound recordings, the decision not to provide such rights is one which should not be lightly reconsidered.

At one level, the Congressional exercise in interest balancing entailed accommodation of the competing claims of various institutional interest groups vying for relative advantage: literary authors, musical composers, motion picture producers, record companies, broadcasters, musicians, and so forth. At a higher level, however,

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[10] *See generally,* 1978 Report.

[11] *See e.g.,* Copyright Issues: Cable Television and Performance Rights, Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of thc House Judiciary Comm., 96th Cong., 1st. Sess. (1979).

[12] It can be argued that Congress, in the 1976 Act, by calling for a Copyright Office study on the advisability of a performance right in sound recordings [See § 114(d)], left open the issue of whether such right should bc recognized. However, Congress' subsequent refusal to adopt legislation of the sort rccommended by the Copyright Office in 1978 can be fairly viewed as a decision not to upset the balance established by the 1976 Act.

[13] Litman, "Copyright, Compromise, and Legislative History," 72 Cornell L. Rev. 857, 896-903 (1987) [hereinafter "Litman I"] (arguing that piecemeal judicial interpretation of controversial provisions may have "fundamentally altered the delicate balance of compromises that run throughout the 1976 Act.") The same risk exists with respect to piccemeal legislative revisions of the copyright scheme.

[14] Olson at 111. He describes this bias against change in the absence of consensus as a disinclination to impose "one-sided losses on copyright interest groups," *id.* at 113. And it should be noted that this process of copyright revision by agreement and compromise was nothing new: Essentially the same approach had been employed in the deliberations leading up to the enactment of the Copyright Act of 1909. *See* Litman, "Copyright Legislation and Technological Change," 68 Oregon L. Rev. 275, 282-88 (1989) [hereinafter "Litman II"].

[15] *See generally,* Litman I. In her review of the legislative history of the 1976 Act, Professor Litman is at pains to point out that it is not a history of "cloakroom deals." Rather, "[t]he negotiated bargains of the 1976 Act were struck not between legislators and lobbyists but among representatives of opposing interests precisely because Congress publicly and on the record demanded that they sit down and agree." *Id.* at 881.

[16] *See* Litman II at 320-21 (describing the evolution of a pattern of interdependen rights and exemptions).

the Congress was engaged in another kind of balancing: trading off the claims of the consuming public against those of private copyright proprietors. Perhaps because the consuming public was not systematically represented in the revision process,[17] it must be said that the private proprietary claims generally were preferred in the striking of the final balance: The replacement of the vague generalities of the Copyright Act of 1909 by the expansive specificity of the 1976 Act represented a collective victory for copyright proprietors.[18] But, in certain other respects, the scheme of compromises which lay behind that enactment gave limited recognition to the conflicting interests of the consuming public. When the Congress decided against new legislation, as in the case of expanded protection for sound recordings, it effectively promoted the interest of the general consuming public in preserving ready, inexpensive access to copyrighted works. Absent some compelling new justification, we should not rush to revise the balance struck in Congress so as to provide greater proprietary rights at the expense of that public interest.

B. Preserving the public domain

Another way to put the same proposition is that the refusal to enact performance rights in sound recordings represents an explicit Congressional recognition of the "public domain," the enrichment of which constitutes a primary goal of our copyright system. Although it is conventional to regard the "public domain" as consisting of works which are, by virtue of their age or other infirmities, entirely outside the scope of copyright protection the concept is a far richer and more important one that such a description may imply. In fact, the "public domain" represents what one writer recently has termed "a commons that includes those aspects of copyrighted works which copyright does not protect..."[19]

Thus, all the features of copyright law which impose limits on the exercise of proprietary rights (including the "idea/expression" distinction, the "useful articles" doctrine, the requirement of "substantial similarity," the "fair use defense," and so forth) are themselves aspects of the "public domain"[20]—as is the traditional rule permitting broadcasting of sound recordings without the need to secure a public performance right in the recording. Although it curtailed the scope of the traditional "public domain" in many respects in the 1976 Copyright Act,[21] Congress struck the balance with respect to rights in sound recordings in a manner which tended to preserve at least one important aspect of that traditional "public domain" For this reason, if for no other, proponents of expanded copyright protection for sound recordings should be required to produce compelling justifications for their position.[22]

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[17] In general, to the extent the consuming public was represented at all it was by proxy: Representatives of educational institutions seeking limitations on the scope of exclusive rights spoke for those institutions, and indirectly articulated the interests of the pupils who are the ultimate consumers of educational materials; even so. In the debate over performance rights in sound recordings, the broadcasting industry spoke for itself, and indirectly for home listeners and viewers.

[18] This tendency may be seen, for example, in the expansion of the list of protected subject matter in § 102 and the particularization of the exclusive rights of the copyright owner in § 106. *See* Litman II at 320–22.

[19] Litman, "The Public Domain," 39 Emory L.J. 965, 968 (1990).

[20] *See* Gorman, "Fact or Fancy? The Implications for Copyright." 29 J. of the Copyright Soc'y of the U.S. 560, 561 (1982): "[Limiting] doctrines mitigate the rigors of what might otherwise be an overreaching monopolistic control by the copyright owner, thus promoting society's interest in enriching the public domain."

[21] One notable example was the extension of the exclusive right of public performance in musical compositions and non-dramatic literary works. Under the 1909 Act, the right of public performance was extended to these works in cases of performance for profit (and this as to the latter only by virtue of an amendmemt enacted in 1952); the "for profit" limitation was eliminated in § 106 of the 1976 Act. *See generally,* W. Patry, Latman's The Copright Law 11, 218 (5th ed. 1979). For a prophetic vision of the protectionist tendencies of the 1976 Act, *see* B. Kaplan, An Unhurried View of Copyright 114 (1967).

[22] In the 1971 House Hearings on sound recording copyright, Representative Kastenmeier put the proposition as follows:

> If we create a monopoly is this area, which is today legally free, — and there is always a question when we act in this area—we have to be able to justify it. There are justifications that may be raised, and objections may be raised by [consumer advocates] who are interested in effectuating the public interest. This committee must justify action on its part which has the apparent effect of extending monopoly.

Prohibiting Piracy of Sound Recordings, Hearings Before Subcomm. No. 3 of the House Judiciary Comm. on S. 646 and H.R. 6927, 92d Cong., 1st Sess. 20 (Comm. Print 1971) [hereinafter "1971 Hearings"].

III. PROPONENTS OF AMENDING U.S. COPYRIGHT LAW TO PROVIDE PERFORMANCE RIGHTS IN SOUND RECORDINGS BEAR A HEAVY BURDEN

The burden of persuasion to be met by advocates of legislative changes which would extend copyright monopoly into the "public domain" is discussed in an article co-authored by formcr Congressman Robert Kastenmeier; although the context of the discussion is the legislative history of the Semiconductor Chip Protection Act of 1984, the "political test" around which it centers is of general applicability:

> At the outset, the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action. . . .
>
> . . . The test is four-fold in scope. First, the proponent of a new interest ought to show that the interest can fit harmoniously within the existing legal framework without violating existing principles or basic concepts. . . .
>
> Second, the proponent of a new intellectual property interest must be able to commit the new expression to a reasonably clear and satisfactoy definition. . . .
>
> Third, the proponent should present an honest analysis of all the costs and benefits of the proposed legislation. . . . Since we live in a society of winners and losers, thc proponent must also candidly identify the groups that will bear the adverse consequences of the proposal and explain why they should bear those losses. The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirement of the intellectual property clause [i.e. "to promote the progress of science and the useful arts."]
>
> Fourth, any advocate of a new protectable interest should show on the record how giving protection to that interest will enrich or enhance the aggregate public domain. The aggregate public domain benefit should outweigh the proprietary gains which result from protection. Congress can safely move forward if the cost to the public of the monopoly is deemed to be less than the value to the public of the total benefits caused by the law.[23]

The test has its immediate genesis in an approach to evaluating proposed intellectual property legislation put forward by Professor Daid Lange at Congressional hearings in 1983.[24] Specifically, Kastenmier and Remington cite to the passage with which Professor Lange introduced his statement:

> [What I propose is a kind of civil procedure for new copyright legislation—a system imposing the legislative equivalent of burdens of proof and adverse presumptions to be met by anyone who proposes protection for a new interest.... [T]he new interest ought to face a stiff challenge amounting to a beavy burden of proof and a clear presumption agaist recognition. Each new copyright interest, by definition, represents a potential encroachment on the public domain. No new interest ought ever to be recognized unless and until the consequences of that encroachment have been explored in the fullest practical sense. It is reasonable to require the proponent of a new interest to bear the burden of showing why any intrusion into the public domain ought to be allowed and equally reasonable to presume that the public domain will be protected until that burden has been discharged.[25]

Later in his statement, Professor Lange expanded on the "cost-benefit" analysis required under the third step of the test the proposed (and Kastenmeier and Remington adopted):

> What may be at stake in a case like this are economic interests developed in reliance on a well-established concept amounting to a vested interest in

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[23] Kastenmeier and Remington, "The Semiconductor Chip Protection Act of 1984 A Swamp or Firm Ground?," 70 Minn. L. Rev. 417, 440–42 (1985) [hereinafter "SCPA Article"].

[24] *See* Copyright and Technological Change: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 98th Cong., 1st Sess. 60–66 (Comm. Print 1983) [hereinafter "1983 Hearings"] Kastenmeier and Remington are at pains to point out the that "the Lange test has its predicates in other earlier works," including the discussion of the purposes of copyright in Professor Kaplan's *An Unhurried View of Copright* 114-15 (1967), and going back to Lord Macaulay's noteworthy speech characterizing copyright as a "the least objectionable way" of assuring "a supply of good books." SCPA Article at 442 n.105.

[25] 1983 Hearings at 66–66.

> the public domain. If so, it will not ordinanly be sufficient merely to say that the proposed legislation will extend the benefits of copyright to existing proprietors or make them more secure. To the contrary, unless a superior claim can be shown on some other ground, the interest derived from the public domain should prevail. Even dire warnings about the likelihood of industry-wide retrenchment should not lead automatically to changes in the copyright law. Copyright can be an efficient form of institutional bargain, but it is not intended to save buggy-whip manufacturers from ruin.[26]

No less exacting a standard should be applied to efforts to justify encroachments on the public domain in thc form of new limits on broadcasting of copyrighted sound recordings.

A. Arguments purporting "equity" are insufficient to justify the extension of copyright in sound recordings

The burden of justification which must be borne by those who advocate the additions to the limited rights now enjoyed by the proprietors of sound records cannot be satisfied merely by pointing out that a perfectly symmetrical copyright scheme would afford the same exclusive rights to all copyright owners. Such an argument might have had a certain appeal when the subject matter of copyright was restricted largely to the "fine arts," as that term traditionally has been understood. Today, however, copyright protection extends to a variety of different kinds of worlds, including designs for toys and consumer products, factual compilations, and computer programs, which have little in common with its traditional subject matter, except insofar as perhaps all can be described as the "writings" of "authors" in a metaphorical sense. It is no longer tenable to argue that merely because all these kinds of works share the same general metaphorical description, all should receive precisely the same kind of protection.[27]

I do not intend to revisit here the unprofitable question of whether sound recordings are in some sense Constitutional "writings," nor to rehash the issue of whether their production constitutes a form of "authorship."[28] Rather, I wish to emphasize that the tendency in modern American copyright law has been toward legislative and judicial adaptation of general copyright principles to the peculiarities of how the many different kinds of works which make up the contemporary universe of copyrightable subject matter are made and used. Thus, for example, we restrict the effective scope of copyright protection in commercial designs by applng the so-called "useful articles" doctrine,[29] and this Term the United States Supreme Court will decide (in *Rural Telephone Service Co., Inc.,* v. *Feist Publications, Inc.*) what special principles should be applied in determining the extent of protection available to functionally organized directories.[30] Recently, new legislation has been enacted to give copyright protection to "architectural works." But in recognition of the special character of such works, and uses made of them, the scope of exclusive rights with respect to an architectural work is limited to permit its unauthorized "pictorial representation," and to allow the owner to alter or destroy a building embodying it."[31]

Nor are the special adaptations of copyright doctrine to particular kinds of works always in the form of limitations on the scope of protection. Thus, for example, recent decisions have relieved plaintiffs in copyright cases involving computer programs of burdensome general restrictions on the proof of infringement.[32] And spe-

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[26] *Id.* at 67.

[27] In fact, there is reason to think that the American recording industry may no longer place much stock in the rhetoric of equal treatment for all "works of authorship." RIAA's President last year claimed that "authors' rights are dead;" conceded that the recording industry's goal, at least in the international arena, is to obtain greater protection for manufacturers' rights; and stated that it "care[s] little about the banner under which [these] rights are protected..." Address to Library of Congress Seminar on "Intellectual Property: The American Experience," May 8, 1990.

[28] *See* Meyers, "Copyright in Sound Recordings—Another Milestone in the Protecion of Intellectual Property," 19 Bull. of the Copyright Soc'y of the U.S.A.. 184, 187 (1972).

[29] *See, e.g., Keiselstein-Cord* v. *Accessories by Pearl, Inc.,* 632 F.2d 989 (2d Cir. 1980).

[30] *See generally,* Raskind, "The Continuing Process of Refining and Adapting Copyright Principles," 14 Columbia-VLA J. of Law & the Arts 125 (1990). Professor Raskind notes that "the appropriate conception of the authorship take account of the conduct involved in the production of each work, *id.* at 138, and proposes a special framework of analysis for cases involving maps and fact works.

[31] These provisions were contained in Title VII of H.R. 5316, the Justice Improvements Act of 1990. *See* Daily Congressional Record (October 27, 1990) at H-13310 and 13311.

[32] *See, e.g., Whelan Associates. Inc.* v. *Jaslow Dental Laboratory. Inc.* 797, F.2d 1222 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 877 (1987) (authorizing expert testimony on the issue of "substantial similarity").

cial legislation has expanded thc exclusive rights of sound recording copyright owners by restricting the operation of the "first sale" doctrine.[33] In the light of these developments, it is unpersuasive, absent additional justification, simply to argue that sound recordings be accorded the same protection against public performance as other copynghted works. Formalistic appeals to "fairness" or "equity" add little to a reasoned discussion of the issue.

This so-called "equitable" argument was the principal basis for the Copyright Office's 1978 Report recommending the enactment of performance rights in sound recordings—on which Congress failed to act. In presenting the Report to Congress, Register of Copyrights Barbara Ringer explained the "equitable" basis for the Repon's conclusion:

> Mr. Chairman, I have taken a rather strong view that in principle personally am, and also the Copyright Office under my leadership is, in favor of a royalty for the performance of sound recordings... I think I am committed to the principle of copyright and I think I am committed to the principle of protection for performance, the principle of creative workers, creators of original materials, being entitled to share under copyright principles in the remuneration that comes from the use of their works."[34]

The difficulty with this argument is that it is circular. It is based on the fallacy identified by Felix Cohen in his seminal article, *Transcendental Nonsense and the Functional Approach,* 35 Colum. L. Rev. 809, 815 (1935): "The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value... depends on the extent to which it will be legally protected." The value which can be obtained from a copyrighted work is created by the copright law: without the law, there is no legally protected interest.

Copyright owners certainly share in the proceeds of some remunerative uses of their works; the law which defines the extent to which they will share is not an equitable outgrowth of the common law, it is copyright. The Register's arguments in the 1978 Report and RIAA's present arguments for a particular extension of copyright protection are, therefore, arguments which assume—rather than demonstrate—the correctness of their distributable consequences.

Obviously, sound recordings, though valuable and worthwhile, are not paintings, nor phone books, nor computer programc. They are a particular class of works, with particular characteristics and associated with particular patterns of use. No one seems ready to contend that all limitations placed on the exclusive rights of copyright owners in 114 of the Copyright Act, including the restriction of the exercise of their 106(1) rights to cases involving duplication (rather than irnitation) of sound recordings, now should be abolished as a matter of natural justice.[35] It remains to be explained why, in particular, the limitation of those rights in favor of broadcasters, other users of sound recordings and their listeners now should be abrogated.

B. Advocates of Change In Performance Rights Must Explain Inadequacies of the Present System and Justify Dislocations That Will Flow From Change

Advocates favoring creation of a performance right cannot simply rely on the increased financial remuneration that may flow to performers and record producers, but must also explain that inadequacy of the present system which provides these groups and the public with considerable benefits. The free dissemination of recorded works by broadcasters has obvious benefits to the public in permitting the widest reception of creative works. Moreover, there is reason to believe that, performers, and recording companies directly benefit from the massive firee exposure of their works by mcans of increased sales of records.[36]

The Register's 1978 testimony—perhaps inadvertently—demonstrates yet another persuasive argument against creation of performance rights in this context. That during the generations in which broadcasting of sound recordings has been an unregulated activity (an aspect of the "public domain"), a variety of arrangements have been made in reliance on this state of the law:

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[33] Section 109(b) now reflects the provisions of the Record Rental Amendment of 1984. This year, similar restrictions have been imposed on "first sale" in favor of the owners of copyright in software prcgrams. *See* Daily Congressional Record (October 27, 1990) at H-13310 and 13311.

[34] 1978 Report at 128.

[35] *See* Chafee, "Reflections on the Law of Copyright: II," 45 Columbia L. Rev. 719, 736 (1945), explaining the policy basis for the limitations: "[W]e ought not to load courts with the new delicate task of comparing the methods of rival conductors.

[36] The unchanged practice in the recording industry is to provide radio stations with free copies of records—an unmistakable demonstration that record companies recognize the benefits they receive from over-the-air play.

> Now, broadcasters and other commercial users, but primarily broadcasters, used sound recordings without paying royalties to their performers and their producers for generations.... Users today generally complain that they are going to have to pay a tax now, and they will call it a tax, there is no question about this.[37]

Without substantial new justification, the Copyright Office should not recommend changes in current law which could profoundly disrupt the arrangements under which the producers and users of prerecorded works have done business for decades.

C. Justification For Performance Rights In Sound Recordings Cannot Be Gleaned By Comparison With The Intellectual Property Laws of Other Countries

Proponents of performance rights in sound recordings should be able to take no particular comfort from the fact that such rights are recognized under the laws of many foreign countries. As is the case with American copyright, so the genesis of every foreign system is to be found in a complex blending or balancing of interests; to compare one feature of American law with one feature of analogous foreign law without taking account how each feature figures into the entire legal scheme of the respective country can produce exceedingly misleading results. For example, many foreign legal systems deny protection to sound recordings as works of "authorship,"[38] while affording producers and performers a measure of protection under so-called "neighboring rights" schemes.[39] While that protection may more generous in some respects than sound recording copyright in the United States, entailing the right to collect royalties in connection with public performances, it is distinctly less generous in others: The term of protection for sound recordings in many neighboring rights jurisdictions, for example, is limited to a fixed term of years,[40] sometimes far less than that allowed for sound recording copyright under U.S. law.[41] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

In this connection, Article 2 of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (to which the United States became a party in 1989) does not mandate the protection of sound recordings under national laws of copyright or "authors' rights" in signatory countries. The absence of sound recordings from that article's itemization of protected works has the effect of permitting Berne Union nations, at their option to afford protection to sound recordings

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[37] 1978 Report at 129. Another dimension of the unsettling effects that change in the law would have on current arrangements was articulated in the Coprrlght Office's 1965 Supplemcntary Report which expressed "concern" that "the recognition of a perfoming right could introduce new and unpredictable factors of bargaining with performers into an already crowded and complicatcd copyright structure." *Id.* at 51-52. *See* Office of Technology Assessment, Copyright and Home Copying Technology Challenges and The Law, OTA-CIT-422 (Washington, D.C., U.S. Gov't Printing Office, October 1989) at 96-100.

[38] *See* Dietz, "Ten Propositions on Publisher's Copyright," 3 Rights (Summer 1989) at 5,6. A classical statement of the grounds for resisting assimilation of sound recordings to traditional subject matter is to be found in Professor Henri Desbols' treatise, Le Droit D'Auteur en France (3rd ed. 1978), where he states the view that "phonogram producers engage in activities of an industrial character, which are extremely useful for the development of musical or literary culture, but which do not have the characteristics of intellectual creativity." Id. at § 187. In this view, sound recordings, though worthy of protection, do not qualify as works of "authorship."

[39] While some countries afford protection under the mainstream law of copyright or authors' rights, many of those which reject the analogy between sound recordings and traditional subject matter, provide protection by means of special legislation. *See generally,* G. Daries ald H. von Rauscher auf Weeg, Challenges to Copyright and Related Rlghts in the European Community 2-9 (1983).

[40] In France, the rights of performers and phonogram producers are recognized, under Article 30 of Title II of the 1985 Act, to fifty years from the beginning of the year of "first communication" of a recording, M. Nimmer and P. Geller International Copyright Law and Practice (1989) at FRA-99 (discussion by Prof. Robert Plaisant), and *see generally,* Chesnais, "Les Droits Voisin du Droit D'Auteur II: Producteurs de phonogrammes et vidéogrammes et entreprises de communication audiovisuelle." 128 R.I.D.A. 67 (1986). In Germany, performers' and producers rights expire 25 years after publication or (in the case of unpublished recordings) production Nimmer & Geller, *supra* at FRG 125-127 (discussion by Dr. Adolf Dietz). Both countries, incidentally, are signatories of the Geneva Phonogram Convention of 1971 and the Rome Convention of 1961—the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

[41] As "works made for hire," sound recordings currently are entitled to protection under U.S. law for the lesser of 75 years from the date of publication, or 100 years from the date of creation. 17 U.S.C. § 302(c).

by other means—or not at all.[42] It is also noteworthy that the participants in the meeting of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright, convened by the World Intellectual Property Organization in July 1990, failed to agree on whether sound recordings should be added to the non-exclusive list of predictable works in Section 3(1) of the "Draft Model Law on Copyright," even on an optional basis. Seven national delegations (including that of the United States) and three international non-governmental organizations favored the inclusion of sound recordings; eight delegations (including France and Gerrnany) and five NGO's were opposed.

Proponents of inclusion pointed out that "[m]ore than 40 countries do actually protect sound recordings as works and about 12 countries do protect sound recordings as literary and artistic works;" opponents argued that "[t]hose who allege that more than 40 countries protect sound recordings by copyright forget that copyright is used in different meanings in different countries," and "it is doubtful that there is real copyright protection in the sense in which this protection exists in the Berne Convention even in the 12 countries to which reference has been made..."[43] Obviously, the case of American copyright, which denies the public performnance right to protected sound recordings, exemplifies this last argument. What this ultimately demonstrates, however, is not that the United Statcs is out of line with an emerging international consensus. Rather, it demonstrates that no such consensus exists. Each country which affords protection to sound recordings has tailored that protection to fit its own legal tradition. Our tradition is one which gives great weight to the interests of the consuming public, in which proposals to expand the scope of copyright protection should be subject to close, critical scrutiny.

IV. CONCLUSION

It yet may be demonstrated that DAB technology poses such significant risks to the proprietary interests of copyright proprietors in musical works and sound recordings that the enactment of new, narrowly-conceived statutory measures is necessary to safeguard those interests. Any such measure, however, should represent the "least restrictive alternative" where the competing interests of the consuming public are concerned. Even in the worst case, the introduction of this new technology would not, in itself, justify the enactment of an "across-the-board" performance right in sound recordings, applicable without regard to the manner in which they are transmitted. Whatever the shortcomings of the legislative process, the sum total of American copyright doctrine represents a complex and hard won balance between a number of distinct interests. That balance should not be lightly upset—especially in ways which would augment the rights of private proprietors at the potential expense of the ultimate intended beneficiaries of the copyright system.

Almost thirteen years have passed since the Copyright Office recommended the enactment of a performance right in sound recordings. The outcome of the present Copyright Office Study should not be dictated by allegiance to that former recommendation, premised as it was on a principle that as matter of "equity"—or simply of definition—all copyrighted works are entitled to parity of protection. That principle, however, has outlived its utility as a useful guide to the formulation of public policy. With the passage of time, the list of works protected under copyright has grown, and the need to tailor the protection granted cach kind of work to the special circumstances of its producers and consumers has become ever more apparent. It is too late in the day to decide a question as important as that presented by this Study on the basis of an intellectual reflex.

Nor does the comparison of the treatment of sound recordings in United States law and the law of foreign countries provide any basis for a recommendation of the enactment of a performance right. Although it is true that the Unitcd States provides sound recordings with more protection than many countries, and not as much as some, this is no more than a reflection of the fact that the Amcrican copyright tradition is a distinct one, with its own animating values. In a consideration of the impact of DAB technology on the recording industry and the consuming public, those values will be served only if proposals for new, restrictive copyright legislation are both narrowly drawn and compellingly justified.

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[42] *See* S. Ricketson, The Berne Convention for the Protection Of Literary and Artistic Works: 1886-1986 (1987), at §§6.66 & 6.78.

[43] "WIPO Meetings: Committee of Experts on Model Provisions for Legislation in the Field of Copyright—Third Session," Copyright, September 1990, at 241, 262.

Mr. HUGHES. Mr. Murphy, in your statement, you take the understandable position that any new rights should not impair an existing one.

I wonder if you can explain to me and the committee how either an exclusive right or a right of equitable remuneration for public performance over sound recordings might harm your members' existing rights?

Mr. MURPHY. I think the statements we just heard here, about the concerns that the broadcasting industry may have; that they already have a 3-percent cost factor, and that there are a number of stations that may go under, if you will, if they have to be burdened with any additional costs.

We would hope that if there were any additional cost associated with legislation in this area, it would not come out of the payments that have been established through the performance-based income that is currently being paid to songwriters and to publishers.

Public performance income constitutes an existing pool of income for songwriters and publishers. We just feel—I don't know if the pool is expandable. From what we have heard here, we are concerned about it.

Mr. HUGHES. You also take the position that existing rights of reproduction and distribution might be adequate to protect record companies.

If a digital audio cable service purchases lawfully made copies of sound recordings and uses those copies to transmit, they don't need the record company's permission, do they?

Mr. MURPHY. No, sir, not under present regulations.

Mr. HUGHES. Does it matter if the service is a monthly subscription or pay per-listen service.

Mr. MURPHY. It does, yes, sir.

Mr. HUGHES. Would you explain?

Mr. MURPHY. If one purchases an album or a particular song in a store and plays it over the air, initial purchase has been made. Under the systems that have been described to us today, there would either be advance notice of what is being broadcast at a future date, and it would make it easy for someone to reproduce the entire album or all the number of cuts being broadcast; or, two, it would be on a subscription basis that the music will be offered, not for the private use for which the recording was originally made, but for a commercial use.

So that what we are going to have is an additional profit being made by the one that transmits that work on a subscription basis. So it is a pay-per listen and pay-per subscription, where you don't need the initial album sale to begin with.

Mr. HUGHES. If any change is made in the copyright laws, internationally and domestically, you favor a new right of electronic reproduction rather than a performance right.

I assume that is because of your earlier statement that you don't want existing rights, such as the right of public performance for songs to be in any way harmed. Am I correct in that assumption?

Mr. MURPHY. Yes, sir, that is part of it.

And the other part is in the way we visualize the business; that the sound recording delivery system, whether it comes via a truck, or parcel post, or via the air, it is still bringing a recording to one's

home or to the particular individual on a select basis so that they can reproduce a copy. So that the delivery system becomes secondary to what is actually transpiring.

Mr. HUGHES. Would this new electronic reproduction right also apply to digital broadcasting?

Mr. MURPHY. Yes, sir. Digital broadcasting on a subscriber basis.

Mr. HUGHES. Mr. Fritts, in your written statement you take, I think, a constructive approach toward the digital services. You state the NAB would be amenable to the possibility of legislation limited to subscription services.

Let me ask a corollary question, would you support legislation that included digital over-the-air broadcasting?

Mr. FRITTS. Mr. Chairman, we think if broadcasters are able to employ digital technology, and there are—we are helping advance that technology now—that the format—the average radio station will continue to operate the same way it has in the past: It will not revolutionize; it will not be a subscription service; it will just be a better sounding radio station, but will keep the same formats and operate basically the same way it has in the past.

We feel that there is a symbiotic relationship between the record companies and broadcasters and a mutual reliance upon one another. Oftentimes the record industry courts very strongly popular radio stations to try to get their music on the air in those stations. And that is a big part of their promotion activities.

Mr. HUGHES. But I think that skirts the issue. The issue is whether or not the digital technology will put at risk the sales that performers now receive.

Mr. FRITTS. That is a good question. It will not in terms of radio stations. I would submit that it might in terms of subscription services, because radio stations are supported only by commericials. And because of the commercial disruptions, no radio station publishes a list and says, "We are going to play these songs at this time in case you want to record them."

It would hurt the radio station, as a matter of fact, to have people recording those songs because then they would not need to listen to the radio. They would have the recording made from that.

So we would hope, in the best of all world's—and we would state, rather, that the radio formats and the way radio stations do business will not change because of digital technology.

Mr. HUGHES. How can you say what a radio station would do by way of policy? The marketplace is so competitive today, and so many of the small stations are having such a difficult time, how can you say that they would not advertise what they are doing as a special service?

Mr. FRITTS. I cannot say they would not, and perhaps a few stations might. But, by and large, I can tell you that it is not a common practice; and it would be a rarity if this were to happen.

Now, in tomorrow's marketplace, who knows what may happen. Clearly, it is in the broadcasters' interest not to set up a scheme where a lot of recording is done off the radio station. Obviously, that would operate to the detriment of the radio station.

Mr. HUGHES. I think you asked a fair question: What has changed? An effort was made back in 1974 to do what we are talking about today. The answer is: There are a number of things that

have changed. The marketplace has changed. Technology has changed; digital being a revolutionary change. The marketplace has changed from the standpoint that we now have a large pool of money, much of it generated by American performers of songs. And we are not able to tap that for the simple reason that we are at a competitive disadvantage because we do not have performers' rights and because of reciprocity prohibitions. As you well know, our artists can't tap those funds, so we are at a disadvantage. That has changed, hasn't it?

Mr. FRITTS. I would suggest that the change in technology for digital subscription service is dramatic. I would suggest that the change for digital over the air radio stations is not going to be dramatic. It will be an improved sound but not dramatic in terms of programming changes.

With respect to the Rome Convention which was discussed here earlier today and I think even Mr. Berman would agree there are many deficiencies with that in terms of reciprocity and his idea of looking forward rather than looking back I would agree with.

We have, for your information, Mr. Chairman, sought the counsel of the immediate past Trade Representative who has dealt with and tried to negotiate all of these various agreements on intellectual property rights with these various countries. He tells us and he tells me and I am sure he would be pleased to meet with you on this, but he tells us that they just use this as an excuse, that the imbalance of trade between what the United States would get and the imbalance of trade from what the other countries would get is so enormous that they will find almost any excuse not to let those moneys come back to the United States.

Mr. HUGHES. That is why we have to find every reason why we don't give them excuses.

Mr. FRITTS. Well, he indicated, of course, in my discussions after listening to some of this morning's discussion, where Mr. Oman, I believe, indicated we would just have to squeeze them harder in other areas. After having experienced that for the past several years, he said that is very, very difficult to do because of the priority of other issues regarding trade matters.

Mr. HUGHES. Well, there is no question but that many of our trading partners will find all kinds of reasons to deny us access to their markets and treat our products as they treat their national products, but the fact of the matter is that the landscape has changed considerably and digital technology has brought about many changes. The DART legislation that you have heard about here today involved legitimate concerns that the industry had.

While I understand your concern—your concern is that you don't want to pay any more obviously, than you are presently paying in royalties for the use of artists' rights—what we are concerned with is attempting to protect that right of creativity and rewarding those that create property of all kinds. If technology begins to undercut that, then obviously we need to take a look at how we are protecting intellectual property. So that has changed. Technology has changed the playing field.

Mr. FRITTS. I would agree with you that the technology, particularly with subscription service has made a dramatic change.

Mr. HUGHES. Subscription services, while rather limited today, it seems to me we can expect that, like a whole myriad of other services that will be provided in the years ahead are going to change the landscape. So we have to change to make sure that we protect the balance that exists: Society's right to enjoy the benefits of works of authorship on the one hand and the creators' rights to receive some just rewards for their work on the other. And when erosion in creators' rights takes place, that is where we need to look at ways to try to deal with the erosion.

Mr. FRITTS. I understand exactly what you are saying and I can't quarrel with that except to say that the digital cable and digital satellite services will also impact very heavily against the local radio stations because they will compete directly with the radio stations. They will be noncommercial services. They will be very attractive to listen to. They will take local audiences away and fragment and reduce advertising and make our life that much more difficult in the future than perhaps it has been in the past.

As you know, we have one of the most competitive industries in America now and we are looking at these new technologies and how they are going to make it even more competitive, so I would say that our job as an industry will continue to be very difficult. It will require a lot of innovation and creativity for a radio broadcaster to be successful in his hometown in the future.

Mr. HUGHES. Would you agree in the second area of change that I have alluded to, that is the international arena, that we can't afford to permit the ship to leave without us this time around? We found ourselves being left out looking in with the Rome Convention.

Now, we see once again the development of a new international treaty dealing with performance rights where our country could once again find its artists on the outside looking in. That wouldn't be good policy, would it, in your judgment?

Mr. FRITTS. Certainly not. I would agree with you that—in fact, I would offer a little bit different suggestion. Broadcasters from around the world, particularly those in emergent democracies, come to the United States to look at and learn about the local system of broadcasting, how it works, how it interacts. They set up their own trade associations in many areas.

What I think might be a proper way to go is not react to the other countries, but stake out our own future because we have found and I am sure you have in your travels around the world that other countries look to the United States.

I was in Mexico and met with their President a couple of weeks ago and he said, "When you in America get the flu, we get pneumonia." There is a certain amount of interaction in that relationship.

What has not changed, I would suggest to you, in this whole process is the relationship between broadcasters, recording a music, and the creators of the music, publishers and authors and composers. That was the relationship I was focusing on that has not changed.

Mr. HUGHES. One of the arguments made by the cable companies against retransmission consent—and you knew I was going to bring it up—is that they did not harm your market. Congress, in the

1976 Copyright Act, reached the same conclusion by not providing a fee for local retransmission of local signals. I understand the argument that retransmission consent was necessary for recognition of broadcasters' creative contributions and I agree with that argument. I thought that was the right argument, even though I did not agree entirely with your position on retransmission consent.

Isn't your position today somewhat inconsistent with your position on retransmission consent? Isn't that what we are talking about? We are talking about making sure that those who create are rewarded for their creations.

Mr. FRITTS. We did expect you to bring this issue to our attention. And I think there is a very fundamental difference from our perspective of how the marketplace has been playing.

The cable industry is a monopoly upon which the broadcast industry is very much dependent. In a way there is a symbiotic relationship between the broadcaster and the cable industry for the transmission of their signals, very similar to the way broadcasters and record companies have a symbiotic relationship. The difference is that cable companies hold a life and death threat over broadcasters at any hour of any day. Prior to this legislation they could drop a station from their cable service and we would not be on the air.

They are very competitive now. They sell advertising. They own the conduit. They own the content. And so the difference would be while broadcasters and record companies help one another and there is no competition between them for dollars in the way they operate, the cable industry, on the other hand, is a very, very strong competitor to the broadcast industry and as a result, they hold the ability to virtually put broadcasters out of business, in addition to the strong competition.

So I think we come at it from a different approach perhaps than you do, but the relationship between the broadcasters and the record company is one of enhancement for each other, and the relationship between the cable industry and between the broadcast industry has been one of continued tension for a number of years and one that is highly competitive.

Mr. HUGHES. Should the record companies have the choice to let you transmit their product just like you want; is that right?

Mr. FRITTS. Well, again, I think we go back to a little bit different premise from the beginning. I could see them making that case. But again, there is a very strong desire on the part of these eight, huge, billion and a half each, record companies to get air play on radio stations. They spend a great deal of their promotion efforts to make sure that they can get their records on the top record stations in the largest markets in the country. That is a very important process that they try to take care of because the advertising, if you will, of playing those records on the air creates interest in sales, and as a result, to get on the radio is helpful to them and obviously to play popular music is helpful to broadcasters.

Mr. HUGHES. I understand that, but isn't the ability to say you cannot transmit, isn't that an inherent right within copyright law? Isn't that inherent?

If you don't have the right to say you cannot use my record, then what good is that right? That is the property right, isn't it, if you are the copyright holder?

Mr. FRITTS. Again, we have multiple tiers of copyright holders which you alluded to earlier.

Mr. HUGHES. I understand, but I am talking about general copyright policy in law. There are certain features of copyright law and one of them is the right to deny you the ability to use a work; isn't that so?

Mr. FRITTS. I suppose it is, actually.

Mr. HUGHES. I think so. OK. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. Mr. Chairman, because of a very hectic schedule, my arrival was late but that does not indicate any lack of interest in this subject.

Mr. Fritts, let me start with you. I was going to ask this question earlier today if I had been able to get here and it might better be addressed to someone in the record business, but let me put it to you to see if you can respond to it.

Do you believe that people in the recording business or the record business believe that air play is significantly important to the success of their records and that it is an essential part of marketing those records?

Mr. FRITTS. Congressman Coble, definitely it is a big part, and I think if you spoke with any record company promoter or executive that they would say their first order of business is to make sure they get air play. And it is a very significant portion of that. The record promoters spend a great deal of time working with the radio program managers in various radio stations and it is the way they exhibit their product. It is their advertising. It is their billboard. It is their way to reach the American people in the most effective way to sell product.

Mr. COBLE. That was pretty much your answer to the chairman's question but I had mine framed a little differently. What, other than playing the records, do radio stations do to contribute to the record artists?

Mr. FRITTS. Well, artists are very popular people. They oftentimes will call on radio stations and say I am available for an interview either by telephone or in person or maybe I could sit in on your morning show for a couple of hours this morning and answer questions back and forth for your audience. They clearly look for every opportunity to be able to, if you will, reach the public through the radio station. They will do dropbys at stations where they have remote broadcasts and will do personal appearances oftentimes if they can work it into their schedule with the radio station deejays and program people in an effort to promote themselves and to promote their product, their records.

Mr. COBLE. In your statement, Mr. Fritts, you indicated that the radio industry is not doing so well financially. Elaborate a little more in detail upon that as to what problems they are facing, et cetera.

Mr. FRITTS. Unlike many governments which protect their radio industry, Canada, for instance, has been very, very loath to allow new stations to come into the market. If you want to own a jazz

station in Toronto, you have the only one. There aren't two of anything in their market. They insist on diversity. In the United States, we have had 2,000 new broadcast stations go on the air in the last decade, to a total of about 11,000 stations. It is very competitive. There is an overpopulation of stations, and it is very difficult for some stations to make money.

Our only source of revenue is advertising. The advertising market has been difficult. It, itself, is highly competitive and as a consequence our latest survey for 1991 showed that about 60 percent of the radio stations are, in fact, losing money. And as I pointed out in my oral testimony, the 3-percent-plus which is paid to ASCAP, BMI and SESAC oftentimes is the difference between profit and loss. I am not suggesting we not pay those fees. I am suggesting that is how narrow the margin is in some stations.

Mr. COBLE. Over what period of time did you say?

Mr. FRITTS. In the last 10 years.

Mr. COBLE. You also referred to a certain number of signals that disappeared.

Mr. FRITTS. In the last 6 to 18 months, we have had 300 radio stations go off the air because of financial difficulty and hardship. When they go off the air that means the community has one less servant to provide public service, public information, school closings, weather, et cetera, et cetera. It is one less station for the record companies to advertise on. It is one less station that the music societies—BMI, ASCAP, SESAC—are going to derive revenue from, so there is a ripple effect that goes beyond just the broadcasters' interest whenever they go off the air.

Mr. COBLE. Thank you, Mr. Fritts. Mr. Murphy, you danced in the shadow of this in your statement. I am not suggesting you were trying to be evasive, and when the chairman asked you the question, you also responded, but as to, yes or no, are you suggesting that any law in this area should only deal with digital delivery systems?

If you can't answer that, yes or no, you may explain your answer.

Mr. MURPHY. I can't answer it, yes or no. Digital delivery is a great concern to me and to my constituents considering the worldwide recorded music business is some $25 billion, and what is at stake here is a great deal of money and a great deal of concern on a worldwide basis. The U.S. music market alone is about $9 billion. We are very much concerned about what subscription services will do to that part of our business and to the people whom we represent.

To put it in perspective, I think there is a very big monetary issue. If you look at the secondary issue about performers income, and loss of income to recording companies of some approximately $60 to $100 million a year, that is a serious problem for the performers and I can understand their concern about wanting to get a share of income that they feel they have lost in Europe and of income they have not arrived at in the United States. There is a great deal of loss to them. But we don't want that cost to come out of the pie that music publishers and songwriters already have, given the economic concerns that we have here. We don't want to move ahead to move backwards.

So I think we have two concerns. We have a broader concern bout digital broadcasting. We have a concern that we would like o keep our income streams alive. We are not looking to gain but o hold the line. We don't want to lose what we already have. On he other hand, we don't want to deny the artists and performers vho have done some wonderful things with songs. The song may e the spark, but it takes a good deal of work and ingenuity to resent the song as well. Those people have been entitled to that n Europe, but they are denied that in the United States.

It may sound like a tap dance, but it is all musical. We are trying to look at the larger sums of money first.

Mr. COBLE. When I alluded to the tap dance, I didn't mean that n a disparaging way. Hypothetical questions can oftentimes be ery deadly and I don't mean to trap you with this. But let me pose hypothetical to you, Mr. Murphy. I am a performer and I say to ou, Mr. Murphy, the making of a record involves several compoents, the writers involved, the record producers involved; I, as a erformer am involved. Why shouldn't all three of us equally share n the pie to which you referred earlier? How would you respond o that?

Mr. MURPHY. Well, I think I would have to go back to what I aid in my statement that the song to me is the most important ngredient. Going back to the creative aspect, I think the song is he beginning of the entire process. Without a song you can't build n these other creative processes. So I think there are a number f creative people involved and they all contribute a real value.

And I was looking the other day at some revenues that came in n the song written by Dolly Parton—which everybody knows of and Whitney Houston has been singing. It is a smash across the United States and throughout Europe, entitled "I Will Always Love You." And here is an old song that was very popular and has a secondary life that is even larger than the first one. Who is more important in that, the song or Whitney Houston? You can make a decision. I don't know. The song had a life and a secondary life. And Whitney Houston has done a wonderful job in that presentation.

So there is a creative aspect of the arrangement of the artist involved, but, of course, without the song I don't think you could have started that process. You needed the song to begin with. So I can best explain by letting you evaluate that song yourself.

Mr. COBLE. Thank you. Mr. Chairman, let me just think aloud for about 60 seconds. I know most of the people who are a party to this affray, as do you. And they are reasonable folks, all of you are. And if I had my druthers, as the old adage goes, it would sure be nice if you all could go into a back room and come up with some sort of solution with which all of you could live. That would be more desirable to me than getting the Congress involved.

On that note, Mr. Chairman, I will thank you again for being here. Thank you, Mr. Chairman.

Mr. HUGHES. Well, thank you very much. I am not so sure that that is achievable. That would be wonderful. I am not going to bet on it at this point.

Mr. FRITTS. You are aware, Mr. Chairman, that we made significant progress in the last year in discussions. We didn't reach a final resolution.

Mr. HUGHES. But I must say I think that your testimony today was constructive and that is a good first step, but I think we would be ostrich-like if we did not take note of the fact that the landscape has changed and we have different problems today than we did back in 1974. We need to take a look at how we can maintain the balance between the rights of creators of property and the rights of society to enjoy those creations in order to ensure that authors receive adequate remuneration for their creativity. That is what is at stake here, as well as the right of American creators of property to receive their just due, not just in our country but around the world. You apparently do concede that that is a problem.

You would prefer not to have to make a contribution to that problem, but that is a problem.

Do I understand you correctly? You do acknowledge it is a problem?

Mr. FRITTS. I can appreciate the concern that the record company and you as the chairman of this subcommittee have for that issue. I may not be as sympathetic to it as you are, but I understand your interest in it and the subject.

I am not satisfied that the American artists are any worse off than the European artists and I am also—after having talked with this person who has been counseling us on some of these international trade matters who actually did the negotiations for the United States on intellectual property, he attempted to give me a real good sense of the flavor of some of the other governments and how for cultural reasons, for economic reasons, and just for political reasons they really don't want to get into a trade of the balance of payments between the United States and the record industry and I can see that the record industry would believe there is a certain unfairness in that.

Mr. HUGHES. All right. Well, thank you much. We appreciate your testimony and that completes the hearing for today and the subcommittee stands adjourned.

[Whereupon, at 3:10 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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