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PERFORMANCE RIGHTS IN SOUND RECORDINGS

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

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LETTER OF TRANSMITTAL

THE LIBRARIAN OF CONGRESS,
Washington, D.C., January 3, 1978.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: I am pleased to submit with this letter the report of the Register of Copyrights, prepared in response to the mandate contained in section 114(d) of the newly revised copyright law, Public Law 94–553.

The new statute expressly excludes performance rights for sound recordings. Instead, it requests the Register of Copyrights to study the problem and, after consultation with various interested groups, report on whether Federal copyright legislation providing performance rights for sound recordings should be enacted. Under section 114(d), the Register's report is to "describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any."

The Copyright Office has sought to conduct as thorough and objective a study of all aspects of this problem as possible. Our report, and the appendixes to it, contain data and analyses dealing with various constitutional and legal issues, earlier attempts to secure legislation in the field, the testimony and written comments of interested parties, the potential economic effects of performance royalty legislation, existing foreign systems, and international considerations, including the Rome Convention for the Protection of Performers, Producers of Phonogrammes and Broadcasting Organizations. We have attempted to provide comprehensive coverage and documentation of these aspects of our study, in an effort to establish a solid legal and factual basis for congressional consideration of the question.

Because of a variety of time pressures, including the Copyright Office's need to implement the new copyright law on January 1, 1978, we have not yet been able to complete certain aspects of the report or to prepare a comprehensive set of "specific legislative . . . recommendations, if any." With your permission, therefore, we propose to prepare and submit the following addenda to the report before the end of February, 1978: (1) a report, prepared by an independent legal consultant, of labor union involvement with performance rights in sound recordings over the past thirty years; (2) a response, by the independent economic consultant who prepared the economic analysis included in the report, to the public comments received on that analysis; (3) a bibliography of works dealing with performance rights in sound recordings; and (4) a statement by the Register of Copyrights

summarizing the views of the Copyright Office on the various legal and economic issues raised in the report and containing specific legislative recommendations.

The issue of whether to enact performance rights for sound recordings has been debated by parties, courts, national legislatures, and intergovernmental bodies in various State, Federal, foreign, and international forums for more than 40 years. It was one of the most hotly contested issues in the recent program for general revision of the Federal copyright law, and it remains highly controversial. The Copyright Office trusts that the data in this report will provide a basis for congressional consideration of the legal and economic questions concerning performance rights, and will assist Congress in making a definitive decision on this important question.

Sincerely yours,

DANIEL J. BOORSTIN,
Librarian of Congress.
BARBARA RINGER,
Register of Copyrights.

FOREWORD

The late Dean Roscoe Pound once wrote, "historically there are three ideas involved in a profession: organization, learning . . . and a spirit of public service."

In the nearly 1,200 pages which follow the reader will have the opportunity to witness the basic elements of the profession of government service displayed at their highest level—by the Register and staff of the United States Copyright Office.

During the course of writing Public Law 94–553, the Copyright Revision Act of 1976, the Congress was called upon to legislate with respect to a wide variety of complex issues involving intellectual property—issues such as the scope of the fair use doctrine in education, photocopying by libraries, the copyright liability of cable television, and the copyright status of noncommercial broadcasting. The debate over these and other issues consumed a remarkable 42 days of subcommittee meeting time. The result was a 61 page bill and 368 page committee report, completely rewriting the existing 67 year old copyright law.

While the Congress was able to reach a final decision on most of the complex issues of law involved in the revision project, we felt a need for more information prior to making a decision on whether to include in the new statute a performance right in sound recordings.

Rather than further expand the already burgeoning number of federal commissions and committees, we decided to assign the task of further information gathering to the Copyright Office itself by writing into section 114 of the law, a requirement that the Register submit to us a report on the performance right issue on January 3, 1978.

Without prejudging the recommendations presented by the Register in her report I commend her and her staff for the organizational talent, scholarship and spirit of public service which are reflected in the following pages. As always in the past the United States Copyright Office has demonstrated the highest standards of professionalism in government service.

Hon. Robert W. Kastenmeier,
April 1, 1978.

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INTRODUCTION

The leading article in the Washington Post's centennial edition chronicled publisher Philip Graham's efforts to make that newspaper into the "first rough draft of history." Perhaps it is not too presumptuous for us to describe the Copyright Office's goal during the past year, in preparing our report on performance rights in sound recordings, in the same terms. While the scope of the "history" with which we are dealing is much narrower than that confronting the Washington Post, and the resources available for our study much more modest, we have sought, in the pages that follow, to provide as comprehensive, thorough, and objective a report as possible on a problem of urgent national and international concern.

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 Organisations (adopted at Rome in 1961).

The attached document compiles a record of our findings. An additional examination of labor unions' involvement with performers' rights in sound recordings over the past 30 years is currently under preparation under a contract with Prof. Robert Gorman of the University of Pennsylvania Law School. Our plan is to issue Professor Gorman's study, together with other addenda to the present report, by the end of February, 1978.

The Copyright Office's report has been prepared in response to the mandate contained in section 114(d) of the newly revised copyright law, Public Law 94–533. The Copyright Act of October 19, 1976 specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the sound recording, and to distribute copies or phonorecords of the sound recording to the public. Paragraph (a) of section 114 confirms that the owner's rights "do not include any right of performance under section 106(4)."

As the legislative history of the new law shows, Congress gave a good deal of consideration to arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem required further study. It therefore added subsection (d) to section 114, re-

quiring the Register of Copyrights to submit a report to Congress on January 3, 1978—

> * * * setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners * * * any performance rights in [copyrighted sound recordings]. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.[1]

As the Copyright Office has interpreted it, the obligation imposed by this provision was to establish a solid legal and factual basis for future congressional consideration of the question—"a rough first draft of history." We believe that the attached report fulfills that obligation. Because the deadline for this report coincided with the effective date of the new copyright statute as a whole, time pressures have made it impossible to prepare, before January 3, a comprehensive set of "specific legislative recommendations, if any," as envisioned in section 114(d). However, we now have under preparation a statement by the Register of Copyrights summarizing the various legal and economic issues raised by the report and containing recommendations as to legislation. As noted above, this statement will be issued as one of several addenda to the report in the near future.

BARBARA RINGER,
Register of Copyrights.

JANUARY 3, 1978.

[1] Public Law 94-553, 90 Stat. 2541 (1976), sec. 114(d).

I. SUMMARY OF THE REPORT

Congress is constitutionally empowered:

> To promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[1]

The U.S. copyright law does not exhaust this power. Congress is free to embrace additional subject matter and to extend exclusive rights under the umbrella of Federal copyright law as long as the protection is legislated for constitutional "writings" and is for "limited times."

The subject matter of Federal copyright protection under the new law is identified as:

> original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[2]

Sound recordings are now a recognized category of copyrightable authorship.[3] Sound recordings include all works (other than motion picture soundtracks and the like) that "result from the fixation of a series of musical, spoken, or other sounds * * * regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[4] Courts have consistently supported Congress constitutional authority to protect sound recordings as copyrightable subject matter, from the early *Waring*[5] and *Whiteman*[6] cases to the more recent decisions in *Shaab* v. *Kleindienst*[7] and *Goldstein* v. *California*.[8] With the principle established that sound recordings may be protected, the question of the extent of that protection becomes one of statutory policy.

Sound recordings typically contain three separate artistic contributions:

(1) *The contributions of the authors.*—This includes the musical or literary works performed on the record together with contributions of various secondary authors, such as arrangers, translators, and editors.

(2) *The contribution of the performers.*—This includes interpretations by the instrumental musicians, singers, actors, and speakers whose particular performances are captured on the record.

(3) *The contribution of the record producer.*—This includes the contributions of the sound engineers, directors, and other personnel responsible for capturing, editing, and mixing the sounds reproduced on the record.[9]

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[1] U.S. Constitution art. I sec. 8.
[2] Public Law 94–553, sec. 102(a).
[3] Public Law 94–553, sec. 102(a)(7).
[4] Public Law 94–553, sec. 101.
[5] *Waring* v. *WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Alt. 631 (1937).
[6] *RCA Manufacturing Co.* v. *Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939), rev'd. on other grounds, 114 F. 2d 86 (2d Cir. 1940). cert. denied, 311 U.S. 712 (1940).
[7] *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).
[8] *Goldstein* v. *California*, 412 U.S. 546 (1973).
[9] See, B. Ringer, "The Unauthorized Duplication of Sound Recordings," Copyright Law Revision Studies, Study No. 26 at 1 (1957).

Subject to certain specific limitations, owners of copyright in musical, literary, and dramatic works enjoy the exclusive right to perform their works publicly.[10] Owners of copyright in sound recordings do not. Since 1972, sound recordings have been embraced within the Federal copyright law,[11] but their owners' rights have been limited to protection against unauthorized duplication (commonly known as "dubbing" or "piracy"). Thus, authors and composers of recorded copyrighted material are normally paid through their performing rights societies (ASCAP, BMI, or SESAC, Inc.) each time their work is broadcast or performed before an audience, but the owners of copyright in sound recordings receive nothing for the public performance of their works.

Performers are in the professional position of being forced to compete with, and of eventually being driven out of work by, their own recorded performances. In the history of the communications revolution, performers offer the most dramatic examples of the concept known as "technological unemployment." The new copyright law's preemption provisions, which may preclude any State law redress for the unauthorized exploitation of recorded performances,[12] seem likely to aggravate the plight of performers unless Congress deals with the problem at the Federal level in the near future.

For many years, union efforts to protect performers against the effects of the use of recordings as a substitute for live performances did not concentrate on copyright law. Mr. Petrillo, former leader of AFM, focused on contract, pension, and unemployment rights, and ignored copyright. A pattern of union efforts having nothing to do with copyright became established, and this pattern was slow to change.[13]

Individual performers and record producers have been more actively concerned with copyright and performance rights, both domestically and internationally. Their efforts were largely responsible for the spate of domestic legislative efforts which began in 1925 and have continued to the present. Since 1965, performers' unions have joined forces with organizations of individual performers and record producers in support of performance rights legislation. Thus, the so-called Williams amendment, proposing performance rights under a compulsory license, was incorporated into the copyright revision bill from 1969 until 1974, when it was deleted on the Senate floor. More recently, similar performance rights legislation was introduced by Representative George E. Danielson, and is now pending.[14]

The Copyright Office solicited public comments[15] on the question of performance rights for sound recordings. The Office also held public hearings in Arlington, Va., on July 6, and July 7, 1977, and in Beverly Hills, Calif., on July 26, 27, and 28, 1977.[16] Copies of the

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[10] Public Law 94–553, sec. 106(4).
[11] Act of Oct. 15, 1971, Public Law 92–140, 85 Stat. 391, made permanent by the act of Dec. 31, 1974, Public Law 93–575, 88 Stat. 1873.
[12] Historically, some State law remedies were employed to protect performers, but these may be void under the preemption provisions of Public Law 94–553. See, legal analysis, infra.
[13] See, R. Leiter, "The Musicians and Petrillo" (1953); V. Countryman, "The Organized Musicians," 16 U. Chi. L. Rev. 56–85 (1948) and 16 U. Chi. L. Rev. 239–97 (1949).
[14] H.R. 6063, 95th Cong., 1st Sess. (1977).
[15] 42 Fed. Reg. 21527–28 (1977).
[16] 42 Fed. Reg. 28191 (1977).

written responses and transcripts of the testimony offered at these hearings are attached to this report as appendixes. The arguments put forward in these comments and hearings generally echoed those heard earlier in Congress with one apparent change: authors' organizations, which had earlier opposed performers' rights for fear that payments might reduce those made to authors and composers for performance rights, did not voice opposition. (One performing rights society expressly stated it would not oppose performance rights so long as there is no reduction in the statutory rights of authors). Broadcasters and other users maintained their opposition to the principle of a performance royalty, though their arguments were founded less on the law than on equities. They maintained that air play promotes record sales and boosts performers' popularity; therefore, they urged that users are providing an advertising service for which they should not be required to pay. A few broadcasters suggested, not entirely with tongue in cheek, that producers and performers should pay them. Broadcasters and jukebox operators again averred that, potentially at least, a performance royalty would be economically disastrous for their industries.

Proponents, including record producers and performers, testified that, as a matter of constitutional policy and simple fairness, recognition of their right to performance royalties is long overdue. They favored a compulsory licensing system, administered either by the Copyright Office or by an independent agency, with appropriate statutory antitrust exemptions to permit private licensing organizations to operate in the field.

From the comments and hearings it appears that positions on the equities of enacting performance rights legislation depend less upon legal considerations than upon the projected economic effect of royalty payments on broadcasters, record companies, performers, authors and composers, and consumers. The Office contemplated holding a special hearing devoted to the economics of a performance royalty. However, because earlier economic predictions by broadcasting and recording interests were widely divergent, and because no agreement on any aspect of the matter seemed possible, the Office decided instead to commission an entirely independent and objective economic analysis of the domestic effect of enacting performance rights legislation similar to the proposed Danielson bill. A copy of the report by Ruttenberg, Friedman, Kilgallon, Gutchess & Associates is attached. This report's general conclusions, based largely on analyses of computerized FCC data for 1971–75, are that the proposed royalty for sound recordings would not significantly effect either the broadcasters' profits or their ability to stay in business.[17] The report also concluded that, because radio advertising demands are inelastic, the costs of a performance royalty could be passed on by broadcasters to advertisers without loss of clients.[18]

Further, on the basis of a survey of performers' employment and earnings, the report disputed the contention that many performers receive substantial royalties either from record sales or because they

[17] The analysis showed that two-thirds of the radio stations experiencing losses in any one year experience losses regularly without going out of business.
[18] This conclusion stemmed from an analysis of national advertising rate data.

are also composers or authors. Finally, with respect to record producers,, the report inferred from its data that the record industry is becoming increasingly dispersed, with smaller firms enjoying progressively higher percentages of sales, and that the performance royalty envisioned in the Danielson bill would yield an amount to be distributed among record companies of less than one-half of 1 percent of estimated sales.

As soon as the Ruttenberg study had been received, the Copyright Office published it without taking any position on its findings, and solicited public response.[19] The time limits for comments were necessarily quite short,[20] but the body of responses and reply comments were fairly substantial, and are included in the appendixes.

The Office also considered the status of performance rights for sound recording under the laws of other countries and under international arrangements, including the 1961 International Convention for the Portection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). The principle of performance rights is accepted throughout most of Western Europe, although the practical administration of royalties to performers is still fragmented and imperfect. Efforts to establish more uniformity in international distributions, sponsored mainly by the record industry, have encountered considerable difficulty, but are continuing.

The existence of performance royalty obligations does not appear to have had any adverse effect on European broadcasting. It is true, of course, that European broadcasting is largely—though not entirely—government supported; but this does not rule out an economic comparison with American broadcasting. Even government-controlled or highly subsidized European broadcasters fight for funding. The public tariffs charged by European broadcasters are not directly proportional to performance royalties, yet no broadcasting operations appear to have reduced or eliminated because of these obligations. Moreover, although to some extent a matter of personal taste, program variety and quality does seem superior in Europe;[21] whether this is because of, or in spite of, the existence of performance rights, is open to argument.

In Canada, performance rights for sound recordings were abolished in 1971, partly in response to broadcasters' strong opposition to paying royalties. Another major factor behind repeal of the royalty was the well-founded fear that most royalties would be paid out to the United States, which exports large numbers of recordings to Canada. A 1977 advisory report to the Canadian Government has recommended that performance rights be reinstated, but that they apply only to Canadian recordings; this report is now under active consideration.

A number of South American and Central American countries have enacted legislation in the field of performance rights, but the extent to which these statutes have been given practical application is unclear. Some countries have experienced serious administrative difficulties, both domestically and extraterritorially, in enforcing performers' rights.

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[19] 42 Fed. Reg. 58226 (1977).

[20] The public was given approximately 3 weeks to comment, with an additional 12 days to file reply comments. These time limits were restricted because of the January deadline for completing the Copyright Office report.

[21] Programing is less influenced by market demand, and is more responsive to a variety of cultural tastes. Also, Europe affords live musicians far more employment opportunities than exist in the United States.

Detailed discussions of performance rights in Denmark, Austria, West Germany, the United Kingdom, Canada, Brazil, Mexico, and Argentina are included in the report. In addition, annexes prepared by the International Federation of Producers of Phonograms and Videograms (IFPI), in response to a 1977 inquiry by the Rome Committee, are included; they outline the status of performance rights for sound recordings, both domestically and internationally, in all countries of the world.

Finally, this report analyzes the 1961 Rome Convention and the 1973 model law for implementing it in national legislation. For many years the opposition of broadcasters to the Rome Convention as a whole was strong and effective. However, a number of developments including the 1972 Geneva Convention against piracy of phonograms, the 1974 Brussels Convention against satellite piracy of broadcast signals, and the experience of Western Europe in implementing performance rights, appear to have tempered broadcaster opposition to the entire Rome Convention, if not to the article on performance royalties. The previous strong opposition of international authors' groups has also abated. The development of the 1973 model law has proved that Rome protections can be legislated, and it has successfully served as a legislative guide, particularly for developing countries.

Taken together, these factors suggest an optimistic prognosis for the Rome Convention, whose future a decade ago seemed bleak. Uruguay's April accession raised the number of contracting States to 20,[22] and predictions have been made that 16 more countries will ratify or accede to Rome by the end of 1978.[23]

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[22] Four states have joined in the past 2 years.

[23] Those European countries whose membership is hoped for or confidently expected include Belgium, Finland, France, Greece, Iceland, Ireland, Norway, Portugal, and Spain. In Latin America, El Salvador, the Dominican Republic, and Venezuela may join. Trinidad and Jamaica are expected to join from the West Indies, and membership is also predicted for Australia and India.

II. LEGAL ANALYSIS

1. Is a Performance Right in a Sound Recording Constitutional?

WRITING

Article I, section 8, of the U.S. Constitution confines copyrightable subject matter to the "writings of an author." [1] Before 1971, sound recordings were not considered "writings" within the meaning of the Constitution. From 1909 and the earlier period of the *White-Smith* case,[2] sound recordings were in a state of legal limbo. Owing to advancing technology and the advent of record piracy, Congress finally recognized the need for national protection. On October 15, 1971, Congress enacted legislation acknowledging sound recordings to be copyrightable writings [3] and securing them against unauthorized dubbing.[4]

The Sound Recording Act survived the first judicial test of its constitutionality in *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972). There a three judge district court denied plaintiff's motion for summary judgment which alleged, *inter alia*, that sound recordings "do not qualify as writings of an author which may be copyrighted under article I, section 8 of the Constitution." [5] The court reasoned that:

> Technical advances, unknown and unanticipated in the time of our founding fathers, are the basis for the sound recording industry. The copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form.[6]

One year later the U.S. Supreme Court in *Goldstein* v. *California*, 412 U.S. 546 (1973), affirmed that the term "writing" could be broadly interpreted to include recordings and that it was within the discretion of Congress to decide whether a "specific category of writings should be brought within the purview of the Copyright Clause." [7] After

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[1] U.S. Constitution, art. I, sec. 8.

[2] *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908).

[3] The committee reports on the amendment express this view: "The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue." S. Rept. No. 92–72 at 4, H.R. Rept. No. 92–487 at 5, 92d Cong., 1st sess. 3 (1971).

[4] Public Law 92–140, 85 Stat. 391, 17 U.S.C. §§ 1(f) 5(n) 19, 20, 26 101(e). These provisions were extended and made permanent by the act of Dec. 31, 1974, Public Law 93–573, 88 Stat. 1873. Protection for sound recordings is limited to the right to prevent unauthorized duplication. Legislative reports on the amendment 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. Rept. No. 92–72, H.R. Rept. No. 92–487, 92d Cong., 1st sess. 3 (1971).

[5] *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590.

[6] Id. at 590.

[7] *Goldstein* v. *California*, 412 U.S. 561, 562. That the copyrightable writings embraced in title 17 are not coextensive with the broader category of constitutionally permissible writings, so that the existing copyright statute does not exhaust Congress' power to legislate copyright protection for additional genres of subject matter, is established principle See Z. Chafee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 719, at 735–36:

"A word in a statute must be read in connection with the purpose of the law and machinery which Congress has set up. We hesitate about extending the word to situations which will make the machinery work badly. The Constitution, however, establishes the framework of government. It contemplates that the machinery will be set up by Congress in order to carry out specific purposes. It is plain that such words as "Commerce" and "Income" consequently have a broader scope in the Constitution than they may possess in a particular statute. The same difference may be true of "Writings." The copyright clause of the Constitution should be construed so as to permit Congress to protect by appropriate devices any literary or artistic work which deserves such protection."

See also, B. Ringer, "The Unauthorized Duplication of Sound Recordings," Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d sess., 6–7 (Comm. Print 1961) [hereafter "Revision Study 26."]

Goldstein, sound recordings were unquestionably accepted as copyrightable writings. Thus, there exists no legal bar to protecting the physical format embodying a sound recording as a copyrightable writing.

FIXATION

May an exclusive right of performance be legislated for sound recordings? Case law since the 1930's clearly holds that once a performance is fixed on a sound recording, it is constitutionally capable of statutory copyright protection as a writing. Judge Leibell enunciated this concept in 1939, speaking for the lower court in *RCA Manufacturing Co., Inc.* v. *Whiteman*: [8]

> Prior to the advent of the phonograph, a musical selection once rendered by an artist was lost forever, as far as that particular rendition was concerned. It could not be captured and played back again in any mechanical contrivance then known. Thus, the property right of the artist, pertaining as it did to an intangible musical interpretation, was in no danger of being violated. *During all this time the right was always present*, yet because of the impossibility of violating it, it was not necessary to assert it.[9]

Later, Judge Learned Hand affirmed the principle in his dissent in *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955). Having concluded that a performance of a musical composition is a constitutional writing, he surmised that "Congress could grant a performer a copyright in it if it was embodied in a physical form capable of being copied." [10] This reasoning seems logical, for an aural performance embodied in a sound recording is certainly as capable of being reproduced or copied [i.e., "fixed"] as a visual performance captured on a motion picture. Motion picture performances have been legally protected as fixed copyrightable writings since 1912.[11] Likewise, Congress may, consistent with the Constitution, choose to legislate Federal copyright protection for performances fixed on sound recordings.

ORIGINAL AUTHORSHIP

A more frequently debated issue is whether recorded performances can meet constitutional tests of original copyrightable authorship.[12] The purpose of the Copyright Clause according to the court in *Goldstein* is "to encourage people to devote themselves to intellectual and artistic creation." [13] Accepting this premise, is a performance legally an "intellectual and artistic creation to be encouraged?" [14]

The Pennsylvania Supreme Court considered this question in a case involving the well-known orchestra leader, Fred Waring, *Waring* v. *WDAS Broadcasting Station Inc.*, 327 Pa. 433, 194 A. 631 (1937). The defendant station broadcast one of Waring's recordings as part of its regular program, and Waring sought an injunction.

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[8] *RCA Manufacturing Co., Inc.* v. *Whiteman*, 28 F. Supp. 787. (S.D.N.Y. 1939), rev'd on other grounds, 114 F. 2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940).

[9] Id. at 791. Emphasis added.

[10] *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 651, 644 (2d Cir. 1955).

[11] See, H.R. Rept. No. 756, 62 Cong., 2d sess., 1 (1912).

[12] The 1971 Sound Recording Act did not identify either the authors of a sound recording or the owners of copyright. Accompanying legislative reports stated that in most cases performers and record producers would own the copyright. S. Rept. No. 92-487, H.R. Rept. No. 92-487, supra note 4 at 5.

[13] 412 U.S. 546, 555.

[14] The equities of the case for peformance rights will be discussed in other sections of this report.

In upholding the injunction, the court considered whether a performer's interpretation was a product of such "novel and artistic creation" [15] as to give him property rights in it. The court noted that a musical composition itself was not a complete work since notation was "only one of the creative acts necessary for its enjoyment. It is the performer who must consummate the work by transforming it into sound." [16] If the performer contributes intellectually and creatively in doing this, he has created a product in which he has a property right. The court decided that Mr. Waring and his orchestra had met these criteria and permitted recovery.

The same question was examined by the district court of North Carolina 2 years later in *Waring* v. *Dunlea.*[17] In deciding that Mr. Waring had created a personal property right in his performance on the recording, the court stated:

> A dramatic performance gives life to the story, and is the property of the interpreter. The great singers and actors of this day give something to the composition that is particularly theirs, and to say that they could not limit its use is to deny them the right to distribute their art, as they may see fit, when they see fit.[18]

The Second Circuit court in *RCA Manufacturing Co., Inc.* v. *Whiteman* [19] assumed for the purposes of deciding that case that the "monopoly of the right to reproduce the compositions covers the performances of an orchestra conductor, and—what is far more doubtful—the skill and art by which a phonographic recordmaker makes possible the proper recording of those performances upon a disc." [20] The court, however, dismissed the complaint, which sought to stop the playing of Whiteman's recordings, on grounds that the records were not protected since any common law protection had been lost with publication.

The Supreme Court of New York again considered whether performances may constitute protectible authorship in *Metropolitan Opera Association, Inc.* v. *Wagner Nichols Recorder Corp.*[21] In deciding that an injunction should issue to stop the unauthorized playing of the recordings of the Metropolitan Opera's performances, the court discussed whether the association had a protectible right in its performances. The court asserted that such a right did exist:

> To refuse to the groups who spend time, effort, money, and great skill in reproducing these artistic performances the protection of giving them a property right in the resulting artistic creation would be contrary to existing law, inequitable and repugnant to the public interest.[22]

Judge Learned Hand discussed the question in his dissenting opinion in *Capitol Records, Inc.* v. *Mercury Records Corp.*[23] He believed that the "performance or rendition of a 'musical composition' is a 'writing' under article I section 8, clause 8 of the Constitution, separate from,

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[15] *Waring* v. *WDAS Broadcasting Station Inc.*, 327 Pa. 433, 194 A. 631 (1937).
[16] Id.
[17] *Waring v. Dunlea*, 26 F. Supp. 338 (D.C.N.C. 1939).
[18] Id., at 340.
[19] *RCA Manufacturing Co., Inc.* v. *Whiteman*, 114 F. 2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940).
[20] 114 F. 2d 88.
[21] *Metropolitan Opera Ass'n.* v. *Wagner Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S. 2d 483 (Sup. Ct. 1950).
[22] Id., 497.
[23] 221 F. 2d 657 (2d Cir. 1955). The majority in the Capitol case stated, "There can be no doubt that, under the Constitution Congress could give to one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition." 221 F. 2d at 660.

and additional to the 'composition itself.' " [24] Congress could therefore elect to protect the performance because "a musical score in ordinary notation does not determine the entire performance, certainly not when it is sung or played on a wind or string instrument." [25]

Judge Hand evaluated the performer as having a wide choice of interpretations for a musical score, depending upon his talents, and opined that the exercise of this choice would make "his renditions *pro tanto* quite as original a 'composition' as an 'arrangement' or 'adaption' of the score itself, which is copyrightable." [26] Since this performance can now be captured upon "a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution." [27] However, the judge recognized that Congress had not yet brought recorded performances within the copyright clause.

A very recent Supreme Court case, *Zacchini* v. *Scripps-Howard Broadcasting*,[28] arising from the unauthorized filming and television broadcast of an entire live "human cannonball" act as part of a news program, again discussed the artist's performance as protectible property. In deciding for Mr. Zacchini, the performer, the court stated: "This act is the product of petitioner's own talents and energy, the end result of much time effort and expense." [29] The court went on to explain the economic value of the act and how much of this value lay in the "right of exclusive control over the publicity" of the act.[30] This consideration mirrored the court's statement in *Goldstein* of how Congress could encourage "intellectual and artistic creation" by guaranteeing to authors and inventors "a reward in the form of control over the sale or commercial use of copies of their works." [31]

These State common law cases prove Congress may constitutionally protect recorded performances as original works of authorship although it has not yet elected to do so. They also establish the performer as an author. Similarly, recent Federal case law confirms the record producer's creative authorship in a recorded performance:

> Sound recording firms provide the equipment and organize the diverse talents of arrangers, performers and technicians. These activities satisfy the requirements of authorship found in the copyright clause [of the Constitution] * * *.[32]

The Register of Copyrights in a letter to Senator Scott, offered this view:

> Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the "writings of an author" in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of "derivative works" accorded protection under the Federal copyright statute.[33]

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[24] 221 F. 2d 664.
[25] *Id.*
[26] Id.
[27] Id.
[28] *Zacchini* v. *Scripps-Howard Broadcasting*, 45 U.S.L.W. 4954 (U.S. June 28, 1977).
[29] 45 U.S.L.W. 4957.
[30] Id.
[31] 412 U.S. 555.
[32] *Shaab* v. *Kleindeinst*, 345 F. Supp. 589 at 590.
[33] 120 Cong. Rec. 27340, 27341 (1974).

This is not to say that every recorded performance is *ipso facto* sufficiently creative to meet Federal copyright standards.[34] Nor is it established that the performer or the record producer is automatically an author, in the copyright sense, of each recording.[35] It is, rather, to certify that Congress may, under its constitutional copyright power, elect to extend Federal statutory copyright protection to recorded aural performances and recognize performers and/or record producers as authors of those copyrighted recordings.

FIRST AMENDMENT

Zacchini v. *Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4954 (U.S. June 28, 1977), has settled the argument that the 1st and 14th amendments proscribe enactment of a performance right in sound recordings. However, the scope of constitutionally permissible performers' rights under that amendment is less clear.

In *Zacchini*, the U.S. Supreme Court declared that the 1st and 14th amendments do not prohibit a State from protecting a performer's proprietary interest in receiving compensation for the broadcast of his or her performance. In broad terms, the court said that:

> Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that *the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's act without his consent.*[36]

In the *Zacchini posture*, the Supreme Court reasoned that Ohio might protect a "human cannonball's" economic interest or publicity right. The decision clearly permits a State and, by like reasoning (since the decision was grounded on the first amendment, which limits Federal actions) the Federal Government, to protect a performer's economic interest in publicizing his performance.

The opinion acknowledged the obvious analogy to copyright protection.

> The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.[37]

Further analogizing the state law to "the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors * * *," [38] the Court distinguished *Time, Inc.*, v. *Hill*,[39]

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[34] See NIMMER, ON COPYRIGHT, Sec. 6 (1976 ed.). Legislative reports accompanying the 1971 Sound Recording Amendment admit of the possibility of copyrightable recordings:

"Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings." S. Rep. No. 92–72 supra note 4, at 5; H.R. Rep. No. 92–487, supra note 4, at 5.

[35] Committee reports on the 1971 Sound Recording Act considered this possibility with respect to anti-piracy legislation.

"The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producers responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to take the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of bird calls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved."

[36] 45 U.S.L.W. 4954, at 4957. Emphasis added.

[37] Id., at 4957.

[38] Id., at 4957.

[39] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

and *New York Times* v. *Sullivan*,[40] which involved First Amendment limitations on state privacy privileges. It found that

> the Constitution does not prevent Ohio from * * * here * * * deciding to protect the entertainer's incentive in order to encourage the production of this type of work.[41]

The performance broadcast in *Zacchini* was live and visual; but the decision's rationale applies equally to recorded sound performances, for each play of a recorded performance displaces a live one with a corresponding dilution on the performer's pecuniary interest.

> [T]he State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.[42]
>
> The case before us is more limited than the broad category of law suits that may arise under the heading "appropriation." Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; respondent televised an entire act that he ordinarily gets paid to perform.[43]

Again, in distinguishing the instant right of publicity from that of the right of privacy, the court noted that—

> An entertainer such as petitioner usually has no objection to the widespread publication of his act *as long as he gets the commercial benefit of such publication.*[44]

Significantly, the court implies that the "commercial benefit" to which a performer is entitled is more than the advertising benefits he arguably receives from commercial air play. His right extends to reimbursement for the performance *per se*. A State may recognize a performer's right to be compensated for the publicity of his act on the additional grounds of providing an economic incentive:

> Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.[45]

This economic incentive, said the court, is comparable to copyright law's raison d'etre: "to grant valuable enforceable rights in order to afford greater encouragement to the production of works of benefit to the public." [46]

Broadcasters have argued that "because a performance right in sound recordings is not likely to increase record production, it lacks sufficient impetus to clear the first amendment hurdle." [47] But to impose an economic test of a performance's promotional value is to create a new constitutional standard, wholly unwarranted and not supported by case law. The only legal requirements derived from the promotional phrase in the Constitution's copyright clause relate to the amount of originality in a work and possibly its nonobscene character.[48]

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[40] *New York Times* v. *Sullivan*, 376 U.S. 374 (1964).
[41] 45 U.S.L.W. 4954, at 4958.
[42] Id., at 4956.
[43] Id., at 4957, note 10.
[44] Id., at 4957. Emphasis added.
[45] Id.
[46] Id.
[47] Comments of National Association of Broadcasters before the Copyright Office, Comment Letter S–77–6 No. 153, at 2; Cf., Comments of the National Broadcasting Co., Inc., before the Copyright Office, Comment Letter No. S–77–6 No. 151 at 2; Comments of American Broadcasting Co., Inc., before the Copyright Office, Comment Letter S–77–6 No. 8 at 12–13.
[48] *See, NIMMER, ON COPYRIGHT supra* note 34 at sec. 3.2.

Thus, broadcasters have clearly misinterpreted this alternative rationale for *Zacchini's* holding that the first amendment does not proscribe protection of performances.

Whether a similar constitutional approbation would obtain if a performer were to enjoy a right of authorization (for example, a power to enjoin the fixation of live performances as by broadcast) is uncertain under *Zacchini's* language:

> There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc.* v. *Hill, supra.* But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the spirit of *Gertz, supra* [*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)]. Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.
>
> We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.[49]

Finally, as affirmed by *Zacchini*, Federal district courts have repudiated first amendment challenges to copyright by reasoning that copyright places no [illegal] restraint on the use of a concept or idea.[50]

In sum, neither the first nor the fourteenth amendment prevents Congress from legislating copyright protection for recorded aural performances; but some question remains whether such a right could constitutionally secure a right to authorize or to prevent the public dissemination of the performance. One obvious way to clear this hurdle would be to limit the performance right in sound recordings to that of compensation, a right which was expressly approved by *Zacchini's* first amendment test.

2. Present Legal Status: Preemption

Accepting the premise that Congress may in its discretion protect a fixed performance under the Federal copyright statute and that it has so far failed to do so,[51] what is the preemptive effect of this congressional inaction on State common law and statutory law?

The newly enacted copyright law provides Federal copyright protection from the moment a work is first fixed in tangible form.[52] Section 301 abolishes common law copyright protection for most works by specifying that:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights are within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no

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[49] 45 U.S.L.W. 4954, at 4958.

[50] *U.S.* v. *Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974). See also, M. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" 17 U.C.L.A. L. Rev. 1180 (1970).

[51] For a history of legislative efforts to include performance rights in sound recordings, see generally 2d Supp. Report of the Register of Copyrights Ch. VIII (1975) (Unpublished document in Copyright Office Library).

[52] Public Law 94-553 Sec. 302(a).

person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.[53]

For State law to be preempted under this section, two conditions must be met: The right must be equivalent to an exclusive right within the general scope of copyright; and, the work must fall within the subject matter of copyright specified in sections 102 and 103. Subsection (b) retains State rights and remedies with respect to subject matter other than that specified in these sections, causes of action arising from pre-1978, undertakings, and rights not equivalent to copyright.[54]

This language leaves unclear what State rights and remedies are not preempted with respect to performance rights in sound recordings. Nor is the question answered by subsection (3) of section 301, which retains State law (whether statutory or common law) with respect to sound recordings fixed before February 15, 1972.[55]

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.[56]

This review will consider the preemption question in terms of recorded performances falling within three time periods demarcated by the above cited statutory provisions: works fixed during or after 1978; works fixed before February 15, 1972; and, finally, works fixed between 1972 and 1978 with respect to both causes of action arising within this time period and causes of action after 1978.

The revised copyright law distinguishes between "sound recordings," which are *works* [resulting from] the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work," [57] regardless of the physical format in which the authorship is embodied. "Phonorecords" are defined as the "*material objects* in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." [58]

Under the legal maxim "a verbis legis non est recedum," [59] the statutory language of section 301 clearly preempts States' rights to protect copyright-type rights in all sound recordings fixed after January 1, 1978, irrespective of the exclusive rights in question. Since sound

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[53] Public Law 94–553 Sec. 301(a).
[54] Public Law 94–553, sec. 301(b).
[55] Feb. 15, 1972 is the effective date of the antidubbing Sound Recording Act. Act of Oct. 15, 1971, Public Law 92–140, 85 Stat. 391, whose provisions were extended and made permanent by the act of Dec. 31, 1974, Public Law 93–573, 88 Stat. 1873.
[56] Public Law 94–553 sec. 301(c).
[57] Public Law 94–553 sec. 101. Emphasis added.
[58] Public Law 94–553 sec. 101. Emphasis added.
[59] No interpretation will be made contrary to the express letter of a statute. H. Broom, Legal Maxims 422 (10th ed. 1939).

recordings are within the subject matter of copyright,[60] equivalent State rights are literally preemted. The accompanying House Report unequivocally confirms that the purpose of section 301 is—

> * * * to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.[61]

This preemptive intent is further established by the fact that Congress expressly considered, and declined, to provide protection for performances of sound recordings. The exclusive rights of section 106 are limited by section 114's provision that:

> exclusive rights of the owners of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and *do not include any right of performance under section 106(4)*.[62]

Reading this provision in connection with section 301 dictates preemption of equivalent state law protection, whether by statute or by common law. That this result was intended with respect to post revision performance rights' protection is documented by the House Report:

> The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, *even though the scope of exclusive rights given the work the bill is narrower than the scope of common law rights in the work might have been.*[63]

Earlier, the present Register of Copyrights anticipated this result in her statement at congressional hearings on a proposed copyright revision bill whose performance rights provisions paralleled those in section 114:

> [M]y view is that sound recordings are the "writings of an author" and that the Congress can grant them any degree of copyright protection it sees fit. However, sound recordings are not subject to statutory copyright under the present law, and under the *Sears*, *Compco*, *Cable Vision* and *DeCosta* decisions, they cannot be given State common law protection equivalent to copyright on any theory. If this construction is correct the revision bill actually gives performing artists and record producers something that they do not now have (exclusive rights of reproduction and distribution), rather than cutting off existing rights of public performance. However, if Congress enacts a bill that, like S. 597, withholds performing rights in recordings, it should do so with the full realization that no such rights can be sought alternatively under State common law theories such as "unfair competition."[64]

It should be noted that there is some disagreement as to the preemptive effect of section 301 on performance rights for sound recordings.[65] However, a literal reading of the statute, reinforced by state-

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[60] Public Law 94–553 sec. 102(a) (7).
[61] H. Rept. No. 94–1476, 94th Cong., 2d Sess. 130 (1976).
[62] Public Law 94–553 sec. 114(a). Emphasis added.
[63] H. Rept. 94–1476 supra note 59 at 131. Emphasis added.
[64] Statement of Barbara Ringer, Assistant Register of Copyrights, at hearings on S. 597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pt. 4 app., at 1178 (1967). Emphasis added. See also the *Sears* and *Compco* cases, *infra* notes 77 and 78; *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348 (1964), *cert. denied*, 397 U.S. 989 (1965); *CBS* v. *DeCosta*, 377 F. 2d 315 (1967). *Cf.*, Judge Hand's opinion in *G. Ricordi & Co.* v. *Haendler*, 194 F. 2d 914 (2d Cir. 1952), that no common law rights in federally uncopyrightable elements could survive the expiration of the Federal copyright in a work.
[65] Professor Goldstein, in a current law journal article entitled "Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright," 24 U.C.L.A. L. Rev. — (1977), suggests States retain rights to afford protection where the Federal law protects the subject matter but withholds protection for the particular exclusive right. He says although the House report suggests State law may not be operative, "the face of the statute" does not require preemption. Id., at 4–5.

ments in the accompanying House report, outlaw any other reading for sound recordings fixed and copyrighted after the effective date of the revised copyright law.

An uncertainty raised by section 301 is what rights are so equivalent to copyright as to prevent like State laws.[66] The language in *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[67] presents an example of the potential problems of equivalency.

In deciding that Mr. Zacchini could recover for the unauthorized filming and broadcasting of his performance under a State right of publicity, the Supreme Court observed that,

> The State's interest in permitting a "right of publicity" is a proprietary interest, which is analogous to the goals of patent and copyright law in focusing on the reaping of rewards.

Acknowledging that the economic incentive was a basis for both the Federal laws in this area and the State-created rights, the Court nontheless held that the Constitution would not prevent Ohio from granting a right of publicity to protect the performer's incentive and encourage his creativity.[68] In the particular *Zacchini* fact situation, since the infringed performance was live, and thus not the subject matter of Federal statutory copyright,[69] a State right of publicity would arguably survive preemption. But if an analogous purpose makes statutes equivalent under section 301 then presumably a right of publicity similar to that in *Zacchini* would be be preempted, even for fixed recorded performances falling within the ambit of the section, in spite of the House report's language salvaging publicity rights.[70]

Had the *Zacchini* court found the economic incentives of the State and Federal laws differed, that would have afforded an alternative grounds for upholding the State's right to regulate. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). The *Kewanee* case upheld State trade secret protection for processes which failed to meet the Federal patent law's novelty test. The court differentiated the rights and investment incentives in trade secret and patent law and concluded that State protection did not obstruct operation of the Federal law.[71]

State rights of privacy and unfair competition present equally puzzling questions as to when a State right is equivalent. For, although

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[66] Section 301 preempts equivalent State rights in "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after [Jan. 1, 1978]." Public Law 94–553 sec. 301 (a). For a comprehensive discussion of equivalency problems, including State rights of privacy and misappropriation. See *P. Goldstein*, supra note 65 at 5–12.

[67] 45 U.S.L.W. 4594.

[68] 45 U.S.L.W. 4958, citing *Goldstein* v. *California* 412 U.S. 546 (1973).

[69] Federal copyright, both under the 1909 Act and the newly revised law, applies only to fixed works. See NIMMER, supra note 34 at sec. 8.32. And the preemptive effect of sec. 301 is limited to works which have been fixed and are therefore appropriate subject matter of Federal statutory copyright. Public Law 94–553 sec. 301 (b), H.R. Rept. 94–1476 supra note 61 at 131.

To be fixed under the new copyright law, a work must be embodied in a copy or phonorecord "by or under the authority of the copyright owner." Public Law 94–553 sec. 102. It seems that in a *Zacchini* type of situation, where the only fixation is an unauthorized one, the performer is consigned to State law remedies and may not avail himself of Federal copyright protection. However, it has been argued that courts might apply Federal law in a comparable situation arising under the 1909 Act on the basis of defendant's unauthorized fixation, by awarding plaintiff an equitable remedy to obtain access to the unauthorized work for purposes of registering it preliminary to a Federal copyright infringement action. See, K. Dunlap, "Copyright Protection for Oral Works—Expansion of the Copyright Law Into the Area of Conversations," 20 Bull. Copr. Soc. 285, 314 (1973).

[70] The House report says: "The evolving common law rights of 'privacy,' 'publicity,' and 'trade secrets,' and the general laws of defamation and fraud would remain unaffected as long as the causes of action contain elements, such as invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement." (H.R. Rept. 94–1476 supra note 61 at 132.)

[71] See P. *Goldstein*, supra note 65 at 20–21.

their effects are equivalent to copyright in that they, like the Federal law, prohibit the copying or distribution of protected subject matter, their purpose may, at the same time be broader in attempting to protect personal or noneconomic interests not covered by the Federal copyright statute.[72]

The question of equivalency is certain to generate litigation. At this nascent State, it is impossible to predict the preemptive scope courts will accord it.

Subsection (c) of section 301, again ostensibly covering all sound recordings, dictates the conclusion that State rights and remedies, whether by legislation or by common law, remain in effect for performances of sound recordings fixed prior to the effective date of the Sound Recording Act, February 15, 1972. The legislative intent of this section is explained in House Report 94–1476: "The Committee recognizes that, under recent court decisions, pre-1972 recordings are protected by State statute or common law, and that should not all be thrown into the public domain instantly upon the coming into effect of the new law." [73] While the House report seems to consider preemption only in relation to dubbing rights in sound recordings, the literal language of the statute applies to all sound recordings and must be given this broad effect whether or not exclusive rights in performances to those recordings are included.[74]

The most unclear area of performance preemption includes sound recordings fixed between the years 1972 and 1978. The ambiguity results from attaching preemptive provisions to different criteria: the date of fixation and the date of undertakings which underpin a course of action. Under the section 301 formula, subsection (a) creates a broad panoply of preemption, applying to works whether created before or after 1978; subsection (b) carves out an exception for any cause of action arising from events before 1978; and subsection (c) merely preserves the State remedies available to sound recordings fixed before February 15, 1972.

Arguably, works fixed between 1972 and 1978 for which a cause of action arose after 1978 would fall within the general preemptive provisions applying to post-1978 works, and State performance laws would thereby be preempted for like reasons. However, subsection (b) quite literally says preemption does not apply for works fixed between 1972 and 1978 where the actionable events also occurred within this time frame.[75] Presumably, works within these boundaries would continue to be governed by State law to the extent that State rights and remedies applied before the effective date of the new copyright law.[76] Several Supreme Court cases have defined this protection, as well as possibly facilitating determinations of when State protection is "equivalent" to copyright protection within the preemption test of section 301. What State protection is permissible?

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[72] Id. Professor Nimmer interprets "equivalent" to mean statutes which protect the acts of reproduction, performance, distribution or display, M. Nimmer, "Syllabus for a Course on the Law of Copyright" 2 (1977).

[73] H.R. Rep. 94–1476 supra note 61 at 133.

[74] Supra note 59.

[75] Subsection (c) would resurrect State rights with respect to all sound recordings fixed prior to 1972.

[76] For an interesting discussion of the Constitution's Supremacy Clause as it effects States rights in the copyright arena, see, P. Goldstein, "Federal System Ordering of the Copyright Interest," 69 Column. L. Rev. 49 (1969).

Goldstein v. *California* was a rather surprising decision on point by the U.S. Supreme Court. The *Goldstein* court was faced with the question of the possible preemptive effect of the [then] prospective Sound Recording Act on California's antipiracy statute, which would make the defendant's taping actionable. The salient legal precedent was dicta in the 1964 Supreme Court companion cases of *Sears, Roebuck & Co.* v. *Stiffel Co.*,[77] and *Compco Corp.* v. *Day-Brite Lighting, Inc.*[78] These cases held that when Congress has not chosen to grant Federal protection to works which could constitutionally be copyrightable, it intends to assure free competition without any inhibition by an equivalent State copyright statute.[79] Over the dissent of four Justices, the *Goldstein* majority modified this doctrine of congressional silence. Although they reaffirmed the *Sears-Compco* decisions, they held that congressional silence need not command total relinquishment of State control. Thus, California was free to promulgate an antipiracy statute, notwithstanding Congress' failure to embrace sound recordings fixed prior to 1972 within the Sound Recording Act.

One could speculate that the guiding principle behind *Goldstein's* apparently contradictory holding—reaffirmance of total preemption and simultaneous acceptance of an equivalent State statute—was its abhorrence for record piracy. In fact, Justice Marshall's dissent implies as much: "We should not let our distaste for 'pirates' interfere with our interpretation of the copyright laws." [80]

More telling, it seems, was that the *Goldstein* case was one of statutory interpretation (of the copyright law) rather than of constitutional law. The Court distinguished—

> * * * situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts [from] those situations where conflicts will necessarily arise.[81]

State copyright powers fall within the former category, said the Court, and are not therefore preempted as a matter of constitutional law.

> Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that State legislation is, in all cases, unnecessary or precluded.[82]
>
> Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyright has been relinquished to exclusive federal control.[83]

Following this type of analysis, the *Goldstein* factual situation would most logically not govern a performance preemption question, for Congress has legislated with respect to sound recordings fixed between 1972 and 1978 without granting performance rights, so State

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[77] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964).
[78] *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).
[79] 376 U.S. 234, 237. Defendants' lamps were the type of articles subject to patent protection but failed to meet the patent standards of invention.
[80] 412 U.S. 579.
[81] 412 U.S. 554.
[82] 412 U.S. 556–57.
[83] 412 U.S. 558. See also, 412 U.S. 562.

law performance protection might arguably abort that congressional policy. *Goldstein* in fact said:

> At any time Congress determines that a particular category of "writing" is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized.[84]

Goldstein involved pre-1972 sound records, for which no Federal protection had been legislated; but where Congress has protected the class of writings [as with post 1972 sound recordings] without extending a specific exclusive right [public performance], States might arguably be preempted from doing so under the dictates of both *Sears-Compco* and *Goldstein*, even if the actionable events occurred between 1972 and 1978, and thus were excepted from the provisions of section 301 of the revised law.

On the other hand, if a court regards the State protection as of a type which does not interfere with Federal policy, then the State law would stand. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974).

In sum, although scholars differ on the preemptive effects of section 301 with respect to State rights and remedies against unauthorized performances of recorded performances, and no legal precedents exist, it is this writer's view that, given Congress' failure to enact Federal performance rights legislation, section 301 clearly preempts State rights for such works fixed after 1978, or fixed between 1972 and 1978 if the event giving rise to a cause of action occurred after 1978. Section 301 equally clearly preserves State rights for pre-1972 sound recordings. Works fixed between 1972 and 1978 for which the cause of action arose before 1978 are arguably preempted only if they fall within the preemptive guidelines of the *Sears-Compco*, *Goldstein*, and *Kewanee* cases.

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[84] 412 U.S. 559.

III. AURAL WORKS

Operation of the 1976 Copyright Act on Works Consisting of Sounds

The ensuing discussion explores the limits of various definitions in section 101 of the 1976 Copyright Act, particularly as they affect the treatment of "sound recordings" and of sounds which accompany audiovisual works. Intended as a "statement of the issues," it is illustrative rather than exhaustive, and therefore, is expected to suggest more questions than it answers.

The relationship between "sound recordings" and sounds "accompanying" a motion picture or other audiovisual work is conceptually clouded. The uncertainty is largely semantic. Motion pictures and audiovisual works include, by definition, "accompanying sounds." On the other hand, sound recordings, by definition, do not include "sounds accompanying a motion picture or other audiovisual work." Although some exclusivity is implied by these definitions, its extent is not clear. The difficulty arises from the virtually interchangeable nature of the actual sounds which either "accompany" a motion picture or other audiovisual work, or which comprise a sound recording. For example, what type of work exists when the soundtrack of a motion picture is distributed in disk form; or, conversely, when a phonorecord containing a sound recording is incorporated into a soundtrack or is used in conjunction with a slide presentation or filmstrip?

Section 101 of the 1976 Copyright Act defines "audiovisual works" as:

> Works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.[1]

"Motion pictures" are defined as:

> Audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.[2]

As the name implies then, audiovisual works, of which motion pictures are one type, can include both sounds and images. They can, in other words, be perceived both visually and aurally.

Sound recordings, unlike audiovisual works, are normally perceived only aurally. They are defined, in section 101, as:

> Works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.[3]

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[1] 1976 Copyright Act, sec. 101, "Audiovisual works"; Public Law 94–553 (cited hereinafter as 1976 Copyright Act; emphasis added throughout unless otherwise indicated).
[2] Id., sec. 101, "Motion pictures."
[3] Id., sec. 101, "Sound recordings."

It should be observed from these definitions that although sounds which accompany an audiovisual work are specifically excluded from the definition of sound recordings, "sound recordings," as copyrightable works, are *not* excluded from the definition of audiovisual works. Support for the conclusion that this result is intentional, not accidental, is found in the 1965 Register's Supplementary Report. Discussing the categories of copyrightable subject matter now listed in section 102 of the 1976 Act,[4] the supplementary report states, "moreover, while separately listed, the items are overlapping and not mutually exclusive. It is quite conceivable, for example, that within itself a motion picture might encompass copyrightable works falling into all of the other six categories," [5] including sound recordings. This fact may produce a somewhat bizarre result when a series of sounds which would otherwise comprise a "sound recording" is combined with visual images. Those sounds might lose their character as one type of copyrightable work, become a part of another, and enjoy different exclusive rights, even though the identical sounds can be used without images.

When one type of work preexists the other, the problem may not seem so severe. Under those circumstances the later work can be considered either a reproduction of, or derivative of, the earlier one. The simplest situation is when a sound recording preexists an audiovisual work, and is later combined with it. Section 114(b) expressly provides that:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording.[6]

Section 106(1) grants to copyright owners the exclusive right, "to reproduce the copyrighted work in copies or phonorecords." [7] Similarly, the second sentence of § 114(b) states:

> The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a *derivative* work in the *actual sounds* fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.[8]

Thus, if the "actual sounds fixed in the recording" are "duplicate[d] * * * in the form of * * * copies of motion pictures and other audiovisual works," whether or not such sounds, "are rearranged, remixed, or otherwise altered in sequence or quality," the result is a copy (not a "phonorecord")[9] of a sound recording. The exclusive rights in this new work may then be subject to the rights in the sound recording. This, however, creates a paradox over whether the sound recording can remain a sound recording if its "actual sounds" now "accompany" an audiovisual work. If the accompaniment of sounds with visual

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[4] Id., sec. 102.
[5] Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 revision bill, 89th Cong., 1st sess. 5 (1965).
[6] 1976 Copyright Act, sec. 114(b).
[7] Id., sec. 106(1).
[8] Id., sec. 114(b).
[9] Id., sec. 101: " 'Phonorecords' are material objects in which *sounds, other than those accompanying a motion picture or other audiovisual work,* are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed."

images is controlling, as a literal reading of the statutory definitions apparently requires, then the aggregate of sounds can no longer be a "sound recording" as copyrightable subject matter. If, on the other hand, "accompaniment" is *not* controlling, and only those sounds which actually accompany visual images are treated as a distinct (derivative) work, then the "underlying" work (the sound recording as it was first created) will now exist in direct contradiction with the section 101 definition of a "sound recording," since those same sounds do accompany an audiovisual work.

Similar problems arise when sounds are transferred from an audiovisual work to what would otherwise be considered a phonorecord of a sound recording. Generally, in the case of motion-picture soundtracks, some degree of remixing, editing, or other adaptation takes place. The situation is further complicated, however, by the usual practice in which the sounds are first recorded separately and then "married" to the copy containing the visual images. This phenomenon raises the question of which work actually "pre-exists" the other. If one looks only to "first fixation," then sounds might (first) accompany a motion picture only when fixed simultaneously with the visual images.

Perhaps the clearest example of this dilemma is presented where an audiovisual work, such as a filmstrip or a series of slides, is accomplished by sounds recorded on a vinyl disk or cassette tape. Standing alone, the aggregate of sounds would certainly be a sound recording, and would be fixed in a phonorecord. It should be recalled, however, that audiovisual works, "consist of a series of related images which are *intrinsically intended* to be shown * * * together with accompanying sounds * * *." [10] Thus, "intention" may be relied upon to support the conclusion that these sounds "accompany" an audiovisual work, and are therefore *not* a sound recording. While the author's intention may thus have some bearing upon the nature of the work as first fixed, such intention is still not sufficient to resolve the paradox engendered by which sounds in fact accompany images, and which can also exist independently.

The definition of "sound recordings" in section 101 of the 1976 Copyright Act is derived from the definition contained in the 1971 Sound Recording Amendment,[11] which in turn relied upon language from previous general revision bills.[12] The Senate report published in conjunction with the enactment of the Sound Recording Amendment offers the following explanation:

> In excluding "the sounds accompanying a motion picture" from the scope of this legislation the committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the committee's opinion that soundtracks or audio tracks are an integral part of the "motion pictures" already accorded protection * * * and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. This is true whatever the physical form of the reproduction, whether or not the reproduction also includes visual images, and whether the motion picture copyright owner had licensed use of the soundtrack on record.
>
> * * * Thus, to take a specific example, if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained under section 1(a) of title 17

[10] Id., sec. 101, "Audiovisual works."
[11] Public Law No. 92-140.
[12] See, e.g., sec. 101, "Sound recordings", S. 644, 92d Cong., 1st sess. (1971).

rather than under the provisions of this bill, and this would be true even if the television producer had licensed the release of a commercial phonograph record incorporating the same sounds.[13]

A reasonable inference of congressional intent from such language is that only one cause of action would subsist for the infringement of sounds accompanying an audiovisual work; and, if so, that this cause of action would belong to the owner of copyright in the audiovisual work. While this may apply to the use of sounds which initially accompany an audiovisual work, the converse situation could entail unexpected results. Specifically, it is possible that the owner of copyright in a preexisting sound recording, through the grant of a license under section 114(b) to "duplicate * * * the sound recording in the form of * * * copies of motion pictures and other audiovisual works* * *," could inadvertently relinquish any further right of reproduction under section 106(1), absent contractual provisions expressly reserving those rights. If the "same sounds" now "accompany" an audiovisual work, there may be no "sound recording" upon which to base any exclusive rights.

EFFECTS UPON EXCLUSIVE RIGHTS

It may well be that the reasoning above refers solely to the reproduction of sounds which first accompany audiovisual works. Conceptually, this explanation is entirely unsatisfactory. For example, under section 114(b):

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[14]

No such limitation exists on the rights to a series of sounds which accompany an audiovisual work. It may be arguable that since other parts of an audiovisual work cannot be "imitated," neither can the sound portions, despite the fact that the same sounds may be on a "commercial phonograph record."

Probably the most significant distinction in the treatment of sound recordings and sounds accompanying audiovisual works involves performance rights. "Perform," in section 101, "means * * * in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying *it audible*." [15] The owner of copyright in a motion picture or other audiovisual work has the exclusive right, "to perform the copyrighted work publicly." [16] The exclusive rights in sound recordings, however, "do not include any right of performance under section 106(4)." [17]

The House Report on the 1976 Copyright Act contains this rather perplexing sentence:

The purely aural performance of a motion picture soundtrack, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work;" but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.[18]

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[13] S. Rep. No. 92–72, 92d Cong., 1st sess. 5 (1971).
[14] 1976 Copyright Act. sec. 114(b).
[15] Id., sec. 101. "perform."
[16] Id., sec. 106(4).
[17] Id., sec. 114(a).
[18] H. Rept. No. 94–1476, 94th Cong., 2d sess. 64 (1976).

This statement makes sense only when considered in the context of the release of a phonograph album or similar product containing "some" of the sounds used in a motion picture soundtrack; and if the second clause is read to create an exception to the first. If the copyrightable subject matter is an aggregate of sounds, whether in a sound recording of accompanying an audiovisual work, then a distinction based upon the reproduction or use of "some" or "all" of these sounds is arbitrary. Although this exception may supersede the statements in S. Rep. No. 92–72, quoted above, as a more recent expression of congressional intent, the reasoning is nevertheless contradictory, and leaves many questions unanswered. If, for example, *all* of the sound from an audiovisual work are reproduced on "phonorecords," would a performance from the "phonorecord" [19] constitute a performance of the audiovisual work? A performance from a vinyl disk containing the sounds "intrinsically intended" to accompany a slide presentation would have to be a performance of the audiovisual work, or the clause stating that, "the purely aural performance of * * * the sound portions of an audiovisual work would constitute a performance of the audiovisual work * * *" is meaningless. In this example, the same vinyl disk can be performed either in conjunction with or separately from visual images. Depending upon its use, it could be classified either as a sound recording embodied in a phonorecord, or sounds which accompany an audiovisual work. The circle is completed with the realization that the rights governing its use are determined by its classification.

If the work contained in a material object is called a sound recording, it has no right of public performance. Under the new copyright law, as presently written, it is conceivable that such a work could obtain a performance right through its use in combination with a a series of visual images. This right would inure to the benefit of the producer of the audiovisual work, rather than to the creators of the aggregate of sounds, and would be based upon authorship of compilation.[20] Conversely, it is also conceivable that sounds which accompany an audiovisual work could forfeit the right of public performance if anything less than the entire aggregate of sounds is reproduced in a form that is physically separable from the series of visual images.

The relationship between sound recordings and sounds which accompany audiovisual works, including motion picture soundtracks, is ambiguous. There is ample justification for relying upon the facts of first fixtation, the author's intentions, or a combination of the two in order to determine the nature of a particular work. Under section 301, statutory protection subsists from creation.[21] Section 101 of the new law states that a work is "created":

> When it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.[22]

This functions best where there are in fact different versions, but does not establish whether use of the same sounds with and without

[19] It is unclear, despite the second clause of the statement in the House Report, id., whether a material object containing sounds which accompany an audiovisual work can properly be considered a "phonorecord" as that term is defined in the statute. See, supra note 9.

[20] This assumes no violation of the right to reproduce. See, 1976 Copyright Act, sec. 101, "compilation," "derivative work"; sec. 103; H. Rept. No. 94–1476 at 57–8.

[21] 1976 Copyright Act, sec. 301.

[22] Id., sec. 101, "created."

images actually represents these different versions. Even where the sounds are remixed or edited, they may still accompany an audiovisual work.

While these criteria may be helpful in individual situations, they have serious shortcomings as an overall conceptual approach. To demonstrate, consider the following illustration. A live jazz performance is broadcast on television, and is simultaneously fixed on both video and audio tape.[23] Neither fixation precedes the other, and both capture the same notes emitted from the saxophone. Similarly, the intention exists simultaneously to exploit the sounds and images on the video tape in one form (e.g., broadcast syndication) and the sounds on the audio tape in another (e.g., commercial phonograph albums). Given these circumstances, any difference in treatment would seem to be based simply on the form in which the performance is fixed. The video tape would have all the rights associated with motion pictures and other audiovisual works, including a performance right, whereas the products form the audio tapes, if they have any rights at all, would be limited by section 114, and would not have performance rights. Additionally, while the sounds could be imitated from the audio tape (if it is treated as a phono record of a sound recording), it is not clear that the same sounds could be imitated from the video tape. It is ironic that the source of esthetic, and therefore financial, value of each piece of tape—the performance, the creation of sounds—should achieve greater protection through a "piggyback" relationship with visual images.

Such a distinction based on the form of fixation qualifies the desire expressed in the House report:

> * * * to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co.*, v. *Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be.[24]

What seems to underlie this distinction is the important but unstated consideration of methods of exploitation and distribution. The differences in classification, along with the resulting differences in treatment, are apparently required by the statutory definitions.

Although not founded on clear artistic or philosophic reasoning, the differences do reflect certain business practices involved in the dissemination of different types of works. Here again, it is ironic that the content of a tape should receive less protection because one material object (a phonograph record) is more easily accessible to the public than another material object (video tape).[25]

ALTERNATIVES

Conceptually, it might be helpful to recast certain definitions in section 101 to more clearly indicate that the "work" intended to receive

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[23] See, H. Rept. No. 94–1476 at 52–3: "Thus, assuming it is copyrightable—as a 'motion picture' or 'sound recording,' for example—the content of a live transmission should be accorded statutory protection if it is being recorded simultaneously with its transmission." It is beyond the scope of this discussion whether such protection is limited to situations involving "transmissions."

[24] Id. at 52.

[25] These circumstances too may change with continued technological development and increasingly available home-taping equipment, both audio and video.

protection is a "performance." It is interesting that, although fixation is an important concept throughout the law, sound recordings are the only "works of authorship" actually defined *in terms* of fixation.There is language in the House report which would support a change in this regard. In its discussion of fixation, the report observes that "an unfixed work of authorship, such as an *improvisation* or an *unrecorded choreographic work*, *performance*, or broadcast, would continue to be subject to protection under State common law or statute but would not be eligible for Federal statutory protection under section 102." [26] The obvious implication is that if such works *were* fiixed in tangible form, they would be subject to Federal statutory protection. The report goes on to state further that:

> The bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts—sports, news coverage, *live performances of music*, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded * * *. If the program *content* is transmitted live to the public while being recorded at the same time * * * the copyright owner would not be forced to rely on common law rather than statutory rights * * *.[27]

It is reasonable to infer that the "content" of a fixation (e.g., a "live performance of music"), if a "work of authorship," should be the subject of copyright protection. Since a sound recording only "results" from the fixation of sounds, the fixation is easily confused with its content.

Regardless of whether such definitional refinements are undertaken, it would seem that the fewer differences which exist between the treatment of sound recordings and sounds accompanying audiovisual works, the less important the distinctions between the nature of these works will become. The most noticeable source of disparity is in the area of performance rights. The grant of a performance right in sound recordings would tend to diminish the possibility that particular rights could be gained or lost with the transfer of sounds from one medium to another. The form of exploitation may justify limitations on the operation of a performance right (such as a compulsory license) much more so than it would justify the absence of that right. Although similar protection will lessen the effects of conceptual distinctions between sound recordings and sounds accompanying audiovisual works, this alone will leave questions of authorship, and of who benefits, unresolved. These, however, are amenable to resolution through contractual negotiation.

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[26] H. Rept. No. 94–1476 at 52.
[27] Id.

IV. LEGISLATIVE HISTORY OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

SUMMARY

Since the 1950's, the issue of performance rights in sound recordings has been a relatively constant topic of legislative concern, albeit with varying degrees of attention. By the early sixties, the rift within the AFM between its members engaged in recording, and those who were not, was repaired, and the union supported copyright protection for performances of sound recordings. A turning point of sorts was reached in 1965 when record companies joined the performers' unions in the active support of performance rights.

By this time it had become acceptable to consider sound recordings as potential subject matter of copyright protection under article I, section 8 of the Constitution. Bills for the general revision of copyright law included such protection, limited to rights against unauthorized duplication. This was the case until, in 1969, an amendment offered by Senator Harrison Williams to the then current revision bill, S. 543, was adopted by the Senate Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee. The amendment's provision for a compulsory license for the public performance of sound recordings remained in successive revision bills until S. 1361 reached the floor of the Senate, with the approval of the Senate Judiciary Committee, on July 3, 1974.

At this point, both proponents and opponents were firmly entrenched in their respective positions. Opponents argued that a performance royalty would be unconstitutional, and would represent a serious financial burden to users; while proponents felt that such a royalty would be constitutional, that users had the ability to pay, and that performers and record companies deserved compensation for the use of their creative efforts for the commercial benefit of others. Based largely on Senator Sam Ervin's prestige as a constitutional authority, the provision granting performance rights in sound recordings was stricken from S. 1361 on September 9, 1974.

Despite hearings on performance rights in both the House and Senate during the summer of 1975, the issue has remained relatively static in terms of congressional action. It has, nevertheless, been kept alive, first by the enactment of the 1976 Copyright Act with section 114(d), calling for a study by the Copyright Office to determine whether that act should be amended to provide for sound recording performance rights, and second, by the introducton, on April 5, 1977, of a bill, sponsored by Congressman Danielson, to amend the new copyright law to provide for such rights.

Legislative History of Performance Rights in Sound Recordings

The issue under study is whether the owners of coypright in sound recordings [1] should be entitled to enjoy a right of public performance in such works. In tracing the legislative history of this proposition, however, the necessary prior question is whether sound recordings are indeed copyrightable. For this reason, the history of performance rights, at least before 1971, cannot be considered apart from the history of protection against unauthorized duplication of sound recordings, where issues of copyrightability frequently arose. This history has been exhaustively treated in Copyright Office Study No. 26, "The Unauthorized Duplication of Sound Recordings," [2] and will be summarized through 1957.[3]

The 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;

The work of an author must therefore be a "writing" in order to be eligible for copyright protection. While section 4 of the 1909 Copyright Act states that, "all the writings of an author," [4] are subject to copyright, there had never been any affirmative judicial or legislative determination of the question whether sound recordings [5] are, or are not, "writings." Based largely upon the result in *White-Smith Music Publishing Co.* v. *Apollo Co.*,[6] however, they were never treated as such. This was the assumption underlying the legislation proposed between 1909 and 1971 which might have defined recorded aural works as the writings of an author.[7]

Under an early bill for the general revision of the copyright law, sound recordings, or "contrivances by means of which sounds may be mechanically reproduced," as "adaptations" or "arrangements," were included as works subject to copyright protection.[8] The owner of this copyright was to be the record producer, and exclusive rights were limited to manufacturing, copying, and vending the record, if it was based upon a copyrighted work. The language of this bill carried the implication, "that public performance and broadcasting rights would accrue to records reproducing public domain material." [9] These pro-

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[1] See definition in 1976 Copyright Act Public Law 94–553, sec. 101, 90 Stat. 2541 (1976). As used herein, the term "sound recording" refers to the definition in new sec. 101, unless otherwise indicated, either specifically or by context.

[2] See Study No. 26, Barbara A. Ringer, "The Unauthorized Duplication of Sound Recordings," prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, 86th Cong., 2d sess., 1961 (cited herein as Study No. 26).

[3] This study itself is now part of legislative history, submitted to the Senate Judiciary Committee, "with a view to considering a general revision of the copyright law * * *" see Foreword, Copyright Law Revision, Studies No. 26–28, 86th Cong., 2d sess. (Comm. Print 1961).

[4] 17 U.S.C.A. § 4 (1952).

[5] See 1971 Sound Recording Amendment, Public Law No. 92–140, 85 Stat. 391 (1971).

[6] 209 U.S. 1 (1908); holding that since the perforations on a piano roll were not visually intelligible, the recording was therefore not a copy of the music, and the author thus had no control over the use of such recording.

[7] See Study No. 26 at 6–7. This seems so despite the evolution of thought on the subject to the point that the scope of "Writings" in the Constitution was considered broader than in the statute, and that sound recordings, although writings in the constitutional sense, were not protected by the 1909 Act. [See, e.g., Chaffee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 719 (1954); *Capitol Records Inc.* v. *Mercury Records Corp.*, 221 F. 2S 657 (2d Cir. 1955).]

[8] H.R. 11258, 68th Cong., 2d sess. (1925).

[9] See Study No. 26 at 21.

posals stimulated no significant response, either in support or in opposition.[10]

In the next Congress, H.R. 10434[11] was introduced as a general revision bill. This bill would have made sound recordings copyrightable, and, unlike the previous bill, would have protected such works against unauthorized public performance,[12] as well as granting the exclusive rights to make, copy, and vend. Issues related to sound recordings did not arise during hearings on H.R. 10434.[13]

No new developments occurred until 1930, when H.R. 12549[14] was introduced. This too was intended as a general revision; however, while sound recordings were still included as protectible works, the scope of this protection varied from previous suggestions. H.R. 12549, sec. 37, contained the following language:

> * * * the copyright in such phonographic records, rolls, or contrivances shall consist solely of the exclusive right to print, reprint, publish, copy, and vend said phonographic records, rolls, and contrivances, and that any such copyright * * * shall be subject to * * * the copyright in any existing work, written on said records, rolls, or other contrivances, at all times, in the absence of express contract to the contrary.

Recordings made for the purpose of "public performance, exhibition, or transmission" were specifically excluded from the reach of this section.[15] The bill was reported out of committee, but by the time it was eventually passed by the full House of Representatives, the provisions dealing with copyright in sound recordings had fallen victim to amendments to strike.[16]

After passage in the House, H.R. 12549 was then referred to the Senate, where hearings were held. There the suggestion was again made to include sound recordings as copyrightable works. Among the rights to be accorded was the right of public performance for profit. No action was taken on these suggestions, and the bill itself failed to gain the Senate committee's approval.[17]

In early 1932, the House Committee on Patents held hearings on the subject of copyright revision.[18] With the impetus of increased use of recorded music on radio, copyright for sound recordings became a significant issue.[19] The chairman of the committee, Representative Sirovich, noted that record companies:

> take a band and an orchestra and the finest singers, for whom they pay a great deal of money, and put out a disk or record, and along comes some little radio broadcasting company and buys that record and puts it on the radio, * * * In other words, they are getting nothing for their work. In other words, in this bill of 1909 they never considered the opportunities of radio * * * I look forward to a good deal of controvery as the years roll by unless we incorporate some sort of protection to the author and manufacturer who puts his talents or his money into the disk without getting any compensation from the others who are using it for commercial gain.[20]

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[10] Id. at 22.
[11] H.R. 10434, 69th Cong., 1st sess. (1926).
[12] See Study No. 26 at 22, note 183.
[13] Id. at 22–23.
[14] H.R. 12549, 71st Cong., 2d sess. (1930).
[15] Id., sec. 37(q).
[16] See Study No. 26 at 24. It is not clear from the language of the bill who was intended as the "author" or copyright owner.
[17] Id. at 25.
[18] Hearings Before the House Committee on Patents on General Revision of Copyright Law, 72d Cong., 1st sess. (1932).
[19] See Study No. 26 at 25.
[20] See Hearings, supra note 18, at 19.

Record companies favored granting copyright protection to sound recordings, suggesting, among other things, that a number of foreign countries recognized such rights. Broadcasters, on the other hand, opposed an extension of copyright, arguing that small broadcasters would suffer harm.[21]

Subsequent to these hearings, three similar bills for general revision were introduced.[22] Although the language varied, each would have included sound recordings as copyrightable works and would have allowed for protection against unauthorized performance through broadcast. The National Association of Broadcasters (NAB) opposed enactment of such a provision, stating that it would be a burden to small radio broadcasters.[23] While one of these bills was eventually reported out of committee, no further action was taken.

A revision bill introduced by Representative Daly in 1936 represents the most significant departure in legislative thinking about this problem, at least until that time, and quite possibly to date.[24] Unlike previous bills, H.R. 10632 did not suggest protection for, "contrivances by means of which sounds may be mechanically reproduced." Rather than addressing issues in this area in terms of a material object, this proposal raised the altogether novel approach of expressly specifying that copyright protection should be afforded to the actual product of creativity itself, i.e., a performance. Thus the following provision defining the subject matter of copyright:

> * * * the works for which copyright may be secured under this Act shall include all the writings of an author, whatever the mode or form of their expression, *and all renditions and interpretations of a performer and/or an interpreter of any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations.*[25]

The concept of requiring fixation in order to secure statutory protection was applied through the description of copyrightable works in proposed sec. 5(n) of H.R. 10632:

> The interpretations, renditions, readings, and performances of any work, when mechanically reproduced by phonograph records, disks, sound-track tapes, or any and all other substances and means, containing thereon or conveying a reproduction of such interpretations, renditions, readings, and performances.[26]

The "work" intended for protection was expressly stated as "performance," as fixed in a material object,[27] and the terms "performer" and "author" were treated as coextensive, the rights of one group equivalent and in addition to the rights of the other:[28]

> Interpreters and performers under this Act shall include interpreters, performers actors, lecturers, and conductors, and the rights afforded them for their

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[21] See Study No. 26 at 25.
[22] H.R. 10364, 72d Cong., 1st sess. (1932); H.R. 10740, 72d Cong., 1st sess. (1932); H.R. 10976, 72d Cong., 1st sess. (1932).
[23] See Study No. 26 at 26, and notes therein.
[24] H.R. 10632, 74th Cong., 2d sess. (1936).
[25] Id., sec. 3 (emphasis added). Conceptually, this is a precursor to the express statement of a central idea of Public Law 94–553, that there is a "fundamental distinction" between an "original work of authorship," and a "tangible medium of expression," and in this context, the specific distinction between a "sound recording" and "phonorecord". See Public Law 94–553, secs. 101, 102; H. Rept. No. 94–1476 at 52–53.
[26] H.R. 10632, sec. 5, 74th Cong., 2d sess. (1936).
[27] Presumably this is distinct from a performer's particular manner or style of expression, although this is not entirely clear. In this context, compare the limitation on exclusive rights in sound recording contained in Public Law 94–553, see 114(b). Also, as to protection for a "performance," cf. the definition of "sound recording" in Public Law 94–553, sec. 101: "* * * works that result from the fixation of a series of musical, spoken, or other sounds * * *."
[28] See Study No. 26 at 27.

renditions, interpretations, and performances shall not be construed to interfere with the rights accorded authors and composers, and said rights are free and independent of each other, and the establishing or maintenance of the rights of one shall not include those of the other class.[29]

The exclusive rights of performers in their copyrighted recorded performances apparently would include rights of public performance and duplication, and were stated as follows:

To perform, or have performed for public performance and/or profit, any rendition or interpretation of a work by any mechanical means, same to include re-recording or recapturing of and by mechanical production or rendition or interpretation by any process, means or method. These rights are not intended to interfere or curtail the right of the authors of any composition or work used for such rendition or interpretation, and are created to be in addition to same, and to protect such persons who render or interpret them.[30]

Additionally, under this bill, notice of copyright would be required on the record label, and the employer in a for-hire situation would be deemed an "assignee" unless a contractual arrangement specified a different result.[31]

Almost 1 month after H.R. 10632 was introduced by Congressman Daly, Representative Sirovich introduced H.R. 11420,[32] another general revision bill. It has been suggested that this bill would have made copyright protection for recorded performances contingent upon the written consent of the copyright owner of a work being performed, and that such protection might have been limited to performance and duplication of musical compositions.[33]

Despite criticism of both the Sirovich and Daly bills as drafted, the idea of protection for performers, and the protectibility of performances, was supported by the National Association of Performing Artists, the American Federation of Musicians (AFM), and others. In hearings convened by the House Committee on Patents,[34] testimony was heard from Fred Waring, among others, concerning the unauthorized use by radio broadcast phonograph records made for home use; the unauthorized use of recordings in motion picture soundtracks; the harm caused by unrestricted repetition of recorded performances; and a variety of other perceived abuses. Complaints were also registered about the phenomenon which found performers competing with themselves through the unauthorized broadcasts of their recorded performances simultaneously with the broadcast of their live performance on another radio station,[35] as well as the phenomenon of a performer's job being replaced by the use of his own recorded performance.[36] Impassioned arguments were made concerning the intellectual and artistic creativity of performers, who, it was said, therefore ought to be entitled to protection under the copyright clause of the Constitution and legislation enacted by Congress.[37] The existence of similar protection in a number of foreign countries was also cited.[38]

[29] H.R. 10632, sec. 32, 74th Cong., 2d sess. (1936).
[30] Id., sec. 1(h).
[31] Id., secs. 15, 29; see Study No. 26 at 28.
[32] H.R. 11420, 74th Cong., 2d sess. (1936).
[33] See Study No. 26 at 28–29.
[34] See Hearings Before the House Committee on Patents on Revision of Copyright Law, 74th Cong., 2d sess. (1936).
[35] Id. at 655–659.
[36] Id. at 656.
[37] Id. at 670.
[38] Id. at 677–78.

Record companies, suggesting that the record itself was a product of creativity, felt that copyright protection should be accorded the producer, as in the case of motion pictures.[39]

Opposing the extension of copyright to performances were such groups as the NAB, ASCAP, and the jukebox industry.[40] It was argued, principally, that copyright protection for a performance would be unconstitutional, since a performance was incapable of being considered a "writing." [41] Objections were also raised concerning the burdens of paying and collecting royalties in addition to those already in existence for the benefit of composers.[42]

No further legislative action was taken on either of these bills, and Representative Daly introduced H.R. 52745, a similar bill, in the 75th Congress.[43] The provisions relevant to recorded performances remained largely unchanged from Daly's previous bill, and the following section was added:

(h) The performer of a rendition of any composition or work in any form whatsoever shall be deemed an author and such rendition when reproduced by any means whatsoever shall be considered a writing; but shall not constitute a publication which shall divest any rights existing at common law and/or under the provisions of this Act.[44]

Despite the problems implicit in the latter clause of this statement,[45] the former represented the most explicit attempt yet to legislatively declare that a performance can constitutionally be a "writing," and a performer an "author." Again, no further action was taken, although the bill was introduced in the Senate.[46] Amid the criticism generated by these provisions, one individual suggested that the idea of according copyright protection to a recorded performance at least warranted further study, and that such protection might be acceptable if it were limited to rights to duplicate, vend, and use "for the purpose solely of public communication for profit." [47]

These suggestions apparently found their way into H.R. 4871, a general revision bill introduced in the 76th Congress, again by Representative Daly.[48]

In addition to various other changes in language from prior bills, the following section on exclusive rights in recorded performances was included in H.R. 4871:

To communicate to the public for profit a copyrighted recordation of a rendition or performance and/or any duplicated, reproduced, or recaptured renditions or performances if transmitted or communicated by any apparatus mechanically or electrically operated: Provided, however, that such rights shall be limited to the making and vending of copies of such recorded renditions and performances and the limited public communication right thereof as contained in this subsection.[49]

[39] Id. at 620–22.
[40] See Study No. 26 at 29
[41] See, e.g., Hearings, supra note 34, at 486–89.
[42] Id. at 1083.
[43] H.R. 5275, 75th Cong., 1st sess. (1937).
[44] Id., sec. 30.
[45] See Study No. 26 at 31.
[46] S. 2240, 75th Cong., 1st sess. (1937).
[47] See Study No. 26 at 31.
[48] H.R. 4871, 76th Cong., 1st sess. (1939).
[49] Id., sec. 1.

Similarly, the statement in the previous bill [50] dealing with the status of performances as writings and performers as authors was refined in the following manner:

(a) The author of a rendition of any composition or work reproduced or captured in any form shall be deemed an author and such rendition when reproduced or captured by any means in tangible form shall be considered a writing.
(b) That in cases of joint renditions the conductor, or leader, shall be considered and deemed the author and be entitled to the protection provided by this Act.[51]

No provision vested copyright in an employer for hire in this situation, and, rather than the sweeping pronouncement with respect to publication and common law protection contained in the prior bill, this proposal attempted to deal with the issue by stating:

* * * but in the case of recorded renditions, such sale and/or dissemination of such fixed renditions shall not constitute a publication *which shall divest the rights of the author of such rendition in and to the rights of public communication for profit.*[52]

The principle of copyright protection for recorded performances received the unanimous support of the American Bar Associations' section on patent, trademark, and copyright law in its report of 1939.[53] Authorship, the section suggested, should be left to contractual relationship among the parties.[54] No further action on the bill, however, was taken.

The idea was also the subject of consideration, in 1939, by the Committee for the Study of Copyright, known as the Shotwell Committee. Performers, viewing their recorded performances as products of artistic and creative endeavor, felt they should be entitled to copyright protection. Record producers, drawing the analogy to motion pictures again, felt that copyright should vest initially in themselves.[55]

Authors, on the other hand, asserted that recordings were not constitutionally copyrightable, since they were not writings, and producers were not authors. Also, unfairness was claimed because record producers would not be subject to a compulsory license similar to the one affecting authors. Broadcasters similarly objected to the copyrightability of recorded performances, and to the economic hardship they would suffer if recordings were made so.[56]

Motion picture producers, while acknowledging the basic similarity among visual recordings, sound recordings, and combinations of the two, argued that copyright should be limited to protection of the performance as recorded, and should not apply to an imitation of such performance.[57]

The bill ultimately proposed by the Shotwell committee [58] would not have accorded copyright to sound recordings. The reasons given were that:

thought has not yet crystallized on the subject . . . (and) no way could be found at the present time for reconciling the serious conflicts of interests arising in this field.

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[50] See supra note 44.
[51] H.R. 4871, sec. 29, 76th Cong., 1st sess. (1939).
[52] Id., sec. 62(a). (Emphasis added).
[53] See Study No. 26 at 32–33, n. 312.
[54] Id. at 33.
[55] Id.
[56] Id. at 33–34.
[57] Id. at 34. See also, 1976 Copyright Act, Public Law 94–553, sec. 114(a).
[58] S. 3043, 76th Cong., 3d sess. (1940).

Additionally, it was found that, "there is considerable opposition to giving copyright in recordings for they are not commonly creations of literary or artistic works but uses of them." [59] This bill, like H.R. 9703,[60] a general revision bill similar to the previous Daly bill and which did contain provisions granting copyright to sound recordings, received no further action.

Between 1942 and 1951, a series of bills was introduced to provide copyright protection for "acoustic recordings." H.R. 7173, introduced in 1942, would have extended such protection by amending the 1909 Act, first to include the following categories among the list of copyrightable works in section 5: [61]

(l) Motion pictures, with or without sound.
(m) Recordings which embody and preserve an acoustic work in a fixed permanent form on a disc, film, tape, record, or any and all other substances, devices, or instrumentalities, by any means whatever, from or by means of which it may be acoustically communicated or reproduced.[62]

A new section 1(f) was proposed, which, in addition to granting the exclusive rights to make, publish, and vend "recordings of sound," also included the right:

* * * to communicate and reproduce the same acoustically to the public, for profit, by any method or means utilizing any such recording in, or as part of, any transmitting or communicating apparatus * * *.[63]

These rights, however, would be limited by a provision that recordings of "any copyrighted musical work," as adaptations:

* * * shall not be regarded as new works subject to copyright under the provisions of this title unless the proprietor of such musical copyright has consented to securing of copyright in such recording.[64]

Although another provision would have defined a recording as a copy of the sounds recorded, there was no indication of notice requirements.[65] H.R. 7173, as with three other virtually identicial bills,[66] received no further action.

The bill was again introduced in 1947, as H.R. 1270.[67] Arguments against the constitutionality of extending copyright to recordings were reiterated by the opponents of the measure, especially authors and broadcasters. The authors argued that the proposed restrictions on broadcasting and public performances, together with the compulsory licensing provisions, would place them in an inequitable position. Broadcasters, for their part, objected to the financial imposition upon their industry implicit in such legislation when, as they saw it, broadcasting was largely responsible for the commercial success of recordings.[68]

The recording industry, now opposed to this bill because of the belief that protection should not be granted to performers rather than the record companies, also argued that the proposal to require the con-

[59] 86 Congressional Record 77–78 (1940); Study No. 26 at 34.
[60] H.R. 9703, 76th Cong., 3rd sess. (1940).
[61] See Study No. 26 at 34.
[62] H.R. 7173, 77th Cong., 2d sess. (1942).
[63] Id.
[64] Id.
[65] See Study No. 26 at 35.
[66] H.R. 1570, 78th Cong., 1st sess. (1943); H.R. 3190, 79th Cong., 1st sess. (1945); S. 1206, 79th Cong., 1st sess. (1945).
[67] H.R. 1270, 80th Cong., 1st sess. (1947).
[68] See Study No. 26 at 36.

sent of a copyright owner in a musical composition would result in the injection of many recordings into the public domain, since whatever common law protection against unauthorized duplication that existed would be lost.[69] Performers, alone in their support of the bill, argued that performances are both creative and deserving of copyright protection, and pointed out as well the inequities of their situation. Additionally, they maintained that it was the performance on the record itself which determined its popularity, not radio, as the broadcasting industry believed.[70]

It has been suggested that another circumstance, mitigating against the acceptance of this proposal, appeared during hearings on H.R. 1270. This circumstance was the lack of support from the AFM, and the negative reflection cast upon the bill was based on the inference that the union's leader, James Petrillo, would have been in a position to unduly influence the distribution among the union membership of moneys collected as the result of any licensing arrangements.[71] H.R. 1270 failed to secure committee approval. The same bill was introduced in 1951 as H.R. 2464,[72] but this too received no action.

Between 1951 and 1957, issues concerning the copyrightibility of sound records had apparently dropped from legislative sight. The battle, however, had not ceased. Its location had changed and its focus had shifted inward. Los Angeles Local 47 of the American Federation of Musicians had "revolted", and a special subcommittee of the House Committee on Education and Labor was appointed to investigate complaints about the "method of operation and basis of contributions to the musicians performance trust funds." [73]

One of the principal criticisms was that:

> Residual property rights have been protected by collective bargaining agreements throughout the entertainment industry for the protection of artists in all fields of artistic property. The technical term is "residual performance right". No such agreements exist at the present time to protect or enforce the residual performance rights of individual musicians. The AFM has diverted compensation for such rights from the individual musicians to the trust fund since June 1955 * * * [74]

The subcommittee found that:

> Substantial sums which would, in most industries, go toward increased wages and fees for many members of Local 47 and the New York local are now being diverted into the various musicians' performance trust funds * * *. Although the funds are supposed to be used to provide employment for unemployed musicians and to promote cultural development throughout the country, these witnesses believe that the majority of performers benefitting from the funds are not really unemployed professional musicians who normally make their living in that profession, and also that the method of allocating the funds is a device by which the president and executive board of the AFM control an overwhelming majority of delegates to the national convention of the union.

This experience lends credence to the conclusion, referrerd to above (at 17), that the union leadership was in a position to misallocate

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[69] Id.
[70] Id.
[71] Id. at 36–37. notes 350, 351.
[72] H.R. 2464. 82d Cong., 1st sess. (1951).
[73] Special Subcommittee of the House Committee on Education and Labor. 84th Cong., 2d sess., Report on Musicians Performance Trust Funds 1 (Comm. Print 1956).
[74] Id. at 2.

funds derived from licensing arrangements and this therefore would have represented a serious hazard to the effectiveness of copyright protection for performers.[75]

86TH–87TH CONGRESS; 1959–62

In 1957, Study No. 26 "The Unauthorized Duplication of Sound Recordings" [76] was submitted to the Senate Judiciary Committee. Examination, to that time, of the legislative history of proposals for copyright protection in sound recordings had led to the conclusion that:

* * * As the importance of radio in the music publishing and recording industries grew, there was a proportionate increase in the pressure to secure copyright in sound records, and in the concerted opposition to such proposals on the part of author and user groups * * *.
* * * Virtually all of the opponents of the measure(s) attacked their constitutionality on the grounds that performances and recordings are not creative, and are labor rights or mechanical objects rather than "writings". Essentially, however, the arguments, pro and contra, were dictated by economic self-interest, and revolved around the problem of radio broadcasting. There was practically no direct opposition to the principle of protection of sound recordings against unauthorized dubbing.[77]

The culmination of this series of studies occurred in 1961, with the submission to Congress of the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law." [78] In its comments on sound recordings, this report's focus was clearly on the problem of unauthorized duplication. The issue of performance rights for sound recordings was merely mentioned, with the statement, "* * * it has also been suggested that their (performers' and record producers') rights might extend to the collection of royalties for the use of their recordings in broadcasts and other public performances." [79] Even with this limited focus, detailed recommendations were deferred because, "* * * Many complex issues [had] not yet crystallized * * * [80] among which was the scope * * * of protection to be accorded.[81]

During this period, these issues appeared in yet another form, this time in the arena of the House Committee on Interstate and Foreign Commerce. The relationships between the recording and broadcasting industries, among others, became the subject of a staff study titled, "Songplaying and the Airwaves: A Functional Outline of the Popular Music Business." [82] "The main emphasis," of this report "is on the

[75] In developments presumably related to this controversy, there were several legislative attempts to make the use of foreign recordings in motion pictures and television a criminal offense, if, at the time of recording, the performer was not eligible for immigration to the United States. See, e.g., H.R. 11658, 11043, 86th Cong., 2d Sess. (1960); cf. H.R 9198, 87th Cong., 1st sess., (1961).
[76] See, supra, note 2.
[77] See Study No. 26 at 37.
[78] House Committee on the Judiciary, 87th Cong., 1st sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, (Comm. Print, 1961) (cited) hereinafter as Register's Report (1961)).
[79] See Register's Report, (1961), at 17.
[80] Id. at 80.
[81] Id. Comments on the Register's Report in this regard favored the general proposition that some protection should be accorded sound recordings, although there was lack of uniformity concerning the suggested extent of such protection. See, e.g., House Committee on the Judiciary Copyright Law Revision Part 2, Discussion and Comments on Report of the Register of Copyright on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess. (Comm. Print 1963), at 241–42, 330–31, 372, 381; cf. id. at 218.
[82] House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., Songplaying and the Airwaves: A Functional Outline of the Popular Music Business (Subcommittee Print 1960).

manufacture and distribution of phonograph records and on the related subject of the use of music by broadcasters." [83] The concern was over potential for abuse. After its analysis, the subcommittee staff stated that:

One of the conclusions reached in this memorandum is that the broadcasting industry is an indispensable promotion arm of the record industry. It is undeniable that broadcasters can and should make available to the public great quantities of America's rich musical harvest. But it is doubtful whether the public interest is served by such a state of affairs as currently prevails. Because of innumerable conflict-of-interest situations, there is considerable reason to believe that much of the music the public hears is played not because of broadcasters' judgment as to its quality, but because of its marketability or because the broadcaster will profit financially from its use. Broadcasting of music is a necessary ingredient in balanced programming. Enhancement of record sales or artist popularity that results incidentally is perfectly legitimate so long as incidentally is perfectly legitimate so long as balanced programming is the broadcaster's principal concern. It is when the broadcaster loses sight of his programming responsibilities and accepts the "promotion" role thrust on him by the record industry that the public interest is compromised.[84]

The early 1960's witnessed two additional legislative developments in this area, although neither dealt directly with any specific bill before Congress. In 1961, a diplomatic conference, was held in Rome and resulted in the "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations," known as the Rome Convention. Under this convention, performers, producers of phonograms, or both are entitled to receive equitable remuneration from any user who broadcasts or otherwise communicates to the public a "phonogram published for commercial purposes. * * *" [85] The Rome Convention was neither signed nor ratified by the United States, despite active U.S. participation in its drafting.

Domestically, in late 1961 and early 1962, a Select Subcommittee on Education of the House Committee on Education and Labor held extensive hearings in New York, San Francisco, and Washington, D.C., on the economic conditions in the performing arts.[86] The subject matter of these hearings represented a broad range of topics affecting virtually every type of performing art. Interestingly, however, the issue of protection for performers, through remuneration for the repeated commercial use of their recorded performances, emerged throughout the testimony as a common, if subordinate, theme.[87] Herman Kenin, president of the AFM, observed that—

* * * it is a shocking crime that people like Mr. Leopold Stokowski or Leonard Bernstein, or Louis Armstrong, or whoever the artist may be, are denied the right to receive additional fees, when money is made with his product. All you have to do is put a radio set into this room today and you can listen for hours and hours to canned music here, records received free by the broadcaster, if you please, while the men who made them are sitting home trying to figure out how to pay for their children's education.[88]

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[83] Id. at 1.
[84] Id. at 13.
[85] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), Art. 12, 1961. "Phonogram" is defined in Art. 3, as "any exclusively aural fixation of sounds of a performance or of other sounds."
[86] Hearings on Economic Conditions in the Performing Arts Before the Select Subcommittee on Education of the House Committee on Education and Labor, 87th Cong., 1st and 2d Sess. (1961–62).
[87] Questions of direct Federal subsidy appeared somewhat more dominant.
[88] Id. at 17.

The following exchange occurred between Representative Frank Thompson, chairman of the subcommittee, and Mr. Nat Hentoff, whose testimony was concerned with jazz:

Mr. THOMPSON. * * * Do you agree with some of the earlier witnesses that if means could be found by which artists could participate in the profits from the sales or use of their records later, this would be helpful?

Mr. HENTOFF. Very much so. It is especially relevant to the jazzman, because, when he performs on a record, his improvisation is what makes the tune quite a new one, and whatever success the record has in sales, is due very much to the musicians, who gets (sic) paid only for the performance and then that is the end of it.[89]

Marianne Mantell, cofounder of Caedmon Records, recommended that the Copyright Act should "be amended to cover performances on phonograph records," arguing that:

While it must be remembered that the broadcasting of records serves to promote them, there are numerous other occasions when an unprotected record is used free of charge in place of a paid live performance. But if recorded performances were covered by copyright, the broadcaster would then make a fair payment to the copyright owner, and the interest of the artist in the performance would be decently protected.[90]

Representative Thompson, during the testimony of Lucien Mitchell of the San Francisco Symphony, commented that:

There have been some interesting suggestions with regard to recordings * * *. The recordings are played almost innumerable times and yet the artist is paid once for having made them.

So the suggestions have been made for us to study the possibility of further remuneration of the performing artist when his work is played over and over and over again.

One suggestion which intrigued me, at least, was that since the air belongs to all of the people and is being used for commercial purposes to such an extent, that consideration might be given to having radio and television companies, broadcasting companies, pay a share of their commercial income back * * *.[91]

Thus, despite the absence of a specific bill, these issues of protection for recorded performances were nevertheless before Congress. Although the National Endowments for the Arts and Humanities were ultimately created in 1965, no concomitant change in the copyright law was enacted for the benefit of performing arts and artists. Congressman Giaimo, in questioning then Secretary of Labor Arthur Goldberg, best summarized the existing state of affairs. Addressing Mr. Goldberg, the Congressman stated:

* * * In your opinion and award in the *Metropolitan Opera Company* matter, you indicated that there is a disparity between the phenomenal growth in audience and appreciation for the peforming arts, on the one hand, and the economic decline of the performer, on the other.

You indicated that more people throughout America are enjoying the products of the performers' craft through radio, TV, films, recordings, jukeboxes, and so forth, but that the creators are not sharing in the boom.[92]

After referring to a variety of statistics, Representative Giaimo continued:

All of this indicates, Mr. Secretary, to me that a great deal of money is being made in the arts, that there is interest by the people, and yet those who are gaining and benefitting financially from this are not carrying their share of the load.

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[89] Id. at 143.
[90] Id. at 217–218.
[91] Id. at 315. See also, e.g., Id. at 65; 77; 231; 245; 316–19; 590–91.
[92] Id. at 443.

* * * How can we get some of the money that is gained and earned by all of the middlemen in this field of the performing arts, those who pay nothing to the creators and to the performers themselves? * * * Is there any way in which we can bring them into a participation, those who are obviously gaining literally billions of dollars as a result of the creative work of the performing artists? [93]

On April 17, 1961, H.R. 6354 was introduced.[94] Its purpose was to deter the unauthorized duplication of sound recordings by making the counterfeiting of records and labels a criminal offense, and by providing civil remedies for infringement of mechanical rights. After this bill received the criticism that it would be "inappropriate for a Federal statute to accord what is in effect a copyright, with none of the conditions and limitations provided in the copyright statute," [95] H.R. 11793 was introduced as a substitute bill.[96] H.R. 11793 provided solely that transportation in interstate or foreign commerce of a phonorecord with a "forged or counterfeited label," would be a criminal offense. Upon receiving additional comments, the bill was amended to provide for penalties of $1,000 and 1 year imprisonment instead of the $10,000 fine and 10 years imprisonment originally proposed,[97] and was eventually enacted into law.[98] During the hearings held on H.R. 6354, there was no consideration of whether any performance rights in sound recordings should be protected. The closest approach to this issue was the remote suggestion by a panel member to a record company executive that "an amendment of the copyright law, based upon the Rome Convention * * *" might be more beneficial.[99]

88TH CONGRESS; 1963–64

In the 2d Session of the 88th Congress, three bills for the general revision of the copyright law were introduced.[100] Each listed "sound recordings" as a category of work subject to copyright protection,[101] and each contained identical definitions of "sound recordings" and of "phonorecords".[102] Each also contained the express provision that the exclusive rights in a sound recording, "do not include any right of performance * * *." [103] No further action was taken on any of these bills. During this period, however, parts 3 and 4 of the House Judiciary Committee's series on Copyright Law Revision were released.[104]

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[93] Id.
[94] H.R. 6354, 87th Cong., 1st Sess. (1961).
[95] See Report of the Librarian of Congress, H.R. Rept. No. 1758, 87th Cong., 2d Sess. 4. (1962); see also letter from U.S. Department of Justice, Byron R. White, H.R. Rept. No. 1758, 87th Cong., 2d Sess. 6–7. (1962).
[96] H.R. 11793, 87th Cong., 2d Sess. (1962).
[97] See S. Rept. No. 2154, 87th Cong., 2d Sess. (1962).
[98] 18 U.S.C.A. Sec. 2318 (West Supp. 1977), Public Law No. 87–773, 76 Stat. 775.
[99] See Hearings on Counterfeit Phonograph Records Before Subcommittee No. 3 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1962), at 57.
[100] S. 3008 (McClellan), H.R. 11947 (Cellar), and H.R. 12354 (St. Onge), 88th Cong. 2d Sess. (1964).
[101] See, e.g., sec. 1(7), S. 3008, 88th Cong., 2d Sess. (1964).
[102] See, e.g., sec. 54, S. 3008, 88th Cong. 2d sess. (1964). "Phonorecords" are defined as "material objects in which sounds, other than those accompanying a motion picture, are fixed or reproduced by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." "Sound Recordings" are defined as, "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied". See, also, "definitions" in 1976 Copyright Act sec. 101. Public Law No. 94–553 (1976).
[103] See, e.g., sec. 10(a), S. 3008, 88th Cong., 2d Sess. (1964).
[104] House Judiciary Committee, Copyright Law Revision, pts. 3 and 4, 88th Cong., 2d Sess. (Committee Print 1966).

These reports contained a preliminary draft of a revised copyright law, together with discussions and comments on the draft. Although sound recordings were listed as protectible subject matter,[105] performance rights were not included.[106] The discussion and comments of the advisory group of specialists considered such questions as whether a sound recording is a "writing," and if so who is the author,[107] as well as the various commercial uses made of sound recordings.[108] The AFM forcibly argued the moral right of performers, "* * * to receive just compensation from the broadcast of their recorded performances * * *",[109] while the National Association of Broadcasters was more concerned with insuring the right of their members to duplicate sound recordings, "* * * for the sole purpose of transmission without the necessity for either permission or payment." [110]

89TH CONGRESS; 1965–66—1965 REVISION BILL

This series of House Judiciary Committee reports, which began in 1961 with the report of the Register of Copyrights, ended with the "Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill," [111] issued as a primer to H.R. 4347, introduced by Congressman Cellar in the 89th Congress.[112] The provision in this bill concerning the exclusive rights in sound recordings was identical with that in the immediately previous bill and was " * * * limited * * * to protection against 'dubbing', that is, duplication of the actual sounds fixed in that recording * * *." [113] In discussing this section, the supplementary report emphasized that sound recordings would be "copyrightable in themselves," [114] and distinguished them from both " 'phonorecords', which are material objects in which sounds are fixed," and "musical, literary, or dramatic works that are reproduced on 'phonorecords.' " [115] It was also recalled that the 1961 Register's report deferred recommendations since "too many of the complex issues underlying the problem had not then crystallized," and noted that "one of the unresolved questions specifically mentioned in the report was the scope of protection to be accorded to sound recordings." [116] Three developments which had occurred since 1961 were mentioned, more or less in passing. These included the signing of the Rome Convention (not by the United States), the enactment of Public Law No. 87–773 against record counterfeiting [117] and the Supreme Court decisions in the *Sears* and *Compco* cases.[118]

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[105] See Preliminary Draft of Revised U.S. Copyright Law, Copyright Law Revision, pt. 3, sec. 1(7).
[106] Id. at sec. 10(a).
[107] See Copyright Law Revision, pt. 3 at 76–78.
[108] Id. at 197, 358.
[109] Id. at 210–11.
[110] Copyright Law Revision pt. 4, supra note 104, at 386.
[111] House Judiciary Committee Law Revision pt. 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 89th Cong., 1st Sess. (House Committee Print 1965).
[112] H.R. 4347, 89th Cong., 1st Sess. (1965), see also, S. 1006, 89th Cong. 1st Sess. (1965).
[113] See Register's supplementary report at xx (1965); H.R. 4347, 89th Cong., 1st sess. sec. 112.
[114] Id. at 49.
[115] Id.
[116] Id.
[117] See supra, note 98.
[118] *Sears, Roebuck and Co.* v. *Stiffel*, 376 U.S. 225; *Compco Corp.* v. *Day-Brite Lighting,*

In explaining the limited scope of the exclusive rights proposed in H.R. 4347, the supplementary report found that:

* * * the aggregate of sounds embodied in a sound recording is clearly capable of being considered the "writing of an author" in the constitutional sense. The analogies between motion pictures and sound recordings in this connection are obvious and inescapable.[119]

While suggesting that there was "little dispute" with the principle that sound recordings should be protected against unauthorized duplication, the report observed, however, that:

* * * when it comes to the question of whether a copyrighted sound recording should be given exclusive rights of public performance, the issue becomes explosively controversial.[120]

Outlining the nature of this "explosive controversy," the Register's supplementary report pointed out that record companies had argued that there were no valid reasons to discriminate against sound recordings in terms of the scope of protection; and that the AFM had adopted a position formally opposing H.R. 4347 because it failed to provide even minimal protection to performers. Users, on the other hand, had voiced strong opposition to suggestions of paying additional royalties, as did owners of copyright in musical compositions who feared they would receive a "smaller slice of the pie." The supplementary report also noted that:

Underlying these arguments is a 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.[121]

Although limiting exclusive rights to protection against unauthorized duplication was, "not meant to imply any disparagement of sound recordings as creative works or any doubt as to their copyrightability," the supplementary report concluded that:

* * * we cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry. We are convinced, under the situation now existing in the United States, that 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.[122]

Extensive hearings on the 1965 revision bill (H.R. 4347) were held before Subcommittee No. 3 of the House Committee on the Judiciary.[123] The issue of performance rights for sound recordings was a comparatively minor issue during these hearings, and the bulk of the testimony from representatives of the recording industry was concerned with matters affecting mechanical royalties.[124] The exception was the testimony of Alan W. Livingston, president of Capitol Records, Inc.,[125] vigorously supporting the principal that:

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[119] Register's Supplementary Report at 30.
[120] Id. at 51. Additionally, no protection was to be extended against imitation of the sounds fixed in a phonorecord, by a separate fixation of another performance; see Id. at 52.
[121] Id.
[122] Id. at 51–52.
[123] Copyright Law Revision, Hearings on H.R. 4347, H.R. 5080, H.R. 6831, H.R. 68351, Before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., Parts 1, 2, and 3, (1965). See also, Copyright Law Revision, Hearings on S. 1008 Before the Subcommittee on Patents, Tradesmarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 1st Sess. (1965).
[124] See, Id. Hearings on H.R. 4347, Part 2 at 659 et seq.
[125] Id. at 946–964.

* * * record manufacturers be given a statutory copyright that includes the exclusive right to the public performance of their copyrighted phonograph records and that they be entitled to collect, as a matter of law, performance fees from those who play such records for profit.[126]

Mr. Livingston suggested that in most cases an equal split of royalties between record companies and performers would generally represent the most equitable division,[127] and at one point in his statement he asserted that:

I do not argue with the right of a creative composer to receive performance royalties. But why only he? What of the other contributors to the success of that song—the talented vocalist whose creative performance made the song a success, the arranger whose interpretation literally created a hit, the jazz musician whose interpretation is the only thing being performed, not the incidental theme on which his talents are bestowed.[128]

He further suggested:

* * * that this committee give attention instead to protecting the performance rights of the vocalist, arranger and record company. . . . Look . . . to the radio stations and others that use records and the performance of talented vocalists for profit without restriction or control or cost.[129]

The AFM, again bearing the standard of musicians and other performers, expressed opposition to the entire revision bill because:

[I]t denies recognition to American performers of a long sought right to participate in the public profitable performance of records * * * [and] would eliminate even the remaining vestiges of common law rights which survive in a few limited areas.[130]

The amendment granting performance rights which was proposed by the AFM also provided for a compulsory license upon service of a notice of intention to obtain such a license, and would be available "when phonorecords of a lawfully recorded sound recording have been distributed to the public under the authority of the copyright owner." [131] Royalty rates would be set, and subject to review, by the Register of Copyrights. Ownership of the copyright in a sound recording would be divided, with the exclusive right to reproduce granted to the producer of the sound recording, and the exclusive right to perform granted to "* * * the person whose performance of musical, spoken or other sounds is fixed in the sound recordings." [132] Duration of the exclusive right to perform a sound recording was suggested as a term of 10 years, "* * * from the year of first publication of phonorecords of the work." [133]

The National Association of Broadcasters offered no direct opposition to suggestions that a performance right be created, but rather seemed to assume their "right to perform a composition," [134] and were more concerned with the ability of broadcasters to make "ephemeral recordings," without liability, "to facilitate their duly authorized performance * * *." [135]

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[126] Id. at 962.
[127] Id. at 963.
[128] Id. at 950.
[129] Id.; see also, testimony of Ernest S. Meyers, General Counsel, Record Industry Association of America, Id. at 964, 974–75.
[130] See testimony of Stanley Ballard, secretary-treasurer, AFM, Id. at 1384.
[131] Id. at 1418.
[132] Id. at 1419.
[133] Id.
[134] See Testimony of Douglas A. Anello, General Counsel, NAB, Id. at 1719–1721.
[135] Id. at 1721.

The constitutionality of copyright protection for sound recordings was again questioned, together with the propriety of treating record manufacturers as "authors." The claim was made that:

If the record manufacturer is entitled to copyright protection for his labors, it would appear to us that similar protection should be extended to the broadcaster for his efforts in generating the signal transmitted over the airwaves.[136]

The NAB testimony was also concerned with cable television, and declared that, "it is the position of this association that CATV's, like broadcasters, perform publicly for profit and, hence, are subject to payment of fees for performance rights." [137]

The testimony of Abraham L. Kaminstein, Register of Copyrights, characterized the provision limiting the exclusive rights in sound recordings as a "half a loaf" provision. His evaluation was that:

By recognizing sound recordings as copyrightable works with rights of reproduction and distribution, but by denying them rights of public performance, the bill reflects—accurately, I think—the present state of thinking on this subject in the United States.[138]

The Register expressed "no doubt" that recorded performances were constitutional "writings of an author," that a record producers' efforts generally represented "authorship," and that sound recordings warranted protection equally with motion pictures and photographs. "No one should be misled," commented Mr. Kaminstein, "by the fact that in these cases the author expresses himself through sounds rather than words, pictures, or movements of the body." [139] While he acknowledged the possibility that a performance right in sound recordings might eventually be recognized under U.S. copyright law, the Register concluded this portion of his testimony with the following observation:

You have seen no towering wave of opposition to [this] proposal simply because there is a general feeling that [it] will not get anywhere; but, if genuine fears were to be aroused on this score, I am sure you would see a wave of protest that would be likely to tear this bill apart.[140]

In the amended revision of H.R. 4347 reported by the House Judiciary Committee, the section on exclusive rights in sound recordings was redesignated section 114, but its language remained unchanged.[141] After summarizing the positions of the AFM and record producers, the committee echoed the testimony of the Register of Copyrights by stating:

The committee believes that the bill, in recognizing rights against unauthorized duplication of sound recordings but in denying rights of public performance, represents the present thinking of other groups on that subject in the U.S., and that further expansion of the scope of protection for sound recordings is impracticable.[142]

The committee explained, however, that the failure to include performance rights in this revision bill was not to be interpreted as a denial of the valuable contributions of performers and record producers but rather that the question was to be left to "* * * a full consideration * * * by a future Congress." [143] In its Report on Activities

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[136] Id.
[137] Id. at 1722.
[138] Id. at 1863.
[139] Id.
[140] Id.
[141] See H.R. Rep. No. 2237, 89th Cong., 2d Sess., sec. 114 (1966).
[142] Id. at 94.
[143] Id.

during the previous year, the House Judiciary Committee repeated these same conclusions.[143a] The committee had, however, earlier in this report, gone on record with the following statement:

> The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statuory protection of them is overdue.[143b]

90TH CONGRESS, 1967–68

H.R. 2512, introduced in the 1st Session of the 90th Congress, was virtually identical to H.R. 4347 as reported by the House Judiciary Committee in the previous Congress.[144] It too did not include a right of public performance in sound recordings.[145] The committee's evaluation of this provision in H.R. 4347 was repeated in its report on H.R. 2512,[146] and the bill was eventually passed by the full House. This same bill was introduced in the Senate as S. 597,[147] and the Senate, during the 90th Congress, held extensive hearings on copyright revision.[148]

On March 16, 1967, Senator Harrison Williams of New Jersey introduced Amendment No. 131 to S. 597.[149] This amendment, among other things, would have accorded a right of public performance in sound recordings. The definition of "perform" included a reference to sound recordings,[150] and a new definition of "performers" in sound recordings was offered.[151] The amendment also would have specifically granted the exclusive right to perform sound recordings in section 106 (4) of the revision bill, and would have applied the exemptions found in section 110.[152] Section 11 of the Williams amendment would delete the language, "and do not include any right of performance under section 106(4)" from section 114 of S. 597,[153] while section 12 would add affirmative language to the effect that the right of performance in sound recordings was "separate and independent" from the right to perform a literary, musical or dramatic work embodied in a phonorecord.[154]

The Williams amendment also proposed a new section 117 for S. 597 which would provide a compulsory license for the performance of a sound recording after it had been "performed publicly by or under the authority of its copyright owner," and upon the payment of a "reasonable royalty."[155] This section 117 was also intended to require notice of use from the user to the copyright owner, quarterly royalty payments, and compulsory arbitration in the event of a dispute as to the reasonableness of the royalty. Such arbitration was to take into account, "* * * in addition to any other relevant facts, the

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[143a] H.R. Rep. No. 83 at 64–65, 90th Cong., 1st sess (1967).
[143b] Id. at 18.
[144] H.R. 2512, 90th Cong., 1st sess. (1967).
[145] Id. sec. 114.
[146] H.R. Rep. No. 83 at 64–66, 90th Cong., 1st sess. (1967).
[147] S. 597, 90th Cong., 1st Sess. (1967).
[148] See Copyright Law Revision, Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 90th Cong., 1st Sess. (1967).
[149] S. 597, Amdt. No. 131, 90th Cong., 1st sess., (1967).
[150] Id., sec. 2; "* * * to make the sounds fixed in it audible.* * *"
[151] Id., sec. 3; "* * * musicians, singers, conductors, arrangers, actors and narrators who perform literary, musical or dramatic works to be embodied in phonorecords."
[152] Id., secs. 7, 8.
[153] Id., sec. 11.
[154] Id., sec. 12.
[155] Id., sec. 15, "sec. 117(a)."

dependence of the user on sound recordings, and the rates and amounts paid by the user for other performance licenses." [156] Royalties received under this regime would be considered the "property of copyright owners and the performers," with the performers entitled to receive one-half of such royalties.[157]

The Record Industry Association of America (RIAA) in its testimony during the Senate hearings supported the Williams amendment,[158] with Mr. Alan W. Livingston, president of Capitol Records, again providing the most detailed and extensive arguments in support of the proposition.[159] Mr. Sidney Diamond, general counsel for London Records, Inc., outlined the manner in which the proposed compulsory license was expected to function.[160] Interestingly, two major record companies, both either associated with or owned by broadcasting interests, went on record in support of performance rights. For example, Mr. Norman Racusin, Division Vice President and General Manager of RCA Victor Record Division of Radio Corporation of America, stated:

> S. 597, although vesting, for the first time, a limited copyright in sound recordings, expressly denies to sound recordings the exclusive right vested in all other works, to perform the copyrighted work publicly. The RCA Victor Record Division therefore vigorously supports the RIAA proposal to place sound recordings on a parity with other art forms, and for an equal sharing of performance right income with performing artists.[161]

Similarly, Mr. Larry Newton, president of ABC Records, Inc., stated:

> Our companies are in favor of the proposed provision embodied in the Senate Bill which * * * grants to record companies the exclusive performance right in copyrighted recordings. It is our position that the owner of any copyright is entitled to full protection of that right, and that the provision of S. 597 which deprives the copyright owners of recordings of the exclusive performance right is illogical, inconsistent and confiscatory.[162]

Mr. Stan Kenton, testifying on behalf of the National Committee for the Recording Arts, pointed out how performers not only have been replaced by their own recordings, but also receive none of the profits generated from the use of their recorded performances.[163] He also went on to describe the nature of the creative interdependence between performer and composer.[164]

The AFM opposed S. 597 for the same reasons it opposed H.R. 4347 in the previous Congress; that is, its failure to accord protection to performers based on performances of sound recordings for commercial gain. Now, however, with the RIAA affirmatively in support of performance rights and its proposal embodied in the Williams Amendment, the AFM proceeded to take issue with several points of that proposal, especially whether record companies would be "suitable custodians" of rights in the public performance of sound recordings.[165]

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[156] Id., sec. 15, "sec. 117(b)(2)."
[157] Id., sec. 15, "sec. 117(e)."
[158] See Hearings, supra note 148, at 453 et seq. See also, e.g., statement of Ernest S. Meyers, General Counsel for RIAA, id. at 532–536.
[159] Id. at 494–505.
[160] Id. at 505–510.
[161] Statement of Norman Racusin, id. at 513.
[162] Statement of Larry Newton, President of ABC Records, Inc., id. at 524, (cf. 1977 comment letter from ABC, Copyright Office Docket S. 77–6, Comment Letter No. 8).
[163] See testimony of Stan Kenton, id. at 540–546.
[164] Id. at 544.
[165] See statment of Herman Kenin, id. at 793, 796.

The Federation proposed its own amendment to S. 597 which, as with its previous suggested amendment to H.R. 4347, would have described record producers as the author of a sound recording for purposes of the exclusive rights to reproduce and distribute, and the performer as the author for purposes of the exclusive right to perform.[166] The AFM proposal also differed from the Williams Amendment in several other respects. The compulsory license proposed by the AFM, for example, would be triggered after a sound recording had been distributed to the public, rather than performed.[167] While no specific royalty rate was suggested by either proposal, the AFM amendment would have the rates set and periodically reviewed by the Register of Copyrights.[168] The Williams Amendment, on the other hand, merely stated that royalties should be reasonable, and that any complaint as to such reasonableness would be resolved by compulsory arbitration before a private tribunal.[169] Additionally, the AFM again proposed a 10-year limitation on the term of copyright for a sound recording.[170]

The Senate subcommittee received testimony from various members of the National Committee for the Recording Arts, including Mitch Miller, Red Foley, Julie London, Erich Leinsdorf, Bonnie Guitar, Guy Lombardo, and Bobby Troup.[171] The statements of these individuals concentrated on detailing the creative contributions of performers on sound recordings, and stressed the need for protection against the commercial use of their recorded performances without compensation.[172] These points were reiterated in a supplemental statement of the National Committee for the Recording Arts, which also included a brief history of attempts to secure such protection.[173] This group also argued that, although there are indeed "stars" who earn substantial incomes, these are few in number, and their success is unpredictable and inconsistent.[174] They observed that performers receive royalties, if at all, based only upon profitable sales, compared to composers and publishers, who receive royalties on all records sold, in addition to performance royalties.[175] The limited sales life of even the most popular recordings was mentioned,[176] as well as the potential threat posed by off-the-air recording of phonorecords broadcast by radio.[177]

The National Association of Broadcasters, opposing the Williams Amendment, continued to challenge the constitutionality of according a performance right in sound recordings. Testifying on behalf of the NAB, General Counsel Douglas A. Anello stated, "We find it extremely difficult to determine what is intellectually created by a record manufacturer in providing technical know-how to the recording of the creative work of a composer." [178] In its opposition to performance rights

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[166] See id., at 798.
[167] Id.
[168] Id.
[169] See Amdt. No. 131 to S. 597, sec. 15.
[170] See hearings on S. 597, supra note 148, at 799.
[171] See id. at 806 et seq.
[172] See, e.g., statement of Mitch Miller, id. at 806–810; statement of Red Foley, id. at 816.
[173] See id. at 1244–1253.
[174] See, e.g., id. at 808–809; 1249–50.
[175] See, e.g., id. at 1250–52.
[176] See, e.g., id. at 815.
[177] See, e.g., id. at 821–822.
[178] See Statement of Douglas A. Anello, General Counsel, National Association of Broadcasters, id. at 863, 865; but see, Statement of Abraham Kaminstein Register of Copyrights, supra p. 30.

the NAB placed much reliance on the fact that, "* * * it is customary for record manufacturers to give records to stations free of charge in order that they may be given the widest possible exposure." [179] Mr. Anello asserted that, "The plain truth of the matter is that recorded music benefits radio, and radio, by exposing this music to the public, benefits both the record manufacturer and the performer." [180] Beyond merely stimulating the sale of recordings for performing artists, it was also suggested that broadcast exposure, "* * * promotes their personality and permits them to augment the demand of the public for personal appearances, endorsements, and other remuneration." [181]

The National Broadcasting Company, in the section of its statement describing the "Nature of Broadcasting," responded to the issue of commercial use of sound recordings with the comment that:

> To the extent that the advertiser does seek identification with the programming, it is an identification with the programming concept and not with a particular item of material, whether it be musical, numbers, conversation, news, discussions, etc.
> * * * The program is broadcast regardless of the presence or absence of commercial messages or the degree to which the station is able to obtain advertising material for broadcast.[182]

NBC also stated, in its description of the industry, that:

> Any analogy to motion pictures and other visual arts in terms of "production" and "artistic contribution" is superficial at best since those latter are typically in a pattern of limited circulation for exhibition rather than for mass distribution for personal use.[183]

In addition, NBC argued that performance royalties would present an unwarranted financial burden to much of the broadcasting industry, and that a "power of limitation or taxation," exercised by record companies, "* * * under financial pressure from the performing personalities * * *" would have serious consequences for the public's right of "free access".[184]

Author groups, as well as the Motion Picture Association of America took no definitive position on any of these issues, choosing instead to suggest that consideration of sound recording performance rights was out of place in copyright revision, and that it should be taken up separately, in the context of "neighboring rights." [185]

On April 28, 1967, the Senate subcommittee held a final day of hearings on five controversial subjects raised by S. 597, with equal time allocated to proponents and opponents of each issue. One such topic was performance rights in sound recordings. The AFM, after some initial disagreements with the wording and impact of the Williams amendment, now announced its support of that proposal as redrafted.[186] The principal changes from the amendment's original wording, accord-

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[179] Id. at 865.
[180] Id. at 866.
[181] Id. at 868.
[182] See Statement of National Broadcasting Company, Inc., id. at 869.
[183] Id. But see Statment of Abraham Kaminstein, Register of Copyrights, supra p. 30 and note 119; and Supplemental Statement of National Committee for the Recording Arts, Hearings on S. 597, supra note 148, at 1380–1383.
[184] Hearings on S. 597, supra note 148, at 870–871.
[185] See Statements of Burton Lane and Leon Kellman, American Guild of Authors and Composers, id. at 875, 883–885; Statement by the Copyright Committee of the Motion Picture Association of America, Inc., id at 1220, 1232–1233.
[186] See Hearings on S. 597 part 4 at 7076, 1079–80.

ing to the testimony of Jerome H. Adler, were that the Register of Copyrights would fix a minimum "reasonable royalty" rate; that performers would be protected from a record company compromising the performer's rights; that users would have compulsory arbitration available to insure reasonable royalty rates; and that a procedure would be provided to allow performers to prosecute their claims should a copyright owner become derelict in its collection or enforcement obligations.[187]

Beyond this, each side expressed its previously stated position, especially with respect to the question of constitutionality of performance rights. Mr. DiSalle, on behalf of the National Council of Recording Arts, having cited Judge Learned Hand and Register of Copyrights Abraham Kaminstein, concluded that, "The constitutional basis for relief seems indisputable." [188] Undaunted, representatives of user groups proceeded to dispute this conclusion. Mr. Anello, speaking for the NAB, argued that, "a prime requisite for copyright protection under the constitution is originality. Performers, arrangers, adapt work; they do not originate it, therefore, in my opinion, they are not authors in the constitutional sense." [189] Supporting this later position, Mr. Nicholas Allen, counsel for Music Operators of America, stated:

> Despite all the technological advances which have occurred in recent years, * * * the fact remains that an author is still an author, not a record manufacturer, and not a performing artist.[190]

At the request of Senator McClellan, Ms. Barbara Ringer submitted a statement commenting upon doubts raised by Mr. Anello, of the NAB, that recent judicial decisions had weakened the constitutional argument in support of protection for sound recordings. After summarizing the conclusions reached in Study No. 26, "The Unauthorized Duplication of Sound Recordings",[191] Ms. Ringer declared:

> In the 10 years since the study was prepared my conviction that recorded performances come within the Constitutional scope of copyright protection has been strengthened and reinforced by the weight of authority embodied in additional judicial decisions and a number of law review articles and notes.[192]

Ms. Ringer went on to consider the relationship between Federal preemption of State law and the proposed revision bill, together with its effects upon protection for sound recordings. Upon careful and detailed analysis, she concluded:

> * * * my view is that sound recordings are the "writings of an author" and that the Congress can grant them any degree of copyright protection it sees fit * * * However, if Congress enacts a bill that, like S. 597, withholds performing rights in sound recordings, it should do so with the full realization that no such rights can be sought alternatively under state common law theories such as 'unfair competition.' [193]

In further supplemental statements, individual broadcasters, broadcaster associations, and jukebox manufacturers stressed the benefits which record producers and performers already received through exposure of their product, and repeated their fears of the economic and administrative burdens they believed would result from the

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[187] Id. at 1078.
[188] Id. at 1081.
[189] Id. at 1086.
[190] Id. at 1089; see also, Statement of American Broadcasting Co., id. at 1116–19.
[191] See supra note 2.
[192] Hearings on S. 597, pt. 4 at 1177.
[193] Id. at 1178.

acceptance of the Williams Amendment.[194] Despite all of this activity, no further action was taken on S. 597.

91ST CONGRESS; 1969–70

In the 91st Congress, the next bill for general revision of the copyright law was introduced in the Senate as S. 543.[195] As originally submitted, S. 543 did not provide for any right of performance in sound recordings. On April 3, 1969, however, Senator Williams again introduced his amendment to grant performance rights,[196] this one even more elaborate than the previous amendment. A "modified version" of this new Williams Amendment was approved by the Senate Subcommittee on Patents, Trademarks, and Copyrights[197] and incorporated in section 114 of the committee print of S. 543, reported on December 10, 1969. According to the Senate Subcommittee, performance rights would be subject to compulsory licensing, with ownership to be shared between record producers and performers. Either blanket or prorated rates were to be available, at the user's option. For broadcast users, the blanket license fee was to be 2 percent of net receipts, and the prorated fee would be a fraction of 2 percent, the formula to be set by the Register of Copyrights after consideration of "... the amount of commercial time devoted to playing copyrighted recordings and whether the station is a radio or television broadcaster."[198] The blanket rate for suppliers of background music was to be 2 percent gross receipts from subscribers, and the prorated fee would be a fraction of the blanket fee computed according to a formula similar to that for broadcast users. Exemptions were accorded to broadcast users with gross receipts less than $25,000, and to background music suppliers with receipts less than $10,000. The royalty rate for cable users would be governed by section 111; and jukebox rates by section 116, which provided for a $9 fee, with $1 allocated to sound recording performance royalties.[199] Additionally, this compulsory license would be triggered by the distribution of a sound recording, and would be subject to a negotiated license.[200] Disputes concerning the distribution of royalties would be heard by the Copyright Royalty Tribunal.

As originally proposed in the Williams Amendment to S. 543, the sound recording public performance compulsory license would be triggered by the first authorized public performance,[201] and the blanket fee for broadcasters would be 3.5 percent of net receipts over $25,000.[202] The prorated license fee would be determined according to a specifically provided formula.[203] The $8 jukebox compulsory license fee[204] was to be divided—one-fourth to sound recordings; three-fourths to copyright owners of works performed by phonorecord.[205]

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[194] See id. at 1105–06; 1197–98; 1359; 1364–65; 1369–72.
[195] S. 543, 91st Cong., 1st Sess. (1969).
[196] Amendment No. 9 to S. 543, 91st Cong., 1st Sess. (1969).
[197] See S. Rept. No. 91–1219, Report of the Committee on the Judiciary, U.S. Senate, 91st Cong., 2d Sess. (1970).
[198] Id. at 7.
[199] Id.
[200] See S. 543 Sec. 114(c)(3), 91st Cong., 1st Sess. (Committee Print 1969).
[201] See Amdt. No. 9 to S. 543, sec. 15, "sec. 117(a)", 91st Cong., 1st Sess. (1969).
[202] Id., "sec. 117(c)(1)."
[203] Id.
[204] Id., "sec. 116(b)(1)(A)."
[205] Id., "sec. 116(c)(1)(A), (B)."

The Register of Copyrights would make an "equitable distribution" [206] of royalties, with disputes subject to the jurisdiction of the U.S. District Court for the District of Columbia. Subject to the criteria in proposed "Section 117(e)", royalties were to be segregated equally between performer and copyright owner. The amendment also contained a provision ("Section 117(e)(4)") which purported to prevent any "agreement or hiring" from denying a performer her 50 percent royalty interest. The primary responsibility for enforcement would have been allocated to the copyright owner,[207] and section 16 of the amendment purported to make protection retroactive. As mentioned above, a modified version of this proposal was included in the bill reported out of committee.

92D CONGRESS—1971–72

S. 644 was introduced in the 92d Congress as a bill for the general revision of the copyright law.[208] Section 114 of this bill was virtually identical to the committee version of S. 543 in the previous Congress, and provided an exclusive right in the performance of sound recordings, subject to a compulsory license.[209]

S. 646, however, introduced on the same day as S. 644, was intended to amend the 1909 Copyright Act for the purpose of protecting sound recordings against unauthorized duplication, and would not extend such protection to cover public performance.[210] This bill, based on provisions of S. 543, defined sound recordings as "* * * works that result from the fixation of a series of musical, spoken, or other sounds * * * ." [211] As noted by the Senate Judiciary Committee in its report, "The copyrightable work comprised the aggregation of sounds and not the tangible medium of expression." [212] This report also included the declaration that:

> The committee believes that as a class of subject matter, sound recordings are clearly within the scope of "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue.[213]

The committee also felt that copyrightability for sound recordings would be limited by the traditional standard of originality; and, drawing an analogy to motion pictures, the committee explained that, "* * * the bill does not fix the authorship, or resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved." [214] On October 15, 1971, S. 646 became Public Law No. 92–140,[215] and sound recordings have been accorded copyright protection against unauthorized duplication continuously since February 15, 1972.[216]

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[206] Id., "sec. 117(d)(1)."
[207] Id., "sec. 117(f)."
[208] S. 644, 92d Cong., 1st Sess. (1971).
[209] Id., sec. 114.
[210] See S. 646, 92d Cong., 1st Sess. (1971); see also S. 4592, 91st Cong., 2d Sess. (1970).
[211] See S. 646, sec. (e); 92d Cong., 1st Sess. (1971).
[212] See S. Rep. No. 92–72, 92d Cong., 1st Sess. 4 (1971).
[213] S. Rep. No. 92–72 at 4. See also, Statement of Barbara A. Ringer, Assistant Register of Copyrights, Hearings on Prohibiting Piracy of Sound Recordings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 1st sess. 10, 13 (1971); supra note 142.
[214] Id. at 4–5.
[215] Public Law No. 92–140, 85 Stat. 391 (1971).
[216] Although Public Law No. 92–140 originally contained an expiration date (H.R. Rept. No. 92–487, 92d Cong., 2d sess. (1972)) this was subsequently removed; see Public Law 93–573, 93d. Cong. 2d sess., (1974). This protection will be continued after January 1, 1978, under the 1976 Copyright Act, Public Law 94–553, sec. 114, 90 Stat. 2541 (1976).

The Senate report on S. 646 observed that the committee version of the previous revision bill, S. 543, would have extended copyright protection to performing artists and record companies so that they would be compensated for the commercial use of sound recordings. In explaining the absence of such a provision in S. 646, the committee stated that it, "will be considered subsequently when the committee acts on the legislation for the general revision of the copyright law." [217] As mentioned above, such a provision was indeed included in S. 644. General revision was not acted upon, however, because of the delay of the Federal Communications Commission in adopting cable television regulations.[218] According to the Senate Subcommittee on Patents, Trademarks, and Copyrights, the ultimate release of these regulations by the FCC removed the "last remaining obstacle" to resumed consideration of revision legislation,[219] and the subcommittee expressed its intention "to act on the copyright bill early in the first session of the 93d Congress." [220]

93D CONGRESS—1973–74

S. 1361,[221] introduced in the Senate on March 26, 1973, included the identical Section 114 as in the previous S. 644, granting the right to public performance, subject to a compulsory license, among the exclusive rights in sound recordings. On April 9, 1974, the Senate Judiciary Committee released its version of S. 1361.[222] Section 114 in the committee print was identical to that section in the original S. 1361, except for the addition, in subsection (g)(3), of a definition of "net receipts from advertising." [223] Yet another version of S. 1361 was reported by the Senate Judiciary Committee on July 3, 1974, accompanied by the committee's recommendation for passage of the bill.[224] Unlike the previous versions, however, this bill proposed a graduated scale of royalty payments under the compulsory performance license for sound recordings.

Both radio and television stations with gross receipts from advertising between $25,000 and $100,000 would be required to pay $250 for an annual blanket license; those stations earning between $100,000 and $200,000 would pay $750, and those earning more than $200,000 would pay 1 percent of net advertising receipts.[225] The prorated rate would be set by the Register of Copyrights, after consideration of, among other things, whether the station is a radio or television broadcaster.[226] Exemptions were again provided for broadcast stations earning less than $25,000, and for background music services earning less than $10,000.[227] The blanket rate for such background music services would be 2 percent of gross receipts.[228] Jukebox and cable royalties would be governed by section 116 and section 111,[229] the former section

[217] S. Rept. No. 92–72, supra note 12, at 3.
[218] See S. Rept. No. 93–88, 93d Cong., 1st sess. 9 (1973).
[219] Id.
[220] Id.
[221] S. 1361, 93d Cong., 1st sess. (1973); see also H.R. 8186, 93d Cong., 1st sess. (1974).
[222] S. 1361 93d Cong., 2d sess.
[223] Id., sec. 114(g)(3): "Net receipts from advertising sponsors" constitute gross receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies.
[224] Library, S. Rept. No. 93–983 (committee print July 3, 1974).
[225] Id., sec. 114(c)(4)(A)(i), (ii), (iii).
[226] Id., sec. 114(c)(4)(A)(iii).
[227] Id., sec. 114(d)(1), (2).
[228] Id., sec. 114(c)(4)(B).
[229] Id., sec. 114(4)(C).

providing for payment of an $8 annual fee per box, $1 of which would be payable equally to performers and record companies.[230] The blanket rate for all other users would be $25 per year, and the prorated rate would not exceed $5 per day of use.[231]

In the committee report submitted with this bill, it was readily acknowledged that the proposal to grant performance rights in sound recordings was "(O)ne of the most controversial issues considered by the committee * * *[232] It was the committee's belief, however, that, "there is no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available."[233] The report proceeds to deal in turn with the arguments raised. The constitutional objection, the committee found, was not persuasive. After referring to judicial decisions, including a case upholding the constitutionality of the 1971 sound recording amendment,[234] the committee concluded that:

> * * * records are "writings" and that performers can be regarded as "authors" since their contributions amount to intellectual creations * * * (R)ecord manufacturers may be regarded as "authors" since their artistic contribution to the making of a record constitutes original intellectual creation. The committee endorses the conclusion of the Copyright Office that sound recordings "are just as entitled to protection as motion pictures and photographs."[235]

The committee next discussed the objection that the proposed new royalty would represent a severe financial burden to users. Noting that "considerable economic data" was submitted to the subcommittee, it found that, "approximately 75 percent of commercial time of radio stations is devoted to the playing of recorded music,"[236] that radio stations enjoyed a "generally consistent growth," in pretax profits; and that the analysis of jukebox, cable, and broadcasting industries showed an ability to pay the royalty fees prescribed by section 114.[237]

Concerning the argument that broadcasters already pay royalties to composers and publishers of music, the committee expressed its belief that, "the fact that payments are made to other parties is (not) a decisive factor in determining the disposition of a performance royalty in sound recordings."[238] The committee also felt that its position in this matter was consistent with its resolution of cable television issues in section 111. It stated its belief that, "just as cable systems will now be required to pay for the use of copyrighted program material so should broadcasters be required to make copyright payments under the performance royalty."[239] The report also pointed out that the bill, in section 114(c)(3)(a), required that royalties be distributed one-half to record companies, one-half to performers, as well as the intention that arrangers be considered as included in the section 114(g) definition of "performers."[240]

The committee's position was supported in a separate statement by Senator Hugh Scott.[241] Senators Eastland, Ervin, Burdick, Hruska,

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[230] Id., sec. 116(b)(1)(A); (c)(3)(A),(B).
[231] Id., sec. 114(c)(4)(D).
[232] See S. Rept. No. 93-983 at 139.
[233] Id.
[234] *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).
[235] S. Rept. No. 93-983 at 140.
[236] Id. at 141.
[237] Id.
[238] Id.
[239] Id.
[240] Id. at 143.
[241] Id. at 221-223.

Thurmond, and Gurney, on the other hand, together submitted their minority views in opposition to a sound recording performance right. They felt such a law would be "economically unwise and constitutionally unsound." [242] The view that performers and record monufacturers are "authors" in a constitutional sense was rejected with the argument that, "Even though their contributions in producing a sound recording are significant, such contributions do not constitute original intellectual creations which would justify protection under the copyright law." [243] The minority also relied on the assertion that, "Broadcasters and jukebox operators render a service to both performer and record companies by playing new recordings;" [244] and that the royalties proposed under S. 1361 would represent a substantial portion (10 percent) of the broadcasting industry's "pretax profits." [245] It was further suggested that, "* * * if the copyright fees set by S. 1361 become law, it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale." [246] In addition, the minority outlined examples of the apparently unjust operation of the graduated rate scale of the current version of S. 1361, and raised the possibility that non-revenue-producing programs, such as news and public affairs presentations, might be curtailed if royalty payments had to be met.[247]

In the report on its activities during the 93d Congress, 2d session, the Senate Subcommittee on Patents, Trademarks and Copyrights [248] noted that Senators Gurney and Ervin had introduced an amendment to S. 1361 for the purpose of eliminating the performance royalty for broadcasters and for jukebox operators.[249] These amendments were rejected in the Judiciary Committee by tie votes of 8 to 8.[250] The report pointed out, however, that the system of graduated royalty payments for broadcasters included in the committee version of S. 1361 was the result of an amendment from Senator Scott. Rather than the blanket license rate for all broadcasters of 2 percent of net advertising receipts, as originally proposed, the maximum was now 1 percent, and only for those broadcast stations earning more than $200,000 in annual gross receipts.[251]

S. 1361, as reported by the Judiciary Committee, was referred to the Senate Commerce Committee. In its report, the Commerce Committee offered several amendments, including one which would exempt broadcasters from payment of a sound recording performance royalty.[252] Feeling it had not had sufficient opportunity to consider the issues, and claiming authority analogous to the FCC's to consider economic conditions in the communications industries,[253] the Commerce Committee reasoned that the proposed royalty payments would have an economic effect on the broadcasting and cable industries, which,

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[242] Id. at 225.
[243] Id.
[244] Id.
[245] Id. at 226.
[246] Id.
[247] Id. at 228.
[248] S. Rept. No. 94–92, 94th Cong., 1st sess. (1975).
[249] S. 1361, amendments 1548, 1553, 93d Cong., 2d sess. (1974).
[250] S. Rept. No. 94–92 at 12.
[251] Id.
[252] S. Rept. No. 93–1035, 93d Cong., 2d sess. 70 (1974).
[253] Id. at 66.

"* * * in turn will bear on the quality and quantity of service broadcasters and cable systems will render to the people of the Nation." [254] This conclusion was reached despite the statement of Richard E. Wiley, Chairman of the FCC, that:

> Although this provision [sec. 114] would result in the addition of a certain burden to industries subject to the Commission's jurisdiction, the primary question appears to us to be one of copyright philosophy without direct regulatory overtones.[255]

On September 5, 1974, Senator Ervin again introduced an amendment to S. 1361 which would altogethed eliminate performance rights in sound recordings.[256] The key provision of this amendment was a new section 114(a), proposing that, "The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 106, and do not include any right of performance under section 106(4)." [257] After extended, and at times acrimonious, debate on the Senate floor, the Ervin amendment striking performance rights was approved by a vote of 67 to 8.[258] Proponents of the amendment, led by Senator Ervin, argued that a performance royalty would be unconstitutional, the 1971 sound recording amendment and the decision in *Shaab* v. *Kleindienst* notwithstanding.[259] It was also asserted that payment of new royalties would be a serious hardship to many broadcasters, and that "$2,000-a-week singers out there in Las Vegas" [260] didn't need the money.

Opponents of the Ervin amendment, including Senators Cranston and Hugh Scott, stressed again that Congress did indeed have the authority to enact performance rights legislation under the copyright clause of the Constitution,[261] that performers and record manufacturers are as much entitled to receive compensation for the commercial use of their creative efforts as any other owner of copyright, and that users of sound recordings had the financial ability to pay.[262] It was also suggested that a performance royalty "would establish the promise of reward to the backup performers so essential to the continued vitality of American music." [263]

It thus seems that the prophecy of Register Kaminstein, in 1965, had indeed come to pass.[264] Fears over performance rights had been sufficiently raised to in fact endanger passage of the revision bill itself. If his amendment had failed to gain Senate approval, Senator Ervin was prepared to offer a motion to recommit the entire bill to committee.[265] As mentioned above, however, the performance right was removed from section 114 on September 9, 1974.[266] Later that same day, S. 1361 was passed by the Senate. When introduced in the House of Representatives, on September 12, 1974, section 114(a) of S. 1361

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[254] Id.
[255] Id. at 74. Mr. Wiley also pointed out that, as drafted, sec. 114 did not cover broadcast stations earning precisely $100,000 or $200,000. Id. at 75.
[256] S. 1361, amendment No. 1846, 93d Cong., 2d. sess. (1974).
[257] Id.
[258] See 120 Congressional Record 30399 (1974).
[259] Id. at 30407; *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).
[260] Id. at 30478 (comments of Senator Pastore).
[261] Id. at 30400 et seq.
[262] See id. at 30481 (comments of Senator Cranston).
[263] Id.
[264] See supra p. 36.
[265] 120 Congressional Record at 30401.
[266] Id. at 30484.

stated that the exclusive rights in sound recordings "do not include any right of performance under section 106(4)." No action was taken by the House prior to termination of the legislative session.[267]

Two additional revision bills[268] were introduced in the 93d Congress. Both were identical to S. 1361 as originally introduced, and neither received any further action. Another bill, intended to amend section 4 of the 1909 Copyright Act to include recorded performances of musical compositions as copyrightable subject matter, was also introduced.[269] This, too, received no further action.

94TH CONGRESS—1975–76

The successor revision bill, introduced in the Senate as S. 22 and in the House as H.R. 2223,[270] did not include a sound recording performance right in section 114. Another bill, however, raised the issue by attempting to amend the 1909 Copyright Act.[271] S. 1111 was similar in most respects to the proposal removed from the Senate Judiciary Committee version of S. 1361. Its most significant refinement was the distinction drawn between radio and television broadcast stations, with a separate graduated scale of royalty payments for each group. The fees due from radio broadcasters were those provided in the previous bill, while television stations earning more than $1 million and less than $4 million in annual gross receipts would pay $750 per year for a blanket license, and those earning more than $4 million a year would pay $1,500.

The question of sound recording performance rights was the subject of hearings on successive days in each House of Congress. In the Senate, the hearings were specifically concerned with S.1111,[272] while in the House of Representatives, the topic was raised in connection with extensive hearings on general revision.[273] Testimony was heard from the chairperson of the National Endowment for the Arts, the Register of Copyrights, representatives of performers' and musicians' unions, the record industry, the National Association of Broadcasters and jukebox operators. In its report on activities during the first session of the 94th Congress, the Senate subcommittee found that, "(t)he views expressed by the various parties were unchanged from those reflected in the previous subcommittee hearings on this subject."[274] While this evaluation is indeed accurate, there seemed to be at least a slight shift in the emphasis accorded to particular arguments. Register of Copyrights Barbara Ringer noted that opposition to the proposal appeared to be limited to those who would have to pay the royalties, and she posed the dilemma in the following terms:

> Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were

[267] S. Rept. No. 94–1058, 94th Cong., 2d sess. (1976).
[268] H.R. 14922, 93d Cong., 2d sess. (1974); H.R. 15522, 93d Cong., 2d sess. (1974).
[269] H.R. 14636, 93d Cong., 2d sess. (1974).
[270] S. 22, 94th Cong., 1st sess. (1975).
[271] S. 1111, 94th Cong., 1st sess. (1975); H.R. 5345, 94th Cong., 1st sess. (1975). See also, H.R. 7059, 7750, 8015: 94th Cong., 1st sess. (1975).
[272] Performance Royalty Hearings on S. 1111 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 94th Cong., 1st sess. (1975).
[273] Performance Royalty Hearings on H.R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 94th Cong., 1st sess. 1297 (1975).
[274] See S. Rept. No. 94–1058, 94th Cong., 2d sess. 6 (1976).

given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.

The results have been tragic: The loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programming, have been equally malign. Most of all it is the U.S. public that has suffered from this process.[275]

It was suggested that there are many types of recordings which do not generate mass sales,[276] and that most performing artists do not achieve resounding financial success.[277]

Broadcasters placed added reliance on the argument that the benefits derived from airplay of sound recordings were already adequate compensation.[278] Vincent T. Wasilewski, President of the National Association of Broadcasters, in wishing not to "denigrate the artistry of the recording industry," [279] praised its talent and creativity. "But," cautioned Mr. Wasilewski, in arguing against the proposal's constitutionality, "talent and creativity do not a copyright make." [280] Explaining the basis and justification for the monopoly granted by copyright, Mr. Wasilewski stated that the, "* * * overriding reason is provided by the desire to encourage creativity and once having encouraged it, to protect and nurture it." [281]

Proponents of the legislation had argued that the situation of performers and record companies vis-a-vis broadcasters was closely analogous to that of the broadcasters vis-a-vis the cable industry. A representative of broadcasting was quoted as making the following statement:

It is unreasonable and unfair to let (the cable) industry ride on our backs, as it were, to take our product, resell it and not pay us a dime. That offends my sense of the way things ought to work in America.[282]

When this was called to his attention, Mr. Wasilewski attempted to distinguish the two situations with this language:

* * * We are paying for that product. We are asking for an extension of the existing copyright namely the copyright that exists in motion pictures, the sports promotions, and such endeavors * * *.

* * * cable should pay for their utilization of already copyrighted works. Recordings are not already copyrighted works.[283]

In chapter VIII of the Register's Second Supplementary Report,[284] submitted together with the testimony of Barbara Ringer before the House subcommittee on December 4, 1975,[285] the history of protection for sound recordings was reviewed and the most recent arguments, pro and contra were summarized. The report stated that, "it was * * * apparent that the possibility of compromise is no closer now," [286] than it had been before. Nevertheless, it was felt that, "While recognizing

[275] See Hearings on S. 1111, supra note 272.
[276] Id. at 6.
[277] Id. at 20–23, 29, 32.
[278] Id. at 70–72, 75.
[279] Id. at 71.
[280] Id.
[281] Id.
[282] Id. at 35.
[283] Id. at 74. Contra, 1971 Sound Recording Amendment, Public Law No. 92–140.
[284] Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, chap. VIII (October–December 1975).
[285] See Copyright Law Revision Hearings on H.R. 2223 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 94th Cong., 1st sess. 1905–09 (1975).
[286] Register's Second Supplementary Report, supra note 284, chap. VIII at 24.

the dangerous impasse on this issue, the Copyright Office does not feel that it can temporize on this issue, and adheres to the position expressed on July 24, 1975." [287] The reference was to the Register's testimony on S. 1111 before the Senate subcommittee, discussed supra at 64-65, and in which it was noted, among other things, that:

> * * * Congress and the courts have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle established, and broadening of protection for sound recordings to include a public performance right becames one not of constitutionality but of statutory policy * * *.[288]

The supplementary report thus reaffirmed, "full agreement with the fundamental air of S. 1111: 'to create, within the framework of Federal copyright law, a public performance right in sound recordings for the benefit of performers and record producers.' " [289]

Beyond the hearings, no further action on sound recording performance rights was taken in either the House or Senate. S. 22 first passed in the Senate on February 19, 1976.[290] As passed, section 114 did not include a right of performance among the exclusive rights in sound recordings. The House recommended an amendment, in the form of a substitute, which provided a new subsection (d) to section 114 calling for the Register of Copyrights to submit to Congress, on January 3, 1978, a report, "* * * setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted materials any performance rights in such material.[291] This suggestion was approved by the conference committee [292] and accepted by both Houses on September 30, 1976,[293] along with the rest of the conference report, and notwithstanding the statements in the Register's Second Supplementary Report and previous testimony supporting a performance right in sound recordings. S. 22 became Public Law 94–553 on October 19, 1976.[294]

95TH CONGRESS; 1977–

On April 5, 1977, Congressman Danielson introduced H.R. 6063.[295] Intended to amend section 114 of the 1976 Copyright Act, this bill closely follows the substance of S. 1111. Its refinements, however, would include among other things a more detailed description of the rights accorded sound recordings under sections (1), (2), and (4). The bill also encourages the creation of a private entity for the collection and distribution of royalties, and would prohibit the assignment of either the "performer's" or "copyright owner's" one-half royalty interest to the other party.

V. ECONOMIC ANALYSIS

The following report is an independent study commissioned by the Copyright Office. Public comments on its findings are contained in appendix 77–6–B.

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[287] Id. at 26.
[288] Id. at 27.
[289] Id. at 26–27.
[290] 122 Congressional Record —— (daily edition Feb. 19, 1976).
[291] H.R. Rept. No. 94–1476, 94th Cong., 2d sess. (1976).
[292] H.R. Rept. No. 94–1733, 94th Cong., 2d sess. (Conf. Rept. 1976).
[293] 122 Congressional Record ——— (daily edition Sept. 30, 1976).
[294] 1976 Copyright Act, Public Law No. 94–553, 90 Stat. 2541 (1976).
[295] H.R. 6063, 95th Cong., 1st sess. (1977).

V. AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE IN THE COPYRIGHT LAW

(Prepared by Stephen M. Werner, Ruttenberg, Friedman, Kilgallon, Gutchess & Associates, Washington, D.C.)

This study was prepared for the Copyright Office, U.S. Library of Congress, under contract No. A77-200. The Copyright Office is directed by Public Law 94-553 to submit to the Congress a report setting forth recommendations concerning a proposed change in the Copyright Law. This research effort is one of several commissioned or undertaken directly by the Copyright Office to fulfill that responsibility. Also, some of the data used in the analysis results from an employment survey conducted among performing artists for the U.S. Department of Labor, contract No. 99-7-264-08-8. The views expressed herein, however, are those of the contractor and do not represent the opinion of the funding agencies. The contractor is solely responsible for the factual accuracy of all material developed in the report.

ACKNOWLEDGMENTS

Much of the analysis contained in this study was made possible by a letter of agreement between Harriet Oler, Senior Attorney-Adviser of the Copyright Office and Richard D. Lichwardt, Executive Director of the Federal Communications Commission (FCC). Under the terms of that agreement, the contractor was permitted to access the data base containing all financial reports of television and radio broadcast licensees on file for the period 1971-75 upon the condition that no data could be released in a form which would breach FCC rules of confidentiality. Mr. Larry Eads, of the Policy Analysis Branch, Broadcasting Division was given responsibility for overseeing the contractor's programing effort in order to insure that rules of confidentiality were adhered to during the course of the study. His cooperation in this regard is hereby acknowledged. Tom Michaelson and Fred Day, both of the FCC, also helped perform this function.

Also deserving of mention is Pat Zurawell, who had the responsibility of recording or calculating advertising rate changes over the period 1971-75 for approximately 1,000 radio stations located in 36 different cities. The patience and persistence in completing that task deserve recognition and it is hereby given.

SUMMARY OF FINDINGS AND CONCLUSIONS

Broadcasters

Legislative proposals currently under consideration would provide holders of copyrights on sound recordings with performance rights, in addition to the mechanical reproduction rights already guaranteed by law. In recognition of those performance rights, commercial users of sound recordings would be required to pay a record music license fee, amounting to approximately 1 percent of revenues for the larger radio broadcast stations, the group most financially affected by the proposed bill.

During both the congressional hearings on the legislation and the hearings conducted by the Copyright Office, the issue was raised that

profits in the radio broadcasting industry are low and that the number of stations experiencing losses each year are considerable, ranging from 30 to 35 percent of all stations in any 1 year. The data supporting this claim are the AM and FM Financial Reports, issued by the Federal Communications Commission (FCC). These reports are published annually and are based on revenue and expense figures submitted by each station to the FCC as a condition of licensing.

The implication suggested by these claims is that any increase in the costs of operating a radio broadcasting station will lead more stations into the loss category and further, that as a result, many stations will be forced out of the industry. The economic principle expected to control in this station is that investment funds will flow to other industries where yields are higher. By assumption, investors will no longer support an industry which continually incurs losses and instead will put their money into an industry where returns are greater.

To investigate the validity of these claims, the financial reports of all radio broadcast stations licensed by the FCC over the period 1971–75 have been analyzed. The purpose of the analysis was to determine whether or not the data indicated discernible trends in terms of the profit versus loss outcome of individual stations over time. A highly competitive market situation—in which it is assumed that firms are attempting to maximize profits and to minimize costs—implies that stations can never be certain of whether they will sustain a loss in any 1 year and that the outcome is determined solely by forces outside their control. In such a situation, movements into and out of the loss category would be distributed somewhat randomly among all stations. In addition, as suggested above, stations sustaining losses repeatedly could be expected to leave the industry.

A major finding of this study is that contrary to theoretical expectations, in many cases, the same radio stations report losses year after year without leaving the industry, thereby casting doubt on the claim that profits are the primary concern of broadcasters and that in their absence, firms would leave the industry. Between 1971 and 1975, for example, 10.9 percent of all stations filing full-year annual reports with the Federal Communications Commission reported losses in every one of those 5 years, yet none of those left the industry. An additional 8.9 percent of those reporting showed losses in 4 out of 5 of those years, yet remained in business. In other words, approximately two-thirds of those stations experiencing losses in any 1 year are repeaters and experience losses regularly without going out of business.

Actually, over the 5-year period, an average of less than one-tenth of 1 percent of all stations ceased operations. Most operators wanting to divest themselves of radio broadcasting stations transfer their license with the sale of the stations. There is some evidence that over the last decade, the average capital gain from the sale of stations may have been substantial. Data are not sufficient, however, to tell whether or not this is still the case.

Taken together these findings suggest that radio broadcast station operators are not necessarily concerned about maximizing the profits associated with the station, that other factors may exist which reduce the importance of a profit-maximizing strategy. It is possible,

for example, the financial interests of owner operators may be better served by taking income in the form of commissions or fees rather than through dividends from profits. In some cases this could serve to maximize personal income because the "would-be-profits" avoid the corporate tax system.

In addition, station operators who are also owners of other communications or media enterprises, such as newspapers or TV stations, may charge joint production costs solely to their broadcasting operation. This could serve two purposes. Depending on individual circumstances, there could be tax advantages to balancing profits in one division against losses in another. Furthermore since entry into the radio broadcasting industry is controlled by the Federal Communications Commission, operators who can exercise discretion in charging expenses to the station may feel that the threat of competition from would-be-operators is lessened by reporting low or no profits in their broadcasting division.

The data contained in this analysis, in our opinion, supports these hypotheses. Specifically when the station's financial reports are adjusted by subtracting out of the total broadcast expenses, payments to owners of the stations and "administrative overhead" expenses which are not clearly defined, the number of stations moving from the loss to the profit category is substantial, resulting in a significant increase in the number of profitable stations. Subtracting payments to owners from total broadcast expenses increases the number of stations which sustained no losses over the 5-year period from 40.2 percent to 58.5 percent. When "other administrative expenses" are also subtracted from total broadcast expenses, before calculating the profit-versus-loss outcome, the number of stations experiencing no losses over the period increases from 40.2 percent to 77.0 percent. Since the category "other administrative expenses" as defined on the FCC reporting form, excludes such costs as general and administrative payroll, depreciation and amortization, interest, and allocated costs of management from home office or affiliates, as well as regular operating costs such as salaries, fringe benefits, and most operating cost, etc., the substantial use of this category raises the question as to the purpose for which these funds are used, and suggests that they may in fact represent "hidden" profit.

In general, the above suggests that radio broadcast stations would be able to pay a record music license fee without any significant impact, either on profits or the number of stations in operation. In addition there is evidence that the radio broadcasting industry would be able to pass on any increase in the costs of operation to the purchasers of advertising time without loss of business or revenues.

An analysis of national advertising rate data indicates that the cost of advertising via radio has increased less than the cost of advertising via other media. In addition, also using national data, our statistical analysis of expenditure trends suggests that the demand for advertising via radio is relatively insensitive to price changes. Furthermore, an original survey conducted by our firm of local spot advertising rates in a randomly selected sample of cities, shows that advertising revenues have gone up consistently, regardless of rate increases, and in some cases, faster than rate increases. All of this suggests that the

cost of the increase in operations resulting from the change in the copyright law could be passed onto advertisers.

Performers

The claim is sometimes made that performers should not be provided with additional rights—and the additional compensation exercise of these rights would bring because (a) many are already beneficiaries of contractual arrangements for the receipt of royalties in sales of records; and (b) many performers are also composers or authors and, therefore, already entitled to copyright benefits.

These claims are cast in doubt by the data collected by this firm in a national survey of employment and earnings of performers. These data indicate that only a small proportion of performers (e.g., 23 percent of the musicians) participating in the production of recordings receive royalties from the sales of those records; and that of those who do, royalties represent a very small proportion of their annual earnings—generally less than 1 percent, with more than three-fourths receiving less than 5 percent of their earnings from royalties.

Although there is some overlap between performers and composers and/or authors, it is far from universal—and in any case on the basis of reported earnings (generally fairly low for most performers) the financial return cannot be very large even when royalties are collected on more than one basis whether as a performer, composer, author or any combination.

Finally, the data indicate that relatively few sound recordings are made by one individual a year. Only 15 percent of the musicians had made as many as 10 in 1976; one-fourth had made only 1. Three-fifths of the musicians had made less than five recordings in 1976. The situation is similar for radio and TV artists; and even more pronounced for musical artists where half made only one record in 1976 and another two-fifths made only two.

Record companies

The total amount which the performing rights amendment would generate to be distributed among record companies, would represent less than one-half of 1 percent of estimated net sales. While this is a positive amount, it is relatively small. The data does not permit a comparison of profits in the radio broadcasting industry to those in the record industry.

Employment in the record industry is decreasing as is the number of establishments. The new establishments tend to have very few employees, one to three production workers. The larger firms, while still accounting for a considerable percent of sales, claim less and less a percentage each year.

INTRODUCTION

The purpose of this research effort has been to determine the potential economic impact of a proposed change in the copyright law. The analysis focuses on the three major groups affected by the bill; broadcasting stations, in particular, radio broadcasters, performing artists, and record companies.

The remainder of the report is organized as follows: The first section contains background information on the current provisions of the copyright law, proposed, changes in the law, and the justification for undertaking this research. The next section of the report, written in textbook-like fashion provides information concerning the theoretical background against which to judge the economic impact of the proposed legislation as it would affect broadcasters. This section is divided into two parts, one concerning the determination of advertising rates and the other concerning the theory of the firm.

The longest part of the report entitled "The Profit and Loss Analysis," shows how radio broadcast stations performed over the 1971–75 period in terms of reported profits or losses. This section also contains estimates of the amount of revenue which would be generated by the Danielson bill from among radio and television broadcasters under the blanket-fee arrangement. In addition, the section contains data concerning simulated profit versus loss outcomes for each station. For example, it is shown how many stations would have moved from profit to loss situations under the blanket record license schedule if it had been in effect over the 1971–75 period. Following the simulations are findings concerning differences in profit versus loss outcomes among stations grouped by area, classical, nonclassical status, type of broadcasting unit, such as AM or FM, and other variables. The section ends with some concluding remarks and recommendations concerning further study and informational needs.

Advertising rates are discussed in the next section of the report. The relative costs of radio, compared to television and print media, are considered first. Next is a discussion concerning an attempt to measure empirically the sensitivity of radio advertising expenditures to changes in relative costs of advertising via other media using national data. This is followed by an analysis of data concerning trends in revenue and local radio spot advertising rates in a randomly selected sample of cities. The demand for radio station licenses is also discussed in this section.

The economic impact on performers, the subject of the next section of the report, is discussed under three headings. The first has to do with the existing trust and benefit plans in the recording industry. The next concerns administrative procedures for implementing the act and a discussion of the implications these have in determining the amount to be distributed to record companies and performers. The last part of this section contains some never before published data on the questions of earnings and employment among performing artists, members of the American Federation of Musicians and others, who would share in the distribution of performance royalties if the bill is enacted.

The economic impact on the record industry is discussed in the last section of the report. Industry-supplied data on profits is discussed and an attempt is made to estimate how profits would be affected if performance rights on sound recordings were provided by the law. The section ends with a look at trends with respect to concentration in the record industry.

Legal Definitions and Terminology

The U.S. Copyright Law, as revised in October 1976, classifies works of authorship into the following seven catagories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomines and choreographic works;
(5) pictorial, graphic and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

The law provides an owner of a copyright with a number of exclusive rights. Among them are the right to reproduce the copyrighted work, and for some categories of works of authorship, the right to perform or display the copyrighted work in public. The former right is referred to as a reproduction right. The latter is referred to as a performance right.

Holders of copyrights on musical works, primarily authors and music publishing houses, enjoy both reproduction and performance rights under the law. Record companies pay a "mechanical" reproduction royalty (approximately 2¢ per song) to record the copyrighted material. Performers and others pay a performance royalty to use the copyrighted material in public. Radio and TV broadcasters are included in the group required to pay performance royalties to holders of copyrights on musical works.

The law puts some limitation on the rights of a holder of a copyright on a musical work, however, in terms of his ability to control the reproduction and distribution of his works. Once a copyright holder has permitted any record company to use a particular musical work all other record companies are automatically licensed to reproduce the music as well. The license is granted on the condition that they give notice and pay the prescribed royalty fees. This statutory license is sometimes referred to as a "compulsory" license. The intent of the law in this regard is to preclude the possibility that an author and any single producer monopolize the market on specific musical works.

The exclusive rights of the owner of copyright in a sound recording "do not include any right of performance" (section 114(a)). Essentially the copyright protection afforded the holders of copyrights in sound recordings is to insure them against "pirating" of their materials by other record producers.

A proposed change in the law

Rep. Danielson (Dem.-Calif.) has proposed an amendment to the Copyright Law (Public Law 94–553) which would require commercial users of sound recordings to pay a royalty to performers and holders of copyrights on sound recordings for the use of the recording they had created or produced. The primary commercial users of sound recordings are radio and TV broadcasting stations. Almost exclusively, the holders of copyrights on sound recordings are record producers. Under the proposed amendment, the record companies would receive

one-half of all royalties and the remainder would be split equally among the musicians, lead singers and back-up performers, or sidemen involved in the recording process. The performers are to share equally in the royalties received for each record. That is, for example, a drummer would receive just as much as the lead singer from the performance royalties on a record they had produced.

An economic impact analysis requirement

Section 114(d) of the Copyright Law directs the Register of Copyrights and General Counsel of the Library of Congress to submit to the Congress a report by January 1, 1978, setting forth recommendations, as to whether the section dealing with copyrights of sound recordings should be amended to provide for performers and copyright owners of sound recordings any performance rights on such material. In accordance with this directive, the general counsel contracted with Ruttenberg, Friedman, Kilgallon, Gutches and Associates to conduct a feasibility survey as a preliminary step before undertaking a study of the potential domestic economic effect of extending the copyright protection to include performance rights. The purpose of the feasibility survey was to determine whether or not there were adequate data presently available to estimate the economic impact of imposing a record music license on commercial users of sound recordings. This study is an outgrowth of that earlier report.

THE ECONOMIC IMPACT ON BROADCASTERS

Theoretical background

Advertising rates as prices

Advertising rates are prices and as such can be analyzed in the context of a market and the interplay of supply and demand for the goods traded in that market. Before getting into discussion of the economic principles involved, however, there needs to be some clarification of the terminology being used.

With respect to the market, the following terminology is suggested. Advertising is an industry, composed of several segments, each of which is also referred to as an industry. Among those segments are the print, radio, and television industries. The demand for advertising by corporations on all media will be referred to as the total-industrywide demand for advertising. The demand for advertising via radio will be referred to as the radio-industrywide demand for advertising. The industrywide demand for advertising via other media will be referred to in a similar manner. Within any one industry, such as the radio industry, it is assumed that there are many firms competing with one another for advertising contracts. The demand for any one individual station's air time is referred to as station-demand, as opposed to radio-industrywide demand.

Decisions with regard to advertising expenditures are assumed to follow a two-step procedure. As a first step, total-industrywide demand for advertising is determined on the basis of the economic conditions within which corporations in the market area are operating. At the national level, for example, corporate decisions regarding the amount

to be allocated to the advertising budget may be determined on the basis of the gross national product, corporate profits in this year, or corporate profits in the preceding year. (These hypotheses are tested empirically, the results of which appear in appendix.) Similarly, in local areas, local sponsors are likely to adjust their advertising budgets to local business conditions.

Once decisions have been reached with regard to total-industrywide demand for advertising, the second step is determining how to allocate budgeted advertising dollars among alternative media. It is at this point that an understanding of the basic principles of economics comes into play. To be able to apply these principles to the issue at hand it is important to understand the difference between changes in the quantity demanded and changes in demand. The elasticity of demand is also an important concept.

Demand relationships: Changes in the quantity demanded

Radio-industrywide, the demand for radio advertising, as is the demand for any good or service, is graphically depicted as downward sloping. At lower prices, there would be more time sold than would be the case at higher prices, all other things held constant.[1] More station time could be sold at lower prices because those already in the market would be willing to buy additional time, or, those who were not previously using radio as an advertising media would be attracted to it from other media. Conversely, at higher prices, the quantity or amount of station time sold would be less than at lower prices.

The demand curve indicates what amount of station time would be purchased along a range of prices. The curve represents the hypothetical reaction to prices of those who are willing and able to purchase station time. In Figure 1, the demand curve is shown as line D. The amount of station time purchased, industrywide, is shown along the horizontal axis. Prices are shown on the vertical. At the higher price, P_2, the quantity demanded, Q_2, is less than the quantity demanded (Q_1) at P_1.

[1] Among the things held constant are the total-industrywide demand for advertising and the prices of advertising via other media. This is discussed fully in subsequent sections.

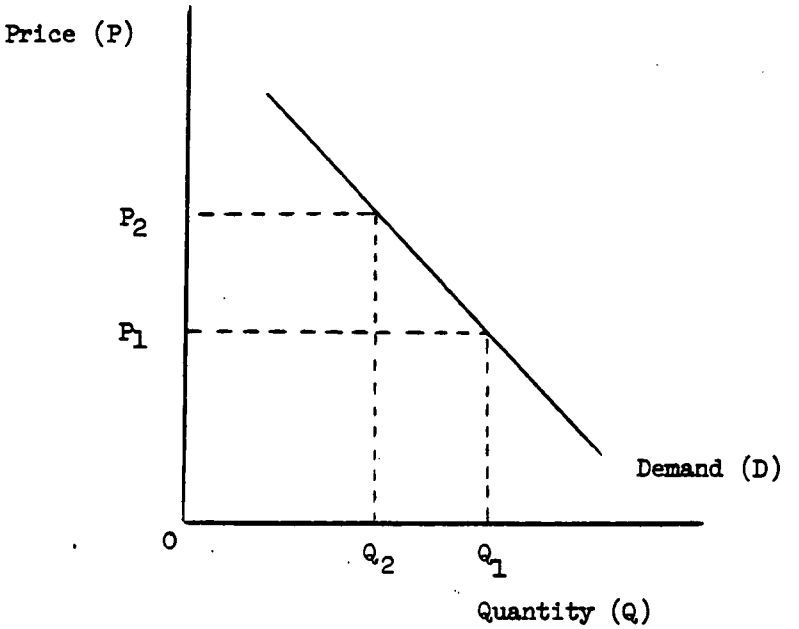

FIGURE 1

Changes in demand

The relationship described above is known as the law of downward sloping demand. Simply stated, again, the law dictates that the quantity demanded fall as the price of the good in question, for example, radio advertising rates, increases. Now consider a different situation. Now consider those variables previously held constant and consider how they might change in such a way that the radio-industrywide demand for advertising increase.

The radio-industrywide demand for advertising may increase if:

(1) The total-industrywide demand for advertising increases. This might occur if corporations increased their advertising budgets in anticipation of increases in consumer's disposable income. In this situation, demand for all media could increase in proportion to their current relative shares of the advertising dollar.

(2) The efficiency of radio as an advertising media increases. For example, demand would increase if there were an increase in the number of radio listeners, increases in the average time spent by individuals listening to radios, or, increases in the disposable income of radio listeners compared to users of other media.

(3) Prices of alternative media for example, television or print media increase. As a result, there would be more buyers of radio advertising time. Similarly, the demand for advertising via radio would increase temporarily if there were a disruption of the services of other media, e.g., a newspaper strike.

AN INCREASE IN DEMAND

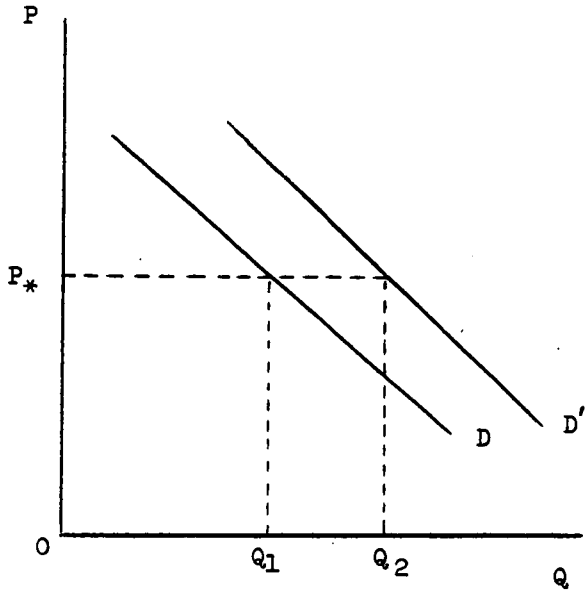

FIGURE 2

An increase in demand is depicted as a shift of the demand curve to the right. In figure 2, this is shown as a movement from demand curve D to the curve labeled D. At the price, P*, the quantity demanded under the original demand curve as Q_1. After the increase in demand, at the same price, P*, the quantity demanded equals Q_2.

Note that with an increase in demand, the amount Q_1 could be sold at a price higher than P*. (That higher price is not shown.) If the demand for advertising via radio increases, in other words, theoretically, radio broadcasters would be able to sell as much time as they currently are selling, only at higher prices.

The elasticity of demand

The law of downward sloping demand dictates that the quantity demanded falls as price increases. The elasticity of demand is a measure of how much the quantity demanded falls as price increases, in percentage terms. If the quantity demanded only falls by 2 to 3 percent, when the price increases 10 to 15 percent, demand is said to be relatively inelastic. If price increased and the quantity demanded did not fall at all, demand would be said to be perfectly inelastic. On the other hand, if the quantity demanded (for example, of radio station time purchased) fell 20 percent as a result of a 1-percent increase in price (or advertising rates), demand would be said to be relatively elastic.

A relatively inelastic demand curve is shown in figure 3. A relatively elastic demand curve is shown in figure 4.

For the same increase in price, from P_1 to P_2 in the figures on the opposite page, the relative changes in the quantity demanded are different between the two figures. In the case of inelastic demand, the quantity falls only slightly. In the case of elastic demand, however, the change is considerable. In the figures on the opposite page, note the approximate fall in Q as price increases. In figure 3, percentagewise, the reduction is 20 percent, from 10 down to 8. In figure 4, the drop is 40 percent down from 10 units to 6.

INELASTIC DEMAND

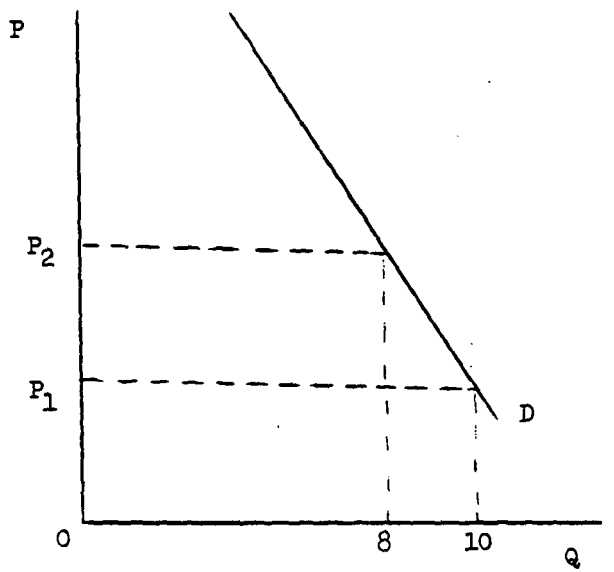

FIGURE 3

The demand is relatively inelastic the smaller the fraction of total cost represented by the good, the fewer the number of substitutes, and the higher the price of substitute goods. The most commonly used example of a good with inelastic demand is common table salt. The cost of salt, as a percent of the total cost of a meal is relatively small. There are few substitutes, some persons would say none.

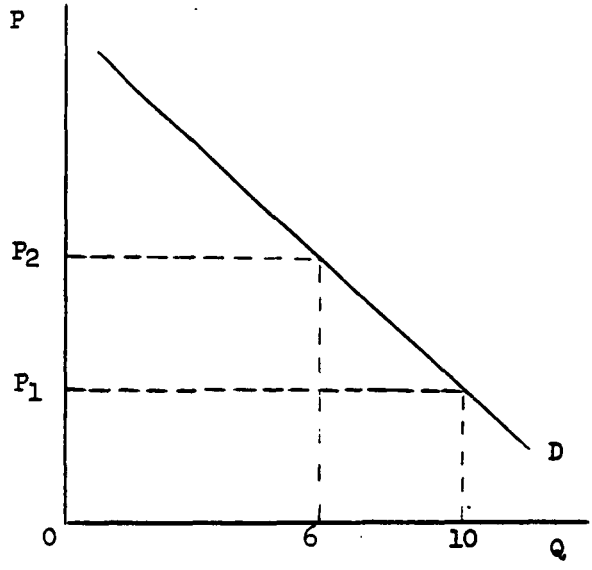

FIGURE 4

The quantity supplied

In this section of the analysis, for discussion purposes, the convention is adopted that stations vary the amount of time available for sale in response to variations in the price paid by advertisers. In addition, it is suggested that the stations operating costs vary directly with the length of time made available for sale. Increases in the amount of time available could be achieved by increasing the ratio of commercial to sustaining time used at the station. Or, the increase could be achieved by increasing the length of the broadcasting day. It is assumed, although not actually true in each case, that both these actions increase station operating costs. Each action would require hiring additional workers or paying premium rates to the current workforce for example.

Actually, an individual station is more likely to experience increases in cost as it attempts to increase its share of the listening audience. These costs include those associated with promotional efforts, giveaways, bumper stickers, local appearances by disc jockeys, and so forth. The station will also incur higher costs as it attempts to increase the size of its sales force. Acceptance of these conventions makes the exposition simplier and does not alter the basic principles discussed below.

If we accept this convention, then at any one point in time, the supply of radio station time available for sale depends upon the length of each station's broadcasting day. Over time, in the long run, it also

depends upon the number of stations in the industry. In the immediately following sections, however, discussion is limited to short-run considerations.

Industrywide, the total amount of time available for sale at a given price is simply the sum of the amount offered at that price by each individual station. Generally, at higher advertising rates, more time will be made available. In our analysis, the assumption is made that increasing the amount of time available increases costs.

The supply schedule is depicted graphically as an upward sloping line. Unlike demand, at higher prices, more will be supplied. At lower prices, less will be supplied. The supply schedule is shown in figure 5.

THE QUANTITY SUPPLIED

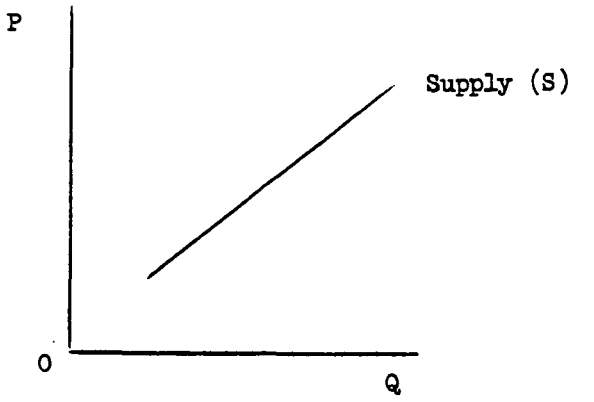

FIGURE 5

Changes in supply

If the costs of operating an individual station increase, each station will offer less time for sale than previously at each price. Or, what is imagined more easily, fewer stations offer their services. In either situation, supply is said to decrease. (This is explained in detail in the section concerning profits and loss.)

A decrease in supply is depicted graphically as a shift of the supply curve to the left. In figure 6, the initial supply situation is described by the line labeled S. The line S′ describes a supply schedule which has decreased relative to S. (An increase in supply would be depicted as a shift to the right.)

An increase in the costs of operation, all other things held constant, necessarily implies two results. One, industrywide, at the same price or advertising rate, less station time will be made available for sale than had been previously. In figure 6 at price P* the amount Q_2 is supplied under schedule S′ instead of Q_1 under schedule S. Secondly, with a decrease in supply, only at a higher price could the same amount of station time be offered for sale under schedule S as had been offered

previously under schedule S. In Figure 7, at the rate P_2, the same amount of station time would be offered for sale after the shift in supply as had been offered at P_1 before the shift.

A DECREASE IN SUPPLY: PRICE CONSTANT

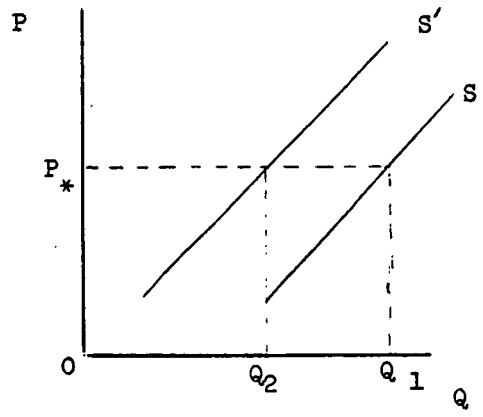

FIGURE 6

A DECREASE IN SUPPLY: PRICE INCREASES

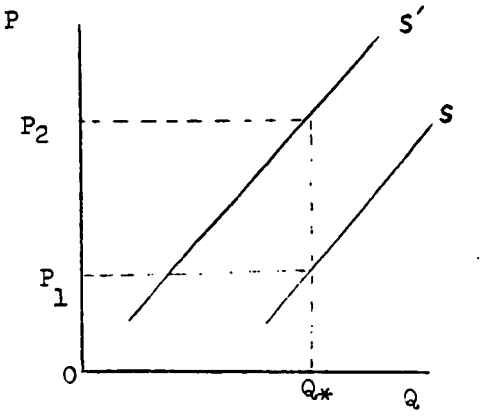

FIGURE 7

The passage of the Danielson bill translates directly into an increase in the costs of operation. The effect on broadcasterss, however, depends not only upon what happens to supply but rather it depends upon the interaction of supply and demand as the two together determine the equilibrium price. Before analyzing the shifts in demand or supply as they affect equilibrium prices, it is important

to understand the relationship between the radio-industry determined price and the advertising price facing each individual radio station.

The equilibrium price and total revenue

In the market for radio advertising, the radio-industrywide rate is determined by the interaction of demand and supply. Theoretically, within the radio industry as a whole, it is possible to postulate the existence of a single rate, for each station, even though individual stations may charge different amounts for the same amount of time. The single rate is a price per 1,000 of radio listeners associated with any given station. The way to increase revenue, therefore, for an individual station, is to increase listenership. In figure 8 the rate determined by the intersection of demand and supply is shown as P_e, the equilibrium rate.

DETERMINING EQUILIBRIUM PRICE

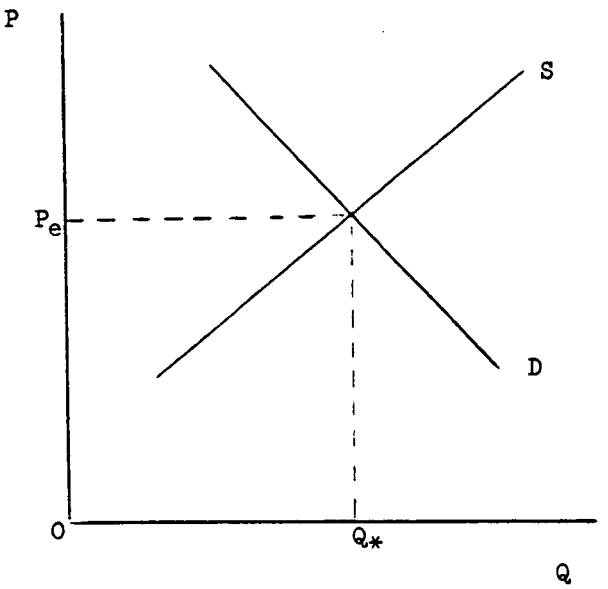

FIGURE 8

Total revenue in the industry is found by multiplying the equilibrium price of advertising by the quantity demanded at the equilibrium price, that is, P_e times Q. Only at this price does the amount offered for sale equal the amount that advertisers are willing and able to purchase at that price. It is necessarily true, in this framework of analysis, that if supply decreases and demand is elastic, total revenues in the industry will fall.

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Individual station-demand

The demand curve facing individual stations is not downward sloping. The price of radio advertising, as pointed out, is determined for all stations in one market on the basis of the demand and supply relationships. The individual stations, in effect, are price takers. They compete among one another for shares of the total listening audience, but the basic rate for a given number of radio listeners is determined radio-industrywide. The demand curve facing individual stations is said to be perfectly elastic.

The relationship between the market-determined equilibrium price and the demand curve facing individual stations is shown in figure 9 to the left.

INDUSTRY VERSUS STATION DEMAND

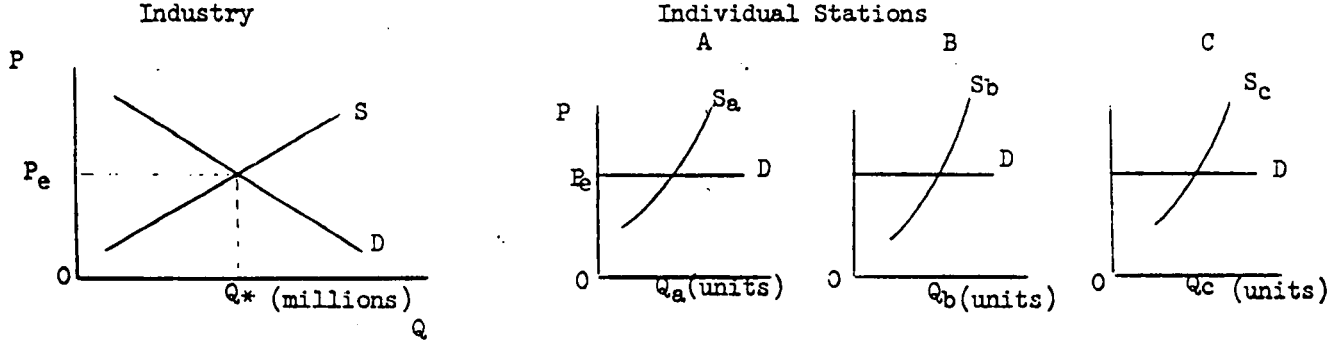

FIGURE 9

As shown in the figures on the opposite page, the equilibrium price, P_e, is determined radio-industrywide. Individual stations, that is, A, B, and C, must charge the same price (per thousand) as their competitors. Actual rates can vary, therefore, only to the extent that the listenership varies.

In a price competitive market [2] a station charging a higher rate (per thousand) than the industrywide determined equilibrium rate would find no buyers. A perfectly elastic demand implies that the station can sell as much as it would like at the going rate. The only constraint is costs. The constraint on selling more time, for example, might be the expense of increasing the size of the sales staff.

The impact of a change in the copyright law

The imposition of a requirement that radio broadcasters pay a music license fee represents an increase in the cost of operations. As pointed out earlier, this has the effect of shifting the industry supply curve to the left, that is decreasing supply. The question then becomes, by how much does the quantity demanded of radio advertising time fall, if at all. If it falls, total revenue accruing to broadcasters in the industry will fall.

Profits may stay the same, despite an increase in the costs of operations, if the increases in costs are matched by increases in revenue. This could occur under either of two circumstances. One, demand for radio advertising is inelastic.[3] Two, the demand for radio advertising increases. These stations are depicted in figures 10 and 11.

In the case of inelastic demand, as depicted in figure 10, with a shift in supply to the left (an increase in the cost of doing business) the equilibrium price increases from P_1 to P_2. If there was a 1-percent increase in the costs of doing business, the increase in the equilibrium prices would equal 1 percent also. Consequently, the increase in costs would be matched exactly by an increase in revenues. In the figure, both increases are represented by the shaded area. This would leave the absolute amount of profit (not shown) in the industry unchanged, (Profit as a percent of revenues, however, would fall.)

In the case of an increase in demand, the same result would hold true. In figure 11, the increase in demand is drawn in such a way that it offsets exactly the decrease in the quantity demanded which results from the increase in the costs of operations.

All statements, therefore, regarding the ability of broadcasters to pass on a rate increase, can be judged in terms of the extent to which they provide information concerning the demand for radio advertising. If it can be shown that the demand for radio advertising is relatively inelastic, or that demand is increasing, the impact of the bill will be negligible. If on the other hand, it can be demonstrated that demand is relatively elastic, or that demand is decreasing, then the impact will not be negligible.

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[2] The analysis of noncompetitive markets is more complex than that given above. The economic impact on producers of an increase in the cost of doing business, however, in an industry which is not competitive is less harmful than that affecting firms in competition. For both these reasons, the non-competitive market situation is not discussed.

[3] In this example, demand is shown to be completely inelastic. This is not a realistic situation but is used to demonstrate the nature of the effect in general.

PASSING-ON THE PRICE INCREASE: INELASTIC DEMAND

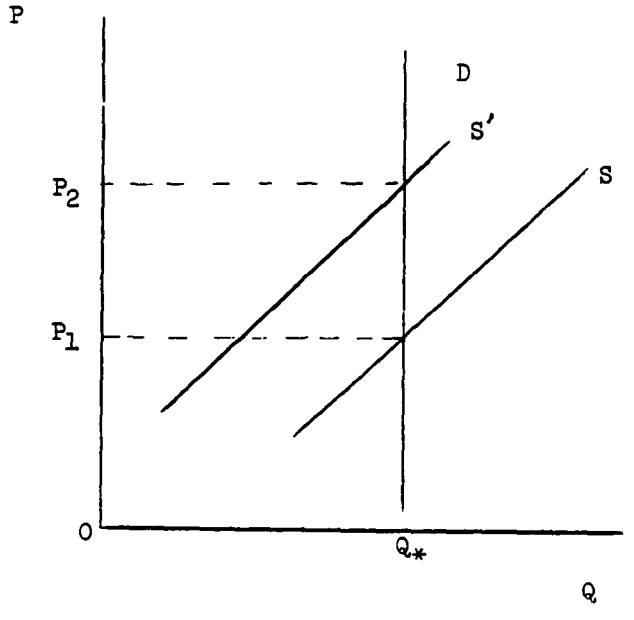

FIGURE 10

PASSING-ON THE PRICE INCREASE: INCREASES IN DEMAND

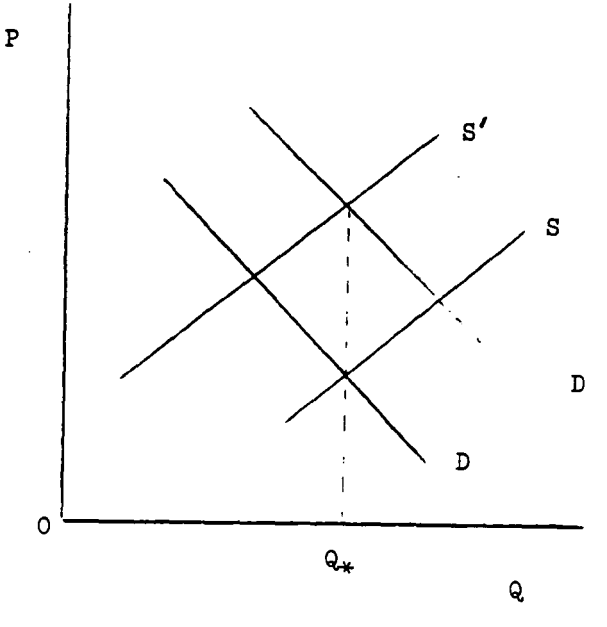

FIGURE 11

The firm; calculating profit and determining the shutdown point

The theory of the firm, as developed by economists, explains, among other things, how profit is determined and why firms may sustain losses in the shortrun, rather than going out of business. The model is based on an assumption that the mangers of the firm are not also the owners of the firm. The managers serve the interests of the owners, stockholders, by maximizing profit. It is assumed that the owners derive income from dividends out of profit. Without sufficient profit, the owners would invest their money elsewhere, in the economy where yields are higher. Consequently, it is the manager's interest to see that profit is maximized.

The main purpose of the theory, however, is to explain the basis on which managers of a firm make decisions regarding production and employment. The managers serve two primary functions in this regard. They determine how to organize the production process in the most efficient manner and second, how much production should take place within a given time period. The focus of discussion in this section is on the second issue, determining how much production should take place after decisions have already been made as to how the work should be organized.

For the moment, the time frame of the analysis is on the short run. The short run is defined as the period during which some aspects of the production progress cannot be altered. For example, the physical space within which production takes place is usually assumed fixed in the short run. The space is considered a factor in the production process and the costs associated with the space, that is, rent, are referred to as fixed costs. Other factors are variable, such as the number of workers hired or the number of hours scheduled for work. The costs associated with these factors are variable costs.

Managerial decisions as to how much production should take place, depend upon the relationship between production, or output, and the costs of production. They also depend upon the relationship between the price at which output sells and the cost of producing that output. The relationships are best explained by references to graphs.

In figure 12 the relationships between output and total variable, and fixed costs are shown. Total fixed costs, rent et cetera, are constant throughout the range of output shown in the graph. Total variable costs, start at zero and increase as output increases. Total cost also increases as output increases, and equal total variable costs plus total fixed costs. While it appears that total cost and total variable cost get closer to one another as output increases, for any given level of output, the two always differ by the same amount.

TOTAL COST RELATIONSHIPS

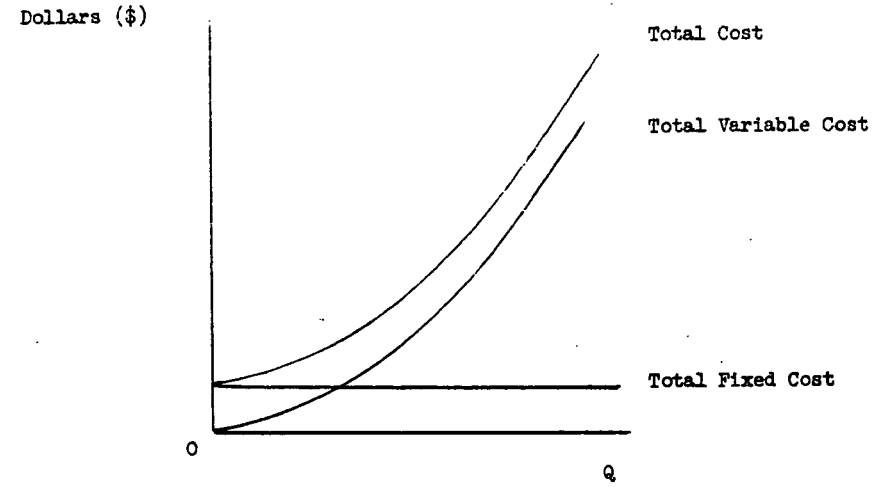

FIGURE 12

AVERAGE COST RELATIONSHIPS

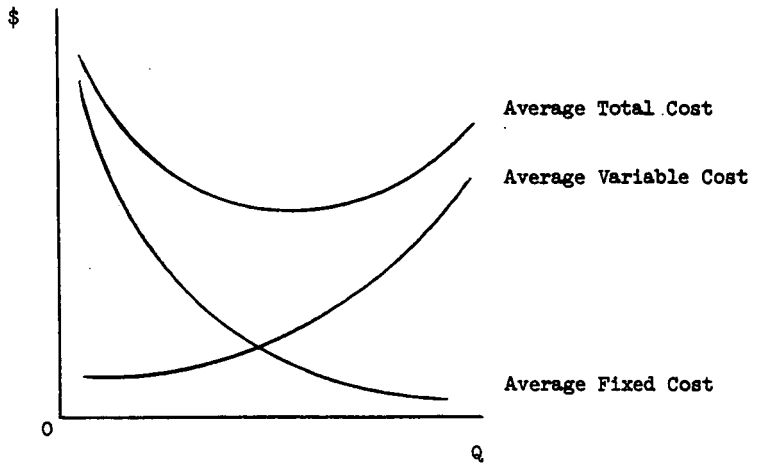

FIGURE 13

The relationships between output and the average of the total, variable and fixed costs are shown in figure 13. Average fixed cost is very high at low levels of output and very low at high levels. Average variable cost starts at one level, falls slightly, and then begins to rise sharply. Average total cost starts high, drops almost as sharply as average fixed cost, and then starts to rise again, similar to average variable cost.

Once average total cost is calculated, it is possible to calculate profit or loss at any given level of output. For a firm in a competitive market, the price at which output sells is fixed. Price is determined marketwide. The price may be considered the average income associated with the production of x number of outputs. The firm experiences a profit, therefore, if the average income (price) for the x number of outputs is greater than the average total cost of x number of outputs.

PRICE VS. AVERAGE TOTAL COST

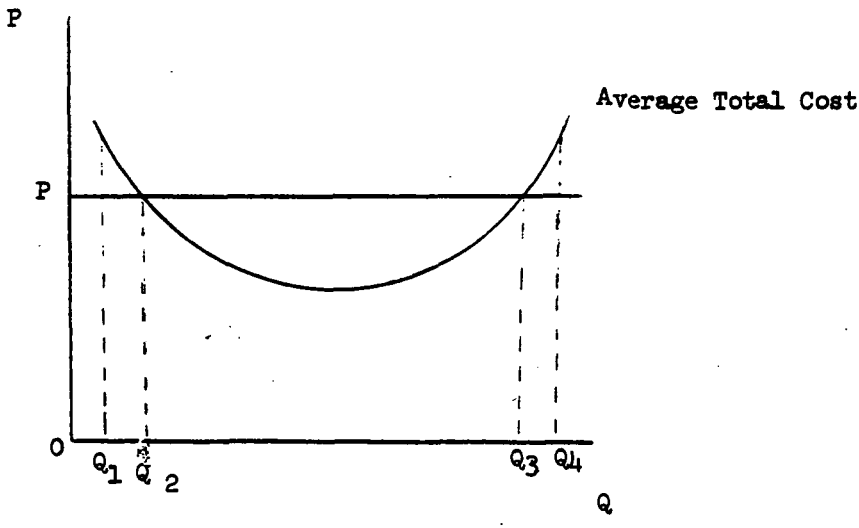

FIGURE 14

In figure 14 price, or average revenue per unit, is greater than average total cost over the range of output from Q_2 to Q_3. If production were limited to a level of output between Q_1 and Q_2, the firm would be experiencing a loss. In that range average total costs exceed the average revenue per unit. Similarly, over the range of output from Q_3 to Q_4, average total costs exceed average revenue, or price. In this range too, the firm would experience a loss. Only if the firm produces a number of outputs greater than Q_2 and less than Q_4—will it experience a profit.

CALCULATING PROFIT: PRICE GREATER THAN AVERAGE TOTAL COST

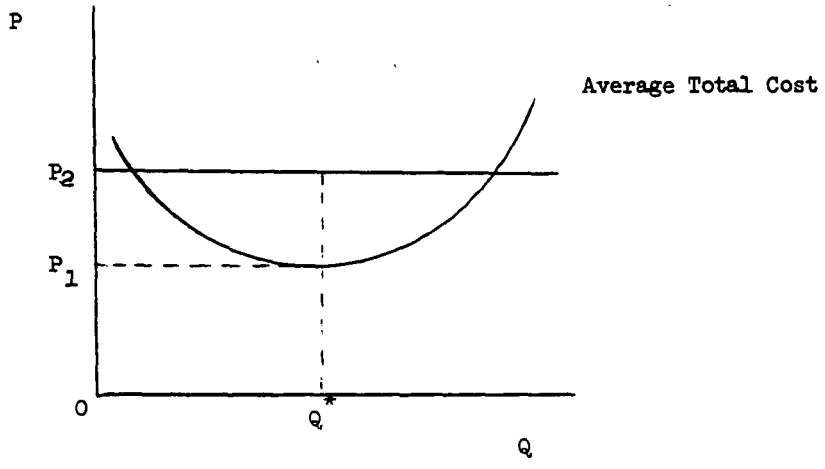

FIGURE 15

If the firm produced Q* units, shown in figure 15, total revenue would equal the amount of Q* times P_2, the selling price. At that level of output, Q*, average cost is only P_1. Total cost, in other words, would equal Q* times P_1. The difference between total revenue and total cost is profit. Profit would equal Q* times $P_2 - P_1$.

The determination of which level of output would yield the maximum profit is based on marginal analysis. The important question is what happens to total revenue and total cost as output is increased. Marginal revenue (MR) is defined as the increase in total revenue associated with a one-unit increase in production (assuming it is sold). Marginal cost (MC) is the increase in total cost associated with a one-unit increase in production.

The basic principle involved in maximizing profit is simple. Increase production until reaching the point at which it costs more to produce another unit than the unit would sell for.

The relationship between total revenue and total cost is shown in figure 16. Profits exist at each level of output for which total revenue is greater than total cost, be definition. In figure 16, this occurs at levels of output over the range from Q_1 to Q_3. Figure 17 demonstrates how much the total revenue represented in figure 16 changes with the sale of each unit of output. For one unit increase in output, the change in total revenue is simply equal to the price (P) of the unit times 1. The price is a constant; it does not change. Consequently, changes in total revenue—that is, marginal revenue—is a constant, represented in figure 17 by the straight horizontal line at price P. Marginal cost is also shown in figure 17. Marginal cost is the change in total cost associated with a unit increase in output.

TOTAL COST AND TOTAL REVENUE

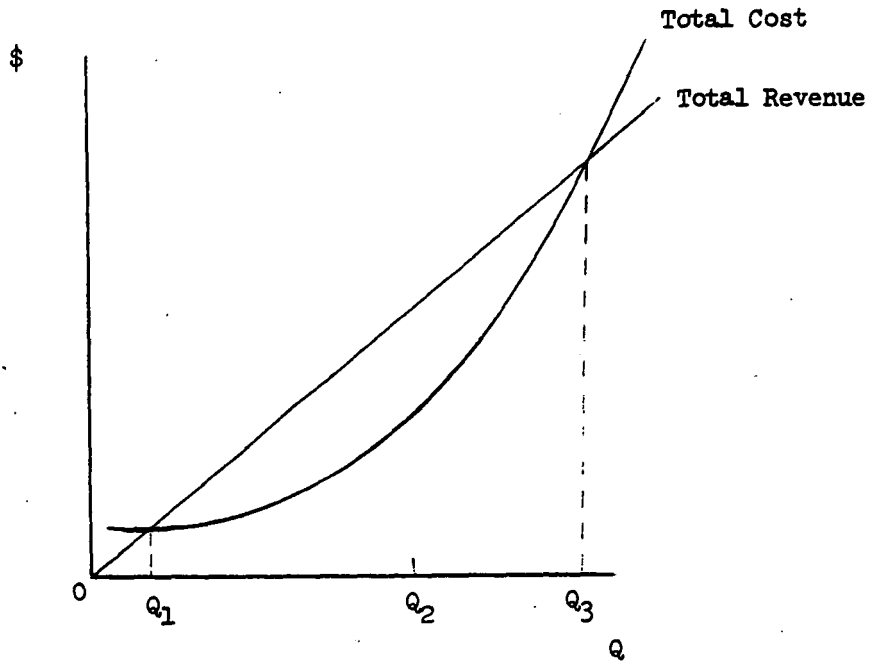

FIGURE 16

MARGINAL COST AND MARGINAL REVENUE

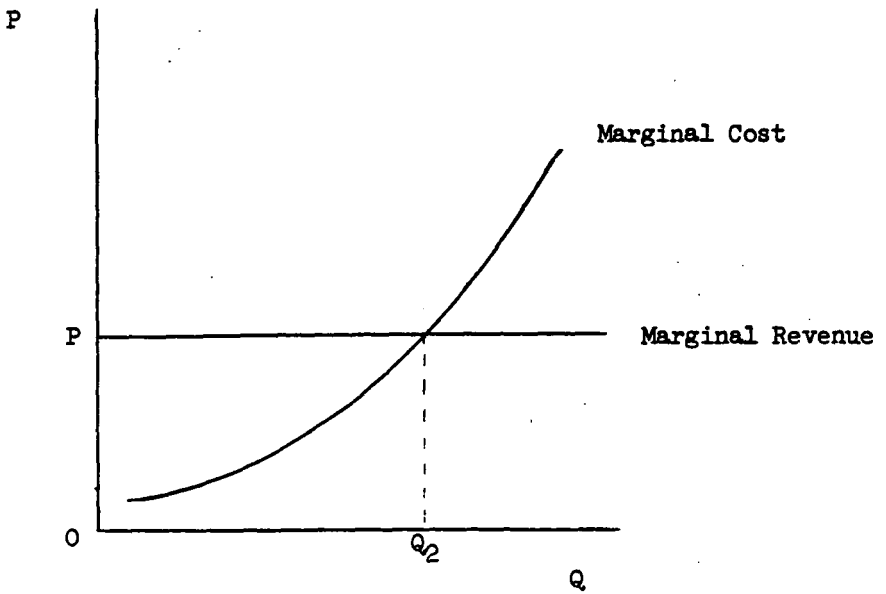

FIGURE 17

Profit is maximized at a level of output where marginal cost equals marginal revenue (Q_2 in fig. 17); beyond that point, it would cost more to produce the unit than it would sell for. That is the same as saying, at a level of output higher than Q_2, marginal cost is greater than marginal revenue.

A profit maximizing firm will always produce at the point where marginal cost equals marginal revenue. As price takers, therefore, in the short run, the firm will alter its level of production in accordance with changes in price. If price increases, so will the amount produced. This is depicted in the figure.

If price increased from P_1 to P_2 as shown in figure 18, the level of production would increase from Q_1 to Q_2. The marginal cost curve indicates the amount of output which would be supplied at various prices. The marginal cost curve is the firm's supply schedule.

If the costs of production increase, total cost is affected. If the increase in costs varies with the level of output, the increase will also have an effect on average variable cost and marginal cost.

As an example, consider the effect of a 1-percent increase in licensing fees. Licensing fees are some proportion of total costs. If licensing fees increase by 1 percent, total cost at each level of output must go up some proportion of 1 percent. So must average total cost. The same is true with respect to marginal costs. All will increase. Such shifts are depicted graphically as a shift upward.

As shown in figure 19, with an increase in cost, the range at which output is profitable decreases with the increase in average total cost. The range is reduced from between Q_1–Q_4 to Q_2–Q_3. The profit maximizing level of output also falls. As shown in figure 20, the result of the shift in marginal cost is that production drops from Q_2 to Q_1.

Under certain circumstances, a firm may continue in operation even if it is not experiencing any profit. There is a range of prices at which the firm would sustain a loss rather than go out of business. But there is also a price below which the firm would shut down.

A PRICE INCREASE AND AN INCREASE IN THE QUANTITY SUPPLIED

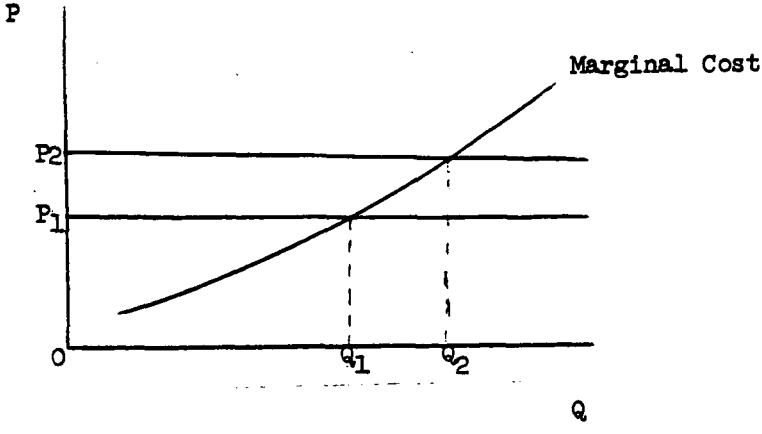

FIGURE 18

THE EFFECT OF A COST INCREASE ON AVERAGE TOTAL COSTS

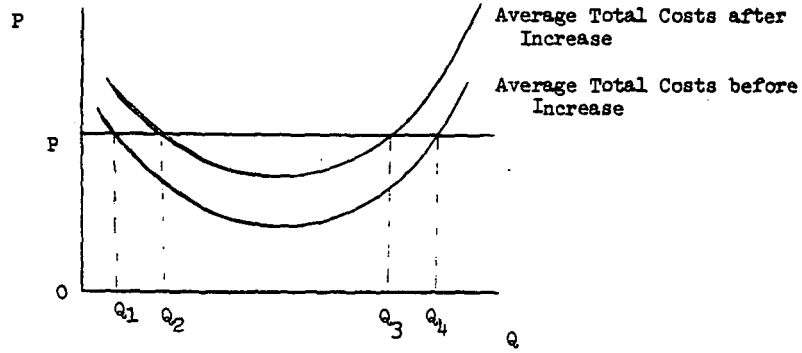

FIGURE 19

THE EFFECT OF A COST INCREASE ON MARGINAL COSTS

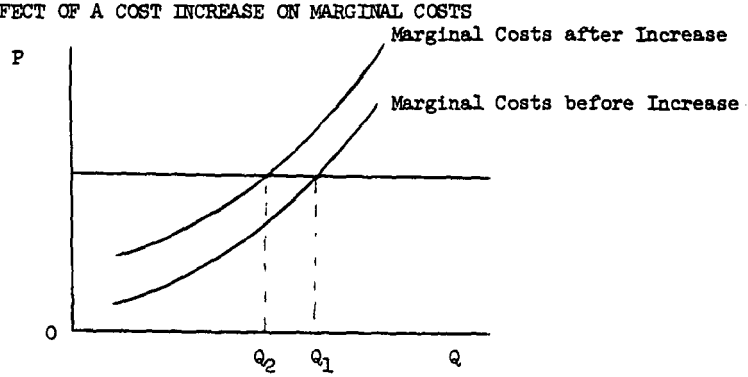

FIGURE 20

DETERMINING THE SHUT-DOWN POINT

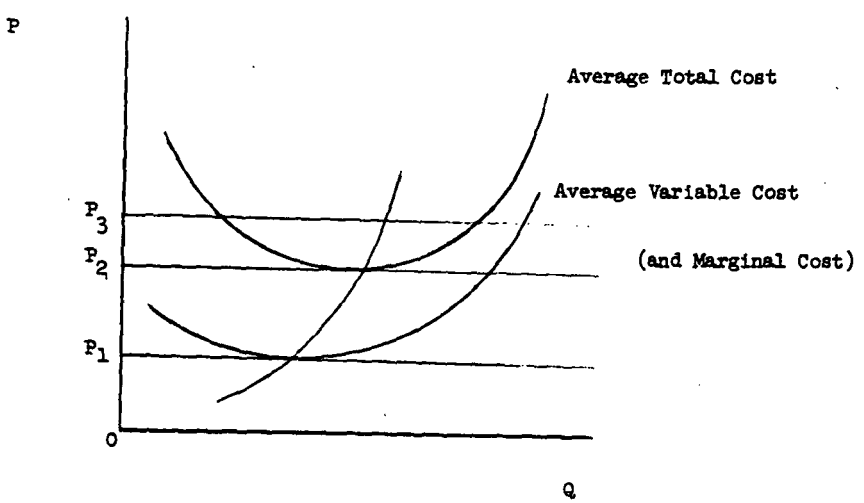

FIGURE 21

Above the price P_2, in figure 21, the firm could operate at a profit and uses the marginal cost equals marginal revenue rule of profit maximization. Below the price P_3 and above P_2, the firm might remain in operation even though sustaining a loss. In that price range, a loss is incurred because average revenue per unit price is less than the average total cost per unit. Total revenue is less than total cost. At the same time, however, price is above average variable cost. In the range, price is at least enough to cover wages and other variable factor costs, even though it does not cover all costs. The firm might stay in business in anticipation that price will increase again or until some means is found to bring down costs. The firm might also want to hold onto its work force, rather than risk having to fire and rehire them again if price should rise. By using the marginal cost equals marginal revenue rule, the firm would be minimizing losses.

If demand fell to the point where prices were below P_1, price would not even cover average variable costs. This is usually referred to as the shutdown point. *Theoretically, therefore, broadcasters would not sustain losses over the long run if they were trying to maximize profit. After a certain point, they would leave the industry.*

THE PROFIT-AND-LOSS ANALYSIS

The purpose of the profit-and-loss analysis is to determine what has been the trend over time in terms of each station's financial profit versus loss outcome for the period. Several questions are being addressed in the analysis. For example, are the same stations experiencing losses in each of the 5 years, or are losses distributed equally over all stations? Are a higher proportion of stations in some regions of the country experiencing losses than those in other regions? Are classical stations operating at a loss more frequently than others? These and many other questions of a similar nature, are based on a station-by-station analysis of financial reports.

Source

As a condition of licensing, since 1938 radio broadcasters have been required to file annual financial reports with the Federal Communications Commission. Broadcasters licensed to use both AM and FM frequencies may file a report for the AM operations separately from its FM, or, at the station owners discretion, he or she may file a joint report. The reports contain detailed categories of expense and revenue items. A sample of the report (FCC form 324) is attached as appendix 2.

Hard copies of the report, which contain confidential information, are kept on file with the FCC in Washington, D.C. In addition, the information contained in the reports is prepared for use on the FCC computer. The FCC uses these data to prepare annual AM and FM financial reports.

Interpretation of the financial reports, however, is subject to some question. There are several reasons for this. For one, the FCC does not prescribe which categories of operating expenses should be included in the chart of accounts. The classification of expenses is determined by the broadcasters, with or without the guidance of

the National Association of Broadcasters (NAB). Second, the FCC does not audit the reports. Third, it is not clear whether there is any attempt to standardize the accounting treatment of fixed assets; for example, requiring that accounts reflect accumulated depreciation expenses rather than allowing the licensees the option of expensing or depreciating assets.

Rules of confidentiality require that the FCC not release data in a form which would allow anyone to associate a given set of information with a particular station. In order to honor these requirements, an agreement was reached between the Copyright Office and the Executive Director of the FCC, to allow us to run several computer programs, utilizing the FCC data base, which would produce files for our analysis purposes, yet which would not contain any confidential information.

Data

In preparing this analysis, we have read 26,838 records concerning the financial reports of all AM and FM stations licensed in the United States between 1971–75. The number of reports processed, by year, is shown in table 1. The table also contains information concerning the number of reports which represent the stations operating a full year, and those not reporting in the year. These figures obtained by our computer analysis, correspond to those published by the FCC.

TABLE 1.—NUMBER OF RADIO BROADCAST STATIONS REPRESENTED IN THE PROFIT AND LOSS ANALYSIS

Year	Total number of stations in operation	Full-year reports	Nonreporting stations
1971	5,115	4,963	95
1972	5,219	5,095	84
1973	5,364	5,248	108
1974	5,480	5,340	43
1975	5,660	5,528	126

The data contained in the financial files used to create an analysis file. The data contained in the analysis (extract) file consists primarily of coded information concerning the difference between net revenues and expense items for the individual station over the 5-year period 1971–75. These profit versus loss outcome variables assume the value 0 or 1 depending upon whether the sign of the difference between net revenues and expenses is positive or negative.

In addition, the analysis file contains codes for each station regarding the geographic region within which it is authorized to broadcast, whether or not the area is a metropolitan area or smaller community, an estimate of the population within the broadcast area, and, whether or not the station in question is a classical music station.

In the analysis file, a record exists for each station which was in operation a full year in 1971 and which filed a financial report covering the full year. The number of stations in this category totals 4,963. The record contains all coded variables and information concerning the type of reporting unit. The types of reporting units include AM, AM/FM, FM independent, and FM associated with an AM in the same market but filing separately.

Some simulated profit versus loss outcomes are described in a later part of this section. The purpose of the simulations is to determine

how the profit versus loss outcomes would have appeared if expenditures were different from those reported. This was accomplished by calculating the variables described in the table below.

TABLE 2.—*Variables used in profit versus loss simulations*

Profit Versus Loss Outcome: *Variable No.*	
1	Including record license fees
2	Excluding payments to owners
3	Excluding other administrative expenses
4	Excluding payroll

In the immediately following section, the findings concerning actual trends in profit versus loss outcomes are discussed.

Actual trends in profit versus loss over time, by station

The number [4] of stations falling into each of the 32 possible type of outcome categories appears on the following page. With respect to the reported profit versus loss outcome over the period there are some unusual findings.

TABLE 3.—*Profit versus loss outcomes of radio broadcasting stations, over the period 1971–75, by type of outcome*

Type of Outcome:*	*Number of stations in outcome category*		*Number of stations in outcome category*
00000	1,650	01011	36
00001	262	10011	51
00010	105	01101	18
00100	93	10101	32
01000	59	11001	27
10000	181	01110	16
00011	150	10110	22
00101	41	11010	19
01001	16	11100	85
10001	70	01111	100
00110	50	10111	75
01010	17	11011	56
10010	32	11101	43
01100	16	11110	92
10100	38	11111	447
11000	97		
00111	110	Total	4,106

*Zero denotes profit in the year, 1 denotes a loss. For example, 00000 denotes no losses in either 1971, 1972, 1973, 1974, or 1975.

Defining good years as those within which profits occur and bad years as those within which losses occur, good years for stations reporting losses in 4 out of 5 years were bad years for stations reporting only one loss out of a possible five.

For stations in the 4-out-of-5-year loss category, the largest number in the group, 100 stations, reported a profit in 1971 only. Ninety-two stations, the second largest number in the group, reported their only

[4] Over the course of the 5-year period, some stations failed to submit full-year reports, some failed to report at all. In addition, the FCC classified some noncommercial stations, e.g. a number of educational and religious stations, as nonreporting. All such stations have been excluded from this profit-and-loss analysis. Since most educational and religious stations do not rely significantly, if at all, on advertising receipts, they would not be affected by the proposed amendment. Hence their exclusion should not affect the analysis. Also, there *is* no evidence that the stations not reporting in any one year are more likely than others to experience a profit rather than a loss, or vice versa, in the year in which they fail to report. Consequently, their exclusion should not affect the results in any way.

profitable year was 1975. Together these stations account for more than 50 percent of all stations in the category. In total, there are 366 stations in the 4-out-of-5 category.

Among stations reporting only one loss over the 5-year period, on the other hand, over 60 percent of the stations in that category reported their only loss in either 1971 or 1975. In 1975, 262 stations reported their only loss. In 1971, 181 out of a total of 700 stations in the one loss category reported their only loss.

This is an unusual result if one holds to the claim that stations are competitive and always attempting to maximize profits. If corporate expenditures on advertising are dependent upon general economic conditions, as is clearly demonstrated in the section of this report concerning the demand for advertising, it is reasonable to expect that the incidences of losses (or profits) in any one year would be as likely to fall on one group of stations as another. This clearly is not the case with respect to these two groups of stations for years 1971 and 1975.

A considerable number of stations report losses repeatedly; 447 stations reported losses in 5 out of 5 years. A total of 366 stations reported losses in 4 out of those years. This is shown in the table below.

TABLE 4.—NUMBER AND PERCENT OF RADIO BROADCASTING STATIONS BY NUMBER OF LOSSES OVER THE PERIOD 1971–75

Number of losses	Number of stations	Percent of total
None	1,650	40.19
1	700	17.05
2	527	12.83
3	416	10.13
4	366	8.91
5	447	10.89
Total	4,106	-----

Together this high loss category, stations reporting four or five losses over the period, represents approximately 20 percent of all the stations represented in the analysis.

It is contrary to the theory of the firm, which includes an assumption that firms attempt to maximize profits, for stations to continually sustain losses year after year. The finding that such a large number of stations do report losses repeatedly, without leaving the industry,[5] strongly suggests that the objective of many station operators is not to maximize the difference between revenues and expenses of the station.

Estimates of the Revenue Generated by the Revision Bill

Estimates of the amount of radio broadcast record music license fees which would have been generated by the revision bill had it been in effect over the period 1971–75, appear in table 5 below. This is followed by a table concerning the number of radio broadcast stations affected by net revenue class size.

[5] A discussion concerning stations which actually leave the industry, or 'go dark," is contained in that part of the report dealing with the demand for advertising (and implicitly, the demand for stations licenses).

TABLE 5.—CALCULATED RADIO BROADCAST, MUSIC LICENSE FEES, BY REVENUE CLASS, BY YEAR

Net revenue class [1]	1971	1972	1973	1974	1975
$25,000 to $100,000	$434,750	$377,500	$356,250	$341,500	$325,750
$100,000 to $200,000	1,182,000	1,247,250	1,257,750	1,332,750	1,324,500
$200,000 and above	8,771,180	10,190,883	11,189,785	12,103,163	13,275,183
Total	10,387,930	11,815,633	12,803,785	13,777,413	14,925,433

[1] The revision bill stipulates that the record music license fee be calculated on the basis of net advertising receipts. Total broadcast revenues differ from net broadcast revenues by the amount paid by stations in the form of commissions to agencies, representatives, brokers, and less cash discounts. Net broadcast revenues differ from net advertising receipts by the amount of revenue received other than from the sale of station time to nonadvertisers or sponsors. In 1975, for all AM and AM/FM stations reporting financial data, income from that source amounted to less than 1 percent of total broadcast revenues. Also requiring special treatment is revenue received from national networks by network affiliated stations. National radio network payments to affiliates and stations in 1975, also amounted to less than 1 percent of net broadcast revenues. As a result, calculations based on net advertising receipts would be slightly overestimating revenues. On the other hand, in 1975 for example, 2.2 percent of all stations were designated as nonreporting stations. This suggests that an estimate based only on reporting stations would underestimate the fees generated by the bill. Obviously, these effects tend to be offsetting, at least with respect to the fees collected from radio broadcast stations.

TABLE 6.—NUMBER OF RADIO BROADCASTING STATIONS, BY REVENUE CLASS, BY YEAR

Net revenue class [1]	1971	1972	1973	1974	1975
$25,000 to $100,000	1,739	1,510	1,425	1,366	1,303
$100,000 to $200,000	1,579	1,663	1,677	1,777	1,766
$200,000 and above	1,488	1,777	1,968	2,134	2,317

[1] See footnote accompanying table 5.

The revenues from television and radio broadcasters are shown in the table below. It should be pointed out that these revenue estimates are based on a blanket music royalty rate. If the stations opt for a rate based on usage, as most probably would, the revenues would be less.

TABLE 7.—CALCULATED BROADCASTING MUSIC LICENSE FEES, BY TYPE OF BROADCASTING UNIT, BY YEAR

Type of broadcasting unit	1971	1972	1973	1974	1975
AM and FM	$10,387,930	$11,815,633	$12,803,785	$13,777,413	$14,925,433
Television	378,750	421,500	432,750	462,000	485,250
Total	10,766,680	12,237,133	13,236,535	14,238,413	15,410,683

The issue of determining a rate other than a blanket rate is a difficult one to deal with. The primary difficulty involves measurement of commercial use of copyrighted sound recordings. The discussion of the issue, however, while relevant at this point, is deferred until after the topic of administering the provisions of the act in behalf of performers is introduced.

At this point several simulated situations are discussed. The first concerns the profit versus loss outcome which would have occurred if the blanket royalty rate had been applied to net advertising receipts of radio broadcast stations over the period 1971–75.

Simulated Profit vs. Loss Outcomes under Various Conditions Including record license fees as proposed by H.R. 6063

The following table demonstrates how the number of stations in each category of losses would have changed if the blanket record

license fee were required. The simulation embodies an assumption that the imposition of the fee-paying requirement would not effect the number of stations staying in the industry over time.

TABLE 8.—A COMPARISON OF OUTCOMES WITH AND WITHOUT THE RECORD MUSIC LICENSE FEE

Number of losses	Number of stations			
	Actual	Including license fees	Net change	Net change as percent of total
None	1,650	1,522	−128	−3.1
1	700	721	+21	+.5
2	527	538	+11	+.3
3	416	428	+12	+.3
4	366	409	+43	+1.0
5	447	488	+41	+1.0

Approximately 3.1 percent of the stations would have had a less favorable profit-versus-loss outcome over the period if the bill had been in effect.

The only category of stations affected would have been those in the no-loss category. If the bill had been in effect, 128 fewer stations would have remained in this category. The stations moving out of the no-loss category amount to 3.1 percent of the total number of stations in all categories. Of this group of 128, 21 would have suffered a loss in 1 year, 11 a loss in 2 years, 12 a loss in 3 years, 43 in 4 years, and 41 in all 5 of the 5-year period. These 128 stations together account for all of the increases in the number of stations in the remaining categories.

The majority of stations moving out of the no-loss category moved into the category of those stations reporting losses in their 4 or 5 years over the period.

In other words, of those stations which repeatedly report profits, those reporting expenses slightly under 1 percent [6] in any one year do so consistently each year.

This finding is difficult to interpret. It does seem unusual, however, that not one station reporting one, two, three, or four losses over the period, reported any one of those losses within 1 percent of revenues.

Excluding payments to owners

The FCC form which broadcasters submit requires those filing the form to indicate the dollar amount of total expenditures "which represent payments—salaries, commissions, management fees, rents, et cetera—for services or materials supplied by the owners or stockholders, or any close relative of such persons or any affiliated company under common control." In the following table, a comparison is made of how the profit-versus-loss outcomes change when these payments to principals are subtracted from total broadcast expenses before determining the profit-versus-loss outcome. It should be pointed out, however, that these results underestimate the significance of this factor. Not all station operators provide information on this question.

[6] The 1-percent rate only applies to stations with net advertising receipts of $200,000 or more. These stations constitute the group most affected. The calculations involve all size stations, however, some of which pay less than 1 percent.

TABLE 9.—COMPARISON OF PROFIT VERSUS LOSS OUTCOMES AFTER SUBTRACTING PAYMENTS TO OWNER, BY NUMBER OF LOSSES OVER THE PERIOD

Number of losses	Number of stations			Net change as percent of total
	Actual	Subtracting payments to owners	Net change	
None	1,650	2,402	752	18.3
1	700	526	174	4.2
2	527	355	172	4.2
3	416	286	130	3.2
4	366	226	140	3.4
5	447	311	136	3.3
Total				36.6

Note: The number of stations moving to a more favorable profit versus loss outcome category, when subtracting payments to principals, totals 1,504, or 36.6 percent of all stations. Over 18 percent of all the stations move into the no loss category when payments to principals are excluded from expenses.

This is strong evidence that many stations are owned and managed by the same individuals. In such cases, the goal of the manager/owner is not necessarily to maximize profits but to maximize personal income. Because of the Federal tax structure, it may be to the manager/owner's advantage to report no profit.

Managers of a company, who are also part owners of the firm, may enjoy a tax advantage by taking out of revenues a raise, fee, or bonus, for themselves instead of allowing those funds to become part of the firms pretax profit. From their point of view, profit is subject to double taxation, once through the corporate income tax system and again through the personal income tax on stockholder's dividends. Depending on individual circumstances, therefore, they may maximize their personal income net of taxes by minimizing the amount of revenue subject to corporate taxes.

Some of these expenses are very likely legitimate costs. Without a case-by-case audit, however, it would be impossible to tell how much of the amount paid to principals would otherwise have gone into corporate profits. In our opinion, it is reasonable to assume that at least some of the amount would have gone into profits.

Excluding other administrative expenses

Broadcasters are required to provide information regarding expenditures in four major expense categories: technical, program, selling, general and administrative, the fourth being a combined category. Within that last category there are line items for the following types of accounts:

General and administrative payroll (including salaries, wages, bonuses, and commissions)
Depreciation and amortization
Interest
Allocated costs of management from home office or affiliate(s)
Other general and administrative expenses.

In the following table a comparison is made of the way in which profit versus loss outcomes change when "Other General and Admin-

istrative Expenses" are substracted from total broadcast expenses before calculating the profit versus loss outcome of each firm. The rationale for this simulation is explained after the table is presented.

TABLE 10.—COMPARISON OF PROFIT VERSUS LOSS OUTCOMES AFTER SUBTRACTING OTHER ADMINISTRATIVE EXPENSES, BY NUMBER OF LOSSES OVER THE PERIOD

Number of losses	Number of stations			Net change as percent of total
	Actual	Subtracting other administrative expenses	Net change	
None	1,650	3,161	1,511	36.8
1	700	402	298	7.3
2	527	227	300	7.3
3	416	138	278	6.8
4	366	95	271	6.6
5	447	83	364	8.9
Total				73.7

Almost three-fourths, 73.7 percent of all stations, improve their profit versus loss outcome for the five year period, when Other General and Administrative Expenses are subtracted from total broadcast expenses before calculating the profit versus loss outcome.

Expenses included in this category include legitimate costs of operation. The fact that the category is such a significant one, however, in terms of the effect it has on the profit versus loss outcome, suggests that there should be more detail concerning the types of expenditures charged to this account.

Many radio broadcast station operators are also owners of other advertising concerns such as newspapers. It is possible that such multimedia owners can exercise discretion in charging joint production costs solely to the radio broadcasting operation. This could serve at least two purposes. One, since entry into the broadcast industry is regulated by the FCC, the threat of would-be competitors might be minimized by reporting no or low profits in broadcast industry. Two, being diversified in the advertising field, the multimedia owner may be able to balance declines in revenue in one division against advances in the other. If the losses charged to one operation exactly offset profits in the other, no corporate income tax liability is incurred. Any loss can be carried forward or backward in time to enable the owner to reduce past or future corporate income tax liabilities.

Excluding payroll

Payroll is the most commonly used example of variable costs in discussions concerning the economic behavior of the firm. The theory dictates that if (average) revenue is not sufficient to cover (average) variables costs, the firm would "shut-down", even in the short-run, which in the radio broadcasting industry would probably be some fraction of a full year. It would be totally inconceivable for a firm to operate continually over a 5-year period with losses exceeding total payroll each year.[7]

[7] Actually the shut-down point is reached when losses exceed total fixed costs. Since these are more difficult to measure, payroll is used as a proxy.

The comparison of profit versus loss outcomes among stations after subtracting total payroll from expenses is shown in the table below.

TABLE 11.—*Percent of radio broadcast stations experiencing losses after subtracting total payroll from expenses, by number of losses over the period*

Number:	Percent of stations	Number:	Percent of stations
0	91.74	3	1.19
1	4.14	4	.56
2	1.83	5	.54

Some stations operate and stay in business even though they consistently report losses which exceed payroll.

While the percentage of stations falling into the high loss (4 or 5) categories is very low, just over 1 percent, this finding must be considered quite unusual.

Comments concerning the interpretation to be made of some of the preceeding findings appear at the end of the profit and loss analysis section. At this point, attention turns to profit versus loss outcomes among different categories of stations.

Profit versus loss among classical music stations

Classical music stations have been operationally defined as those which are members of the Concert Music Broadcasters Association (CMBA).[8] The number of stations appearing in the 1976–77 directory of CMBA totals 268. Of these, however, 90 stations identify themselves as commercial stations. Only 60 classical music stations are represented in this analysis, almost all of which are commercial stations. Stations not represented may have had different call letters in 1971 than those appearing in the 1976–77 directory, they may have been coded as nonreporting by the FCC as educational or religious stations even though they filed a report, or they simply may have been delinquent in fact, and not filed in one of the 5 years. The call letters and broadcasting area of the classical music stations included in the analysis appears as appendix 3.

The table below shows the number and percent of stations in each of the two categories in terms of the number of losses reported over the period. There are significant differences between the two groups among stations reporting no losses over the period and among stations reporting five losses over the period.

TABLE 12.—NUMBER AND PERCENT DISTRIBUTION OF CLASSICAL AND NONCLASSICAL STATIONS, BY NUMBER OF LOSSES OVER THE PERIOD

Number of losses:	Number of stations		As a percent within group category	
	Classical	Non-classical	Classical	Non-classical
0	13	1,637	21.7	40.5
1	12	688	20.0	17.0
2	9	518	15.0	12.8
3	6	410	10.0	10.1
4	7	359	11.7	8.9
5	13	434	21.7	10.7

[8] CMBA originated as a result of an 1970 meeting of concert music station representatives who had gathered to discuss problems peculiar to classical music broadcasting. Recently, CMBA has begun negotiating with performing rights societies for a licensing fee for its members lower than that paid by other broadcasters.

From the table, it is clear that these two categories appear significantly different.

More than twice as many of the classical stations fall into the 5-out-of-5-year loss category.

The proportion of classical stations reporting profits in every year was only about one-half that of the nonclassical stations.

The financial position of classical stations is worse than the average for nonclassical stations—if it is correct to make two assumptions. One, that categories of stations which report a higher than average percent of members in the no-loss category are better off than average and two, that categories of stations which report higher than average number of stations in the 5-out-of-5 loss are worse off than average. Only 21.7 percent of the classical stations reported no losses at all over the period, compared to 40.5 percent of the nonclassical stations. Also on the negative side as far as the classical stations are concerned, 21.7 percent of them reported consecutive losses over the 5-year period, compared to 10.7 percent of the nonclassical stations.

The finding that classical stations are less likely to report profits than nonclassical stations suggests that consideration should be given to the possibility to determining record license fees for serious music differently from nonserious music. While such a suggestion would increase the administrative complexities of implementing the bill, it would appear necessary if the act is not to have a differential impact on classical stations compared to nonclassical ones.

Profit versus loss differences by metropolitan, nonmetropolitan area

Each radio broadcaster is licensed to operate a station in a specific geographic area, either metropolitan or nonmetropolitan. The table below shows how stations grouped by area differ in terms of the frequency of the occurances of losses over the period. As was the case with classical stations, the greatest percentage differences occur in the best and worst categories.

TABLE 13.—NUMBER AND PERCENT DISTRIBUTION OF RADIO BROADCASTING STATIONS, BY METROPOLITAN, NONMETROPOLITAN AREA, BY NUMBER OF LOSSES OVER THE PERIOD

	Number of stations		As a percent within area category	
Number of losses:	Metropolitan	Non-metropolitan	Metropolitan	Non-metropolitan
0	698	952	34.6	45.6
1	323	377	16.0	18.0
2	252	275	12.5	13.2
3	228	188	11.3	9.0
4	224	142	11.1	6.8
5	292	155	14.5	7.4

Although the differences are not quite as significant as in the case of classical stations, the trend is similar. One category of stations are high in one type of loss situation and high in another.

Metropolitan area stations are almost twice as likely to report losses as nonmetropolitan area stations in 5 years out of 5.

Metropolitan area stations are less likely to report profits in each year than nonmetropolitan stations.

This suggests that nonmetropolitan area broadcasters may be better able than their metropolitan area counterparts to absorb a cost increase without moving from a profit to a loss category.

Profit versus loss differences by region

Stations were grouped on the basis of the State within which they were licensed to broadcast. In every case, only one State is referenced in the financial report, even though the broadcast area may include several States. The percent distribution of stations grouped by region is shown in the table below.

TABLE 14.—PERCENT DISTRIBUTION OF STATIONS GROUPED BY REGION, BY NUMBER OF LOSSES OVER THE PERIOD

	Percent distribution								
	Northeast	Middle Atlantic	East North Central	West North Central	South Atlantic	East South Atlantic	West South Central	Mountain	Pacific
Number of losses:									
0	25.2	37.2	42.6	50.1	38.1	44.8	45.8	44.3	25.3
1	15.3	17.9	17.0	14.6	19.3	19.3	14.1	16.4	15.2
2	22.1	11.1	12.8	13.1	13.6	12.0	12.1	9.0	12.9
3	14.5	9.0	8.8	8.8	10.2	9.4	11.5	11.4	11.5
4	9.2	11.1	7.8	5.6	9.3	6.8	7.3	8.4	15.2
5	13.7	13.6	10.9	7.8	9.3	7.7	9.3	10.5	19.8

Note: Because of a coding error, region codes for stations in 4 States are missing. The States are Massachusetts, Utah, Nevada, and Oregon.

Consistent with the general trend so far when grouped by region, categories of stations with low numbers of stations in the no-loss category are also likely to be high in the 5 out of 5-year loss category. This is clearly the case in three regions, the Northeast, Middle Atlantic, and Pacific regions.

> The radio broadcasting stations in the Northeast, Middle Atlantic, and Pacific regions are more likely than stations in other regions to report consistent losses.

Profit versus loss differences by revenue class size

All radio broadcast stations were grouped into one of four categories on the basis of their total receipts net of commissions. The first group, or class 1, had net receipts of $25,000 or less after a full year of operations. Stations in this class would pay no record license fee. Class 2 stations had net revenues in the $25,000 to $100,000 range. A record license fee of $250 would be required of this group. The class 3 stations, in the $100,000 to $200,000 net revenue range, would pay $750 in record license fees. And the class 4 stations, with net revenues in the $200,000 and over category, at the blanket rate, would pay 1 percent of net advertising revenues. The distribution of losses among stations grouped by class size is shown in the table below.

TABLE 15.—NUMBER AND PERCENT DISTRIBUTION OF RADIO BROADCASTING STATIONS, BY REVENUE CLASS, BY NUMBER OF LOSSES OVER THE PERIOD

	Number of stations				As a percent of total within class category			
Number of losses	Class 1	Class 2	Class 3	Class 4	Class 1	Class 2	Class 3	Class 4
None	7	396	553	694	8.5	30.4	40.6	51.0
1	8	222	256	214	9.7	17.1	18.8	15.7
2	13	202	170	142	15.9	15.5	12.5	10.4
3	9	168	123	116	10.9	12.9	9.0	8.5
4	16	132	120	98	19.5	10.1	8.8	7.2
5	29	182	140	96	35.4	14.0	10.3	7.1

More than 65 percent of the stations with net receipts under $25,000 report losses more frequently than profits.

Stations in the $250,000 to $100,000 net revenue class are also more likely than the average station to be in the high loss categories.

Stations in the $100,000 to $200,000 range are about average with respect to loss outcomes.

The class of stations showing the highest percentage of all profit years and fewest no-profit years, is that in the $200,000 and above category. (Nevertheless, 15 percent of these stations appear in the 4 to 5 years of losses categories.)

These findings suggest that the rate schedule proposed in the bill appears to be appropriately scaled against the profitability of stations in the specified class categories. It is not clear, however, that profitability, and the ability to pay, necessarily varies directly with increases in net revenue.*

Profit versus loss outcomes by type of broadcasting unit

On the basis of their filing status in 1971, stations were grouped into types of broadcasting units. The units include AM, FM only; FM affiliated with an AM in the same area but filing separately; and AM/FM. It would be possible to separate out of the analysis those stations which changed reporting status during the five year period. The number of cases in which this occurred among the stations represented, however, is minimal. As a result, they are included in the table below. These tabulations represent some very unusual findings.

TABLE 16.—NUMBER AND PERCENT DISTRIBUTION OF RADIO BROADCASTING STATIONS, BY TYPE OF BROADCASTING UNIT, BY NUMBER OF LOSSES OVER THE PERIOD

Number of losses	Number of stations				As a percent within type of unit category			
	AM	FM	FM affiliate	AM/FM	AM	FM	FM affiliate	AM/FM
None	955	67	28	600	40.7	21.4	18.7	46.3
1	419	37	19	225	17.8	11.8	12.7	17.4
2	299	48	29	151	12.7	15.3	19.3	11.7
3	253	41	20	102	10.8	13.1	13.3	7.9
4	198	48	18	102	8.4	15.3	12.0	7.9
5	224	72	36	115	9.5	23.0	24.0	8.9

FM and FM affiliates of AM stations but filing a separate report have very similar profit versus loss outcomes when compared to one another. In terms of the number of reported profit-making years compared to the number of losses, both are lower than average.

AM/FM stations filing a joint report each year have a profit versus loss profile for the period which is not at all like that of the former group. AM/FM stations are twice as likely as FM or FM affiliates to have reported profits in each of the five years covered in the analysis. AM/FM stations are half as likely to have reported consistent losses, i.e., in each of the four or five years, compared to the FM or FM affiliates.**

*The following language was deleted, by the author, from the report as originally submitted, in order to more accurately reflect the data: *There still are some peculiarities in the outcome trends which are appearing. For example, the percent of stations in the four to five loss category first are high, then low, then high again, then low as revenue size increases.*

While there is no obvious explanation for this, some possibilities are suggested at the end of this section.

**The preceeding two paragraphs were substituted by the author in order to more accurately reflect the data. As originally submitted, the report stated:

AM and FM affiliates of AM stations but filing a separate report have very similar profit versus loss outcomes when compared to one another. In terms of the number of reported profitmaking years compared to the number of losses, both are higher than average.

AM/FM stations filing a joint report each year have a profit versus loss profile for the period which is not at all like that of the former group, but instead, is equal to or worse than that of FM independents. AM/FM stations are half as likely as the average number of stations to have the average number of stations have reported profits in each of the 5 years over the period. Compared to the average station, they are almost twice as likely to have reported losses in the 4 or 5 years over the period.

FM affiliates of AM stations are twice as likely as their FM independent counterparts to report profits in every year. And the FM affiliates are half as likely as their FM independent counterparts to report losses in 4 or 5 years out of 5.

It is difficult to understand why the FM Independent and FM stations as a group should differ so significantly from their AM/FM counterparts. The fact that an FM station which is an affiliate of an AM in the same area chooses to file separately may be meaningful in itself. These findings do tend to suggest, in our opinion, that questions of ownership, and, or, management structure may have an influence on the reported number of losses over time.

Total revenues versus total expenses over the period

A calculation was made of the sum of net revenues over the period and the sum of total expenditures for each station. Total (net) revenues were then compared to total expenditures to determine which was greater. The result was then tabulated for each station on the basis of the number of losses reported by the station during the 5-year period. While not a perfect measure, this calculation attempts to get at the question of whether or not stations receive in 1 or more profitable years an excess of revenues over expenses which more than compensates them for the amounts by which their revenues fell short of expenses during years of reported losses. The results are shown below.

TABLE 17.—5-YEAR TOTAL RADIO BROADCAST STATION REVENUES MINUS TOTAL EXPENSES, NUMBER OF LOSSES OVER THE PERIOD

Number of losses	Total revenues greater than total expenses	Total revenues less than total expenses
None	1,650	0
1	674	26
2	375	152
3	100	316
4	8	358
5	0	447

For 26 out of 700 stations, the amount of the loss reported in 1 year exceeded the sum of profits in the four remaining years.

More than two-thirds of the stations reporting two losses over the period received total profits in the remaining periods which exceeded their total of losses.

For the overwhelming majorty of stations reporting three or more losses, total expenses exceeded total costs.

In 8 out of 366 cases, 2.2 percent, total revenue exceeded total costs despite poor reported losses over the period.

These findings suggest that there is not such a great volatility in profits each year which is sufficient to compensate stations for losses in the nonprofitable accounting periods. While there are some instances where this has occurred, they are considerably few in number.

Conclusions concerning the profit and loss analysis and recommendations concerning changes in the FCC reporting requirements

The incidence of profit versus loss outcomes of various categories of stations does not conform to that expected in a competitive, profit maximizing, cost-minimizing market. In our opinion, the findings presented above strongly suggest that income interests of owners of radio broadcasting stations are being met, in many cases, other than through dividends from profits. That being the case, it is inappropriate for broadcasters to claim that their ability to pay any increase in the cost of doing business should be based solely on the level of reported profits.

To fully understand the situation would require that a study be conducted of a randomly selected number of stations to determine for example, the extent to which payments to owners provide manager/owners with income in excess of their opportunity cost, and the extent to which other administrative expenses may include expenditures for items which may actually reflect joint costs of production. This would appear to be a relevant question, especially among stations reporting consistent losses. This necessarily implies an investigation into the degree and nature of joint ownership and a disaggregation of consolidated income statements in those cases where a station is a wholly owned subsidiary of a parent company. Such a study is not necessary, however, if one accepts, and is satisfied with, the above stated conclusions.

In our opinion, the FCC should require that broadcasters report greater detail concerning the nature of payments to owners and other administrative expenses. In addition, the FCC should be empowered to audit randomly financial statements as a check on their accuracy. Further, licensees should be required to provide information concerning ownership along with their annual reports. In those cases where the radio broadcasting station is a wholly owned subsidiary, financial data concerning the parent corporation should be required.

If accepted, the above recommendations, unfortunately, would impose additional administrative costs on broadcasters. It is this group, however, which has relied on the FCC analysis of their financial data in arguing that they are unable to pay, with the implied threat that many would be forced out of the industry because of low or nonexistent profits. If their claims are valid, therefore, they should be willing to accept the idea of a special study or the idea of additional reporting requirements.

ADVERTISING RATES AND THE ABILITY TO PASS ON COST INCREASES TO PURCHASERS OF STATION TIME

In the previous section it was suggested that the level of reported profits in the radio broadcasting industry is not necessarily a valid indicator of the ability of station operators to sustain an increase in the cost of doing business without incurring hardship. In our opinion, the findings presented above clearly indicate that the tenacity with which operators hold on to stations which repeatedly report losses can only mean that profit maximization is not necessarily their ultimate goal.

Nevertheless, as the evidence presented below tends to suggest, it may very well be the case that radio broadcasters, as a group, will be able to pass on the increase in the cost of operations to advertising sponsors who purchase station time.

Relative costs of radio, televison, and print media, nationally

There are two levels at which sales of radio advertising time takes place. One is at the national level, the other is at the local or metropolitan area level. At the national level, large corporations typically utilize the services of advertising agencies to reach a desired audience. For their clients, the advertising agencies perform two major functions.

One, the advertising agency composes the ad to be used on the air. Two, they determine which stations have a listenership which would be most appropriate for airing the ads of their client. With respect to this second function, the agencies refer to radio audience surveys conducted by Arbitron,[9] and on the basis of those surveys calculate the gross point ratings achieved through individual contracts with stations.

In addition, some of the larger advertising agencies [10] use contract data to prepare statistical information of interest to their customers, and others.

Only one advertising agency, Ted Bates & Co., prepares an annual analysis of trends which attempts to compare the media in terms of the cost per thousand of consumers reached. The annual average cost per thousand trends, beginning with 1968 figures, the first year in which they were calculated, and running through 1977, appear in the table on the following page.

The table demonstrates quite clearly that costs per thousand have increased in the radio industry at a lower rate than increases in any other media. While the table on the following page does not contain information concerning every form of media for which data was published in the cited article, in no case were increases in any of the types of media represented in the article less than that of either spot or network radio costs over the 1968–77 period.

Theoretically, therefore, if there is substitutability of radio for television advertising (or vice versa) the demand for radio advertising should increase as its relative cost decreases. If this is the case, the equilibrium price of radio advertising would increase along with revenues. It would be possible for advertising rates to increase in the radio broadcasting industry so that the rate increase would compensate stations for the increase in costs associated with the revision bill. In such a situation all the existing stations might receive exactly the same absolute amount of profits as they did before the increase in demand and the increase in costs. In this situation, however, profits as a percent of revenues would fall.

TABLE 18.—COST PER THOUSAND TRENDS

Year	Television				Radio	
	Day network	Evening network	Spot	Newspapers	Spot	Network
1968	100	100	100	100	100	100
1969	91	104	115	105	91	100
1970	103	115	131	111	99	102
1971	100	103	129	115	101	101
1972	94	113	121	118	106	91
1973	105	126	111	125	106	91
1974	113	132	122	132	108	91
1975	122	131	122	156	114	92
1976	152	150	151	173	118	102
1977	189	184	164	190	124	111

Source: Broadcasting magazine, Jan. 31, 1977, p. 38.

[9] Arbitron is the only corporation currently engaged in the systematic collection of data regarding radio listenership. The surveys are conducted in 60 metropolitan areas throughout the U.S. For the most part, the areas surveyed are among the largest in population.

[10] Broadcast Advertisers Reports, Inc., also prepares data on expenditures in network radio broadcasting by monitoring the ABC, CBS and NBC radio stations.

The sensitivity of radio advertising expenditures to changes in relative costs, nationally

An attempt was made to measure empirically the sensitivity of radio advertising expenditures to changes in the relative cost of radio to television and print media. The analysis (details of which appear in appendix 4) took place in two stages. First, it was necessary to relate advertising expenditures by corporate sponsors to aggregate economic variables. According to the analysis, total advertising expenditures, on all media, varies directly and very closely with domestic gross national product and the level of corporate profits in the current year. The second stage of the analysis involved an attempt to express the relationship of radio advertising expenditures, given the overall level of demand for advertising via all media, to the cost of advertising via radio compared to television and print media.

While the results are not conclusive, they tend to suggest that expenditures on radio advertising are somewhat insensitive to changes in the relative costs of advertising via radio. This could be interpreted to mean that demand for advertising via radio is relatively inelastic, there are no good substitutes. If this is the case, that demand is relatively inelastic, the implication, again, is that radio broadcasters should be able to pass on some, if not all, of the cost increase onto advertising sponsors.

The evidence is not clear, in part, because the cost per 1,000 index only goes back as far as 1968. Unfortunately, according to research staff persons employed by Ted Bates & Co., there is no comparable trend data to which the cost per 1,000 information could be related which would permit a more comprehensive analysis.

Local area rate and revenue changes in a sample of cities

Radio, similar to most newspapers, serves a local audience. Most of the revenue coming from advertising sponsors comes from the sale of station time to local, as opposed to national sponsors. In 1975, among all AM and AM/FM stations, for example, over 75 percent of the revenues from the sale of station time to advertisers came from the sale of time to local advertisers or sponsors.

No organization attempts to prepare a cost index for local area radio advertising rates in a systematic fashion. Furthermore, as pointed out earlier, Arbitron only performs radio audience surveys in 60 cities. Consequently, there are no data collected by organizations in the industry which provide an estimate of the cost per 1,000 paid by local sponsors for radio advertising in their area.

Convinced of the importance of knowing the trends in local areas with respect to radio advertising rates (and revenue) this firm undertook an original survey to shed some light on the matter. For this purpose a random sample of cities was selected to represent localities [11] on a national basis. A detailed explanation of the random selection procedure is contained in the appendix 5.

[11] Metropolitan areas were chosen originally on the assumption that Arbitron audience survey data could be included in the analysis. Despite our attempts through their local office to secure a contract with Arbitron to provide us with access to their radio audience survey data, the necessary personnel have not responded to our calls or letters.

For every radio broadcasting station in each of the cities included in the sample, for the years 1971 and 1975, a record or calculation was made of the rate charged in those years by each station for a 30-second advertisement aired six times a week, for a 1-week period, during the time slot between 7:30 and 8 a.m.[12] The sources of these data were 1971 and 1975 November issues of Standard Rates and Data. These are list prices. Discounts are offered in various ways. However, as long as percentage discounts remained constant over the 5-year period, the analysis is not affected. The important variable is the percent increase in a base rate over time.

The rates charged by all the stations in each city in each of the years were then added together to estimate the amount which would have to be paid by an advertiser to reach 100 percent of all radio listeners who would have been listening to the radio in that city during that time slot. That sum, for each city, one for 1971 and one for 1975, was then divided by the Bureau of Census population estimates of that city for the respective years to yield an estimated cost per 1,000 of reaching radio listeners in that broadcast area. Rate information from approximately 1,000 stations are included in the analysis. The actual stations and their rates are shown, by city, in appendix 6.

A calculation was then made of changes in the cost per 1,000 of radio advertising rates in each of the cities included in the sample. The data for the cities were then grouped by region to yield an (unweighted) average change in rates. FCC reported revenue changes for the cities included in the sample were then averaged and grouped by region. The results of this effort are shown in the table below.

TABLE 19.—ESTIMATES OF PERCENTAGE CHANGES IN RADIO BROADCAST REVENUES AND LOCAL SPOT ADVERTISING RATES OVER THE PERIOD 1971–75, BY REGION

Region	Radio broadcast revenues	Advertising rates
Northeast	18.0	22.7
Middle Atlantic	17.4	26.6
East North Central	17.6	28.0
West North Central	20.7	32.3
South Atlantic	30.8	38.9
East South Central	28.9	28.1
West South Central	33.4	27.7
Mountain	39.9	19.7
Pacific	30.1	19.2

As indicated above, radio broadcast revenues increased over the period, despite estimated increases in advertising rates. In some regions, revenues increase faster than advertising rates. Necessarily this implies that stations in those areas were able to sell more station time.

This can be interpreted as evidence of ever-increasing demand for advertising via radio. In such a situation, again, radio broadcasters should be able to pass on some of the increase in the cost of doing business to advertising sponsors without necessarily suffering losses in reported profits.

It seems appropriate to bring up at this point the question of whether revenues should be adjusted to reflect constant dollars. The

[12] The Radio Advertising Bureau indicates that 7–8 a.m. is the hour when the greatest percentage of radio listeners are listening to the radio.

purpose of the Consumer Price Index (CPI) is to determine whether or not an urban wage earner's labor income, expressed in current dollar terms, is sufficient to purchase more or less, and by how much, than his or her previous labor income. The purpose of the GNP deflator, an implicit price deflator, is to adjust a current dollar amount by some factor so as to determine whether the quantity of goods and services produced in the economy have increased or decreased relative to some benchmark figure. It is irrelevant and inappropriate, therefore, to attempt to adjust revenues to something other than current figures, if the index proposed is the CPI or the GNP implicit price deflator.

Instead, an appropriate cost index to introduce would be one which attempts to measure changes in the costs of purchasing factors of production which are peculiar, in this case, to the radio broadcast industry. The ultimate purpose of such as exercise, however, would be to determine whether production costs are increasing faster than revenues. The significance of this is that it sheds light on what is happening to profits, ostensibly the main concern of business firms. Unfortunately, such a cost index does not exist. In our opinion, it is inappropriate to use the CPI or a price deflator. The issue really comes down to the question of profits, and this is one which we feel has already been discussed in sufficient detail elsewhere in the report.

Additional evidence concerning the demand for radio advertising

Advertising receipts are the primary source of revenues for commercial stations. Consequently, the demand for radio broadcast licenses can be viewed as being derived from the demand for radio advertising. Net changes over time in the number of licensees, therefore, can serve as some indication of the demand for radio advertising.

Based on FCC aggregate data, some of which is presented below, concerning the number of stations in operation each year, there is additional evidence that the demand for radio advertising has increased.

The number of stations

Between 1971 and 1975, the total number of radio broadcast stations in operation the full year, with advertising sales of $25,000 or above, increased from 6,159 to 6,782, a rise of 10.1 percent. Much of the increase took place among FM independent broadcasters and in the number of AM stations establishing FM affiliates. See table 20. In the table, the latter group is represented primarily by the FM affiliates filing separate financial reports from their AM counterpart.

TABLE 20.—RADIO BROADCAST STATIONS OPERATING THE FULL YEAR WITH OVER $25,000 IN TIME SALES, 1971–75

Year	AM	AM/FM	FM affiliate [1]	FM independent	Grand total [2]
1975	2,783	1,477	428	617	6,782
1974	2,792	1,460	359	587	6,658
1973	2,775	1,398	301	525	6,397
1972	2,725	1,450	231	475	6,331
1971	2,673	1,451	185	399	6,159

[1] FM affiliates represented in this column are associated with an AM station but file separate financial reports with the FCC. Those AM and FM stations filing jointly are represented under the column AM/FM.
[2] In this column only, AM/FM stations are considered as 2 separate stations.

Source: Federal Communications Commission.

During the same period, the number of AM and AM/FM stations operating a full year with revenues in excess of $200,000 increased from 1,397 to 1,966, over 40.7 percent. See table 21. Note that these figures exclude FM independent stations and those FM stations affiliated with an AM station but filing separately. These data are not published by the FCC.

TABLE 21.—NUMBER OF AM AND AM/FM STATIONS WITH REVENUES IN EXCESS OF $200,000, 1971–75

Year	Number of stations	Percent increase from previous year
1975	1,966	4.6
1974	1,875	6.1
1973	1,761	7.9
1972	1,632	16.8
1971	1,397	----------

Source: Federal Communications Commission.

There is evidence that growth in the total number of stations in operation is being experienced in each region of the Nation. An analysis of the net change in the number of stations in operation in SMSA's of 200,000 or more residents, over the period 1971–75, indicated that 157 out of 160, the total number of such SMSA's, experienced an increase in the number of stations in operation.

An aggregation of the data on SMSA's by region demonstrates that only one region, the Pacific region, experienced a decline in the number of stations in operation over the period. In that region, the total number of stations in operation in the larger SMSA's fell by 1 station, from 195 to 194.

TABLE 22.—CHANGE IN THE NUMBER OF RADIO BROADCASTING STATIONS BY REGION, 1971–75

Region	Number of stations in operation		Net change
	1971	1975	
New England	70	72	2
Middle Atlantic	188	198	10
East North Central	198	213	15
West North Central	86	94	8
South Atlantic	278	296	18
East South Central	110	125	15
West South Central	131	154	23
Mountain	85	94	9
Pacific	195	194	−1
Total	1,341	1,440	99

While it is clear that the total number of station licenses are increasing, another important question to consider is how many stations go out of business each year and how many are sold. These questions are discussed below.

The number of licenses which are surrendered each year is low compared to the number of stations in operation. The number amounted to less than one-tenth of 1 percent, on average, over the period 1971–75. The actual number of stations which surrendered their licenses, technically, which had their operating authority deleted, in each of those years, is shown in the table below.

TABLE 23.—STATIONS WITH OPERATING AUTHORITY DELETED DURING THE YEAR, BY TYPE OF BROADCASTING UNIT

	AM	AM/FM	FM independent	FM affiliate
1975	1			
1974	6	1	2	
1973	6		1	
1972	4			
1971	6			

Before the FCC takes the action of deleting a station operator's authority to broadcast, it is often the case that the operator fails to submit a financial report in one or more of the preceding years or submits part-year reports, whether or not the station was in operation for a part year. As a result, it was not possible to determine what the profit-versus-loss situation was for the stations which "went dark" during the 1971–75 period. A longer time period of analysis would be required for that analysis. It would seem reasonable to assume that the station experienced financial difficulties, however, before surrendering or being asked to surrender their licenses.

Most operators who want to divest themselves of their stations, however, do not surrender their licenses but transfer them to those willing to purchase the station. Such transfers have to be approved by the FCC. Approval depends on several factors, a major one involving the other media holdings of the purchasing firm. Data concerning the value of radio station transactions approved over the last 16 years are shown in the table below.

TABLE 24.—VALUE AND NUMBER OF RADIO STATION TRANSFERS OF OWNERSHIP, 1961–76

Year	Dollar volume of transactions approved	Number of stations changing hands	Average transaction price
1961	$55,532,516	282	$196,924
1962	59,912,520	306	195,793
1963	43,457,584	305	142,484
1964	52,296,480	430	121,620
1965	55,933,300	389	143,787
1966	76,633,762	367	208,811
1967	59,670,053	316	188,829
1968	71,310,709	316	225,667
1969	108,866,538	343	317,395
1970	86,292,899	268	321,988
1971	125,501,514	270	464,820
1972	114,424,673	239,	478,764
1973	160,933,557	352	457,197
1974	160,998,012	369	457,989
1975	131,065,860	363	361,062
1976	180,663,820	413	437,442

As shown in the table, the number of stations changing hands each year varies considerably. There is no obvious trend with respect to time. Average transaction prices have tended to increase with time, however, but were at their highest point in 1972. Since then the average would appear to have declined.

The evidence in this case is not clear. While a fall in the average transaction price might suggest that the demand for station licenses has fallen, this is not necessarily the case. The variation in average prices may be partially explained by differences in the types of sta-

tions traded or their locations. A more meaningful measure, which would also measure capital gain, would be the average difference in original purchase and resale prices.

In general, however, the overall evidence discussed above [13] suggests that the derived demand for radio advertising is increasing.

THE ECONOMIC IMPACT ON PERFORMERS

The analysis of the impact on performers is divided into three parts. The first deals with the existing trust, benefit, and welfare funds in the record industry. These funds have been established through collective bargaining and are not the result of any legislation. This information is provided primarily for reference purposes. It is not anticipated that the performance rights amendment will have any effect on the amount contributed to these funds nor the way in which the collected funds are distributed. The information regarding funds is relevant, however, in assessing the economic needs of performers engaged in producing sound recordings, a topic discussed in the third part of the analysis.

The second part addresses itself to the matter of estimating the overall administrative costs associated with a performing rights society and, in particular, the costs of collecting data to be used in determining the distributional shares of performers. The nature of the data collected and the costs associated with the data collection effort have important implications in terms of both the amount to be distributed to performers and the equity of the distribution among the intended beneficiaries of the bill.

Part three focuses on economic conditions among performers in general, such matters as employment, unemployment, and earnings, but with specific reference to the needs of those engaged in the production of sound recordings. This part of the analysis is based primarily on survey data collected under a separate U.S. Department of Labor grant and administered by the AFL–CIO Professional Employees Council. Also in this part, estimates are made of the number of performers who will receive performance royalties from sound recordings, and the average amounts they will receive.

Existing trusts and funds in the music industry

In the following section, a brief description is given of the trust, welfare, and pension funds created as a result of negotiations between the American Federation of Musicians (AFM) and record companies. While other union members would be affected by the performance rights amendment, the AFM is the group affected the most. There are three such funds in existence. A short statement concerning the general purpose of each fund, is contained below.

American Federation of Musicians Employees Pension and Welfare Fund

By far the largest fund is the American Federal of Musicians, Employees Pension and Welfare Fund. Given the title of the fund, the

[13] The study of the radio industry, "Radio 1985", funded by the National Association of Broadcasters, strongly supports this conclusion.

purpose is obvious. Actually there are two distinct funds under this title. One is a conventional retirement fund, which meets the minimum Labor Department and Internal Revenue Service standards necessary to qualify for special tax treatment. In effect, qualifying for such treatment means that the pension plan is administered in a way which guarantees that the interests of members of the plan are protected in terms of eligibility, vesting, and benefit accrual rights. The other is a separate fund to provide members with three types of insurance plans. These include a form of survivors benefits, catastrophic illness protection, and a limited disability plan.

Music Performance Trust Fund

The Music Performance Trust Fund was established in 1948 for the purpose of financing admission-free public performances by musicians. Typically, the events are scheduled in parks, schools, and similar places which accommodate large audiences. The union's (AFM) intention in establishing the fund was to stimulate public interest in attending live performances of musicians whom the union believed were being put out of jobs because of record production and radio broadcasting. Semiannual payments are made into the fund by record companies on the basis of the revenues from their sales of records. Since the fund was established, approximately 1 million live performances have been financed through the fund at a cost of over $130 million.

Phonograph Record Manufacturer's Special Payments Fund

The photograph record manufacturer's payments fund is financed in the same manner as the Music Performance Trust Fund. The special payments fund was created in 1960 because of dissatisfaction on the part of some union members over the way in which the moneys were collected and distributed through the Music Performance Trust Fund. Members engaged in making sound recording felt that they should receive some of the funds being collected from the record companies for deposit into the Music Performance Trust Fund. Consequently, a decision was reached to divide the revenues collected from the manufactures equally, with one part going to the trust fund and the other to the special events fund.

The funds contributed to the special payments fund are distributed annually to all musicians who have participated in the production of sound recordings during the most recent 5-year period. Shares are determined on the basis of the amount earned (at union scale) by each member producing records during the period. In 1976, record companies contributed a total of $11.9 million dollars to the fund. Administrative expenses amounted to 6.7 percent of that total. The remainder, $11.1 million, was distributed to the eligible union members.

Administrative costs and distributional equity

The amount of performance royalty fees distributed to performers and record companies will equal the amount collected minus the administrative costs incurred by the performing rights society in

fulfilling its function.[14] The functions ordinarily would include negotiating fees issuing licenses, detecting and prosecuting unlicensed users, sampling public performances to estimate the use of member's works on an individual basis, and distributing the collected revenues to the membership on the basis of the estimated use of their work.

The purpose of this part of the analysis is to estimate the amount which would be distributed to performers and record companies under alternative administrative schemes, and demonstrate the significance which future decisions will have in determining the actual amount to be distributed. (The amount to be distributed is hereafter referred to as the Distribution Fund.) One major factor is the relationship between the organization representing performers and record companies, and the existing domestic performing rights societies representing authors and composers.[15] The nature and extent of the relationship have direct and considerable cost implications for the organization established to represent the performers and record companies.

The second, related issue has to do with the nature and amount of the performance data collected by the society representing performers and record companies. Decisions in this regard have implications in terms of cost, and more importantly, in terms of the number of performers sharing in the revenues collected.

For purposes of discussion, reference is made to three alternative administrative systems. They are referred to under these headings: Parallel, augmented, and substitute systems. Under each heading is discussed the nature of the data necessary to estimate the cost of the system. Ranges for the cost of each are then discussed. It should be noted that under the parallel system, even with the maximum compulsory fee applied to all stations, the administrative costs might exceed the total amount of the fees collected.

Parallel system

Under the parallel system, the performing rights society representing performers and record companies would have to duplicate each of the functions performed by the performing rights societies representing authors and composers. There would be no exchange of information between the performing rights society representing performers and the societies representing authors and composers. The main difference between the work done by the two types of societies would be that the society representing performers would calculate credits on a performer and record company basis rather than on an author and composer basis.

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[14] Record industry spokesmen have indicated that the costs of administration should not be borne equally between the two groups. Specifically, Sidney A. Diamond, speaking in behalf of the Record Industry Association of America (RIAA), said, "Since there would be many more individual payments involved in dealing with performers, the (performing rights organization representing performers and record companies) presumably would charge the administrative expense of paying the performers on the one hand and the record companies on the other against the respective shares of each group," p. 506, pt. 2, of the hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee (90th Cong., 1st sess.) (1967).

[15] In the United States, the majority of authors and composers are represented by either of two performing rights organizations. The older of the two is the American Society of Authors, Composers, and Publishers (ASCAP), founded in 1914. The second of the two, Broadcast Music, Inc. (BMI), was established in 1940 and represents 31,000 writers and 16,000 publishers. A third society, SECAP, represents a small number of religious music publishers.

While it might seem reasonable to assume that the existing societies would be willing to share information and expenses with a similar society representing performers, this is not necessarily the case. First of all, the existing societies do not currently collaborate to reduce costs in collecting performance data even among themselves. Second, if the societies representing authors and composers were convinced that the organization representing performers and record companies posed an economic threat to their membership, it is understandable that they would be unwilling to cooperate. There is already some indication that this is the case. During the recent period when hearings were being held on the Performance Rights Amendment, BMI issued the following statement: "While (BMI is) prepared to support legislation that will properly compensate the performer, we can do so only if we are assured that the position of BMI writers and publishers will not be adversely affected." [16]

The costs of administration

Total annual expenditures of ASCAP and BMI serve as a starting point in estimating the costs which an organization performing similar functions would incur in behalf of performers and record companies. In 1976, ASCAP spent a total of $18.8 million. During the same year, BMI spent approximately $5.6 million.

The total cost of administering the terms of the amendment, however, would not equal the sum of expenditures incurred by both ASCAP and BMI for at least three reasons. First, there is duplication of effort between the two organizations. Utilizing different data collection techniques, both organizations monitor radio broadcasters, without collaborating, as mentioned above, to reduce costs nor increase the size of the sample taken of airplay. At considerably higher costs, ASCAP monitors broadcasts using tape recordings of airplay. BMI relies on station-supplied logs. Second, the two societies are under consent decrees of the U.S. Supreme Court.[17] This fact necessarily imposes reporting requirements on both organizations. The costs associated with these reporting requirements are costs which they would not experience in the absence of the decrees. Third, the amendment prescribes a fixed fee, as opposed to a negotiated license fee. Consequently, unlike ASCAP or BMI, the performing rights society representing the performers and record companies would not incur any costs in negotiating rates.

The augmented system

The second type of administrative system would be less costly to operate and is based on the assumption that ASCAP and/or BMI agree to cooperate with the performing rights organization representing performers and record companies. The basic principle behind

[16] Letter dated May 27, 1977, from Edward M. Cramer, president of BMI, to Harriet Oler, senior attorney-adviser, Copyright Office, U.S. Library of Congress.

[17] *United States* v. *American Soc'y of Composers, Authors and Publishers,* 1950–51 Trade Cas. 62,595 at 63,752 (S.S.N.Y. 1950); *United States* v. *Broadcast Music, Inc.,* 1966 Trade Cas. 71,941 at 83,326 (S.D.N.Y.). Both the ASCAP and BMI decrees prohibit them from discriminating in rates between licensees. Both are also required at least to offer licensees a rate schedule which varies in proportion to the use made of copyrighted musical works. Only ASCAP's decree, however, calls for regulation of the internal structure and operations of the society. In addition, only ASCAP's rates are subject to judicial review. (This information is taken from the article authored by Bard and Kurlantzick appearing in the George Washington Law Review, vol. 43, No. 1, November 1974.)

the system is to avoid duplication of effort, and to augment, or alter slightly, the tasks within the function of the cooperating society(ies) so as to serve the needs of performers and record companies as well as authors and composers.

Under this system, users licensed by ASCAP and BMI, de facto, would be licensed by the performing rights society representing performers. Surveillance operations would automatically serve the interests of all parties concerned. Changes would have to be made, however, in terms of the way in which information is collected and stored for the purpose of calculating credits for the membership.

To estimate the costs of administering the system, four sets of data would be required. First, would be a breakdown of expenses concerning the parallel system. Second, estimates would be needed of the incremental costs [18] which ASCAP and BMI would incur in handling the changes in their procedures necessary to accommodate the needs of the performing rights society representing performers and record companies. Third would be the charges ASCAP and BMI would make for providing the performing rights society with the required information and services. And last would be the estimates of the costs which the performing rights society representing performers and record companies would incur for those functions or tasks which it must complete itself.

The substitute system

The costs of administering the third type of system are the most difficult to estimate. However, this system could result in a distribution fund greater than that associated with either of the two previously mentioned systems.

Under the substitute system, the performing rights society representing performers and record companies acts as the primary data collection agent in terms of monitoring radio broadcasters' use of individual musical works. As a substitute data collection agency, the performing rights society representing performers and record companies would charge ASCAP and BMI for the use of, or access to, information concerning the use made by broadcasters of individual works. In order for the system to be practical, two key factors would need to be employed which are not currently in use: (1) new technology, and (2) shifting some of the costs of data collection onto broadcasters.

For those performance rights societies relying on tape monitoring of airplay, the cost of that method of identifying individual works could be reduced considerably by implanting in the work an identification code which is inaudible to the human ear but perceptible using special electronic equipment. Until now, despite the alleged feasibility of such a system, record companies have had no incentive to produce records in this manner for identification purposes.

Broadcasters could be required to supply the Performing Rights Society representing performers and record companies with tapes of

[18] The incremental costs should not be considerable. Most broadcasters announce the name of the artist performing each piece played, as opposed to the author of the work. It is assumed that each performer only makes one version of a record with one record company at a time. Consequently, it should be possible to determine which record company is associated with the work being played as soon as the artist is known.

airplay as a condition of licensing. This is similar to the current situation whereby broadcasters are required to submit a log to BMI on all music perfomed for 1 week per year, on request. This reporting system might also provide the Register of Copyrights with data necessary to prescribe a license fee other than the blanket rate. The prorated rate should take into account the use made of copyrighted recordings.

Until the necessary technology is developed, however, some sort of parallel or augmented system would be necessary. Even after the technology is developed, there would be a period when records being played might not have the newer technology embodied in their manufacture. Over time, however, especially if record companies reissue old releases, most records played over the air could be identified under this system.

Estimates of the costs of administration and the size of the distribution fund

The Performing Rights Society representing performers and record companies would have to represent all record companies and all performers, ASCAP and BMI each represent only a subset of all composers, authors and publishers. As pointed out earlier, ASCAP expenses for the year ending December 31, 1976 amounted to $18.8 million. BMI expenses amounted to approximately $5.6 million. The total amount generated in the form of record music fees from radio and television broadcasters in 1975 would have amounted to an estimated $15.4 million. Under a parallel system, modeled after ASCAP, expenditures of the Performing Rights Society representing performers and record companies could exceed revenues.

A major difference between ASCAP and BMI which has a significant effect on costs is the way in which each goes about monitoring performances. ASCAP hires monitors to tape 3 or 6 hour time segments of airplay. Based on preliminary discussions with individuals familiar with the ASCAP sytem of taping, the costs of this type of performance monitoring is estimated at $7.5 million dollars annually. BMI, on the other hand, analyzes station-provided logs. Mr. Edward M. Cramer, president of Broadcast Music, Inc., has indicated [19] that his organization spends between $470,000 and $1.15 million for "logging and clearing" operations. Obviously the costs versus the benefits of these alternative data collection procedures need careful attention. The costs of a parallel or augmented system will vary significantly depending on the procedures adopted to monitor performances.

The substitute system has the potential of requiring the last expenditure of revenues for administration and at the same time reducing the administrative costs of ASCAP and perhaps BMI. Discussions as to whether or not it is a realistic possibility at this time, however, are purely speculative. The interest of the two societies in such a system would need to be explored.

In the following section, another issue is discussed which is unclear at this time but which will have an important impact on the way in which the performers and record companies are affected by the revision bill.

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[19] Statement by Mr. Edward M. Cramer to the National Commission on New Technological Uses of Copyrighted Works, March 31, 1977, p. 20.

The objectives of a performing rights society: Profit maximization versus distributional equity

The stockholders of a firm, in most cases, are united in motive. They want the managers of the firm to maximize profits. To fulfill this purpose, according to standard economic theory, managers increase production up to the point where increases in cost equal increases in revenue.

The motives of an individual member of a performing rights organization, on the other hand, is to maximize his or her earnings from the commercial use of his or her material. From an individual member's point of view, the optimal financial position of a performing rights organization may not be at the point where increases in total cost to the society equals increase in total revenues accruing to the society. To understand why this may be the case, it is necessary to consider the factors which have an effect on revenues and costs within a performing rights organization.

Similarities with respect to maximizing profit

A performing rights organization may increase the revenue collected for its members in three ways. One is to negotiate higher license fees with commercial users. Another is to increase its surveillance activities to detect unlicensed users. A third way is to increase the audits conducted on users whose fee is calculated as a percent of revenue.

With respect to each of these three choice situations, the officers of a performing rights organization would base their decisions as to how the organization should proceed on the same criteria used by the managers of a profitmaking firm. In the following section, it is demonstrated that this is not always the case.

Dissimilarities

A performance rights society may increase costs, and not revenues, by increasing the monitoring (taping or analyzing programing logs) of licensed users. This may imply collecting information about what is played during nonprime as well as prime time. It also may imply collecting information from locations which are difficult to reach because of their physical location. Or, it may mean monitoring all stations in an area, not just the most popular ones.

The society may choose to adopt a data collection effort which will add to costs and not to revenue so that members whose works are only played in the off-hours or in distant places receive some part of the funds collected for distribution.[20]

Graphically, we may consider the situation as described on the opposite page. The society would be maximizing the amount to be distributed to its membership if it limited its costs to that level associated with Q_1 in figure 22. At that point, A, additions (marginal cost, MC) to total cost (TC) equals additions (marginal revenue, MR) to total revenue (TR). That is the same as saying that maximization occurs at the point at which the rate of change in total cost equals the rate of change in total revenue.

[20] The society, however, is likely to impose some sort of constraint on total expenditures. ASCAP, for example, budgets its administrative and data collection expenditures at approximately 20 percent of anticipated revenues.

The rates of change in the values of total cost and total revenues can be found disgrammatically be drawing straight lines tangent to both variables at points corresponding to each Q. The rates of change can be calculated from the slopes of the tangents. The rates are equal when the slopes of the tangents are parallel. This occurs at Q_1 in figure 23.

The constraint on total costs is expressed as a percent of total revenues and is represented by the dotted line in Figure 23. The intersection D, of this line and the total cost line determines the extent to which the society will permit costs to exceed those associated with Q_1 in its monitoring operations. In both figures, this occurs at Q_2.

The shaded area in Figure 22, (A–B–C) represents the excess of costs over revenues which the society incurrs for the sake of insuring that more of its members are represented among those receiving a share of receipts. These additional members would not have received any performance royalties if monitoring were limited to Q_1 in the diagrams.

The validity of the above statement relies on a yet unmeasured but assumed function: the direct relationship between the number of members whose work is monitored and the costs of monitoring. In the presentation thus far, the assumption has been made that it is of the following form suggested in Figure 24.

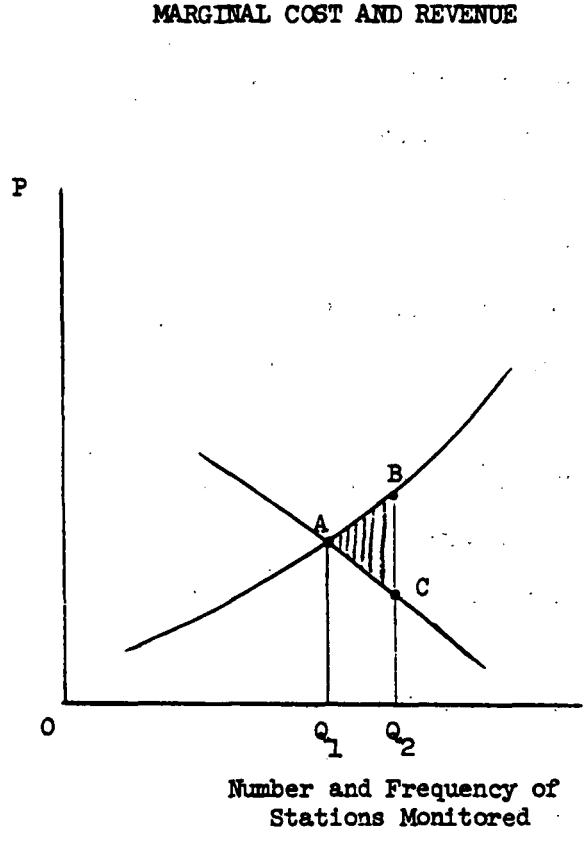

FIGURE 22

TOTAL COST, TOTAL REVENUE AND
THE EXPENDITURE CONSTRAINT

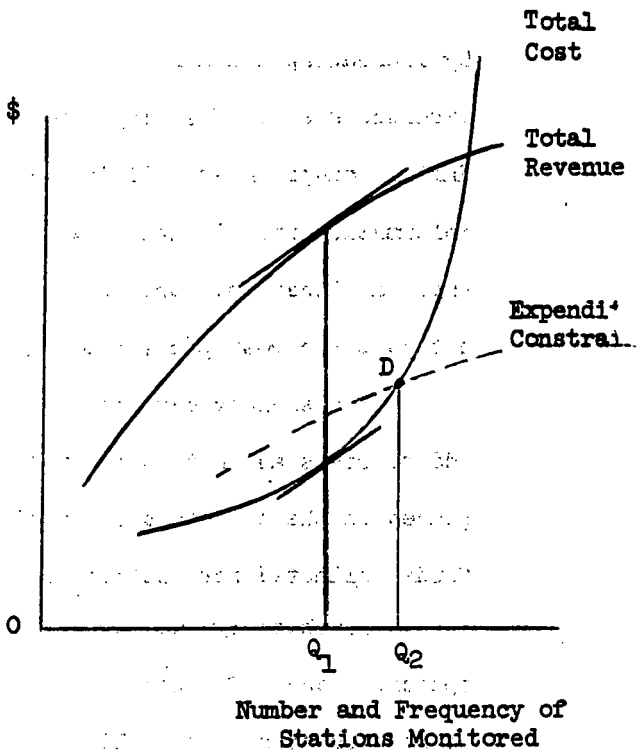

FIGURE 23

RELATIONSHIP BETWEEN THE PERCENTAGE OF MEMBERS REPRESENTED
BY MONITORED PERFORMANCES AND THE COST OF MONITORING PREFORMANCES

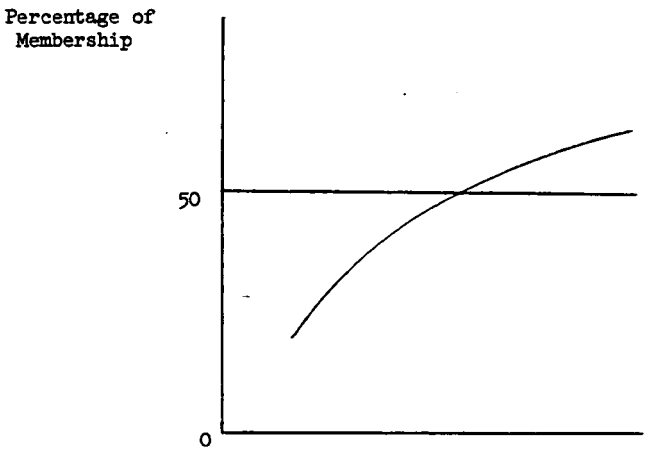

FIGURE 24

As suggested in Figure 24, relationship between the two variables is non-linear. At relatively low levels of total cost, large increases in the percentage of members represented can be achieved per dollar spent. After a certain point, however, increases in the percentage represented become ever more costly (the total cost line becomes closer to horizontal). The maximum difference between total revenues and total costs (not shown) may occur at a point at which less than 50 percent of the membership is represented. Acting as a democratic body, one man, one vote, the membership directs the society to increase costs at least to the point where 50 percent of the membership is represented (subject to the constraint that costs do not exceed a specified percent of revenues).

Even if a system of collecting performance data resulted in a calculation of credits for all performers, there still remains the question of whether or not the credits can be weighted in such a way so as to favor one group of performers compared to another group. The weights given to each sample point, for example, could be based on data which would bias the calculated credits in favor of performers from one region of the country compared to another. Should credits from commercial stations be weighted differently from those of non-commercial stations?

Employment and Earnings among Performers [21]

In considering the impact of proposed changes in the copyright law on performers several economic issues are raised. Are performers already benefitting from existing procedures and if so to what extent? Is there a demonstrated need to increase the earnings of performers?

To obtain answers to these questions we relied on data developed in a current survey of employment and unemployment in the performing arts. The survey, conducted in the summer and early fall of 1977, was performed by the Human Resources Development Institute (HRDI) of the AFL–CIO under a contract with the U.S. Department of Labor. Actual work on the survey was done by the same firm conducting this study under a subcontract with HRDI. Questionnaires were distributed to a sample of the membership of five performing arts unions: the American Federation of Musicians, the American Guild of Musical Artists, the American Federation of Radio and Television Artists, Actors' Equity, and the Screen Actors Guild.

Although it is recognized that not all performers belong to the performing arts unions, it is likely that a majority of those who consider themselves full time professionals in the performing arts do. The survey was directed to the unions' active members. In any case union membership lists provided the only feasible base from which a nationwide representative sample could be drawn. If anything, restriction of the survey to union membership would bias the results in favor of the broadcast industry since it is likely that those involved in the production of sound recording are more likely to be union members than not. For example, if earnings are low for union performers who presum-

[21] This section of the report was written by Jocelyn Gutchess, principal investigator responsible for the survey of performing artists. A final report on the survey is due in late November.

ably have some collective bargaining power, they are apt to be even lower for non-union performers.

The questionnaire included several questions specifically directed to the issues involved in extending copyright benefits to performers involved in creating sound recordings. A copy of the questionnaire is attached as appendix 7. Survey responses to the specific questions pertaining to the production of sound recordings are described below. At this writing, responses to all of the survey questions have not yet been tabulated. Therefore answers to some questions regarding the relationship of the existing royalty payment systems to performers cannot be answered. For example, we cannot yet say which, if any, income group among performers is most apt to receive royalties from record sales. However, as this additional information becomes available, it will be supplied.

Analysis of questionnaire responses

1. Participants in the survey were asked if they had ever participated in making any sound recordings. The percentage answering yes is shown below.

Ever participated in making sound recordings

	Percent
American Federation of Musicians (AFM)	54
American Guild of Musical Artists (AGMA)	44
American Federation of Radio & TV Artists (AFTRA)	33
Actors' Equity	28
Screen Actors Guild (SAG)	32

The performers most involved in making sound recordings are clearly the musicians and musical artists. Although members of other performing arts unions do participate in making sound recordings, this form of artistic endeavor is of less importance to them. It is interesting that, for the musicians, rate of participation in making sound recordings varies considerably according to geographic area. For example, 93 percent of the musicians in the Nashville area answered yes to the question compared to only 47 percent in Washington, D.C., and a national average of 54 percent.

2. Those performers who indicated that they had at one time or another participated in making sound recordings were asked if they had made such recordings in 1976—the most recent full calendar year. Affirmative responses to this question were as follows:

MADE RECORDINGS IN 1976

	Percent of those who ever made recordings	Percent of all respondents
AFM	54	29
AGMA	51	22
AFTRA	63	21
Actors' Equity	44	12
SAG	39	12

These figures indicate that, generally speaking, participation in making sound recordings is not an activity that occurs every year. Only slightly more than half of the musicians who ever made sound

recordings, made such recordings last year. Looking at the data another way, less than a third of the musicians participated in making records last year, while for AGMA and AFTRA, only about one in five participated in this activity. In absolute terms, this means that in the three unions most concerned, about 30,000 of their members participated in making sound recordings last year.

3. In order to determine whether 1976 was a normal year insofar as recording activity was concerned, those who ever participated in making sound recordings were asked if they made more, fewer, or no records in the previous year. Responses indicated that 1976 was, in fact, fairly normal year; if anything slightly better than 1975. Individual union responses were as follows:

OF THOSE MAKING SOUND RECORDINGS IN 1976, HOW DID 1976 COMPARE WITH 1975?
[In percent]

	AFM	AGMA	AFTRA	Equity	SAG
Made more in 1976 than 1975	26	29	25	36	28
Made fewer in 1976 than 1975	24	22	21	11	18
About the same	33	18	38	27	33
Made more in 1975	15	24	11	21	21

4. Those who participated in making sound recordings in 1976 were asked to indicate how many such recordings they made. The purpose of this question was to determine the relative significance of this activity in their overall work activities. The responses indicate that generally speaking the performers make very few recordings in a year. Considering that a minority of all performers are involved in making recordings at all, the importance of sound recordings as a source of work is very small. The responses to this question are shown below:

OF THOSE WHO MADE ANY SOUND RECORDINGS IN 1976, HOW MANY WERE MADE?
[In percent]

	AFM	AGMA	AFTRA	Equity	SAG
Only 1	26	49	24	39	36
2	19	39	16	23	13
3 to 4	19	4	17	9	13
5 to 9	13	8	8	7	8
10 or more	15		27	20	21

A quarter of the musicians (AFM) made only one recording in 1976 and more than three-fifths made fewer than five recordings. The relative infrequency of recording was even sharper among the musical artists (AGMA). Almost one-half of this group made only one recording, and another two-fifths made only two. Only 8 percent of the group made more than four recordings during the year.

5. All participants in the survey were asked about their individual earnings in 1976. Individual earnings, as distinct from family income, were defined to exclude unemployment compensation, social security or retirement benefits, or any payments from Aid to Families with Dependent Children or other public assistance programs. Respondents

were asked to indicate which of a number of specified ranges of before-tax earnings they fell in. The distribution of individual 1976, earnings of those who ever made sound recordings are shown below:

[In percent]

	AFM	AGMA	AFTRA	Equity	SAG
Less than $7,000	30	41	25	40	43
$7,000 to $12,999	26	20	16	22	16
$13,000 to $18,999	14	18	17	14	11
$19,000 to $24,999	10	13	12	5	13
$25,000 and over	14	1	25	16	13

This data indicates that earnings of performers are more apt to be low than high and further that they are clustered at the low and high ends of the scale. This suggests that for those in the performing arts things are either very good or very bad. Most performers are clustered at the low level on the income ladder, but the few that make it, make it big. It is worth noting that almost one-third of the musicians earn less than $7,000 (the poverty level for a family of four is currently defined as being $5,850) and more than one-half earn less than $13,000 (median family income for 1975 was $13,719). More than two-fifths of the musical artists, stage actors, and screen actors earn less than $7,000 and one-quarter of the radio and TV artists.

6. Those who ever participated in making sound recordings were asked a series of questions to determine to what extent they benefit from royalties on the sale of any such recordings. They were asked whether they currently receive royalties, if so on how many different recordings, and whether they receive royalties as authors, composers or performers. Responses to these questions are shown below.

6a. Do you currently receive royalties from the sale of sound recordings you ever made? Affirmative responses were as follows (in percent): AFM, 23; AGMA, 5; AFTRA, 19; Equity, 12; SAG, 7.

Clearly only a minority receive any royalties from sales of recordings. The highest percentage of recipients of royalties is among the musicians, and, even there, less than one-fourth of those who ever participated in making recordings currently receive royalty payments from sales of those recordings. Two factors may be at work here. One possibility is that most performers are not in a strong enough position to bargain with the record companies for a sales royalty as a condition for participation in making the record. Another possibility is that contracts, even when entered into, may have such high recoupment costs that as a practical matter the level of sales where royalties might be paid is never reached.

6b. On how many different recordings do you receive sales royalties?

PERCENTAGE OF THOSE WHO RECEIVE ROYALTIES

	AFM	AGMA	AFTRA	Equity	SAG
1 record	21	40	26	41	57
2 to 3 records	30	20	16	17	14
4 to 9 records	13	20	26	17	14
10 or more	13	20	21	8	
Don't know/no answer	23		11	17	15

For most performers, royalties are generally received on very few records; one or two is the typical pattern.

6c. Of those who received royalties on sales, what proportion receive them because they are performers, what proportion receive them because they are composers, and what proportion receive them because they are authors? The responses are shown below. Percentages are based on those receiving royalties.

RECEIVE ROYALTIES CURRENTLY

[In percent]

	As performers	As composers	As authors
AFM	65	48	9
AGMA	100		
AFTRA	84	37	37
Equity	83	8	8
SAG	86	14	29

Of those performers who receive royalties at all, most do so in their role as performers. Some also receive royalties as composers, particularly among the musicians. The musical artists receive royalties only as performers. There is obviously some overlap—with some individuals receiving royalties both as performers and composers or authors. The true extent of the overlap will not be known until further analysis of the data can be made. It must be remembered, however, that the above figures represent percentages of those receiving royalties—which in turn is a small proportion of those participating in making recordings.

7a. Those who had ever participated in making sound recordings were asked to indicate whether any of their 1976 earnings came from royalties (as opposed to current earnings) and if so, what proportion. Affirmative responses were as follows (in percent): AFM, 17; AGMA, 5; AFTRA, 16; Equity, 12; SAG, 6.

These responses are comparable to the responses to the previous question concerning current earnings, indicating that the proportion receiving royalty payments was about the same.

7b. Those who indicated that a share of their 1976 earnings was in the form of royalty payments were then asked to indicate what percentage of earnings was in this form. Responses are shown below:

[In percent]

	AFM	AGMA	AFTRA	Equity	SAG
1 percent or less	35	80	25	33	17
2 to 5 percent	41	20	13	25	17
6 to 10 percent	12		13	25	
More than 10 percent			38	8	66
Don't know/no answer	12		11	9	

This data show that for 76 percent of the musicians who received royalty income in 1976, those payments represented only 5 percent or less of their earnings. For 35 percent, such royalty payments were only

1 percent (or less) of total earnings. For the musical artists, the situation was even more striking. In that group for 80 percent of those receiving royalty payments in 1976, such payments represented 1 percent or less of total earnings; for another 20 percent of the group royalty payments were between 2 and 5 percent of total earnings. The screen actors who received royalties on recordings appeared to collect a larger share of their earnings in the form of royalties—but it must be noted that only 2 percent of the screen actors receive sales royalties at all, suggesting that these larger benefits accrue to very few people. The data show that on the whole performers get a very small share of their income from sales of records, and that—with probably some notable exceptions—since total earnings are apt to be low, the dollar return to most individuals for royalties is also apt to be low.

8. Those who received royalty payments as part of their 1976 earnings were asked a series of questions to determine if 1976 was a typical or aberrant year. More than half of all groups but one answered that 1976 was about the same as the previous year. Slightly less than half (47 percent) of the musicians indicated that their royalty earnings were different in 1976 from what they were in 1975 were divided, with most indicating 1976 was not quite as good as 1975 (except for the musical artists) but the difference apparently was small.

9. Those receiving royalty payments in 1976 were asked the same question as those currently receiving royalty payments as to the reason for receiving such payments; that is, whether as a performer, composer or author. Answers were comparable to the previous questions except for the musical artists (AGMA). None currently receive royalties as composers or authors, but a substantial proportion did in 1976.

RECEIVED ROYALTIES IN 1976

[In percent]

	As a performer	As a composer	As an author
AFM	71	47	6
AGMA	60	60	40
AFTRA	75	33	25
Equity	75	13	12
SAG	87	33	33

Again, as in the previous question, there is some overlap—with some individuals receiving royalty payments not only as performers but also as composers and/or authors. The exact extent of the overlap will not be known until cross tabulations are completed. However, even this preliminary data show that among musicians the overlap could range from 20 percent to 60 percent, and for the musical artists from 18 percent to 47 percent.

Summary

Returning to the two issues raised at the beginning, are performers already benefiitting from the existing procedures in regard to the production and sales of records and are they receiving adequate compensation for their efforts, survey data indicate negative answers to both questions. Only a small proportion of those engaged in the production

of sound recordings receive any financial benefits from the sale of those records. In the three groups most affected only 23 percent of the musicians benefit from sales, 5 percent of the musical artists and 17 percent of the radio and TV artists. Furthermore, annual earnings of performers as a group are generally low, with almost a third of the musicians, and two-fifths of the musical artists and radio and TV artists earning $7,000 a year or less. Finally, although there is clearly some overlap between performers and composers and/or authors, it is far from universal. The exact extent of such overlap will be know as soon as cross tabulations are completed.

THE ECONOMIC IMPACT ON THE RECORD INDUSTRY

The economic impact on the record industry is difficult to estimate, essentially because of a lack of data. Some information concerning profits does exist, however, and will be discussed below. Also in this section is an analysis of trends in the industry with respect to employment, the number of firms, and the employment-size class of firms.

Trends with respect to profit

During congressional hearings on the question of whether or not the mechanical royalty rate should be increased, record industry spokesmen presented some of the following information concerning profits among their members over time:

TABLE 25.—SELECTED INCOME STATEMENT ITEMS OF A SAMPLE OF RECORD COMPANIES, 1967–74

[In millions of dollars]

Year	Net sales of recordings	Net profit on sales	Net profit after taxes	Net profit as percent of sales
1967	256.4	9.8	10.7	4.1
1968	290.1	16.7	15.0	5.1
1969	410.1	39.3	28.3	6.9
1970	521.2	42.3	34.9	6.6
1971	548.8	23.8	27.4	4.9
1972	583.5	32.1	34.6	5.9
1973	572.7	9.4	19.7	3.4
1974	702.0	31.8	35.4	5.0

The data comes from a survey of 10–20 firms with sales representing 45–60 percent of those in the industry as a whole. In 1973, according to the information presented at the hearings, the net sales data referenced above represented 56.8 percent of total industry sales. Assuming this is correct, estimated sales of all record companies would have amounted to a little over $1 billion.

If the record license fee had been a requirement in that year, and the record companes received $5 million for distribution, after deducting administrative expenses, the total amount to be distributed would be less than one-half of 1 percent of net sales and 8 percent of total after tax profits in the industry. That assumes existing companies would share in the distribution of performance royalties in the same proportion that they contribute to record sales. It may be the case that extent record manufacturers will not receive performance royalties in the same proportion that they account for record sales. Record performance royalties may go to individuals (who hold copy-

rights on sound recordings) who leave the record industry while their works are still being performed.

Trends with respect to concentration in the industry

There appear to be some very definite trends in the record industry with respect to employment and the number of firms as shown in table 26.

TABLE 26.—EMPLOYMENT AND NUMBER OF ESTABLISHMENTS IN THE RECORD AND PRERECORDED TAPE INDUSTRY 1967–74

Year	Number of employees	Total Number of reporting units	Number of reporting units by employment size							
			1 to 3	4 to 7	8 to 19	20 to 49	50 to 99	249	500	500 plus
1967	19,052	287	122	48	33	42	14	14	7	7
1968	18,001	308	127	42	52	32	26	14	6	9
1969	17,650	334	131	51	59	38	18	22	8	7
1970	18,333	340	138	47	52	49	20	19	8	7
1971	19,178	354	133	53	47	53	33	20	9	6
1972	19,798	361	130	55	53	57	30	22	8	6
1973	21,573	393	142	60	68	55	25	27	8	8
1974 [1]	22,422	507	246	75	63	52	26	28	10	7

[1] Employment size categories changed slightly in 1974. The basic findings are still necessarily true, however.

Source: County Business Patterns: U.S. Summary 1967–74.

Employment is growing in the industry, despite the low in 1969, and there are an ever-increasing number of smaller establishments entering the field. As a corollary to this, it can be shown that the percent of total sales accounted for by the larger companies is decreasing.

These findings would tend to indicate that the level of profit in the record industry based on the survey data referenced above may not be indicative of the profit level in the industry as a whole. Secondly, the finding that so many smaller units are entering the industry has administrative cost implications.

In the absence of valid and complete data concerning economic profits in radio broadcasting and the recording industry, no comparisons can be made concerning the level in each of the two sectors. If economic returns to owners were as low as the reported level of profits discussed in the profit-and-loss analysis, many radio broadcast station operators would have left that industry already.

It is not clear that enactment of the Performance Rights Amendment will result in any increase in the amount of serious music recorded nor an increase in the production of other forms of nonrock music, as some industry spokesmen would suggest. It remains to be determined whether the performance-versus-sales distribution among record producers benefits the larger or smaller firms (measured in terms of record sales).

In summary, it can be said that the effect of a change in the copyright law as it would affect companies is slight but a favorable one.

APPENDIX 1. A CRITIQUE OF THE BARD AND KURLANTZICK ARTICLE

The article [1] by Bard and Kurlantzick is relatively long (86 pages) and, at some points, repetitious. Rather than restate and criticize sequentially the arguments presented there, we will cite and discuss the issues which, in our opinion, are most significant and deserving of comment.

Introduction and summary

The purpose of the Bard and Kurlantzick article is to relate their assessment of the merits and potential outcomes of a change in the copyright law. The change being considered, as expressed in the Performance Rights Amendment of 1977, would extend performance rights to holders of copyrights on sound recordings. Briefly, this would have the effect of requiring commercial users of records and tapes, primarily radio broadcasters, to pay a performance royalty to the performers who made the records and record companies producing them. (Authors, composers, and music publishers already receive such fees from broadcasters.) Bard and Kurlantzick conclude that there is no strong argument in favor of the bill, and that if enacted, it would not have the intended results.

The strongest of the authors' arguments mitigating against passage of the bill in our opinion, are not those which challenge any of the positions taken by proponents of the bill. Instead, their most serious allegations are those which attempt to show that the intended effects of the bill will not be met. In this regard, they suggest two hypothetical outcomes which are of special concern. One is that the revenues collected will not be divided equally between the record companies and the performers. The second is that composers and authors will recover most of the revenues accruing to the record companies as a result of the bill. Both of these outcomes are contrary to the congressional intent, as evidenced by testimony presented during hearing on a similar amendment in 1975 and the actual wording of statutes within the proposed legislation.

In the following pages, we explore these two alleged possibilities in detail, analyzing the assumptions behind, and content of, their arguments. Other issues are also discussed. Some of the points they raise are valid and, it would appear to us, necessitate modifications of the bill if it is to have the effect intended by proponents of the bill. In most cases, however, either of two conditions will be shown to exist which invalidate their conclusions. One is that the economic forces they claim would lead to such outcomes are not strong enough to achieve the results they suggest. The second is that the situation which they present is an unrealistic one, based on false assumptions, and, therefore, irrelevant to an analysis of possible effects. In addition, it will be demonstrated that even if they could occur, by rewording the bill, and monitoring its effects over time, such unintended results would be avoided or eliminated through regulatory action on the part of the Register or Copyright Tribunal.

Many of the other statements and opinions of the authors, of lesser importance, are addressed directly in the text of this report. For example, considerable attention is given in the text to the problem of estimating transaction costs, the cost of administering the bill. This has significant implications in determining the amount of funds to be distributed among record companies and performers. It is, however, discussed in detail in the text. Another issue they raise has to do with

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[1] The article discussed in this critique is entitled "A Public Performance Right in Recordings: How To Alter the Copyright System Without Improving It," written by Robert L. Bard and Lewis S. Kurlantzick, and published in the George Washington Law Review, vol. 43, No. 1, November 1974.

the performers affected by the bill. According to the authors, the claim that certain performers are injured under the present system is unfounded. In what follows, our analysis suggests differently.

The main issues

The main intent of those favoring the bill, as mentioned earlier, is to provide record companies and performers with a right already enjoyed by holders of copyrights on musical works' performance rights. The bill clearly states that one-half of all royalties to be distributed shall be paid to the copyright owners (record companies), and the other half to be paid to the performers (104(e)(3)(A). The authors of the article contend, however, that "the ultimate distribution of these revenues * * * is likely to differ from the statutory scheme" (p. 209). Secondly, composers should gain by capturing most of the revenues collected by record companies pursuant to the proposed legislation" (p. 236). Each of these situations are discussed separately in the following section.

The division of revenues collected between record companies and performers

According to the authors, there are two ways in which the distribution of fees collected could deviate from the 50–50 split recommended in the legislation. One results from what could be termed a "loophole" in the law. Another is based on an anticipated reaction to the change in the law on the partof the record companies. The scenario projected by the authors is presented and critiqued below. In addition, we present another possible development which should be considered and guarded against if the intent of the law is to be followed.

The "Loophole"

The relevant section (114)(e)(3)(A) of the Performance Rights Amendments of 1977 [2] reads in full:

> One-half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to the performers to be shared equally on a per capita basis, of the sound recordings for which claims have been made *under clause (1)*. (Emphasis added.)

Clause (1) refers to the license fees which users shall deposit with the Register of Copyrights. Limited to the above situation the bill would seem to guarantee a division of the music license fees as intended. However, the bill also states that "Copyright owners, performers, and copyright users * * * are encouraged to establish a private, nongovernmental entity to assume the collection and distribution functions of the Register of Copyrights" (114)(f) after approximately 1 year. One implication of establishing such an entity would be that no funds would then be collected by the Register of Copyrights. That being the case, based on a strict interpretation of the law, the legislatively mandated division of funds would apply only to an empty account.

To remedy the situation, it would appear that the bill should be reworded so that (1) the Register of Copyrights never relinquish

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[2] All comments concerning the proposed legislation refer to H.R. 6063, cited as the "Performance Rights Amendment of 1977," introduced in the House of Representatives by Mr. Danielson (Dem.-Calif.) April 5, 1977.

responsibility for collecting the fees or, (2) that the 50–50 split be required of all fees collected pursuant to the legislation, whether deposited with the Register of Copyrights or some similarly designated agent.

Renegotiations of contracts—the authors' position

Bard and Kurlantzick make two points with respect to the way in which record companies might recoup money collected by performers as a result of the passage of the bill. First, however, they make a major assumption. "The record companies and performers are interested only in the performers' total compensation," (p. 207) which can be divided into income derived from the sale of records and income resulting from the public performances of those records, "the division into record sale and public performance components is irrelevant." (p. 207) From this they conclude,

(1) "Downward adjustments would be made in that component of the performer's compensation attributable to record sales." (p. 207) and

(2) The only check on market power of the record companies to adjust compensation downward would be the union minimum wage scale.

Criticism

The performers who are the intended beneficiaries of the bill may be divided into two major groups, and within those major groups, they can again be divided into two categories. The first major distinction to be made is between those performers who are still making records and those who are not. It should be obvious from the testimony presented at the hearings on the Performing Rights Act of 1965 that congressional sympathies lie in part with those performers whose records continue to be broadcast all practical possibilities for sale of the records have passed. Most of the performers in this group are no longer making records. These are the artists responsible for the music which is now described as "golden oldies."

Within both of the major groups, it is important to distinguish the name artist from all other performers involved in the recordmaking process who are recognized in the bill. These include instrumentalists, background singers, conductors, actors, narrators, and others. According to the legislation as proposed, all these performers will share equally (per capita) in the distribution of funds associated with the sound recordings they created.

Name artists typically sign agreements with record companies which provide that the artist will receive royalties from the sale of records after the recording company has "recouped" the costs associated with the single or album in question. The authors state that the downward adjustments in performer's income "would be accomplished within the contract, which defines the performer's compensation with respect to record sales." (p. 209)

There are three responses to this allegation. First of all, a very small number of the performers affected by the bill sign such contracts. Of those that sign them, according to a 1966 survey by the National Committee for the Recording Arts, only 13.8 percent ever receive such roy-

alties. The survey data discussed in the body of this report also suggests that very few performers who make records receive royalties from sales.

Second, there is an important distinction to be made between performer's income which may be viewed as proprietary by record companies and that which is not. Record companies do not contract with performers in such a manner as to take the performer's total income into account. They make no claims on performer's income attributable to live performances, even though the performers are likely to play music contained in their records during such appearances.

Third, performer's income from performance royalties in no way would reduce record company's income from the same source. Receipts from record sales, on the other hand, do involve a subtraction from the total: the difference, which goes to the performer, would otherwise have been retained by the record company.

Another scenario could be projected, however, which would allow the record companies to "recoup" some share of the performer's funds.

The law states that money collected should be divided equally among record companies and performers, per capita, for all sound recordings for which claims are made. A crucial question is "per" which "capita." Are head counts taken at the time that the records are made, or, on the basis of the number of individuals recognized by the Register as legitimate claimants to performance royalties, after having filed the proper credentials. If it is the latter count which serves as the denominator in a per capita distribution formula, then the record companies would have a financial incentive to see to it that only performers who have recoupment clauses file the proper credentials. While the bill would not allow a performer to sign over his or her rights to performance royalties, it is possible to imagine that recoupment contracts could be reworded in such a way that the performer agrees to pay some of his or her recording costs to the record company out of performance royalties.

If the record companies can secure from performers who do not sign sales-related contracts, an agreement not to register as claimants for performance royalties, they may very well recoup a significant portion of the revenues which are intended for the performers.

A remedy to this situation may not necessitate any changes in the law. Instead, it should suffice for the Register to prescribe by regulation an entitlement procedure which precludes the above mentioned possibility. Whatever the solution to the problem, if indeed it exists, some attention should be given to this matter as it has direct implications for the intended beneficiaries of the bill.

The bill explicitly states that "The Register shall prescribe by regulation" (114) (e) (1) procedures by which individuals engaged in the production of sound recordings demonstrate their entitlement to compulsory license fees. The regulations, therefore, could guarantee that the above scenario does not develop.

Composers versus the record companies

The second main issue the authors raise has to do with the alleged possibility that composers will recoup record license fees from the record companies. The authors construct an elaborate economic frame-

work within which they demonstrate that, under certain conditions, the authors and composers will suffer income losses as a result of the bill. Among the assumption that are necessary for this to occur are, one, that broadcasters will not increase advertising rates as a result of the bill and, two, that the main license fee presently in effect is below the level which maximizes author and composer income from commercial broadcasters. In response to this alleged "injustice," Bard and Kurtlantzick suggest that the authors and composers will attempt to extract this "lost" income from the record companies by increases in the mechanical royalty rate.

The validity of the first assumption, that radio broadcasters will not increase advertising rates is doubtful. There is clear evidence, discussed in the text, that stations have increased rates without reducing total revenues. Evidence suggests that the demand for radio advertising is increasing and that it may be relatively elastic. In both these situations, cost increases can be passed on to advertising sponsors. The record license fees would not have to come out of funds that might otherwise have gone to composers and authors.

The second assumption, that music license fees are presently below a fee-maximizing level, cannot be determined, and, in our opinion, is an irrelevant consideration. The mechanical royalty rate is set by statute. The rate cannot be increased simply because the composers want a higher rate. Presumably they do now and always will.

In summary, the main issues brought up by the authors are important ones to be considered but the conclusions which they draw about the potential outcomes are incorrect.

APPENDIX 2

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November 1976

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1976

ANNUAL FINANCIAL REPORT OF NETWORKS AND LICENSEES OF BROADCAST STATIONS

Mail one copy to the Federal Communications Commission, Policy Analysis Branch, Broadcast Bureau Washington, D. C. 20554

BEFORE FILLING OUT THIS REPORT, SEE INSTRUCTIONS

1. _____ (NAME OF RESPONDENT)

2. _____ (STREET ADDRESS OR P.O. BOX NUMBER) (CITY) (STATE) (ZIP CODE)

3. Indicate the station(s) for which this report is submitted:

Current Call Letters _____ **(OTHER CALL LETTERS OF STATION DURING REPORTING YEAR, IF ANY** _____ **)**

Location: _____ (CITY)

_____ (COUNTY)

_____ (STATE)

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4. **Type of station reporting:** (CHECK ONE)

- TV ☐ TV
- TV ☐ TV Satellite
- TV ☐ Combined TV and Satellite
- AM ☐ AM
- AF ☐ Combined AM and FM
- FA ☐ FM affiliated with AM in same area
- FM ☐ FM unaffiliated with AM in same area
- ☐ International

5. If this report does not cover the full **calendar** year, indicate the period covered: From: _____ To: _____

6. **Network affiliation(s) of station:** (PRIMARY FIRST) _____
(ABC, CBS, NBC, or MBS, only) *(Network - Initials only)*
OR CHECK IF NOT AFFILIATED ☐ (IND) _____

7. Licensee also owns the following stations for which separate reports are filed:

Call Letters	Type of Station*	Call Letters	Type of Station*

Indicate the type of station (See item 4 above)

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1. F P N C	2. A B	3.	4. O D S P R G
5.	6.	7.	8.

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1976 CALL LETTERS .....

SCHEDULE 1. BROADCAST REVENUES

LINE NO.	CLASS OF BROADCAST REVENUES (a)	MAKE ENTRIES IN THIS COLUMN FIRST (omit cents) (b)	USE THIS COLUMN FOR YOUR TOTALING ONLY (omit cents) (c)
		$	$
1	A. REVENUES FROM THE SALE OF STATION TIME:		
2	(1) Network		
3	Sale of station time to networks:		
4	Sale of station time to major networks, ABC, CBS, MBS, NBC (before line or service charges)		
5	Sale of station time to other networks (before line or service charges)		
6	Total (lines 4 + 5)		
7	(2) Non-network (after trade and special discounts but before cash discounts to advertisers and sponsors, and before commissions to agencies, representatives and brokers).		
8	Sale of station time to national and regional advertisers or sponsors		
9	Sale of station time to local advertisers or sponsors		
10	Total (lines 8 + 9)		
11	Total sale of station time (lines 6 + 10)		
12	B. BROADCAST REVENUES OTHER THAN FROM SALE OF STATION TIME (after deduction for trade discounts but before cash discounts and before commissions): (1) Revenues from separate charges made for programs, materials, facilities, and services supplied to advertisers or sponsors in connection with sale of station time:		
13	(a) to national and regional advertisers or sponsors		
14	(b) to local advertisers or sponsors		
15	(2) Other broadcast revenues		
16	Total broadcast revenues, other than from time sales (lines 13 + 14 + 15)		
17	C. TOTAL BROADCAST REVENUES (lines 11 + 16)		
18	(1) Less commissions to agencies, representatives, and brokers (but not to staff salesmen or employees) and less cash discounts		
19	D. NET BROADCAST REVENUES (lines 17 minus line 18)		
20	Report here the total value of trade outs and barter transactions. This value must also be included as sales in the appropriate lines above		
21	If this is a report for a Joint AM-FM operation, indicate in lines 22, 23, 24 below the amounts, if any, of total broadcast revenues shown in the totals in line 19 above, which are applicable to the FM station ALONE.		
22	(a) Revenues from sale of station time (after discounts, commissions, etc.)		
23	(b) Revenues from providing functional music or other special services		
24	Other FM revenues		
25	Total (lines 22 + 23 + 24)		

1976 CALL LETTERS .....

SCHEDULE 2. BROADCAST EXPENSES

LINE NO.	CLASS OF BROADCAST EXPENSES (a)	MAKE ENTRIES IN THIS COLUMN FIRST (omit cents) (b)	USE THIS COLUMN FOR YOUR TOTALING ONLY (omit cents) (c)
1	TECHNICAL EXPENSES:	$	$
2	Technical payroll*		
3	All other technical expenses		
4	Total technical expenses		
5	PROGRAM EXPENSES:		
6	Payroll* for employees considered "talent"		
7	Payroll* for all other program employees		
8	Rental and amortization of film and tape		
9	Records and transcriptions		
10	Cost of outside news services		
11	Payments to talent other than reported in line (6)		
12	Music license fees		
13	Other performance and program rights		
14	All other program expenses		
15	Total program expenses		
16	SELLING EXPENSES:		
17	Selling payroll*		
18	All other selling expenses		
19	Total selling expenses		
20	GENERAL AND ADMINISTRATIVE EXPENSES:		
21	General and administrative payroll*		
22	Depreciation and amortization		
22a	Interest		
22b	Allocated costs of management from home office or affiliate(s)		
23	Other general and administrative expenses		
24	Total general and administrative expenses		
25	TOTAL BROADCAST EXPENSES (lines 4 + 15 + 19 + 24)		

Payroll includes salaries, wages, bonuses and commissions.

SCHEDULE 3. BROADCAST INCOME

LINE NO.		AMOUNT (omit cents)
1	Broadcast revenues (from Schedule 1, line 19)	$
2	Broadcast expenses (from Schedule 2, line 25)	
3	Broadcast operating income or (loss) (line 1 minus line 2)	
4	Show here the total of any amounts included in line 2 above which represent payments (salaries, commissions, management fees, rents, etc.) for services or materials supplied by the owners or stockholders, or any close relative of such persons or any affiliated company under common control (see page 3 of instructions).	
5	NOTE: If No such payments were made, check here ☐	

1976 CALL LETTERS .....

SCHEDULE 4. EMPLOYMENT

LINE NO.	
1	Indicate the number of employees in the workweek in which December 31 falls:
2	Full-Time _____ (17-24) Part-Time _____ (25-32) Total _____

(Do not count as "part-time" those employees who worked a full week but whose duties were divided between two or more stations of the license. Allocate those employees between the stations in accordance with instructions for Schedule 4 (pg. 4)).

SCHEDULE 5. TANGIBLE PROPERTY OWNED AND DEVOTED EXCLUSIVELY TO BROADCAST SERVICE BY THE RESPONDENT

LINE NO.	ITEM (a)	As of December 31		
		Total Cost (omit cents) (b)	Balance in accrued depreciation account (omit cents) (c)	Cost after depreciation (Col. (b) minus (c)) (omit cents) (d)
1	Land and land improvements and buildings			
2	Tower and antenna system			
3	Transmitter equipment			
4	All other property			
5	Total, all property (lines 1-4)			
		(41-48)	(49-56)	(57-64)

Person in charge of correspondence regarding this report:

_____ NAME _____ OFFICIAL TITLE

_____ ADDRESS (include ZIP Code)

_____ TELEPHONE NUMBER (include Area Code)

CERTIFICATION

(This report must be certified by licensee or permittee, if an individual; by partner of licensee or permittee, if a partnership; by an officer of licensee or permittee, if a corporation or association; or by attorney of licensee or permittee in case of physical disability of licensee or permittee or his absence from the Continental United States.)

I certify that to the best of my knowledge, information, and belief, all statements contained in this report are true and correct.*

Signed ..... Date .....

Title .....

* *Any person who willfully makes false statements on this form can be punished by fine or imprisonment. U. S. Code, Title 18, Section 1001.*

APPENDIX 3

CONCERT MUSIC BROADCASTERS REPRESENTED IN THE ANALYSIS, BY STATE

State	Call letters[1]	City
Alabama	WNDA	Huntsville.
Alaska	KNIK	Anchorage.
Arizona	KHEP	Phoenix.
California	KMJ	Fresno.
	KFAC	Los Angeles.
	KWAV	Monterey.
	KFBK	Sacremento.
	KDFC	San Francisco.
	KIBE	Do.
	KKHI	Do.
Colorado	KSPN	Aspen.
	KBOL	Boulder.
	KVOD	Denver.
Connecticut	WTIC	Hartford.
	WYBC	New Haven.
District of Columbia	WGMS	District of Columbia.
Florida	WNDB	Daytona Beach.
	WINK	Fort Meyers.
	WRUF	Gainesville.
	WRYZ	Jupiter.
	WTMI	Miami.
	WPBR	Palm Beach.
	WMCF	Stuart.
Georgia	WGKA	Atlanta.
	WCOW	Newman.
Illinois	WEFM	Chicago.
	WFMT	Do.
	WNIB	Do.
	WXFM	Do.
Louisiana	WFMF	Baton Rouge.
	WJBO	Do.
Maine	WDCS	Portland.
Maryland	WCAO	Baltimore.
Massachusetts	WHRB	Cambridge.
	WVCA	Gloucester.
	WVLC	Orleans.
	WCRB	Waltham.
Michigan	WQRS	Detroit.
Missouri	KXTR	Kansas City.
Nevada	KCRL	Reno.
	KNEV	Do.
New Jersey	WPHA	Dover.
New Mexico	KHFM	Albuquerque.
	KRSN	Los Alamas.
New York	WHCU	Ithica.
	WNCN	New York.
	WQXR	Do.
	WHLD	Niagara Falls.
	WCHN	Norwich.
	WONO	Syracuse.
North Carolina	WDBS	Durham.
	WQMG	Greensboro.
Ohio	WCLV	Cleveland.
Oregon	KOIN	Portland.
Pennsylvania	WFMZ	Allentown.
	WFLN	Philadelphia.
	KDKA	Pittsburgh.
	WYZZ	Wilkes-Barre.
South Carolina	WMUU	Greenville.
Tennessee	WMPS	Memphis.
Texas	KSIX	Corpus Christi.
	WRR	Dallas.
	KLEF	Houston.
	KMFM	San Antonio.
Utah	KWHO	Salt Lake City.
Virginia	WGH	Hampton.
Washington	KACA	Prosser.
	KING	Seattle.
	KXA	Do.

[1] Only commercial stations are listed. The majority of the members of CMBA are noncommercial and, therefore, not required to file financial reports.

APPENDIX 4. REGRESSION RESULTS CONCERNING THE DEMAND FOR RADIO ADVERTISING

A two-stage least squares approach was used to estimate the parameters of two equations. The results are displayed in the immediately following table. Equation 1 expresses total advertising expenditures on all media as a function of GNP and corporate profits. Two forms of the equation were tested with the variation between them being that in one corporate profits in the current year was used as an explanatory variable, in the other, corporate profits in the previous year. The second equation expresses radio broadcast expenditures as a function of total advertising expenditures and various combinations of relative cost estimates. Because of the low number of observations on the second equation, the number of explanatory variables was kept to a minimum.

As is shown in the table, the formulation of the first equation which exhibits the best goodness of it is the one using corporate profits in the current year as the explanatory variable. The results of this regression were used in the second stage of the estimating routine.

With respect to equation 2, all three specifications of the model (a, b, and c) using a single CPT variable produced negative coefficients. This is an unexpected finding. As the cost of advertising, via TV, for example, goes up compared to the cost of advertising via radio, the

value of the ratio increases. It was assumed that the independent variable, radio advertising revenues, and this explanatory variable would move in the same direction, which implies a positive coefficient. The lack of a positive relationship, therefore, suggests that the two media in question are not true substitutes. (The inconsistency in equation 2 (d) is assumed to be attributable to collinearity among the CPT variables in that equation.)

The evidence in this regard is unclear, however. The t-statistics of the CPT variables in equations 2(a) and 2(c) fall in the 50–80 percent confidence range. The high Durbin-Watson statistics suggesting the presence of first-order serial correlation of the disturbance terms, implies that the t-statistics may be biased upward.

While it cannot be said with a high degree of confidence that these results are statistically significant, it was felt worth noting that there was some consistency between equations in the sign of the CPT variables.

DEMAND FOR ADVERTISING EQUATIONS, ANNUAL 1961–75 FOR ALL MEDIA, 1968–75 FOR BROADCAST RADIO

Dependent variable	Equation number	Constant	GNP	Corporate profits	Corporate profits$_{t-1}$	Total advertising expenditures	Regression statistics: CPT TV / Radio	CPT print / Radio	CPT TV and print / Radio	R^2	Standard error	F-ratio	Durbin-Watson
Total advertising expenditures	1(a)	2,341.76	15.21	33.94						0.998	230.69	3,604.62	2.53
		(6.97)	(37.34)	(4.08)									
	1(b)	2,506.75	15.56		28.67					.997	272.73	2,577.29	1.93
		(6.27)	(35.05)		(2.89)								
Radio broadcast revenues	2(a)	65.54				0.67	−248.63			.994	23.12	428.87	1.57
		(0.42)				(28.52)	(−1.52)						
	2(b)	112.51				.68		−76.76		.992	27.50	302.43	1.31
		(−.84)				(13.27)		(−.41)					
	2(c)	−2.67				.69			−102.48	.993	25.42	354.44	1.31
		(−.02)				(18.71)			(−1.02)				
	2(d)	56.52				.66	−297.18	83.88		.990	25.34	237.96	1.84
		(.32)				(12.91)	(−1.37)	(.40)					

Sources: Total advertising expenditures, 1977 Statistical Abstract, table HA–1333; radio broadcast revenues—"AM and FM Broadcast Financial Data, 1975"; Federal Communications Commission; GNP—Economic Report of the President, 1976, table B–1; corporate profits—Economic Report of the President, 1976, table B–73; cost per thousand estimates—Broadcasting magazine, Jan. 31, 1977, p. 38.

APPENDIX 5. SAMPLING PROCEDURES FOR SELECTING SMSA'S

The sample drawn of Standard Metropolitan Statistical Areas (SMSA's) was stratified by region. The 1970 population estimates of the Census Bureau served as the basis for determining the number of SMSA's to be selected from each region. The States included in each region and the total population of each region are shown for reference purposes in table 1 on the following page. The procedures for selecting the number of SMSA's to be chosen from each region, and for choosing the SMSA's within each region, are discussed below.

To determine the number of SMSA's to be selected from each region, a calculation was made of each region's population as a percent of the total U.S. population. (See table 2.) A cumulative distribution range was then estimated for each region. The beginning of the range was determined by summing the percentage distributions of all preceding regions in the list. The end of the range equals the sum plus the percentage distribution of the region in question. This procedure results in an array of numbers which sum to one. Within the range 0–100, each region has a weight or probability of selection equal to its share of the population.

In order to assure that at least two SMSA's would be selected from each region, the number of sample points which would have to be chosen was determined to be 40. A three-digit random number then was selected and divided by 40 to provide another random number in the range 00.00 and 2.49. Using this second random number (which happened to be 1.52) as a starting point and by successively adding 2.5 to the starting point 40 times, the regions were assigned one sample point for each time the sum fell within its cumulative distribution range. The number of sample points for each region which were obtained as a result of this procedure is shown in table 2.

TABLE 1.—THE 9 CENSUS REGIONS, THE STATES INCLUDED IN THE REGIONS, AND TOTAL 1970 POPULATION OF EACH REGION

Region	States included in the region	Total 1970 population of the region (thousands)
1. New England	Maine, New Hamphsire, Vermont, Rhode Island, and Connecticut	11, 873
2. Middle Atlantic	New York, New Jersey, and Pennsylvania	37, 271
3. East North Central	Ohio, Indiana, Illinois, Michigan, and Wisconsin	40, 368
4. West North Central	Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas	16, 367
5. South Atlantic	Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, and Florida	30, 772
6. East South Central	Kentucky, Tennessee, Alabama, and Mississippi	12, 823
7. West South Central	Arkansas, Louisiana, Oklahoma, and Texas	19, 397
8. Mountain	Montana, Idaho, Wyoming, Colorado, and New Mexico	8, 345
9. Pacific	Washington, Oregon, California, Alaska, and Hawaii	26, 589

TABLE 2.—SAMPLE POINTS OF REGIONS WEIGHTED BY POPULATION

Region	1970 population (thousands)	Percentage distribution	Cumulative distribution range	Number of sample points
New England	11,873	5.82	0. – 5.82	2
Middle Atlantic	37,271	18.28	5.83–24.10	8
East North Central	40,368	19.80	24.11–43.90	7
West North Central	16,367	8.03	43.91–51.93	4
South Atlantic	30,772	15.10	51.94–67.03	6
East South Central	12,823	6.29	67.04–73.32	2
West South Central	19,397	9.51	73.33–82.83	4
Mountain	8,345	4.09	82.84–86.92	2
Pacific	26,589	13.07	86.93–99.99	5
Total	203,838			40

A similar sampling procedure was employed in selecting metropolitan areas within each region. The areas in each region, however, were first arrayed in alphabetical order. The starting point within each region was determined by dividing the random number 10.5 by the number of sampling points in the region. The areas selected in this manner for each region are represented in appendix 6 of this report. It should be noted that broadcast areas do not correspond exactly to SMSA's and that since 1970, the Census Bureau has redefined some areas. For example, Nassau-Suffolk Counties in New York were part of the New York-Northeastern New Jersey SMSA in 1970. In 1975, however, the two counties were defined as a separate SMSA. Sample points were chosen using 1975 SMSA definitions. For these reasons, although 40 sample points were chosen, they are represented by 36 cities in the appendix.

APPENDIX 6

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD

Station	1971 rate	1975 rate	Percent
BOSTON			
WBCN-FM	$20.00	$40.00	100.0
WBOS-FM	11.00	17.60	60.0
WBZ	120.00	170.00	41.7
WBZ-FM	120.00	170.00	41.7
WCAS	12.75	14.40	12.9
WCOP	40.00	36.40	−9.0
WCOP-FM	12.00	36.40	203.3
WCRB	18.40	19.60	6.5
WCRB-FM	14.70	19.60	33.3
WEEI	68.00	101.00	48.5
WEEI-FM		32.00	
WEZE	40.00	40.00	0
WHDH	128.00	113.00	−11.7
WHDH-FM	24.00		
WHIL-FM	10.40		
WILD	14.75	20.00	35.6
WJIB-FM	44.00	56.00	27.3
WKOX-FM	4.80		
WMEX	45.60	41.00	−10.1
WRKO	68.00	81.60	20.0
WROR	12.00	25.50	112.5
WRYT	25.00	25.00	0
WUNR	16.00	19.20	20.0
WMLO	5.00	6.00	20.0
WKOX	11.00	11.00	0
WLYN	6.50	7.75	19.2
WLYN-FM	4.00	7.00	75.0
WWEL		13.00	
WGTR		11.70	
WNTN	12.00	9.50	−20.8
WJDA	10.00	12.00	20.0
WESX	6.00	8.00	33.3
WCGY		11.60	
WHRB-FM		8.40	
WSSH-FM		16.00	
WVBF-FM		33.00	
WWEL-FM		18.00	
Total	923.90	1,251.25	
HARTFORD			
WCCC	18.00	18.00	0
WCCC-FM	16.00	18.00	12.5
WDRC	38.00	52.00	36.8
WDRC-FM	38.00	45.00	18.4
WEXT	9.60	9.60	0
WHCN-FM	9.00	20.00	122.2
WINF	20.00	20.00	0
WKND	26.40	16.50	−37.5
WKSS-FM	12.80	30.00	134.4
WLVH-FM	12.00	12.00	0
WPOP	31.00	34.00	9.7
WRCQ	36.80	20.10	−45.4
WRCH-FM	36.80	20.00	−45.7
WRYM	8.50	8.50	0
WTIC	80.00	83.00	3.7
WTIC-FM	6.00	15.00	150.0
WIOF		11.25	
WKCI-FM		16.50	
Total	398.90	449.45	
ALBANY			
WABY	14.40	8.70	−39.6
WFLY	7.85	7.60	−3.2
WGFM-FM	4.00	15.00	275.0
WGY	58.00	57.00	−1.7
WHA	6.50	6.00	−7.7
WHRL-FM	7.50	6.35	−15.3
WOKO	22.40	22.40	0
WPTR	24.00	25.00	4.2
WQBK	14.00	12.25	−12.5
WROW	42.00	50.00	19.0
WROW-FM	7.00	13.00	85.7
WSNY	15.00	15.00	0
TWRY	29.50	27.20	−7.8
WHSH-FM	4.80	8.00	66.7
WCSS	5.05	5.05	0
WKOL	4.00	2.50	−37.5
WIZR	6.00	5.90	−1.7
WIZR-FM	6.00	5.90	−1.7
WQBK-FM		5.50	
WWOM-FM		16.80	
WKAJ	5.00	5.75	15.0
WGNA		6.00	
Total	283.00	326.90	
NEW YORK CITY			
WABC	158.00	165.00	4.4
WADO	48.00	63.00	31.2
WBNX	23.00		
WCBS	138.00	174.00	26.1
WCBS-FM	20.00	66.00	230.0
WEVD	44.00	47.00	6.8
WEVD-FM	13.50	14.40	6.7
WHN	112.00	103.00	−8.0
WHOM	27.75	48.50	74.8
WINS	200.00	200.00	0
WLIB	31.75	34.75	9.4
WBLN	19.00	47.00	147.4
WMCA	43.80	132.00	201.4
WNBC	84.00	188.00	123.8
WNBC-FM	84.00	188.00	123.8
WQIV-FM	28.00	40.00	42.9
WNEW	185.00	168.00	−9.2
WNEW-FM	27.00	64.00	137.0
WNJR	28.50	42.00	47.4
WOR	187.50	200.00	6.7
WOR-FM	68.00	44.75	−34.2
WPAT	76.00	76.00	0
WPAT-FM	76.00	68.00	−10.5
WPIX-FM	36.00	32.00	−11.1
WPLJ-FM	21.00	64.00	204.8
WPOW	6.00	18.00	200.0
WQXR	59.02	77.50	30.9
WRFM-FM	60.00	76.00	26.7
WTFM-FM	30.00	40.00	33.3
WVNJ	39.00	48.00	23.1
WVNJ-FM	39.00	24.00	−38.5
WWRL	45.00	50.00	11.1
WBAB	22.50	23.40	4.0
WBLI-FM	10.40	24.00	130.3
WCTO-FM	20.00	24.40	22.0
WFAS	31.20	31.20	0
WFAS-FM	31.20		
WGBB	32.30	32.80	0
WGLI	24.00	24.00	0
WGSM	30.40	30.40	0
WHBI-FM	22.50	18.75	−16.7
WHLI	32.00	39.00	21.9
WHLI-FM	8.00	18.40	130.0
WJRZ	64.00		
WLIR-FM	14.00	23.25	66.1
WLIX		24.00	
WSUF	11.80	28.50	141.5
WRKL	14.40	16.00	11.1
QRNW-FM	12.00	20.00	66.7
WTHE	13.50	15.00	11.1
WVIP	12.80	19.60	53.1
WVIP-FM	12.80	19.60	53.1
WVOX	17.00	18.00	5.9
WVOX-FM	10.00	10.00	0
WPUT	11.75	16.00	36.2
WLNA	17.60	22.40	27.3
WLNA-FM	17.60	22.40	27.3
WKQW	5.90	8.90	50.8
WWDJ		44.00	
WDHA-FM	14.75	14.75	0
WRAN	12.80	15.60	21.9
WJDM	12.00	14.15	17.9
WMTR	18.75	31.50	68.0
WERA	13.25	15.75	18.9
WBRW		16.50	
WQXR-FM		53.70	
WALK		14.40	
WWYD-FM		18.80	
WHUD-FM		28.00	
WKER	13.25	13.00	−1.9
Total	2,642.95	3,413.05	

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
PHILADELPHIA			
KYW	79.00	128.00	62.0
WCAU	79.00	104.00	31.6
WCAU-FM	12.00	35.00	191.7
WDAS	42.40	56.80	34.0
WDAS-FM	42.40	45.44	7.2
WDVR-FM	56.00	56.00	0
WFIL	104.00	128.00	23.1
WFLN	31.00	25.00	−19.4
WFLN-FM	31.00	25.00	−19.4
WHAT	19.50	21.50	10.3
WIBG	72.00	72.00	0
WIFI-FM	10.00	40.00	300.0
WIOQ-FM	31.00	30.00	−3.2
WIP	116.00	96.00	−17.2
WJBR-FM	19.60	----------	----------
WMMR-FM	14.00	29.00	107.1
WPBS-FM	21.60	27.00	25.0
WPEN	31.50	36.00	14.3
WPEN-FM	13.00	36.00	176.9
WRCP	24.00	32.00	33.3
WRCP-FM	8.00	8.00	0
WTEL	17.00	18.00	5.9
WTMR	32.00	28.00	−12.5
WWDB-FM	12.00	17.50	45.8
WWSH-FM	20.00	52.00	160.0
WBUX	7.50	7.50	0
WCAM	12.50	10.00	−20.0
WEEZ	16.00	12.80	−20.0
WIBF-FM	8.00	8.00	0
WNAR	12.80	16.75	30.9
WVCH	6.00	7.80	30.0
WXUR	4.00	5.00	25.0
WXUR-FM	2.75	1.70	−38.2
WCOJ	12.00	18.75	56.2
WNPV	6.58	8.00	21.6
WBCB	7.20	7.50	4.2
WJJZ	10.00	12.00	20.0
WPAZ	17.75	17.75	0
WCHE	3.55	4.80	35.2
WYSP	----------	28.00	----------
Total	1,064.63	1,312.59	----------
PITTSBURGH			
KDKA	115.00	153.00	33.0
KDKA-FM	115.00	153.00	33.0
KQV	53.00	36.00	−32.1
WAMO	17.75	20.00	12.7
WAMO-FM	7.20	12.00	66.7
WARO	9.10	9.10	0
WDVE	11.00	36.00	227.3
WEDO	12.50	9.00	−28.0
WEEP	24.00	45.50	89.6
WEEP-FM	24.00	45.50	86.6
WHJB	9.25	----------	----------
WIXZ	25.00	14.00	−44.0
WJAS	21.00	49.15	134.0
WSHH-FM	2.00	30.15	1407.5
WKJF-FM	17.60	28.00	59.1
WKPA	11.00	15.00	36.4
WLOA	14.80	16.00	8.1
WLOA-FM	14.80	16.00	8.1
WMBA	4.10	7.10	73.2
WNUF-FM	10.40	11.00	5.8
WOKU-FM	3.60	4.20	16.7
WPIT	18.00	18.00	0
WPIT-FM	18.00	18.00	0
WTAE	49.00	49.60	1.2
WTAE-FM	49.00	49.60	1.2
WWSW	38.00	56.00	47.4
WWSW-FM	38.00	56.00	47.4
WYDD-FM	15.00	16.00	6.7
WZUM	1.80	7.20	300.0
WJPA	6.90	6.90	0
WKEG	4.50	6.30	40.0
WBVP	8.00	6.75	−15.6
WBVP-FM	3.50	----------	----------
WESA	4.10	5.00	22.0
WESA-FM	3.80	----------	----------
PITTSBURGH—Con.			
WQTW	5.60	4.95	−11.6
WTRA	2.90	2.80	−3.4
WPSL	3.75	4.50	20.0
WBCW	----------	6.25	----------
WPEZ-FM	----------	23.00	----------
WWKS	----------	8.40	----------
Total	791.95	1,054.95	----------
AKRON			
WAKR	44.00	55.20	25.5
WAKR-FM	9.60	22.20	131.2
WCUE	19.20	22.00	14.6
WCUE-FM	6.50	9.60	47.7
WDBN-FM	30.40	30.40	0
WHLO	24.40	28.00	14.8
WSLR	36.80	36.80	0
WKNT	6.00	6.00	0
Total	176.90	210.20	----------
CHICAGO			
WAIT	57.60	57.60	0
WBBM	175.00	145.00	−17.0
WBBM-FM	14.00	50.00	257.1
WCFL	104.00	112.00	7.7
WCLR-FM	16.00	40.00	150.0
WCRW	12.00	12.00	0
WDAI-FM	11.00	64.00	481.8
WDHF-FM	20.00	32.00	60.0
WEAW-FM	14.50	----------	----------
WEDC	12.00	12.50	4.2
WEFM-FM	35.00	20.00	−42.9
WLOO-FM	26.40	52.80	100.0
WFMT-FM	35.00	39.00	11.4
WGLD-FM	14.40	----------	----------
WGN	178.00	193.00	8.4
WGRT	33.00	53.50	62.1
WIND	120.00	114.00	−5.0
WKFM-FM	32.00	----------	----------
WLS	152.00	164.00	7.9
WJJD	70.00	76.00	8.6
WJJD-FM	70.00	76.00	8.6
WMAQ	76.00	112.00	47.4
WMAQ-FM	7.60	----------	----------
WNIB-FM	8.10	8.00	−1.2
WNUS	59.50	----------	----------
WNUS-FM	52.50	56.00	6.7
WSBC	----------	20.40	----------
WSDM-FM	25.00	29.00	16.0
WWEL-FM	17.60	63.00	258.0
WXFM-FM	20.00	14.90	−25.5
WXRT-FM	----------	21.80	----------
WBEE	13.50	18.50	37.0
WCGO	7.00	8.55	22.1
WCLR	16.00	40.00	150.0
WEAW	14.50	14.25	−1.7
WVVX	10.50	13.50	28.6
WVVX-FM	10.50	13.50	28.6
WEXI-FM	20.00	----------	----------
WLNR-FM	6.25	8.05	28.8
WLTD	16.00	11.40	−28.8
WMPD	14.00	15.50	10.7
WOPA	12.00	17.75	47.9
WTAQ	9.00	9.50	5.6
WTAS-FM	5.20	6.50	25.0
WVON	55.00	78.00	41.8
WYCA-FM	4.50	10.50	133.3
WAUR-FM	----------	4.90	----------
WFVR	7.25	5.80	−20.0
WKKD	8.00	14.00	75.0
WMRO	9.00	9.20	2.2
WIVS	26.25	12.75	−51.4
WRMN	7.80	7.00	−10.3
WRMN-FM	4.25	----------	----------
WGSB	5.50	5.50	0
WJOL	11.50	16.00	39.1
WJOL-FM	4.00	----------	----------
WJRC	5.00	5.75	15.0

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
CHICAGO—Con.			
WEFA-FM		7.20	
WKRS	16.45	27.88	69.5
WZBN	7.00	8.00	14.3
WLTH	9.60	13.00	35.4
WWCA	12.50	15.00	20.0
WJOB	12.00	17.60	46.7
WYEN-FM		18.00	
WFYR-FM	52.00		
WJKL		6.70	
WLLI-FM		7.00	
WKZN-FM		4.70	
WBMX-FM		14.00	
WJOI-FM		18.00	
WOJO		14.25	
WWMM-FM		15.50	
WXFM-FM		14.80	
Total	1,880.25	2,186.53	
CLEVELAND			
WABQ	15.00	14.75	−1.7
WCJW-FM	10.00		
WCLV-FM	18.75	21.80	16.3
WCUY-FM	7.20	14.40	100.0
WDBN-FM	30.40	30.40	0
WDOK-FM	36.00	39.00	8.3
WELW	11.50	12.00	4.3
WELW-FM	11.50	8.00	−30.4
WGAR	48.00	60.00	25.0
WGCL-FM	6.00	40.00	566.7
WHK	44.00	60.00	36.4
WIXY	52.00	34.00	−34.6
WJMO	28.00	36.00	28.6
WJW	80.00	75.50	−5.6
WKYC	46.40	56.00	20.7
WKYC-FM	3.20	25.60	700.0
WMMS-FM	10.50	36.00	242.9
WNCR-FM	19.00	24.00	26.3
WXEN-FM	11.10	11.10	0
WZAK-FM	11.60	11.75	1.3
WBKC	3.50	3.50	0
WPVL	7.00	12.10	72.9
WSLR-FM		11.75	
WQAL-FM		50.00	
Total	510.65	687.65	
DETROIT			
CKLW	92.00	120.00	30.4
CKLW-FM	92.00	120.00	30.4
WABX	14.00	34.00	142.9
WBFG	8.00	9.25	15.6
WCAR	47.52	41.00	−13.7
WCAR-FM	9.90	12.20	23.2
WCHB	36.00	40.00	11.1
WCHD-FM	10.00	32.00	220.0
WDEE	50.00	68.00	36.0
WEXL	23.00	11.00	−52.2
WGPR-FM	15.00	15.00	0
WJLB	38.00	47.00	23.7
WJR	155.00	180.00	16.1
WJR-FM	11.20	15.00	33.9
WKNR	56.00		
WKNR-FM	56.00		
WLDM-FM	22.25	22.25	0
WMUZ-FM	6.25	10.00	60.0
WMZK-FM	25.00	20.80	−16.8
WOMC-FM	29.50	52.00	76.3
WHUND	9.60	48.00	400.0
WWJ	72.00	92.00	27.8
WWJ-FM	40.00	22.40	−44.0
WWWW-FM	18.00	42.00	133.3
WXYZ	76.00	106.00	39.5
CKLW	92.00	120.00	30.4
CKLW-FM	92.00	120.00	30.4
WBRB	17.00	18.00	5.9
WBRB-FM	10.20	10.80	5.9
WHFI-FM	11.00		
WIID	20.00	24.00	20.0
WPON	14.00	16.00	14.3

Station	1971 rate	1975 rate	Percent
DETROIT—Con.			
WQTE	48.00		
WNIC		45.00	
WHMI	3.30	4.15	25.3
WTHM	4.70	6.75	43.6
WTHM-FM	3.30	6.75	104.5
WSMA	5.30	5.90	11.3
WHLS	6.00	8.50	41.7
WHLS-FM	4.80	7.00	45.8
WHNE-FM		48.00	
WQRS-FM		11.40	
WRIF-FM		55.00	
WPHM	6.80	8.10	19.1
WDRQ		35.00	
Total	1,350.62	1,710.25	
FLINT			
WAMM	13.00	18.50	42.3
WFDF	24.80	29.00	16.9
WGMZ-FM	8.80	20.50	133.0
WKMF	24.00	24.00	0
WCZN	5.00	18.00	260.0
WCZN-FM	5.00	18.00	260.0
WTAC	25.60	28.00	9.4
WTRX	17.60	18.00	2.3
WOAP	5.45	5.45	0
Total	129.25	179.45	
MILWAUKEE			
WAWA	6.00	10.00	66.7
WAWA-FM	3.50	10.00	185.7
WBKV-FM	6.80	9.50	39.7
WBON-FM	3.50		
WEMP	40.00	42.00	5.0
WEZW-FM	9.60	42.00	337.5
WFMR-FM	10.75	16.00	48.8
WISN	48.00	48.00	0
WISN-FM	7.00	6.00	−14.3
WMIL	16.00	30.00	87.5
WMVM-FM	8.00	30.00	275.0
WNOV	15.25	14.00	−8.2
WNUV-FM	9.60	7.20	−25.0
WOKY	41.60	56.00	34.6
WQFM-FM	3.80	18.00	373.7
WTMJ	50.00	54.00	8.0
WTMJ-FM	5.50	14.00	154.5
WYLO	12.00	9.00	−25.0
WZMF-FM	13.50	34.00	151.9
WTKM	4.50	4.50	0
WRIT	32.00	32.50	1.6
WRIT-FM	32.00		
WGLB	3.00	3.00	0
WAUK	10.25	7.50	−26.8
WAUK-FM	6.15	5.50	−10.6
WBKV	4.85	6.50	34.0
WBKV-FM	4.50	9.50	111.1
WBCS-FM		10.50	
WRKR-FM		10.75	
WTKM-FM		3.00	
Total	407.65	542.95	
DAVENPORT			
KSTT	24.00	28.00	16.7
KWNT	12.00	12.00	0
KWNT-FM	4.80	17.85	271.9
WHBF	18.00	18.00	0
WHBF-FM	15.00	7.50	−50.0
WOC	20.50	24.00	17.1
WOC-FM	20.50		
KIIK-FM		30.00	
WMDR-FM		10.40	
WJRE-FM		4.10	
WQUA	19.60	17.60	−10.2
WGEN	4.50	5.00	11.1
WKEI	3.50	6.20	77.1
WKEI-FM	2.30		
Total	14.470	180.65	

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
KANSAS CITY			
KBEA	21.00	20.00	−4.8
KBEY-FM	10.00	30.00	200.0
KBIL	11.25	11.25	0
KCCV	7.20	8.00	11.1
KCKN	28.00	32.00	14.3
KCMO	45.00	50.00	11.1
KFMU-FM	10.75	20.80	93.5
KMBR-FM	15.00	36.00	140.0
KMBZ	50.00	48.00	−4.0
KPRS	15.75	28.00	77.8
KPRS-FM	7.75	28.00	261.3
KUDL	30.00	40.00	33.3
KUDL-FM	11.75	19.25	63.8
KWKI-FM	17.50	17.50	0
KXTR-FM	6.00	9.40	56.7
WDAF	48.00	48.00	0
WDAF-FM	7.20	13.60	88.9
WHB	52.00	56.00	7.7
KEXS	2.95	4.50	52.5
KAYQ		20.00	
KBOA		8.00	
KBXM		3.50	
Total	397.10	551.80	
MINNEAPOLIS			
KDAN	6.00	9.00	50.0
KDWB	33.60	44.80	33.3
KEEY-FM	11.20	24.25	116.5
KQRS	15.00	19.00	26.7
KQRS-FM	15.00	19.00	26.7
KRSI	30.40	40.80	34.2
KRSI-FM	30.40	40.80	34.2
KSTP	27.35	48.00	75.5
KSTP-FM	7.60	28.00	268.4
KTCR	15.00	28.00	86.7
KTCR-FM	6.50	9.60	47.7
KUXL	11.50	9.20	−20.0
WAYL-FM	10.40	24.80	138.5
WCCO	135.00	140.00	3.7
WDGY	31.00	31.00	0
WJSW	7.00	8.80	25.7
WLOL	31.50	18.00	−42.9
WLOL-FM	7.10	9.00	26.8
WMIN-FM	16.00	12.85	−19.7
WPBC	16.00		
WPBC-FM	16.00		
WWTC	28.00	28.00	0
KANO	4.40	4.40	0
KTWN	7.00	19.20	174.3
KDWA	4.50	4.00	−11.1
KSMM	3.95	4.40	11.4
WAVN	4.40	4.65	5.7
WEVR	4.15	4.40	6.0
KRWC		4.25	
WYOO		26.40	
WYOO-FM		26.40	
KFMX-FM		14.40	
WCCO-FM		18.00	
Total	535.95	723.40	
ST. LOUIS			
KADI-FM	5.40	34.00	529.6
KATZ	22.00	20.50	−6.8
KCFM-FM	11.90	21.00	76.5
KGRV-FM	7.75		
KIRL	18.00	18.00	0
KMOX	67.00	87.00	29.9
KMOX-FM	13.50	16.50	22.2
KRCH-FM	11.70	42.00	259.0
KSD	39.00	68.00	74.4
KSHE-FM	13.20	40.00	203.0
KSTL	13.50	13.50	0
KWK	25.50		
KXEN	10.25	3.00	−22.0
KXLW	13.75	13.75	0
KXOK	64.00	68.00	6.2
WEW	18.00	18.00	0
WGNU	9.00	9.00	0
WGNU-FM	9.00	9.00	0
WIL	38.00	50.40	32.6
WIL-FM	10.80	20.00	85.2
WMRY-FM	3.00	4.50	50.0
WRTH	47.20	44.00	−6.8
KHAD	3.20	3.20	0
KJCF	3.95	3.95	0
KTUI	3.20	3.70	15.6
KLPW	4.20	3.80	−9.5
KLPW-FM	2.15	2.25	4.7
WOKZ	5.90	5.90	0
WRTH	47.20	44.00	−6.8
WIBV	11.00	9.00	−18.2
WINU	6.75	6.75	0
KMRN		3.50	
WESL		12.50	
KEZK-FM		23.00	
KKSS		27.00	
Total	559.00	753.70	
ATLANTA			
WAOK	32.00	48.00	50.0
WAVO	2.65	3.90	47.2
WERD	28.80	12.00	−58.3
WGKA	13.80	28.25	104.7
WGZC-FM	13.80	40.00	189.9
WGST	22.50	28.50	26.7
WGUN	15.60	16.10	3.2
WIGO	18.00	38.00	111.1
WIIN	20.00	14.00	−30.0
WKLS-FM	12.00	25.50	112.5
WLTA-FM	9.40	19.20	104.3
WOMN	2.75	3.75	36.4
WPLO	51.20	60.00	17.2
WPLO-FM	16.00	14.40	−10.0
WQXI	51.00	86.00	68.6
WQXI-FM	12.60	40.00	217.5
WRNG	38.00	37.60	−1.1
WSB	97.00	165.00	70.1
WSB-FM	14.00	26.00	85.7
WSSA	12.00	9.75	−18.7
WTJH	7.50	7.50	0
WYNX	6.00	6.00	0
WYZE	15.50	15.50	0
WACX	1.90	3.20	68.4
WDYX	3.20	3.20	0
WGCO-FM	3.20	4.60	43.8
WCHK	4.75	4.75	0
WGFS	1.95	2.20	12.8
WJGA	1.70	2.00	17.6
WJGA-FM	1.70	2.00	17.6
WLAW	2.70	2.70	0
WBIE	1.50	20.00	1233.3
WBIE-FM	6.30	4.50	−28.6
WFOM	3.80	5.75	51.3
WPCH		54.00	
Total	544.80	853.85	
BALTIMORE			
WAMD	2.75	3.00	9.1
WANN	5.90	7.40	25.4
WXTC-FM	5.90		
WNAV	5.90	5.60	−5.1
WNAV-FM	3.80	5.00	31.6
WYRE	7.20	10.40	44.4
WAYE	16.00	24.00	50.0
WBAL	60.00	81.60	36.0
WBAL-FM	10.80	10.80	0
WBMD	13.00	13.00	0
WBMD-FM	3.50		
WCAO	47.20	57.00	20.8
WCAO-FM	9.60	23.00	139.6
WCBM	40.00	44.00	10.0
WEBB	23.00	23.00	0
WFBR	33.60	44.00	31.0
WFMM-FM	8.10	21.60	166.7

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
BALTIMORE—Con.			
WISZ	9.00	15.20	68.9
WISZ-FM	9.00	15.20	68.9
WITH	26.00	24.80	−4.6
WITH-FM	26.00	24.80	−4.6
WLIF-FM	11.80	36.00	205.1
WLPL-FM	11.20	20.00	78.6
WMAR-FM	11.75	16.00	36.2
WRBS-FM	9.40	6.25	−33.5
WSID	11.20	19.20	71.4
WTOW	8.00	9.00	12.5
WWIN	16.00	24.00	50.0
WVOB	2.75	3.05	10.9
WASA	4.68	5.70	21.8
WASA-FM	1.95	3.30	69.2
WTTR	4.40	5.30	20.5
WTTR-FM	4.40	5.30	20.5
WDJQ		10.80	
WKTK-FM		19.00	
Total	463.78	636.30	
WASHINGTON, DC			
WASH-FM	20.60	41.00	99.0
WAVA	33.60	33.60	0
WAVA-FM	33.60	33.60	0
WDON	15.20	15.00	−1.3
WEAM	35.20	24.00	−31.8
WEZR-FM	9.40	14.90	58.5
WFAN-FM	4.80	6.40	33.3
WFAX	16.00	16.00	0
WGMS	25.75	28.00	8.7
WGMS-FM	10.00	28.00	180.0
WHFS-FM	11.20	22.00	96.4
WINX	15.00	10.00	−33.3
WJMD-FM	36.80	28.00	−23.9
WMAL	134.00	210.00	56.7
WMAL-FM	11.40	37.00	224.6
WMDI-FM	9.60		
WMOD-FM	11.00	28.00	154.5
WOL	46.00	50.00	8.7
WOOK	24.00	32.00	33.3
WPGC	44.00	64.00	45.5
WDGC-FM	25.00	64.00	156.0
WPIK	27.00	36.80	36.3
WQMR	30.40		
WGAY	30.40	44.00	44.7
WGAY-FM	30.40	44.00	44.7
WRC	72.00	64.00	−11.1
WRC-FM	9.00		
WTOP	75.50	92.00	21.9
WUST	25.60	22.40	−12.5
WWDC	64.00	48.00	−25.0
WWDC-FM	19.20	8.80	−54.2
WSMD	2.50	9.70	288.0
WSMD-FM	2.12	9.70	357.5
WLMD	4.45	19.00	327.0
WEEL	13.10	8.20	−37.4
WEZR-FM	9.40	14.90	58.5
WHRN	4.80		
WAGE	2.40	5.20	116.7
WPRW	5.90	10.00	69.5
WPWC	3.35	4.95	47.8
WOHN		7.00	
WCTN		11.00	
WHUR		24.00	
WKYS		24.00	
Total	1,003.67	1,293.15	

Station	1971 rate	1975 rate	Percent
FT. LAUDERDALE			
WAVS	12.00	9.60	−20.0
WAXY-FM	11.25	29.60	163.1
WCKO-FM	8.60	24.00	179.1
WEXY	11.20	11.00	−1.8
WFTL	13.60	21.00	54.4
WFTL-FM	5.25	11.00	109.5
WGMA	14.75	18.50	25.4
WLOD	10.65	10.50	−1.4
WMJR-FM	7.00	52.00	642.9
WRBD	15.00	24.00	60.0
WSRF	12.50	16.00	28.0
WSRF-FM	12.50	16.00	28.0
WSHE-FM		40.00	
Total	134.30	283.20	
MIAMI			
WAXY-FM	12.00	29.60	146.7
WBUS-FM	18.00	23.00	27.8
WEDR-FM	5.50	23.00	318.2
WFAB	20.00	24.00	20.0
WFUN	26.00	22.40	−13.8
WGBS	35.00	53.00	51.4
WINZ	27.00	38.50	42.6
WIOD	42.00	46.00	9.5
WIOD-FM	8.50	26.00	205.9
WKAT	28.00	26.00	−7.1
WLTO	8.80	25.00	184.1
WLYF-FM	11.20	45.00	301.8
WMBM	23.20	43.50	87.5
WOCN	32.00	14.00	−56.2
WOCN-FM	32.00	14.00	−56.2
WQAM	50.00	56.00	12.0
WQBA	28.80	52.00	80.6
WRIZ	13.50	7.00	−48.1
WTMI-FM	11.60	22.00	89.7
WVCG	40.60	40.00	−1.5
WYOR-FM	45.60	40.00	−12.3
WWOK	30.00	40.00	33.3
WIII	4.40		
WQDI		6.65	
WHYI		52.00	
WIGL		40.00	
WMYQ		31.00	
Total	553.70	839.65	
ORLANDO			
WABR	9.75		
WDBO	6.90	38.00	450.7
WGTO	17.00	9.75	−42.6
WHOO	16.40	20.00	22.0
WHOO-FM	10.80	10.80	0
WKIS	15.20	21.60	42.1
WLOF	27.50	29.60	7.6
WLOQ-FM	14.00	5.60	−60.0
WORJ	14.00	26.80	91.4
WORJ-FM	14.00	26.80	91.4
WBJW	7.80	18.00	130.8
WTLN	6.10	6.20	1.6
WTLN-FM	6.10	6.20	1.6
WACY	2.00	2.90	45.0
WFIV	9.00	6.75	−25.0
WTRR	2.65	4.55	71.7
WVCF	3.45	4.50	30.4
WOKB	8.60	11.80	37.2
WBJW-FM		18.00	
WDBO-FM		22.00	
WDIZ		12.50	
WORL		24.00	
Total	191.25	326.35	

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
BIRMINGHAM			
WAPI	24.00	24.00	0
WAPI-FM	6.30	6.30	0
WAQY	8.20	11.20	36.6
WATY	20.90	20.90	0
WERC	28.80	42.00	45.8
WERC-FM	3.00	42.00	1300.0
WCRT	9.30	21.00	125.8
WCRT-FM	9.30		
WENN	11.95	18.40	54.0
WENN-FM	5.95		
WJLD	13.60	13.60	0
WJLN-FM	1.35		
WLPH	6.40	6.40	0
WSGN	28.00	33.00	17.9
WVOK	19.00	21.00	10.5
WYAM	12.00	6.00	−50.0
WYDE	30.00	42.00	40.0
WBYE	1.70	2.10	23.5
WARF	1.95	3.60	84.6
WWWB	2.15	3.20	48.8
WFHK	1.95	2.80	43.6
WDJC-FM		5.50	
WZZK-FM		12.00	
WWWB-FM		2.31	
Total	245.80	339.31	
LOUISVILLE			
WAKY	48.00	48.00	0
WAVE	25.60	42.00	64.1
WFIA	10.00	5.70	−43.0
WHAS	42.00	52.00	23.8
WHAS-FM	8.00	7.75	−3.1
WHEL	12.00	12.00	0
WINN	24.00	21.00	−12.5
WKLO	40.00	27.50	−31.2
WKLO-FM	5.50		
WKRX-FM	6.70	19.00	183.6
WLOU	12.70	22.00	73.2
WLRS-FM	11.40	15.00	31.6
WREY	4.90	4.90	0
WSTM-FM	4.85	6.00	23.7
WTMT	15.0	15.00	0
WCSN-FM		11.00	
WFIA-FM		2.85	
WQHI		35.00	
WXVW	6.75	6.75	0
Total	277.40	353.45	
AUSTIN			
KASE-FM	3.95	8.70	120.3
KHFI-FM	6.35	4.25	−33.1
KNOW	13.75	19.20	39.6
KOKE	10.40	11.10	6.7
KOKE-FM	5.60		
KTAP	6.35		
KLBJ	15.20	13.75	−9.5
KLBJ-FM	4.75	7.00	47.4
KVET	14.80	14.30	−3.4
KCNY	2.90	2.90	0
KIXL		7.60	
KRMH		8.90	
Total	84.05	97.70	
DALLAS			
KBOX	56.00	56.00	0
KTLC	10.00	22.00	120.0
KDTX-FM	4.70	4.50	−4.3
KPBC	25.50	10.25	−59.8
KEZT-FM	25.50	6.50	−74.5
KKDA	18.80	27.20	44.7
KLIF	60.00	60.00	0
KNOK	17.55	23.90	36.2
KNOK-FM	17.55	23.90	36.2
KNUS-FM	10.00	23.00	130.0
KOAX-FM	7.00	26.00	271.4
KRLD	64.00	84.00	31.2
KRLD-FM	3.00		
KSKY	12.00	7.20	−40.0
KVIL	17.00	52.00	205.9
KVIL-FM	8.50	52.00	511.8
WBAP	52.00	110.00	111.5
WFAA	52.00	42.00	−19.2
WZEW-FM	12.00	32.00	166.7
WRR	27.20	18.50	−32.0
WRR-FM	14.80	9.00	−39.2
KDNT	3.95	5.50	39.2
KDNT-FM	2.00	2.25	12.5
KCLE	3.00	3.25	8.3
KBUY	21.60	14.00	−35.2
KBUY-FM	8.00	14.00	75.0
KPLX-FM	4.40	12.00	172.7
KFJZ	30.00	30.00	0
KFWT-FM	16.25		
KJIM	11.20	11.20	0
KWXI-FM	5.00	11.50	130.0
KXOL	16.00	20.00	25.0
KAWB-FM	2.35		
KYAL	5.60	10.75	92.0
KTER	3.25	3.60	10.8
KBEC	3.00	3.55	18.3
KZEE	3.00	4.00	33.3
KKDA		27.20	
KAMC-FM		11.00	
KFWD-FM		24.00	
KSCS		24.00	
KNOK		23.90	
KNOK-FM		23.90	
KMMK		4.25	
KMMK-FM		4.25	
Total	653.70	978.05	
HOUSTON			
KAUM-FM	8.80	12.00	36.4
KRLY-FM	11.75	19.00	61.7
KCOH	20.80	29.00	39.4
KENR	14.50	49.00	237.9
KLKK	46.40	45.60	−1.7
KIKK-FM	7.60	45.60	500.0
KILT	51.00	65.00	27.5
KILT-FM	51.00	24.00	−52.9
KLEF-FM	12.80	14.40	12.5
KLOL-FM	15.00	25.00	66.7
KLVL	7.45	7.45	0
KLYX-FM	7.95	13.25	66.7
KNUZ	40.00	40.00	0
KODA	23.20	32.00	37.9
KODA-FM	12.00	34.00	183.3
KPRC	37.00	37.00	0
KQUE-FM	15.20	25.60	68.4
KRBE-FM	6.00	40.00	566.7
KTRH	42.00	54.00	28.6
KULF	36.00	74.40	106.7
KBUK	6.05	6.90	14.0
KXYZ	38.00	38.00	0
KYND-FM	5.75	35.60	519.1
KYOK	21.00	32.00	52.4
KVLB	2.45		
KIKR	2.85	6.22	118.2
KNRO-FM	2.85	6.22	118.2
KBRZ	4.50	6.45	43.3
KPXE	2.95	2.95	0
KFRD	4.50	8.25	83.3
KFRD-FM	4.50	8.25	83.3
KJCH		3.20	
KTLW		7.05	
KGOL		4.00	
KEYH		33.00	
KFMK-FM		6.00	
Total	561.85	890.39	

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
OKLAHOMA CITY			
KBYE	15.75	4.25	−73.0
KBYE-FM	4.00	5.25	31.2
KPJL-FM	6.15	11.20	82.1
KFNB-FM	6.70	6.00	−10.4
KGOU-FM	4.40	4.20	−4.5
KGOY-FM	1.85	3.10	67.6
KJAK-FM	6.75	2.30	−65.9
KLEC	11.50	16.00	39.1
KAFG-FM	3.60	7.55	109.7
KLPR	12.75	12.75	0
KNOR	2.35	6.75	187.2
KOCY	18.00	18.00	0
KXXY-FM	9.00	14.40	60.0
KOFM	9.40	12.00	27.7
KOMA	23.00	23.00	0
KTOK	43.50	50.00	14.9
KWHP-FM	3.65	6.20	69.9
KKNG-FM	6.40	18.00	181.3
WKY	45.60	45.60	0
WNAD	8.50	6.80	−20.0
KGFF	4.50	4.50	0
KRMC		4.70	
Total	247.35	282.55	
ALBUQUERQUE			
KABQ	8.40	8.50	1.2
KAMX	6.40	6.40	0
KMYR	4.50	7.20	60.0
KDAZ	3.70	11.25	204.1
KDEF	14.40	14.40	0
KDEF-FM	14.40	14.40	0
KGGM	15.60		
KHFM-FM	3.30	4.20	27.3
KOB	19.00	23.00	21.1
KOB-FM	10.00	17.00	70.0
KPAR	5.40	9.00	66.7
KPAR-FM	5.40	4.40	−18.5
KQEO	18.40	18.40	0
KRST-FM	6.30	11.20	77.8
KRZY	12.00	15.00	25.0
KZIA	4.45	5.85	31.5
KKIM		4.10	
KRKE		20.00	
Total	151.65	194.30	
PHOENIX			
KASA	5.95	5.95	0
KBUZ	10.00	12.00	20.0
KBUZ-FM	10.00	12.00	20.0
KHCS	12.00	4.50	−62.5
KDOT	9.60	11.25	17.2
KDOT-FM	9.60	11.25	17.2
KHPX	7.40	10.65	43.9
KHEP	4.45	4.90	10.1
KHEP-FM	3.15	7.40	134.9
KIFN	11.10	12.70	14.4
KMEO	7.80	28.50	265.4
KMEO-FM	7.80	28.50	265.4
KMND	3.65		
KMND-FM	7.40		
KNIX-FM	6.00	15.00	150.0
KOOL	27.60	26.80	−2.9
KOOL-FM	6.50	11.60	78.5
KOY	30.00	58.00	93.3
KJJJ	17.00	30.00	76.5
KRDS	15.00	12.50	−16.7
KRFM-FM	12.20	29.75	143.9
KRIZ	13.50	21.50	59.3
KRUX	17.50	20.00	14.3
KTAR	22.40	32.00	42.9
KBBC-FM	18.40	12.00	−34.8
KTUF	20.00	15.00	−25.0
KUPD	10.75	17.50	62.8
KUPD-FM	10.75	17.50	62.8
PHOENIX—Con.			
KXIV	12.60	15.80	25.4
KXTC-FM	7.90	11.80	49.4
KDKB		22.00	
KDKB-FM		22.00	
Total	358.00	540.35	
LOS ANGELES			
KABC	92.00	120.00	30.4
KEZL-FM	10.80	14.00	29.6
KBCA-FM	15.25	50.00	227.9
KBIG	25.50	72.00	182.4
KBRT	14.00	32.00	128.6
KDAY	32.00	45.00	40.6
KFAC	56.80	72.00	26.8
KFAC-FM	56.80	72.00	26.8
KFI	118.00	159.00	34.7
KGBS	31.00	38.00	22.6
KGBS-FM	15.50	38.00	145.2
KGFJ	36.00	41.00	13.9
KGIL	30.50	67.25	120.5
KHJ	100.00	108.00	8.0
KRTH-FM	38.00	38.00	0
KHOF-FM	10.25	14.60	42.4
KIIS	44.00	51.20	16.4
KJOI-FM	17.00	51.00	200.0
KKDJ-FM	18.50	57.00	208.1
KLAC	72.00	92.00	27.8
KLOS-FM	16.00	60.00	275.0
KMET-FM	18.00	55.00	205.6
KMPC	120.00	145.00	20.8
KNX	100.00	142.00	42.0
KNX-FM	13.20	64.00	384.8
KOST-FM	48.60	44.00	−9.1
KPOL	88.00	80.00	−9.1
KPOL-FM	88.00	80.00	−9.0
KRLA	80.00	40.00	−50.5
KWST-FM	36.00	30.00	−16.7
XEGM	27.95	27.95	0
XERB	24.00		
XETRA	48.60	52.00	7.0
KALI	28.00	40.00	42.9
KBBQ	21.00		
KBOB-FM	4.90	4.90	
KEZY	29.75	38.00	20.7
KEZY-FM	8.00	10.00	25.0
KFOX	34.50	30.00	−13.0
KFOX-FM	34.50		
KGRB	9.80	9.80	0
KIEV	14.00	27.00	92.9
KJLH-FM	10.00	14.00	40.0
KKAR	5.75	8.83	53.6
KKOP-FM	18.75	11.00	−41.3
KNAC-FM	8.00	14.00	75.0
KNOB-FM	16.00	25.80	61.2
KPPC	5.00	5.00	0
KPPC-FM	11.25		
KSRF-FM	11.00	11.50	4.5
KTYM	8.75	8.75	0
KTYM-FM	4.80		
KUTE-FM	16.50	19.00	15.2
KVFM-FM	5.60	16.25	190.2
KWIZ	36.00		
KWIZ-FM	6.00	10.40	73.3
KWKW	34.30	35.00	2.0
KWOW	10.50	26.00	147.6
KYMS-FM	9.00	8.90	−1.1
KAVL	4.00	5.70	42.5
KBVM	3.00		
KOTE-FM	3.50	3.50	0
KUTY	3.70	3.70	0
KGIL		58.00	
KKZZ		3.50	
KFWB		116.00	
KIQQ		50.00	
KLVE-FM		43.00	

APPENDIX 6—Continued

BROADCAST RADIO SPOT ADVERTISING RATES IN SELECTED CITIES, 1971, 1975, AND PERCENTAGE CHANGE OVER THE PERIOD—Continued

Station	1971 rate	1975 rate	Percent
LOS ANGELES—Con.			
KAGB		21.50	
KAPX-FM		10.00	
KRLA		40.00	
KDOL		6.00	
KORJ-FM	4.80	8.75	82.3
Total	1,962.90	2,795.78	
SAN DIEGO			
KBBW-FM	4.75		
KBKB-FM	8.00		
KCBQ	30.00	42.00	40.0
KDEO	20.00	7.30	−63.5
KDIG-FM	5.47	8.00	46.3
KFMB	26.40	46.75	77.1
KFMB-FM	9.00	11.20	24.4
KFMX-FM	7.20		
KGB	30.00	49.00	63.3
KGB-FM	30.00	44.00	46.7
KITT-FM	5.00	9.20	84.0
KLRO	6.95	6.00	−13.7
KOGO	35.20	39.00	10.8
KFSD-FM	8.00	20.00	150.0
KPRI-FM	9.00	20.00	122.2
KSDO	24.00	35.60	48.3
KOZN-FM	5.00	11.00	120.0
KSEA-FM	4.50	13.00	188.9
KSON	22.40	32.00	42.9
XEAZ	6.40		
XEBG	6.30	7.10	12.7
SAN DIEGO—Con.			
XEGM	27.50	27.50	0
XEMO	8.10		
XEXX	4.70		
KMLO	7.25	9.10	25.5
KUDE	11.95	10.45	−12.6
KUDE-FM	4.80	9.95	107.3
KOWN	7.50	15.00	100.0
KOWN-FM	4.40	3.00	−31.8
KXXY-FM		12.00	
Total	379.77	488.15	
SAN JOSE			
KAZA	8.50	12.65	48.8
KBAY-FM	26.00	21.00	−19.2
KEEN	17.25	14.40	−16.5
KEGL	11.50	11.00	−4.3
KLIV	25.50	23.60	−7.5
KLOK	42.50	43.00	1.2
KOME-FM	6.40	24.00	275.0
KPLX-FM	10.25		
KARA-FM	10.80	17.35	60.6
KSJO-FM	28.50	23.60	−17.2
KTAO-FM	4.00		
KXRX	21.80	23.60	8.3
KIBE	14.80	14.80	0
KEZR-FM		18.00	
KPEN-FM		12.00	
Total	227.80	259.00	

APPENDIX 7

CONFIDENTIAL QUESTIONNAIRE

OMB-APPROVED
June 1977
44S-77014

Employment, Unemployment and Underemployment in the PERFORMING ARTS

WHEN YOU HAVE FILLED OUT THIS QUESTIONNAIRE, PLEASE RETURN IT TO THE BALTIMORE OFFICE OF THE RESEARCH FIRM, USING THE POSTAGE-PAID ENVELOPE PROVIDED. THE NUMBER IN THE UPPER LEFT HAND CORNER OF THE ENVELOPE IS MERELY TO LET THE RESEARCH FIRM KNOW WHO HAS RETURNED A QUESTIONNAIRE IN CASE IT IS DECIDED TO DO A FOLLOW-UP SURVEY OF THOSE WHO HAVE NOT. THE QUESTIONNAIRE ITSELF WILL *NOT* BE IDENTIFIED IN ANY WAY WITH THIS NUMBER.

IF YOU'D LIKE A COPY OF THE SUMMARY RESULTS OF THE STUDY, SEND YOUR REQUEST (A POSTCARD WILL DO) TO:

RUTTENBERG, FRIEDMAN, KILGALLON, GUTCHESS & ASSOCIATES
P.O. BOX 3027
BALTIMORE, MARYLAND 21229

1. Are you a member of a union in the **PERFORMING ARTS?**

( ) No (Please leave remainder of questionnaire blank and return it in the postage-paid envelope provided.)

( ) Yes: Which one(s)? (Check as many as apply.)

-1 ( ) Actors' Equity 6-8
-2 ( ) American Federation of Musicians (AFM) 7-9
-3 ( ) American Federation of Television and Radio Artists (AFTRA) 8-6
-4 ( ) American Guild of Musical Artists (AGMA) 9-
-5 ( ) American Guild of Variety Artists (AGVA)
-6 ( ) Screen Actors Guild (SAG)
-7 ( ) Screen Extras Guild (SEG)
( ) Other(s) (Specify): _____

If you are a member of more than one **PERFORMING ARTS** union, do you consider one of them your *principal* union of employment?

( ) No ( ) Yes: Which one? _____ 10-

2a. Do you look on the **PERFORMING ARTS** as your principal profession?

-1 ( ) Yes (Skip to Question 3.) 11-

( ) No b. What is your principal profession? _____ 12-

c. Is it related to the **PERFORMING ARTS** in any way? ( ) Yes ( ) No

d. Do you consider your work in the **PERFORMING ARTS** an avocation (hobby) *or* a secondary profession? (Check one.)

-1 ( ) Avocation -2 ( ) Secondary profession 13-
( ) Other (Specify): _____

e. Would you want to spend more of your time in the **PERFORMING ARTS** if work were available?

-1 ( ) Yes, at present rate of remuneration 14-
-3 ( ) Yes, but only if remuneration were increased
-5 ( ) No
-7 ( ) Don't know

PLEASE SKIP TO SECTION II, PAGE 2.

3a. (If "Yes" to Question 2a): Is your work as a **PERFORMING ARTIST** the sole source of your *individual* income?

-1 ( ) Yes 15-

( ) No b. Does it provide

-2 ( ) more than half,
-3 ( ) about half, or
-4 ( ) less than half of your individual income?

4a. Are you currently working full time or *less* than full time in a **PERFORMING ARTS** profession? 16-

-1 ( ) **Full time**

( ) **Less than full time:** b. Why are you working less than full time? Is it because... (Check the *one* reason that most closely describes your situation.)

-2 ( ) **full time work is not available?**

-3 ( ) **even working full time, the remuneration is not sufficient for your needs?**

-4 ( ) **you want to spend time in further training?**

-5 ( ) **you don't want full time work?**

( ) **Other reasons (Specify):** _____

c. Whether you are working full time or less than full time, would you want to spend more of your time in the **PERFORMING ARTS** if work were available? 17-

( ) **Yes, at present rate of remuneration** ( ) **No**

( ) **Yes, but only if remuneration were increased** ( ) **Don't know**

Section II. EMPLOYMENT AS A PERFORMING ARTIST

5. During 1976 about how many *days* did you work at your profession in the **PERFORMING ARTS**? (Exclude work that was not for pay. Also exclude work *related* to the arts but not in your profession, such as teaching or coaching, general management, clerical, ushering, etc.) 18-

-0 ( ) **None** -1 ( ) **1 to 50** -2 ( ) **51 to 100**

-3 ( ) **101 to 150** -4 ( ) **151 to 200** -5 ( ) **201 to 250** -6 ( ) **Over 250**

6. In general, how does this compare with the number of days you worked at your profession in the **PERFORMING ARTS** in 1975? 19-

-1 ( ) **More days in '76 than in '75** -3 ( ) **About the same**

-2 ( ) **Fewer days in '76 than in '75** -4 ( ) **Was not in the profession in '75**

IF YOUR ANSWER TO QUESTION 5 IS "NONE" (YOU DID NOT WORK IN YOUR PROFESSION IN 1976), PLEASE SKIP TO SECTION III, PAGE 4. OTHERWISE, CONTINUE. 20-

21-

7a. Of all the days in 1976 you worked as a **PERFORMING ARTIST**, about what proportion were you working in the following metro areas? 22-

(For each, please enter your best estimate, or 0 if none.) 23-

24-

25-

26-0

New York	_____ %	**Cleveland**	_____ %
Los Angeles	_____ %	**Las Vegas**	_____ %
Nashville	_____ %	**Washington, D.C.**	_____ %

27-

What proportion in all other areas? _____ % On tour? _____ % 28-

b. About what proportion were you working in your *home* area, regardless of where it is? _____ % 29-

c. Did you work more than a total of 12 days in any metro area other than your home area: New York, Cleveland, Los Angeles, Las Vegas, Nashville and Washington, D.C.? 30-

( ) **No** ( ) **Yes:** Which area(s)? About how many days in each?

_____ _____

_____ _____

_____ _____

(If you need more space, use blank space at left.)

d. During 1976, did you work as a **PERFORMING ARTIST** in Canada, Mexico, or any other foreign countries?

-0 ( ) **No** ( ) **Yes:** Please specify which countries and the approximate number of days you worked in each.

Country	No. of Working Days
_____	_____
_____	_____ 31-
_____	_____

(If you need more space, use blank space at left.)

8. About how many different employers did you work for as a **PERFORMING ARTIST** in 1976? (Check one.) 32-

( ) **One** ( ) **Two** ( ) **Three** ( ) **Four** ( ) **More than four:**

About how many? _____

Section III. EMPLOYMENT IN OTHER FIELDS, *NOT* AS A PERFORMING ARTIST

9a. During 1976 did you hold any jobs that were *not* in your profession as a PERFORMING ARTIST?

-1 ( ) Yes (Skip to Question 10.)

( ) No: b. Which of the following is the most important reason for *not* working in a job outside of your profession in the PERFORMING ARTS? (Check only one.) 33-

-2 ( ) You had enough work in your profession

-3 ( ) You did not have enough work in your profession but you were not interested in non-professional work

-4 ( ) You looked for other work not in your profession but no suitable work was available

( ) Other reasons (Specify): _____

_____

_____

PLEASE SKIP TO SECTION IV, PAGE 4.

10a. (If "Yes" to Question 9a): During 1976 did you work in any jobs that were *related* to the PERFORMING ARTS, such as teaching or coaching, or in arts administration (e.g., general management, clerical work, bookkeeping, working as an usher or ticket taker, etc.)?

-0 ( ) No (Skip to Question 11.)

( ) Yes: b. Which category most nearly describes the kind of arts-related work you did? 34-

-1 ( ) Teaching or coaching -2 ( ) Administration

( ) Other (Specify): _____

c. Why did you work in these art-related jobs? (Check as many reasons as apply.) 35-

-1 ( ) You like this kind of work more than work as a PERFORMING ARTIST

-2 ( ) Not enough work as a PERFORMING ARTIST was available

-3 ( ) The pay is better than your pay as a PERFORMING ARTIST

-4 ( ) There is greater job security in these jobs

-5 ( ) The work complements your work as a PERFORMING ARTIST

( ) Other reasons (Specify): _____

_____

d. About how many days did you work in such arts-related jobs during 1976? 36-

-1 ( ) 1 to 50 -2 ( ) 51 to 100 -3 ( ) 101 to 150

-4 ( ) 151 to 200 -5 ( ) 201 to 250 -6 ( ) Over 250

11a. During 1976 did you hold any jobs that were neither in your profession as a PERFORMING ARTIST nor related in any way to the PERFORMING ARTS? 37-

-0 ( ) No (Skip to Question 12, page 4.)

( ) Yes: b. Why did you work in these jobs? (Check as many reasons as apply.)

-1 ( ) You like this kind of work more than work as a PERFORMING ARTIST

-2 ( ) Not enough work as a PERFORMING ARTIST was available

-3 ( ) The pay is better than your pay as a PERFORMING ARTIST

-4 ( ) There is greater job security in these jobs

( ) Other reasons (Specify): _____

_____

c. About how many days during 1976 did you work in such jobs, that is, jobs that were outside your profession and completely unrelated to the PERFORMING ARTS? 38-

-1 ( ) 1 to 50 -2 ( ) 51 to 100 -3 ( ) 101 to 150

-4 ( ) 151 to 200 -5 ( ) 201 to 250 -6 ( ) Over 250

d. Which occupational category most nearly describes the kind of such work you did? (Check as many as are applicable to different jobs you held in 1976.) 39-

-1 ( ) Professional or technical

-2 ( ) Managerial or administrative

-3 ( ) Sales

-4 ( ) Clerical

-5 ( ) Skilled craftsman, such as carpenter, electrician, printer, etc.

-6 ( ) Factory worker

-7 ( ) Transportation equipment operator

-8 ( ) Non-farm laborer

-9 ( ) Service worker, such as waiter, hairdresser, custodian

-x ( ) Farm worker

( ) Other (Specify): _____

12. Including all the work you did in 1976 that was *not* in your profession as a **PERFORMING ARTIST**, whether it was arts-related or not arts-related, about how many different employers did you work for? (Check one.)

( ) One ( ) Two ( ) Three ( ) Four ( ) More than four: 40-
About how many?_____

13. In general, how does the time you spent in such jobs (that were not related to your profession as a **PERFORMING ARTIST**) in 1976 compare with 1975?

-1 ( ) More days in '76 than in '75 -3 ( ) About the same 41-
-2 ( ) Fewer days in '76 than in '75 -4 ( ) Did not work in such jobs in '75

Section IV. UNEMPLOYMENT

14a. During 1976 were there any weeks during which you were not working for pay at all, either as a **PERFORMING ARTIST** or in some other job? (Do not count any weeks when you were on a paid vacation or paid sick leave.)

-0 ( ) No (Please skip to Section V, Page 5.) 42-
( ) Yes: b. About how many weeks?_____

As you know, one of the purposes of this survey is to compare the level of *unemployment* in the **PERFORMING ARTS** with the level in other fields. In order to do this we must follow the precise definition of *unemployment* used by the Department of Labor: an *unemployed* person is someone who is not working at any job during an entire week, *and* who meets *one* of the following requirements:

has actively looked for work at any time within the preceding four weeks, *or* is waiting to be recalled to his/her regular job, *or* is expecting to start a new job.

The remaining questions of this Section (Questions 15, 16, 17 and 18) refer to *unemployment* in this strict sense. Please keep this definition in mind in answering them.

15a. About how many weeks in 1976 were you *unemployed?*

-0 ( ) None -1 ( ) 1 to 3 -2 ( ) 4 to 10 -3 ( ) 11 to 15 43-
-4 ( ) 16 to 26 -5 ( ) 27 to 39 -6 ( ) 40 to 52

b. In general, how does this compare with the number of weeks you were *unemployed* in 1975?

-1 ( ) More weeks in '76 than in '75 -3 ( ) About the same 44-
-2 ( ) Fewer weeks in '76 than in '75 -4 ( ) Was not *unemployed* in '75

IF YOUR ANSWER TO QUESTION 15a IS "NONE," PLEASE SKIP TO QUESTION 18, BELOW. OTHERWISE, CONTINUE.

16. About how many different periods of *unemployment* did you have in 1976? That is, how many times were you *unemployed* after having worked for a period of time? (Check one.)

( ) One ( ) Two ( ) Three ( ) Four ( ) More than four: 45-
About how many?_____

17a. Did you collect unemployment compensation at any time you were *unemployed* in 1976?

( ) No: b. Did you *apply* for unemployment compensation?
-2 ( ) Yes -3 ( ) No 46-
SKIP TO QUESTION 18.

-1 ( ) Yes: c. Altogether, about how many weeks did you collect unemployment compensation? _____ 47-
d. Did you collect unemployment compensation during more than one period?
-1 ( ) No, only one period 48-
( ) Yes: e. About how many different periods?_____

18a. During 1976 were there any weeks when you were not working at all and did *not* meet the requirements to be considered *unemployed?*

-9 ( ) No (Skip to Section V, page 5.) 49-
( ) Yes: b. Was this because... (Check as many reasons as applicable.)
-1 ( ) you were voluntarily taking an unpaid vacation?
-2 ( ) you were ill or disabled (but not on paid sick leave)?
-3 ( ) you were involved in full time education or training?
-4 ( ) you believed no work was available?
( ) Other reasons (Specify):_____
_____

c. If you checked more than one reason, which *one* do you consider the most important? _____ 50-

Section V. EARNINGS

19. What was the *total* 1976 income (before taxes) of *all* members of your household, including yourself? (Include all compensation, interest, dividends, social security or retirement benefits, income from Aid to Families with Dependent Children or other public assistance programs.)

(Please check box on *left* side of table below.)

20. What were your *individual* earnings (before taxes) from all jobs you held in 1976? (Do *not* include unemployment compensation, social security or retirement benefits, or any payments from Aid to Families with Dependent Children or other public assistance programs.)

(Please check box on *right* side of table below.)

-1 ( ) Less than $ 7,000	( ) -1	
-2 ( ) $ 7,000 to $ 8,999	( ) -2	
-3 ( ) $ 9,000 to $10,999	( ) -3	51-
-4 ( ) $11,000 to $12,999	( ) -4	
-5 ( ) $13,000 to $14,999	( ) -5	
-6 ( ) $15,000 to $16,999	( ) -6	
-7 ( ) $17,000 to $18,999	( ) -7	52-
-8 ( ) $19,000 to $20,999	( ) -8	
-9 ( ) $21,000 to $22,999	( ) -9	
-x ( ) $23,000 to $24,999	( ) -x	
-y ( ) $25,000 and over	( ) -y	

21. About what percentage of your total 1976 *earnings* came from (a) work as a **PERFORMING ARTIST**, (b) jobs *related* to the **PERFORMING ARTS**, (c) other jobs, *not* arts related?

22. How do these percentages for 1976 compare with percentages of your total *1975* earnings for similar types of work? 53-

	1976	1975	
(a) from work as a PERFORMING ARTIST	_____ %	_____ %	54-
(b) from jobs *related* to the PERFORMING ARTS	_____ %	_____ %	55-
(c) from other jobs, *not* arts related	_____ %	_____ %	56-

23a. Have you ever participated in making any sound recordings – that is, any musical, spoken, or other sound discs, tapes or other phonorecords? (In answering this question and also 24 and 25, do *not* consider phonorecords made for advertising purposes or for accompanying motion pictures or other audio-visual works.)

-9 ( ) No (Skip to Section VI, Page 6.) 57-

( ) Yes: b. Did you participate in making any in 1976?

-2 ( ) No (Skip to Question 24.)

-1 ( ) Yes: c. How many? _____ 58-

d. How does this compare with the number of sound recordings in which you were a participant in 1975?

-1 ( ) More in '76 than in '75 -3 ( ) About the same 59-

-2 ( ) Fewer in '76 than in '75 -4 ( ) No sound recordings in '75

24a. Do you *currently* receive royalties from the sale of sound recordings you *ever* made?

-0 ( ) No 60-

( ) Yes: b. On about how many different recordings? _____

c. Are you receiving any part of these royalties because you are . . .

-1 ( ) the composer of the recording(s)? 61-

-2 ( ) the author of the recording(s)?

-3 ( ) the performer of the recording(s)?

25a. Was any part of your individual 1975 *earnings* received in the form of royalties from the sale of sound recordings?

-0 ( ) No 62-

( ) Yes: b. Approximately what percentage of your 1976 earnings was derived from such royalties? _____ %

c. How does this compare with the *percentage* of your earnings derived from such royalties in 1975?

-1 ( ) Higher in '76 than in '75 63-

-2 ( ) Lower in '76 than in '75

-3 ( ) About the same

-4 ( ) No such royalties in '75

d. Did you receive any part of these 1976 royalties because you are . . .

-1 ( ) the composer of the recording(s)? 64-

-2 ( ) the author of the recording(s)?

-3 ( ) the performer of the recording(s)?

Section VI. EDUCATION AND TRAINING

26a. While you were attending school (high school, college, or degree-level postgraduate school) did you take any courses (classes) connected with your work in the **PERFORMING ARTS** (or if you are still in school, are you taking any now)?

-0 ( ) No (Skip to Question 27.)

( ) Yes b. When you took these courses (classes) were you planning to work in the **PERFORMING ARTS?**

-1 ( ) Yes -2 ( ) No 67

c. At what level were these courses? (Check as many as applicable.)

-1 ( ) High School -2 ( ) College -3 ( ) Postgraduate 68

d. About how many semester hours (in total) did you take of courses at the college or postgraduate level? _____ 69

27a. In addition to any courses you may have taken in school (and noted in answer to Question 26), have you participated in any organized study, training or classes to improve your abilities as a performer?
(In answering this question don't consider any self-imposed practice time.)

-0 ( ) No 70

( ) Yes: b. Altogether, about how many years did you participate in such study or training? _____

c. On the average, about how much time do you estimate you spent in such study or training during each of these years? (Please indicate *both* the hours per week and the weeks per year.) 71 72

_____ Hours per week _____ Weeks per year

28a. Did any of this organized study, training or classes related to improving your abilities as a performer take place during 1976?

-0 ( ) No (Skip to Question 29, below.)

( ) Yes: b. How much time, on the average, did you spend in 1976 in such study, training or classes? 73

_____ Hours per week _____ Weeks 74

c. How does the time you spent in study, training or classes in 1976 compare with the amount of time you spent similarly in previous years since entering your profession?

-1 ( ) Generally more in '76 -4 ( ) '76 time more than in some years, less than in others 75

-2 ( ) Generally less in '76

-3 ( ) About the same -5 ( ) Did not spend any such time in previous years

d. Did you finance any of this 1976 study out of your own resources (earnings, savings, or other forms of personal income)?

-0 ( ) No 76

( ) Yes: e. About how much money, approximately, did you spend in 1976 on such study, training or classes? 77 78

-1 ( ) Under $100 -5 ( ) $1,500 to $1,999 79

-2 ( ) $ 100 to $ 499 -6 ( ) $2,000 to $2,499 80-1

-3 ( ) $ 500 to $ 999 -7 ( ) $2,500 to $2,999

-4 ( ) $1,000 to $1,499 -8 ( ) $3,000 and over

29a. Have you ever participated in any programs under the federal Comprehensive Employment and Training Act (CETA)? 1-8

-0 ( ) No 9

( ) Yes: b. Was this in . . .

-1 ( ) your profession in the **PERFORMING ARTS?**

-2 ( ) some other field?

30a. Have you ever participated in any *other* federal government-supported employment or training program? (Exclude employment or training programs that were supported by the National Endowment for the Arts.)

-0 ( ) No 10

( ) Yes: b. Was this in your profession in the **PERFORMING ARTS?**

-1 ( ) Yes -2 ( ) No

c. Did the support come from . . .

-1 ( ) Veterans Administration (GI bill)?

-2 ( ) U.S. Office of Education basic opportunity grants or student loans? 11

-3 ( ) Other assistance programs of the U.S. Office of Education?

-4 ( ) Vocational education?

-5 ( ) Vocational rehabilitation? 12

-6 ( ) Revenue sharing?

( ) Other sources? (Specify): _____

Section VII. PERSONAL CHARACTERISTICS

31. Your age?
-1 ( ) Under 16 -2 ( ) 16 to 19 -3 ( ) 20 to 24 -4 ( ) 25 to 34 13-
-5 ( ) 35 to 44 -6 ( ) 45 to 54 -7 ( ) 55 to 64 -8 ( ) 65 or over

32. Your sex?
-1 ( ) Male -2 ( ) Female 14-

33. Your race?
-1 ( ) Black -2 ( ) White -3 ( ) Asian -4 ( ) American Indian 15-
( ) Other (Specify): _____

34. Do you consider yourself part of the Spanish American community?
-1 ( ) Yes -2 ( ) No 16-

35. What is the highest level of school you have completed?
-1 ( ) Less than high school graduate -2 ( ) High school graduate
-3 ( ) Some college -4 ( ) College graduate -5 ( ) Postgraduate 17-

36. About how many years have you worked in your present profession in the PERFORMING ARTS? _____ 18-

37. Did you have any previous occupation(s)?
( ) No ( ) Yes: b. What? _____ 19-
_____ 20-
21-

38. What *state* do you consider your permanent residence? _____ 22-
What zip code? _____ 23-
24-
25-

Thank you . . . and do you have any comments? 26-
27-
28-
29-

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VI. HEARINGS AND COMMENTS*

1. Introduction

Section 114(d) of the 1976 Copyright Act (Public Law 94–553) directs the Register of Copyrights, "after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted material," to submit to Congress a report on whether that section should be amended to provide for performance rights in sound recordings.

This study is intended to summarize and evaluate the positions advanced by the parties with whom the Register has consulted. Although the major protagonists include the broadcasting and recording industries, the principles discussed are not limited to the use of sound recordings by broadcasters alone, except as indicated by context; nor are they limited only to sound recordings which contain musical compositions.

During the summer of 1977, hearings on performance rights in sound recordings were convened by the Copyright Office under the congressional mandate in § 114(d) of the 1976 Copyright Act. Numerous public comment letters had been received earlier, and testimony was heard over a total of 5 days, two in Washington and three in Los Angeles. Witnesses included representatives of the National Association of Broadcasters (NAB), and the Record Industry Association of America (RIAA), as well as those of individual broadcasters and record companies.

Statements were also offered on behalf of performers by representatives of their unions, including the Council of AFL–CIO Unions for Professional Employees, the American Federation of Television and Radio Artists (AFTRA), and the American Federation of Musicians (AFM). The views of the National Endowment for the Arts, the American Symphony Orchestra League, and the Associated Council for the Arts were contributed by spokesmen of those organizations, along with the testimony of Alan W. Livingston, of Twentieth Century-Fox, and Cecil Read.

2. Constitutional Arguments

Broadcasters principally have opposed the extension of performance rights to sound recordings on constitutional grounds. Three such constitutional objections have been raised. It is suggested that sound recordings are not "writings," and that performers and record producers are not "authors," within the meanings of those terms in article I, section 8, clause 8 of the Constitution. The point raised next is that enactment of legislation granting performance rights in sound record-

*Citations to Copyright Office Hearings refer to transcripts as originally presented to Congress as appendices to this Report.

ings would exceed congressional authority under the copyright clause, and additionally, the claim is made that such rights would be in conflict with first amendment rights of users of sound recordings.

A. ARE SOUND RECORDINGS "WRITINGS" UNDER THE COPYRIGHT CLAUSE?

While the argument that sound recordings are not constitutional "writings," and performers and record producers are not "authors," has taken a variety of forms over the years,[1] the reasoning is basically that the nature of performing, and of fixing a performance, is not sufficiently unique, original, or creative to justify copyright protection. Mr. Nicholas Allen, representing the Amusement and Music Operators Association, expressed this reasoning with a reference to the comments of then Senator Sam Ervin that the Constitution speaks simply about authors, not about performers,[2] a statement echoing Ervin's position during the floor debates on S.1361 when performance rights were stricken from that bill.

The American Broadcasting Companies, Inc., have commented that "* * * neither the performing artist nor the record company (producer) provides a sufficiently unique contribution to the musical composition * * *" [3] and the NAB has argued that:

> First, performers are not "authors" or "inventors" in the Constitutional sense. The performer of another author's work hardly can be considered an author who has created an original work. The concepts of creation and authorship are distinct from the concept of performance. The former connotes originality, something entirely new and unique. The latter is simply a rendition of something already created by someone else.[4]

This position is vigorously contested by those supporting a performance right. The RIAA, in its prepared statement, details the nature of a performer's creative contribution, and quotes the following testimony of Erich Leinsdorf:

> Improvisation is one of the earmarks of the performer in music * * *. You're engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?[5]

Theodore Bikel, testifying before the Copyright Office panel on July 7, 1977, stated that a performer's "* * * work is not recreative, not imitative, but creative intrinsically * * *," and later:

> I cannot put a percentile value on the performance of a work. I only know that my own performance of yesterday is different from my own performance of the same work of today, and certainly, would be 10 years hence, and it thus becomes unique, and extraordinary, and unduplicable—even by myself.[6]

The creative contributions of a record company were described as including the selection of artists, both principal and supporting, participation in the choice of material, the choice or assistance of the

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[1] See, generally, legislative history.
[2] See, Copyright Office docket S. 77–6 (Washington 1977); cited hereinafter as "hearings."
[3] See, Copyright Offic docket S. 77–6, comment letter No. 8 at 3–4.
[4] Id. Comment letter No. 7 at 2.
[5] See, RIAA statement at 22–24, quoting Erich Leinsdorf testimony in hearings on S. 597 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, 90th Cong., 1st sess. 821 (1967).
[6] See, testimony of Theodore Bikel, at 327, 334.

proper producer for an artist, the development of appropriate arrangements, and the provision of properly equipped recording studios, as well as technicians and engineers capable of editing, mixing, overdubbing, and a variety of other sophisticated electronic techniques necessary for the release of an album which will meet professional standards.[7] Supporting the value of these contributions is the following statement from "The 1965 Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law:"

> * * * the aggregate of sounds embodied in a sound considered the "writing of an author in the constitutional sense." The analogies between motion pictures and sound recordings in this connection are obvious and inescapable.[8]

These individual points of contention aside, the argument itself, that sound recordings are not constitutionally protectible as the writings of an author, is suspect. Since at least 1955, judicial decisions have held that, although sound recordings were not in fact protected under the 1909 Copyright Act, they were nevertheless capable of receiving such protection under the Constitution, should Congress so decide.[9] With the passage of the 1971 Sound Recording Amendment,[10] Congress did decide to accord copyright protection to sound recordings, even though such protection was limited to rights against unauthorized duplication. The propriety of this legislative action has been upheld by the courts,[11] and both the current and previous Registers of Copyrights have concluded that copyright protection for sound recordings is constitutionally permissible.[12]

This argument is no longer pressed, even by the NAB, with quite the same vigor which it once received.[13] When asked, "* * * have you given up the argument that the sound recording is not a writing of an author, or that a performer is not an author * * *." Mr. James Popham, assistant general counsel of the NAB, replied, "No, we have not given that argument up, yet. When the Supreme Court decides against us, I suppose we will give it up."[14] Thus the argument seems to be asserted only in the absence of what the NAB feels to be a definitive ruling from the Supreme Court. Mr. Popham had stated previously that, "* * * there has, obviously, never been a Supreme Court ruling on a performance right in sound recordings. Until there is such a ruling, we believe that is open to question. We are willing to—and will continue to—argue that constitutional arguments are valid."[15] Protection against unauthorized duplication is continued under the 1976 Copyright Act, and sound recordings as a class are treated as a category of "works of authorship."[16] In this context, Jon Baumgarten, General Counsel of the Copyright Office, confronted Mr. Popham with the logic of the NAB's position on this issue:

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[7] See, RIAA statement at 24–27.
[8] "The 1965 Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law," 89th Cong., 1st sess. 30 (1965).
[9] See, *Capitol Records Inc.*, v. *Mercury Records Corp.* 221 F. 2d 657 (2d Cir. 1955); see also, Ringer, Study No. 26 at 6–7.
[10] Sound Recording Amendment Public Law 92–140. 1971.
[11] See, e.g. *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).
[12] See, Hearings on H.R. 4347, 89th Cong. 1st sess. 1863 (1965). Hearings on S. 597, 90th Cong., 1st sess. 1177–78 (1967); see also Legislative History herein.
[13] Cf. Testimony of Vincent T. Wasilewaski on S. 1111; cf. also, 120 Congressional Record 30407 Statements of Sen. Sam Ervin.
[14] Hearings, at 267 (Washington).
[15] Id. at 242.
[16] 1976 Copyright Act, Public Law No. 94–553, sec. 102.

Mr. BAUMGARTEN. If you accept the reproduction right that is given, which you seem to accept, how can a work be a "writing," or its creator an "author," for protection against one form of exploitation, but not be an author or a writing in terms of other protection against exploitation? * * * I don't see the distinction between anti-piracy legislation and performance rights legislation.

Mr. POPHAM. All I can do is point to the conflict between yourselves, the courts, Senator Ervin, and others, and leave it to the Supreme Court to decide—when that day arises.[17]

The contention that sound recordings are not the writings of an author thus seems to be based, at this point in its history, on a foundation whose structure has become porous, and which is ultimately a non sequitur. As stated by the Register of Copyrights during testimony on S. 1111:[18]

Congress and the court have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle established, any broadening of protection for sound recordings to include a public performance right becomes one not of constitutionality but of statutory policy.

B. ADEQUATE COMPENSATION

The constitutional argument currently asserted most forcibly by the NAB has been phrased in the following terms:

The basic question is whether performers and record companies are adequately compensated in the absence of a performance right in sound recordings; or must we further reward their talents in order to "promote progress in the useful arts."[19]

The premise is that performers and record companies are in fact already well compensated, and the conclusion is that it is therefore not possible to establish the need for a performance right.[20] The result, according to the NAB's reasoning, is that, "In view of the lack of need for a performance right in sound recordings, and the performance right's inability to stimulate the creative effort of recording artists, enactment of a performance right * * * would exceed the powers granted Congress in the Constitution."[21]

The premise upon which this argument is formulated relies on a study conducted for the NAB several years earlier by Dr. Frederic Stuart, professor of business statistics at Hofstra University. Based upon a random sample of records, the study purports to compare the relative distribution of income among composers, publishers, performers, and record companies, from the sale and performance of recordings. While acknowledging that, " * * * only composers and publishers receive payment for broadcast performances," the NAB nevertheless asserts that:

* * * Dr. Stuart found that performing artists and to an even greater extent, record companies, received shares of record sale and performance revenues which exceeded those of composers and publishers.[22]

After referring to a group of statistics "refined" to show "The royalties from broadcast performance received by performing artists who

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[17] Hearings at 268, (Washington).
[18] See, Hearings on S. 111 Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, 94th Cong., 1st sess. 15 (1975).
[19] See, Hearings at 225–226 (Washington).
[20] Id. at 226.
[21] Id. at 232 (emphasis added).
[22] Id. at 227.

also are the composers and/or publishers of the songs they record," [23] the NAB quotes the following conclusion by Dr. Stuart:

> The foregoing analysis shows the performing artist to be * * * well ahead of * * * composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies; and none of these figures takes into account the substantial revenues generated by live concerts.[24]

The NAB goes on to suggest that not only is there no "need" for a performance right because performers and record companies are already adequately compensated, but also that performance royalties will be an ineffective means of stimulating the production of new recordings, and thus will not "promote progress in science and the useful arts." Reference is made to the statement in a law review article written by Professors Robert Bard and Lewis Kurlantzick that the production of recordings of "new songs from unproven composers, performed by unproven artists, are risky enterprises," and to the conclusion that:

> The margin of error in these decisions is so large that the small amounts of additional potential revenues from the sale of a public performance right are unlikely to be considered.[25]

Although the NAB interprets this to mean, "a performance right in sound recordings will provide *no* stimulus to the creative endeavor of unknown and unproven performers," [26] the same law review article, a few lines subsequent to those quoted above, observes that, "Whatever the impact of a record public performance right upon the behavior of individual record companies, overall record production will increase * * * " and, a few lines later, "It appears then, that establishment of a record public performance right will make more records, popular and classical, available to consumers at lower prices." [27]

As these latter statements imply, the point stressed here by the NAB involves speculation, itself a "risky enterprise", concerning the business judgment of another industry within the context of a particular unit of production. To the extent such speculation is to be engaged in, however, it would seem at least equally reasonable to conclude that, while potential performance royalties may not be a significant factor in the decision to produce a given recording, more recordings in the aggregate will indeed result from the availability of performance revenues. This was apparently acknowledged by Mr. Popham, of the NAB, in his testimony during the Copyright Office hearings. In the course of questioning about whether only those royalties from classical recordings would be allocated to the production of classical records, and whether other amounts received from performance royalties would be used to subsidize classical recordings, Mr. Popham was asked:

> * * * if record companies are able to defray their costs of production, isn't it equally likely * * * that they will be able—or at least be in a position—to have developmental projects?

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[23] Id. at 228.
[24] Id.
[25] Id. at 230.
[26] Id. (emphasis in original).
[27] Bard & Kurlantzick, "A Public Performance Right in Recordings", 43 G.W. L. Rev. 152, 181–82 (1975).

Answer. They may be in a better position simply because they have more money in the coffers, so to speak, but it does not unnecessarily mean that they are going to do that.[28]

While this result may not be "necessary," one is left with at least the impression that it is likely; an impression reinforced by the fact that the recording industry is in the business of producing records, and by the generally limited sales life of most recordings.[29] The RIAA has asserted that the uses of performance royalties earned by record companies would be varied, but would include, in addition to the ability to produce more recordings, offsetting increased operating costs in order to delay price increases, augmenting an "A. & R." (artists and repertoire) program, or increasing promotional activity for recording artists. In terms of investment decisions, according to the RIAA, awareness that a recording may generate revenues from a source in addition to sales may have an influence on decisions to record, especially in cases where the sales outlook is marginal.[30]

As mentioned above, such matters involve considerable guesswork and speculation, and are thus of limited usefulness. Whereas the contention that sound recording performance royalties will be unconstitutional because "ineffective" in promoting the "progress of science and the useful arts" has been "answered" by the RIAA; the previous suggestion, that performers and record companies are "adequately compensated" under the present regime, has been roundly criticized. In a separate supplemental statement filed by the RIAA with the Copyright Office,[31] the Stuart study is characterized as "incorrect," "outdated," and "irrelevant." [32] According to Mr. Dimling, of the NAB, the purpose of this study was to compare, in the aggregate, revenues among composers, publishers, performing artists, and record companies from the broadcast and sale of recordings.[33] Among the methodological questions raised by the RIAA, it is suggested that Dr. Stuart, "compared relative revenue shares without making a comparable analysis of relative contributions and investments." [34] It was established, from questioning, that despite the fact that only composers currently receive royalties from broadcast performances of sound recordings, such revenues received by composers who happened to be peformers were included in the figures attributed to performing artists, and not to composers.[35] This was the only basis upon which the NAB asserted that performers share in broadcast performance royalties.[36] On further probing, Mr. Dimling indicated that:

They [performers] don't receive any performance royalties or any copyright payments, but * * * we believe they receive substantial benefits from the airplay of the records * * * in terms of generating record sales; in terms of generating popularity.[37]

This seems to represent a subtle shift in the focus of the argument that performance rights would exceed the constitutional authority of

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[28] Hearings at 254–255.
[29] See, RIAA statement at 57–58.
[30] Id. at 36–37.
[31] See, RIAA supplemental statement, Copyright Office Docket S. 77–6. Comment letter No. 150.
[32] Id. at 6.
[33] Hearings at 274 (Washington).
[34] See, supra, note 30, at 2, 9–12.
[35] Hearings at 246–47 (Washington).
[36] Id. at 247.
[37] Id. at 249.

Congress since the intended recipients are already "adequately compensated." What is actually being suggested is that performers and record companies presently earn enough money, regardless of the source; rather than the suggestion that those groups, and their works, do not merit the benefits of the copyright protection intended by the Constitution. In addition to acknowledging that performers and record companies receive no compensation, based on copyright, for the use of their product, the NAB also recognized the distinction between such compensation and the remuneration derived from the sales of the product or from a live performance, but argued that:

> * * * there is a fairly clear direction of causality. A performance that is recorded and played over the air is clearly distinct from somebody buying a record; or a performance for which the artist is compensated.
> We are simply suggesting that one flows from the other.[38]

It is thus evident that the "adequate compensation" argument is merely a variation on the "free airplay" argument proposed by broadcasters, and as such, will be discussed below. In the context which it is raised here, such an argument is an economic "sheep," dressed in constitutional "wolf's clothing." Posted as it is, in constitutional terms, the argument ultimately points to its own irrelevancy. In the first instance, assuming the copyrightability of sound recordings, it is virtually unheard of to suggest that a copyright owner should be restricted to receiving compensation from one or more forms of exploitation of his work, if, in someone's (let alone a user's) judgment, such compensation is considered "adequate." Beyond this, no evidence has been offered which would reasonably lead to the conclusion that, at any time during the history of copyright law in the United States, an affirmative, definitive showing of economic "need" is required in order to invest Congress with the authority to extend protection to a particular form of exploitation of an already copyrightable work of authorship. Similarly, no support is offered for the proposition that historically, it must be proved that the quantity of copyrightable works will actually increase before Congress is empowered to enact legislation to "promote the progress of science and the useful arts." While these arguments may be admired for their creativity, they do not withstand scrutiny.

C. FIRST AMENDMENT

During his testimony for the NAB, Mr. Popham raised the following issue:

> We are loathe to place any restraints on an individual's first amendment rights to speak and express himself as he so desires. Only those restraints which reasonably further more imperative national interests are tolerated.[39]

The assumption implicit in this statement is that a performance right would in fact operate as a restriction on first amendment rights by somehow interfering with a broadcaster's choice of programing. When the Register pointed out that, "Everyone assumes that this will be under a compulsory license and involve simply compensation as distinguished from the right to withhold * * *." [40] Mr. Popham ex-

[38] Hearings at 250.
[39] Hearings at 224 (Washington).
[40] Hearings at 280 (Washington).

plained that the argument was raised, "* * * just to point out, in the Copyright area, generally, that Congress should have a very slow approach." [41] Thus there is no indication, other than the suggestion itself, that performance rights will actually conflict with any first amendment rights.

During questioning of the NAB witnesses about their first amendment argument, the Register referred extensively to the recent 5 to 4 Supreme Court decision in *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[42] in which a human cannonball's entire act was filmed, against his wishes by a television news crew, and displayed without compensation on an evening news program. The court upheld the performer's common law right of publicity to protect his performance against use without compensation, and in so doing drew significant parallels to copyright law, including the following:

> The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrights dramatic work without liability to the copyright owner.
>
> Of course, Ohio's decision to protect petitioner's right of publicity here, rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provided an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the Patent and Copyright laws, long enforced by this Court.[43]

The NAB, in a supplemental statement filed by Mr. Popham,[44] attempted to distinguish these issues as applied to performance rights in sound recordings. Noting the court's comparison of the economic incentive behind Ohio's right of publicity, referred to above, with the copyright law's intention "to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public," [45] the NAB nevertheless reaches the conclusion that "* * * because a performance right in sound recordings is not likely to increase record production, it lacks sufficient impetus to clear the first amendment hurdle." [46] This difference perceived by the NAB is characterized as "critical factual distinction." [47]

As expressed here, this contention is little more than an effort to recast in first amendment terms the argument discussed above, that enactment of performance rights would exceed congressional authority under the copyright clause if "ineffective" in promoting progress of science and the useful arts. The court in *Zacchini*, however, made no finding that protection would in fact cause the human cannonball to soar to even greater heights, nor that "little Zacchinis" would enter the human cannon ball business, nor were any such findings necessary. The court did find, as noted by the NAB, that the intention of such laws is, "to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public." [48] In other words, the rights themselves, by their very existence are de-

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[41] Id.
[42] *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. ——, 45 U.S.L.W. 4954 (1977).
[43] 45 U.S.L.W. at 4957.
[44] Copyright Office docket S. 77-6. comment letter 153.
[45] 45 U.S.L.W. at 4957 (emphasis added by NAB).
[46] Supra, note 44 at 2.
[47] Id. at 3.
[48] 45 U.S.L.W. at 4957 (emphasis added).

signed to provide an environment where there is incentive to create works ultimately enuring to the public benefit. The court quotes *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954) stating:

> The economic philosophy behind the [copyright clause] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors * * *.

Thus, the "tension" between the first amendment and copyright law reasonably can be seen as merely apparent, since both are concerned with the benefit to the public through the creation and currency of ideas. In any event, the court felt it was "important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized." [49]

In response to a question from the Register during the hearings, Mr. Popham drew another distinction between *Zacchini* and the issue of performance rights in sound recordings:

> Mr. Zacchini, when his act was shown on television, felt there was no point in my going to the county fair * * * because I had seen his entire act * * *.
>
> On the other hand, if I hear a performance [of a] record on my radio, I may *very well* go out and buy that record. Mr. Zacchini has lost all hope of benefit from me, by the broadcasting of his act on television. On the other hand, that is not true in the case of a recording.[50]

This distinction is a restatement of the rationale underlying the "for profit" limitation of the 1909 Copyright Act, whereby an unauthorized performance of certain copyrighted works, such as musical compositions, would have to be "for profit" before liability would arise.[51] Were this standard applied to the performance of sound recordings, it would be indisputable that such performance by broadcasters is "for profit." [52] Indeed, it is precisely on this basis that performing rights societies presently collect royalties from broadcasters. Beyond this, the "for profit" limitation was replaced in the 1976 Copyright Act with the requirement that a public performance, unless specifically exempted, is subject to the exclusive rights of the copyright owner. In discussing the exemption for performances of nondramatic literary and musical works in section 110(4), the exemption most closely related to the 1909 "for profit" limitation, the House report makes the following observation which bears special relevance to the distinction raised by Mr. Popham:

> This provision expressly adopts the principle established by court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.[53]

It thus seems inapposite to offer the rationale of the "for profit" limitation as the basis for any distinction between the scope of protection afforded to the performance of a human cannonball and to a performance embodied in a sound recording. Similarly, it is a perversion of the rationale to suggest that because the performance of a

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[49] Id. at 1958, and note 13.
[50] Hearings at 279–B (emphasis in original) (Washington).
[51] See, 1 M. Nimmer, Nimmer on Copyright sec. 107.3 (1976).
[52] Id. sec. 107.32.
[53] H. Rept. No. 94–1476, 94th Cong., 2d. sess. 85 (1976).

sound recording may not decrease its potential for exploitation, an exemption for such public performance is therefore justified, even though "given or sponsored in connection with * * * commercial or profitmaking enterprises * * *." [54]

3. Economic Arguments

The most emotionally charged and vigorously asserted arguments are those concerning the possible economic effects of performance rights legislation. These issues are raised by opponents of such rights, both in terms of the detriment to be suffered by users (cost), as well as in terms of the benefits presently accruing to the intended recipients ("free airplay").

A. Effects upon user's costs

Jukebox operators do not object quite as strenuously to performance royalties if the money will be taken from the $8 per year fee imposed by Section 116 of the 1976 Copyright Act.[55] There remains the fear, however, that once the "door is opened," the original royalty rates will be changed and additional or higher fees will be assessed. The primary concern at this time seems to be with the adjustments within the jukebox industry required by the licensing system of the new copyright law,[56] together with the notion that a sound recording performance royalty would amount to the payment of two fees for one performance, rather than a royalty for the performance of each of two different works, e.g., a musical composition and a sound recording. Unless additional fees are specifically charged to jukebox operators through the enactment of sound recording performance rights, their costs will remain unaffected.

Broadcasters argue, both individually and collectively, that payment of performance royalties for sound recordings will impose serious financial burdens. Individual radio station operators have suggested either that services to their communities would have to be curtailed, or that, if their operations are already marginal, they may be forced out of business. Broadcasters as an industry, through the NAB, claim that royalties collected under the Danielson bill (H.R. 6063) would represent over 16 percent of 1975 pre-tax profits,[57] exacerbating what is felt to be the already "highly competitive" nature of the broadcasting industry.[58] It is also suggested that broadcasting's competitive position with other local advertising media will be adversely affected by increased costs from performance royalties. Finally, many broadcasters express the feeling that they already pay enough to existing performing rights societies, and new royalties would therefore represent, as some characterize it, "double taxation." [59]

This last point expresses, at best, a basic misconception of the issues involved. Payments made to ASCAP, BMI, and SESAC are for the use of musical compositions which may be contained in a sound

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[54] Id.
[55] Hearings, at pp. 203–04 (Washington).
[56] Id. at 205.
[57] Hearings at 238–40 (Washington).
[58] Id. at 256–58.
[59] See, e.g., Copyright Office Docket S 77–6, Comment Letter No. 83.

recording, and not for the separately copyrightable aggregate of sounds (that is, the performance) which is a sound recording. These fees would be due regardless of whether the broadcast is "live" or from a recording. While broadcasters may indeed feel they pay "enough" to ASCAP, BMI, and SESAC, it is ironic that this is offered as a reason to deny remuneration to those who create, as the RIAA states, "a performance that makes the original musical composition come to life in a form usable for broadcasting and public performance." [60]

Responding to broadcasters' complaints about increased costs and the resultant financial and business difficulties, the RIAA maintains initially that ability to pay should have no bearing on the decision of whether or not to grant the rights contemplated. This aside, is suggested that despite their claims to the contrary, broadcasters can in fact afford the added cost of performance royalties. The RIAA points to such evidence as the increased value of radio stations and increases in radio revenues and profits to support the conclusion that, overall, radio is a healthy and growing industry.[61] It is further alleged that because of the unique advantages of radio advertising, such as comparatively low rates and an exceptionally large audience, radio occupies a solid position among all other media in the competition for advertising revenues.[62] Indeed, the RIAA suggests, radio's share of those revenues is continually growing.[63] The RIAA also offers several possibilities to explain the broadcasters' claim that many stations are already either marginal or losing money. These include, excessive payments to proprietors; excessive depreciation deductions; ownership links with other AM, FM or TV stations; the peaking of losses or profits in one unit of multiowned stations because of tax considerations; the nonprofit nature of radio stations operated by schools and other educational institutions; and so on.[64]

The existence of these possibilities, together with the fluctuating behavior of radio pretax profits over recent years, causes the RIAA to regard skeptically the NAB's claim that the radio industry will suffer undue hardship because proposed performance royalties would have represented over 16 percent of the industry's 1975 pretax profits. Mr. Popham, of the NAB, stated during Copyright Office hearings that:

"Other than to take away, basically, one-sixth of the radio industry's profit, I am not sure that the performance right is going to be a tremendous competitive factor in the broadcasting industry".[65]

This seems to acknowledge that as the RIAA observes, "(s)ince a performance royalty for sound recordings would affect all radio stations of a similar size equally, it will not substantially affect interstation competition." [66] One is thus left with the impression that all the NAB suggests is that only those stations actually "pushed over the edge" will feel any real impact from payment of performance royalties. RIAA skepticism is heightened by statements from "Radio in 1985," a report prepared for the NAB, and quoted as follows:

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[60] RIAA. statement at 44.
[61] See, RIAA. statement at 72–76.
[62] Id. at 79–82.
[63] Id. at 82.
[64] Id. at 77–78.
[65] Hearings at 238.
[66] RIAA, statement at 83 (emphasis by RIAA).

Every analysis shows not only continued good health, but improving health within the [radio] industry. This is true across the board, in every section of the country, in every size market.[67]

The RIAA concludes first that the radio industry's competitive position with other advertising media is so strong that it will remain unaffected by the increased cost from performance royalties, thereby enabling radio to pass on such costs to advertisers.[68] Should broadcasters elect not to pass on these costs, competition within the industry will not be affected, since radio stations similarly situated financially will be affected equally. This also seems to mitigate against threats of curtailment of services or the substitution of sound recordings with other programing. Curtailment of services would involve the concession of a competitive advantage, to say nothing of the obligations imposed by the FCC. Substitution of sound recordings with other programing is unlikely considering the already high costs of such programing.[69]

Primarily because of the inherent difficulty in evaluating the competing and at times contradictory economic claims of the proponents and opponents of performance rights legislation, the Copyright Office, pursuant to its mandate in section 114(d) of Public Law 94–553, commissioned an independent study to assess the overall financial condition of the radio industry and the potential impact of performance royalties.[70] This report speaks for itself, and will not be discussed here in any detail. Mention of some of its findings and conclusions, however, may be helpful.

The study notes the claim that radio industry profits are low and that 30 to 35 percent of all stations annually experience financial losses; together with the implication that the increased cost from performance royalties would cause more stations to suffer losses, some to the point of being forced out of business. The report states:

A major finding of this study is that contrary to theoretical expectations, in many cases, the same radio stations report losses year after year without leaving the industry, thereby casting doubt on the claim that profits are the primary concern of broadcasters and that in their absence, firms would leave the industry * * * approximately *two-thirds* of those stations experiencing losses in any one year are repeaters and experience losses regularly without going out of business.[71]

It is suggested that there is "some evidence" that the transfer of radio stations over the past decade has been accompanied by substantial capital gain, rather than severe loss,[72] although it is acknowledged that data are insufficient to tell if this is currently so. The report offers several hypotheses, supported by the data, to explain the apparent lack of concern by broadcasters for maximizing profits. These include the payment of commissions or fees to station owners, rather than dividends from profits; the ability to charge joint costs to one entity in situations where several stations or other media are owned by one enterprise; or the desire to avoid the threat of increased competition by

[67] Id. at 76 and notes therein.
[68] Id. at 83–84.
[69] See, Hearings at 286 (Washington).
[70] Ruttenberg, et al., "An Economic Impact Analysis of a Proposed Change in the Copyright Law." Although radio broadcasters are the user group which would be most affected by performance rights legislation, it should be remembered that they are only one such group.
[71] Id. at x (emphasis in original).
[72] Id. at xi, cf. Testimony of Peter Newell, G.M. of radio station KPOL, Los Angeles, at 131.

reporting little or no profits to the FCC, the licensing authority.[73] The study observes that:

> Specifically, when the station's financial reports are adjusted by subtracting out of the total broadcast expenses, payments to owners of the stations and "administrative overhead" expenses which are not clearly defined, the number of stations moving from the loss to the profit category is substantial, resulting in a significant increase in the number of profitable stations * * * the numbers of stations experiencing no losses over the period [1971–75] increases from 40.2 percent to 77.0 percent.[74]

The report concludes that:

> In general, * * * radio broadcast stations would be able to pay a record music license fee without any significant impact, either on profits or the number of stations in operation. In addition there is evidence that the radio broadcasting industry would be able to pass on any increase in the costs of operation to the purchases of advertising time without any loss of business or revenues.[75]

B. "FREE AIRPLAY"

The argument uttered most frequently by broadcasters, and with the most fervor, is that the benefits derived by record companies and performers from the free airplay of sound recordings represents compensation sufficient to justify unlimited use without payment or other interference. As stated by Mr. Popham:

> It is, after all, the efforts of radio broadcasters that are primarily responsible for huge record sales and huge audiences at recording artists' concerts. Radio broadcasters, too, serve the creative process. We insure broad exposure for creative work via airplay of records and, thereby, promote and stimulate the sale of original artistry. We, too, insure appropriate [rewards] for creative endeavors and encourage additional creative efforts by record companies and recording artists.[75a]

Although it is acknowledged that performers and record companies receive no direct compensation for the use of recorded performances, it is the broadcasters' firmly held belief that substantial rewards, in terms of increased record sales, increased attendance at live performances, and increased "popularity," are generated specifically from the airplay of recordings. According to Mr. Dimling, of the NAB:

> I think there is a fairly clear direction of casuality. A performance that is recorded and played over the air is clearly distinct from somebody buying a record; or a [live] performance for which the artist is compensated. We are simply suggesting that one flows from the other.[76]

In other words, broadcasters are suggesting that since adequate compensation, regardless of its form, results from the airplay of sound recordings, additional compensation from those responsible for the benefits presently enjoyed would be unnecessary, unwarranted, burdensome, and unfair. Some have even proposed that, rather than establishing performance royalties, a fee should be paid to broadcasters for their promotion, through airplay, of sound recordings.[77]

That concrete and significant benefits can and do result from the airplay of sound recordings is immediately conceded.[78] This, however,

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[73] Id. at xi.
[74] Id. at xii.
[75] Id. The exception seems to be for classical music stations. Id., at 53–55.
[75a] Hearings at 237 (Washington).
[76] Hearings, at 250 (Washington).
[77] See, e.g., Copyright Office docket S. 77–6, comment letter No. 31.
[78] See, hearings at 201–202; Smith at 335 (L.A.).

represents only part of the picture, according to representatives of the recording industry and other proponents of performance rights legislation. The extent, nature, and effectiveness of these benefits are issues hotly disputed by performers and record producers.

Broadcasters do not use sound recordings solely, or even primarily, for the benefit of performers and record producers. Their use is principally for the purpose of attracting audiences, which in turn sells advertising. According to the RIAA, over 75 percent of commercially available radio air time is devoted to programing using sound recordings.[79] In connection with this, it is pointed out that the broadcasting industry currently pays for virtually every other source of programing.[80]

The recording industry suggests that while radio airplay may indeed be valuable in individual cases, its overall effect is not what broadcasters make it out to be. In terms of the quantity of product released by the record industry, the proportion which actually receives airplay is minor. Stanley Gortikov, president of the RIAA, has testified that out of an approximate average of 1,000 new recorded songs released each week, only about 6 are added to radio station playists.[81] Thus he concludes that, "Most recordings released never got on the radio * * *." [82] Statistics offered by the RIAA indicate that 75 percent of all recordings released fail to recover their costs, and that only 6 percent earn any "real" profits.[83] Ninety-five percent of classical recordings lose money, and it is estimated that 53 percent of the music played on radio consists of "oldies," with little or no meaningful sales life.[84] As recognition of the medium's potential and apparently motivated by the perception that such potential is not presently realized through the activities (airplay) of broadcasters, the recording industry spends an estimated $100 million annually for paid broadcast advertising, including radio and TV.[85] Additionally, while broadcasters have argued that performance royalties would provide an added incentive for payola, performers and record producers have responded, among other things, that it is precisely the difficulty of obtaining airplay which prompts payola in the first instance.[86]

Questions are also raised concerning the nature and effectiveness of airplay; or, more specifically, questions concerning who actually benefits. It is suggested that significant segments of the radio listening audience do not purchase records, and record sales are therefore not enhanced by airplay. Examples include audiences which listen to classical music stations, so-called beautiful music stations, and religious music stations. While one operator of a "beautiful" music station believes that a market exists for sales of the type of product he uses, and expresses his consternation at the recording industry's failure to produce enough of it,[87] another broadcaster suggests that: "It has been demonstrated that they aren't selling those kinds of records to people." [88] Both agree that performance royalties will not help the

[79] See, e.g., Copyright Office docket S. 77–6, comment letter No. 12, p. 13.
[80] Id. at 15.
[81] Hearings at 202 (L.A.).
[82] Id.
[83] See, Copyright Office docket S. 77–6, comment letter No. 12, pp. 14–15.
[84] RIAA statement at 58.
[85] See, hearings at 199 (L.A.).
[86] See, hearings at 330 (Washington).
[87] See, hearings at 11, 19 (Washington).
[88] Id. at 156 (L.A.).

situation, either because a "beautiful" music format doesn't promote sales by announcing the names of selections, or because people don't purchase the music anyway. Such reasoning is somewhat askew, and ignores what is implicit in their own facts. As expressed by Alan Livingston, the existence of a listening audience, even in the absence of a buying one, would be enough reason to encourage creation of a particular product, if there were compensation for its commercial use. Under the present system, if records don't sell, for whatever reason, there is no way for record producers to recover their investments.[89]

The obvious situation in which benefits are derived from the airplay of sound recordings is in the case of "Top 40" radio stations broadcasting the performance of popular recording artists. Even in this regard, however, supporters of performance rights legislation seriously question the quality of these benefits. Just as records sales may be enhanced, there is also danger from overexposure to the point that sales may be damaged.[90] The availability of home taping equipment, and the behavior of radio stations in encouraging such activity, also hurts the sale of records.[91]

Where radio airplay and a large volume of record sales do in fact coincide, either the cause or the effect, depending upon one's point of view, is a recording "superstar." Joe Smith, chairman of the Board of Elektra-Asylum Record Company, has testified that:

> The radio stations * * * have gone through a process in the last 15–20 years of restricting the exposure of new artists. The formats have shifted and gone the so-called tight play list as the ruling philosophy * * * the overwhelming amount of broadcasters are only looking for the winners.
>
> We're also involved—and deeply, in where music is going. Radio broadcasting waits for the lead to be established. Whatever new has come along in terms of jazz music, has been our initiative and own dollars spent.[92]

Broadcasters acknowledge that the exposure of new artists involves substantial risks. Peter Newell, General Manager of KPOL in Los Angeles, implies that broadcasters accept those risks, stating, "so we risk a great deal when we go on a new record * * *. We take a risk every time we add a new record, and record companies and performers benefit from our taking that risk." He also states:

> The old records aren't so risky. We've already established their popularity, and, by that, I mean we, the radio stations, have established the popularity of those old records, and we believe we should have the right to play them and continue to play them without recompense, whether they're still selling or not.[93]

Thus, contrary to the statements of Mr. Smith, Mr. Newell's testimony leaves the impression that radio is the cause of whatever success is enjoyed by record companies and performers.

The testimony of another broadcaster, however, casts doubt upon Mr. Newell's premise that radio actually undertakes the risks as he implies. John Winnamon, general manager of KLOS-FM an "album-oriented" rock music station in Los Angeles, testified, "We have very specific criteria for adding records * * * it's based on merit and popularity because young people like to hear popular music. You buy the

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[89] Id. at 13–15 (L.A.).
[90] See, e.g., RIAA statement at 59–60.
[91] Id. at 60.
[92] See, hearings at 335–36 (L.A.).
[93] Hearings at 127–28 (L.A.).

artists that are the big ones—Carole King and Linda Ronstadt and Elton John and all of these biggies that are on the charts today." [94] When asked how such popularity was measured, Mr. Winnamon replied:

> We have very specific criteria. We do local research by calling some 300 record stores every week and find out how albums and singles are going. We actually go out to the field and talk to these people. We do look at five different surveys, * * * and we have a formula for weighting that out * * * [95]

Asked specifically about decisions to play new songs recorded by unknown artists, Mr. Winnamon answered:

> Well, I think what you have to understand is how the criteria is (sic) based. If people reach into their pocket and pull out $5 or $6 to buy an album, that means that that album is saying something to you. It's hot. It's familiar. It's good to listen to. So we look at sales very heavily * * * (b)ecause that indicates popularity.[96]

Mr. Winnamon continued:

> There are such artists that we call "core artists," and those are artists who have had a track record in the last 6 months or a year with a hit album. They're safe because they generally come out with another hit album. It is not too difficult to determine that—the new Carole King album just came out a week ago, and we went on it immediately because we know Carole King is a fine, established artist and a fine writer * * *. You see, to pick up an obscure artist is very dangerous.[97]

These "core artists" to which Mr. Winnamon refers are apparently, according to Mr. Smith, the same whose albums will sell regardless of airplay.[98] While these performers are in the process of becoming "core artists" or "stars," the recording industry, as Mr. Smith maintains above, is deeply involved, both financially and creatively, and without any contribution from broadcasters. Again, in his words, "the overwhelming amount of broadcasters are only looking for the winners." [99] Mr. Smith refers to several highly successful recording artists, "all of whom," he states, "have been established in a long process wherein radio has played an enormous part, but well down the line, well after we started." [100]

All that is clear from these arguments is that there is at least some interdependence between the broadcasting and record industries. The benefits which flow from the airplay of sound recordings, as broadcasters have acknowledged, are indirect, and are difficult to either measure quantitatively or evaluate qualitatively.

Although supporters and opponents of performance rights legislation may seem to be working adamantly at cross-purposes, without a glimmer of compromise, when the testimony on this question is considered as a whole, the picture of interdependence begins to assume, however surprisingly, a sharper focus. Briefly stated, broadcasters are primarily in the business of selling an audience to advertisers. Desiring to attract and maintain these audiences, broadcasters tend to use recordings already established, either by the artist's reputation or by the works which these recordings contain. Newer, "unknown" record-

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[94] Id. at 88 (L.A.).
[95] Id. at 89 (L.A.).
[96] Id. at 90 (L.A.).
[97] Id. at 91 (L.A.).
[98] Id. at 352.
[99] Id. at 335.
[100] Id. at 337.

ings are considered risky by broadcasters, and seem usually to be used only after showing some sign of public acceptance through sales.

The glibness of such statements as, "radio sells records," expressed in a variety of forms by nearly all broadcasters, ignores the existence of important variables. There is a distinction, perhaps subtle but nonetheless critical, between exposure and "popularity." Radio, by definition as a mass medium, exposes sound recordings to an enormous audience. Indeed, as a method of exposure, radio is probably indispensable to the recording industry as it presently exists. It is not, however, the sole means of exposure; and simple exposure, in whatever form, does not automatically result in "popularity" or public acceptance. To conclude that it does requires that the role of public opinion, or taste, be completely dismissed. Specifically, it would ignore the public's decision to purchase a particular recording, or, for that matter, to listen to a particular radio station. In other words, it is no guarantee, simply because someone hears a recording, that the response will be favorable. It sems equally reasonable to assume that the reaction will be one of dislike or indifference. Exposure alone, while it is a necessary cause of popularity, is not a sufficient one.

The relationship between the recording and broadcasting industries has been described, by a broadcaster, as a, "real nice marriage * * *. It's like the tracks and the train." [101] Another broadcaster states that, "the present system benefits all the parties * * *," [102] while a record company executive suggests that the industries are "mutually using each other." [103] A staff study entitled "Songplugging and the Airwaves: A Functional Outline of the Popular Music Business," published by the House Committee on Interstate and Foreign Commerce in May 1960, observes:

> One of the conclusions reached in this memorandum is that the broadcasting industry is an indispensable promotion arm of the record industry. It is undeniable that broadcasters can and should make available to the public great quantities of America's rich musical harvest * * *. Because of the innumerable conflict-of-interest situations * * * there is considerable reason to believe that much of the music the public hears is played not because of the broadcasters' judgment as to its quality, but because of its marketability or because the broadcaster will profit financially from its use. Broadcasting of music is a necessary ingredient in balanced programing. Enhancement of record sales or artist popularity that results incidentally is perfectly legitimate so long as balanced programing is the broadcaster's principal concern. It is when the broadcaster loses sight of his programing responsibilities and accepts the "promotion" role thrust on him by the record industry that the public interest is compromised.[104]

Broadcaster arguments concerning the airplay of recordings, if accepted at face value, not only imply a certain degree of contempt for the integrity of listening audiences, but also indicate that the industry has succumbed entirely to the dangers and fears expressed above. Mr. Winnamon has stated:

Exposure can dictate popularity.

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[101] Id. at 94 (L.A.).
[102] Id. at 130 (L.A.).
[103] Id. at 334 (L.A.).
[104] House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., "Songplugging and the Airwaves: A Functional Outline of the Popular Music Business" 13 (Subcommittee Print 1960).

(T)here's a mentality of the public, and in the radio business or in the television business—I guess in any business when you're trying to sell a product to somebody—say "Here, folks look at it. It's good. You need it. You should have it." [105]

By his own words, however, this does not accurately reflect the purposes for which broadcasters use sound recordings. Mr. Winnamon suggests, immediately after making the previous statement, that:

We are in a very competitive business * * * and it becomes a bit of a dogfight when it goes out to sell time on those stations * * * and our intention is to provide a programing service that will reach the largest possible mass audience, and we feel that by playing hot hit artists who do traditionally generate great sales of albums, that tends to be the way to go in radio today. And, as proof of the matter, your top stations that are playing popular hit music are the ones with the big ratings.[106]

Thus, as Mr. Smith puts it:

They are playing the music for their own self-interest. Most of their listeners—and whatever the demographic targets are—want that kind of music * * * [I]f it came to dropping ashtrays and that was a very popular sound, they would drop ashtrays. It's incidental that we are in the record business. And they are using whatever is necessary to attract audiences.[107]

4. Equity

Many of these economic arguments become the foundation of issues which the parties consider matters of equity. For example, the NAB's "fundamental equitable argument [is] based on the substantial economic benefits accruing to record producers and performers as a result of airplay of their recordings." [108] Or, as stated by ABC, "In view of the fact that broadcast stations represent the principal promotional device leading to the success and well-being of recording artists and companies, the proposed performance royalty would amount to an unfair (and burdensome) tax on the broadcast industry." [109] On the other hand, representatives of the record industry and performers argue that sound recordings are used to attract audiences, and it is inequitable for broadcasters, jukebox operators, or others to use these products for their own commercial benefit, without payment of compensation.[110]

Broadcaster objections are usually stated in terms of the perception that the benefits to record companies and performers from airplay are adequate, and no further compensation is needed. The relationship of airplay to the record industry is discussed above. As it affects performers, proponents of performance rights legislation consider the relationship first as it applies generally to employment among performers, and second, as broadcasting affects performers who make sound recordings.

A. EMPLOYMENT

Historically, the transition in the broadcasting industry from the use of "live" performances to recorded performances caused severe dislocation in employment among performers. According to performers and their representatives, it is unjust and inequitable to allow

[105] Id. at 91–93 (L.A.).
[106] Id. at 93 (L.A.). See also, id. at 102–103.
[107] Id. at 339, 341 (L.A.)
[108] See, Copyright Office Docket S 77–6–B, Comment Letter No. 13.
[109] Id. Comment Letter No. 12.
[110] See, e.g., Hearings at 100 (Golodner-Washington).

the uncompensated exploitation of a performer's talent and creativity. As Woody Herman states, "Were the stations to hire us to perform live, they would have to pay us; why shouldn't they have to pay when they exploit our recorded performance?" [111] It seems obvious that, by itself, the form of a performance, whether live or recorded, will have no affect on whatever benefits accure to either party. Certainly a broadcaster has no "right" to compel an artist to perform in person. Since the benefits are the same, citation of those benefits cannot justify the existence of a "right" to use a performance in one form (recorded), over the other (live). The NAB, in attempting to distinguish the two situations, states, "In the days of live radio, the performers did not volunteer to come into the studio and play for nothing. In contemporary radio, record distributors bring records to the station and say, "here is a free record. 'Play it, please.' " [112] Rather than a distinction, however, the costs incurred by record producers, including performers, in providing these records might just as well be considered the quid pro quo for the exposure received from radio, leaving the commercial benefits to broadcasters obtained without compensation.[113] Performers complain that because of the ability to freely use sound recordings, they are unfairly displaced from employment, whether in radio, clubs, restaurants, or elsewhere, and frequently by a product of their own creation.[114]

B. PERFORMERS MAKING SOUND RECORDINGS

When broadcasters and others argue that performers are not in need of any additional compensation, reference is often made to those recording artists who have achieved considerable financial success, that is, the "stars." [115] These, however, represent only a small portion of professional performing artists. Indeed, suggestions that, "successful recording artists are amply rewarded and hardly need further encouragement," [116] do not accurately reflect the intention of proposed performance rights legislation to benefit all participants on a given recording equally. In order to determine whether performers are benefiting from the current system, and if so to what extent, the economic study commissioned by the Copyright Office examined the data produced from a survey of the membership of five performing arts unions.[117] The survey data indicate that performers do not, in fact, receive adequate compensation.[118] Among its findings, the report states that, "The responses indicate that generally the performers make very few recordings in a year. Considering that a minority of all performers are involved in making recordings at all, the importance of sound recordings as a source of work is very small." [119] Further, the study finds that:

> This data indicates that earnings of performers are more apt to be low than high and * * * that they are clustered at the low and high ends of the scale. This suggests that for those in the performing arts things are either very good

[111] Copyright Office Docket C 77–6, Comment Letter No. 15.
[112] Hearings at 267 (Washington).
[113] Id. at 334 (L.A.).
[114] See, e.g., Id. at 96–98 (Washington).
[115] See, e.g.. Id. at 86–87 (L.A.).
[116] Id. at 229 (Washington).
[117] See, supra note 69 at 97.
[118] Id. at 106.
[119] Id. at 100.

or very bad. Most performers are clustered at the low level on the income ladder, but the few that make it, make it big.[120]

Broadcasters and other users suggest that if performers are inadequately compensated, they should look to the record companies and successful recording artists.[121] One broadcaster states that, "If the consumer has to pay, then let it be the one who buys the product (record) * * *." [122] This ignores the fact that the record buyer already bears the entire cost of production,[123] and that perhaps those who use recordings for profit should share in some of that cost.

C. OTHER EQUITABLE ISSUES

Ultimately, supporters of performance rights contend that the benefits from airplay are irrelevant to the equities of the debate and should have a bearing, if at all, only on the amount of the royalty, not on the existence of the right of performers itself. It is observed that every other copyrightable work capable of performance has such a right.[124] To deny a performance right to the owners of copyright in sound recordings because of the benefits from airplay would be no different, according to the RIAA, from the television network which broadcast the dramatization of Alex Haley's *Roots* refusing to pay Mr. Haley because book sales were enhanced.[125] Similarly, it is suggested that broadcasters argue with "unclean hands," since, under the 1976 Copyright Act, they are entitled to receive royalties for the use of their copyrighted programing by cable television systems. Broadcasters should have no objection, therefore, to paying for their own use of copyrighted material.[126] Finally, it is noted that broadcasters currently pay royalties to composers and publishers for the use of musical compositions, usually as contained in sound recordings. It is curious, if not ironic, that they so vigorously resist compensating those who render such musical compositions into a form so easily accessible to broadcasters' needs. "Absent a recording, [and a live performance] the musical composition is silent." [127] Maintaining an exemption for the public performance of sound recordings is not only inequitable when compared to the treatment of other copyrightable works; it is also equally inappropriate, in terms of the principles of copyright law, to justify that exemption on the basis of benefits accruing from a means of exposure. Similar exemptions might then be justified in numerous other areas, e.g., the public performance of a motion picture by a television broadcaster, the rebroadcast of a sporting event by a cable system, or the public singing of a song.

5. Miscellaneous Issues

A. PAYOLA

Broadcasters suggest that sound recording performance rights would provide an added incentive to payola.[128] At the same time, how-

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[120] Id. at 101.
[121] See, e.g., Copyright Office Docket S 77-6, Comment Letter, No. 7, p. 8; see. also, Hearings at 132-133 (L.A.).
[122] Hearings at 134 (L.A.).
[123] See, e.g., Hearings at 324 (Washington); see also, Id. at 106 (Washington).
[124] See, e.g., RIAA Statement at 19.
[125] Hearings at 180 (L.A.).
[126] RIAA Statement 27-29.
[127] Copyright Office Docket S 77-6. Comment Letter No. 12, p. 19.
[128] See, e.g., Id., Comment Letter No. 7, pp. 9-10.

ever, many assert that they should be paid for the promotion of sound recordings through airplay.[129] While on the surface it might seem that an additional source of revenue could stimulate corruption, upon analysis such a result seems unlikely. All parties agree, at least publicly, that payola is disapproved of unequivocally, and does not occur in the normal course of business. Establishing performance rights would not create a new commodity, nor would it create a new market for an existing commodity. Payola still would involve bribery for the purpose of securing airplay of recordings, and it would still be illegal. Unless the activity were sanctioned by the record company, or engaged in by the performers, the participants would realize none of the additional revenues thought to represent the "added incentive." If record companies desire airplay but, as they say, disapprove of getting it through payola, it seems doubtful that the receipt of royalties would cause those companies to ratify such behavior on their behalf. In other words, if, for example, a record company employee felt that his standing in the company would be enhanced through his obtaining airplay for certain recordings, payment of royalties to the company would appear to have little, if any, affect on that individual's decision to secure airplay in a manner that violates company policy and breaks the law. In any event, to argue that performance rights should be rejected in the face of numerous important considerations because of the threat of payola reflects a jaundiced attitude toward the deterrent and punitive effects of existing legislation.[130]

B. COMPOSER/PUBLISHER GROUPS

No opposition to sound recording performance rights has been expressed by these groups. Concern, is expressed, however, that royalties presently received not be diminished. The Association of Independent Music Publishers takes no position on the issue as long as current royalties will not be affected by proposed legislation.[131] Broadcast Music, Inc. (BMI) one of the major performing rights societies, goes one step further, stating,

> (W)hile prepared to support legislation that will properly compensate the performer, we can do so only if we are assured that the position of BMI writers and publishers will not be adversely affected.[132] On the other hand, BMI opposes compulsory licensing in this area.

It is worthy of mention that proposed legislation is neither designed nor intended to affect directly the royalties payable to composers and publishers. Representatives of performers' unions suggest that such concern is unfounded since the amount of money available is not necessarily limited. The "pie is growing," [133] in other words. As one indication that this is an accurate analysis, an article in the August 20, 1977 issue of "Record World" Magazine observes that:

> In each of the last three negotiations [between ASCAP and the radio industry], ASCAP has accepted reductions in station rates * * *. Despite the reduction in rates, the total fees ASCAP collects from radio have risen steadly * * * reflect[ing] radio's growing profitability and the increased number of stations on the air.[134]

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[129] See, e.g., Id., Comment Letter No. 31.
[130] See, 47 U.S.C. §§ 317, 508.
[131] See, Copyright Office Docket S 77-6, Comment Letter No. 126.
[132] Comment Letter No. 10.
[133] See, Hearings at 163 (Washington), see also, Id. at 61 (L.A.).
[134] Record World, Aug. 20, 1977, p. 4, 57.

Whether the bargaining position of performing rights societies will be affected by the existence of sound recording performance rights is a consideration too highly speculative for evaluation at this time.

C. COLLECTION AND DISTRIBUTION OF ROYALTIES

Many of the issues raised in this area are more appropriately discussed in terms of specific recommendations for legislation. It is nevertheless useful to outline briefly some of the topics mentioned by the parties involved.

Although there have been suggestions that the identification of beneficiaries would present insurmountable problems, representatives of performers' unions indicate that effective mechanisms presently exist which enable identification of individual performers who make sound recordings, including supporting as well as lead artists.[135] Similarly, these union representatives express no apprehension that administrative costs, regardless of the particular system, will be in any way prohibitive.[136] The AFM has suggested that, provided the necessary arrangements are made, composers, publishers, and performers might benefit from sharing administrative costs through the use of an existing system such as ASCAP or BMI.[137]

All proponents of performance rights legislation advocate an equal division of royalties between record producers and performers. Of the 50-percent share intended for performers as a group, there is also no disagreement that such moneys should be allocated on a per capita basis, an equal share payable to each individual participating in a given recording. Thus, supporting artists are intended to benefit to the same extent as leading artists.

While some suggest there is a danger that royalties due performers will be misallocated because of the superior bargaining position of record companies,[138] it is interesting that such objections come, not from performers, but from users of sound recordings. One method of avoiding this result is to provide by statute that royalties are not assignable between record companies and performers. Beyond this, representatives of performers' unions express enough confidence in their own bargaining position to prevent for example, record companies from recouping excessive amounts in studio fees or other production costs from performers.[139] All those favoring performance rights would prefer that royalty rates be set either through private negotiation or by the Copyright Royalty Tribunal, but statutory rates are an acceptable alternative. The specific uses to which royalties may be put by the recipients would seem to be beyond the appropriate scope of performance rights legislation.

D. NATIONAL ENDOWMENT FOR THE ARTS AND OTHER GROUPS

Several groups which would not be directly affected by performance rights legislation have publicly indicated their support. These include

[135] See, Hearings at 52 (L.A.) 148–49 (Washington).
[136] Id. at 131–35 (Washington).
[137] Id. at 39 (L.A.).
[138] See, id. at 231 (Washington).
[139] See, id. at 135–137 (Washington).

the Consumer Federation of America; [140] American Women in Radio and Television; [141] the Minnesota State Arts Board; [142] and the Chicago Bar Association. [143] In addition, the National Endowment for the Arts has reaffirmed its support, first expressed during Senate hearings in 1975.[144] Mr. Robert Wade, General Counsel to the Endowment, during hearings before the Copyright Office, testified that a distribution formula weighted in favor of folk, classical, operatic, and other nonmainstream types of projects might be considered.[145] Mr. Wade also mentioned that the RIAA, on behalf of its membership, had voluntarily and independently offered to contribute a percentage of royalties received, should performance rights legislation be enacted. Mr. Gortikov, president of the RIAA, verified this, stating, "the Board of Directors (of RIAA) has pledged that 5 percent of their respective companies' performance royalty income would be channeled to the National Endowment for the Arts * * *." [146] Each of these alternatives is intended to encourage the production of recordings which are so far unable to generate mass appeal, as well as to benefit those who produce them. Although both a weighted distribution formula and a percentage contribution might be desirable, the latter seems less cumbersome and problematical in terms of a statutory scheme which avoids qualitative assumptions among various types of works. Such a weighted distribution formula, supported also by the American Symphony Orchestra League,[147] would best be undertaken through private negotiation rather than through legislative action. Similarly, although the American Symphony Orchestra League suggests that distribution of royalties be made to a symphony's sponsoring organization rather than to the musicians themselves,[148] this, too, may be properly left to negotiation in the absence of substantial justification for altering a proposed statutory system intended to benefit performers directly.

E. TECHNOLOGY

At present, the recording industry's only source of revenue is from the sale of records. During their testimony, representatives of the RIAA articulated significant apprehension that even this source of income was not secure in the face of technological advance. Increasingly accessible home taping equipment has already had some effect upon record sales.

Indeed, radio broadcasters often encourage and facilitate this activity by playing complete albums at specified times, and by announcing sound levels and tracking time. Moreover, according to Mr. Gortikov:

> We are not far away from in-home pushbutton recall from vast banks of recorded musical repertoire. * * * Technical forecasters anticipate the day when a cable subscriber need merely press a few buttons to signal his desire to hear a particular album or selection. This could be a body blow to record buying.[149]

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[140] Copyright Office Docket S 77–6, Comment Letter No. 152.
[141] Id., Comment Letter 154.
[142] Id., Comment Letter 134.
[143] Id., Comment Letter 2
[144] Hearings on S. 1111. Peformance Royalty, before the Subcommittee on Patents, Trademarks, and Copyright of the Senate Judiciary Committee. 94th Cong., 1st sess. (1975).
[145] See Copyright Office Docket S 77–6, Hearings at 63–64 (Washington).
[146] Id. at 212 (L.A.).
[147] Id. at 308 (Washington).
[148] Id. at 313 (Washington).
[149] Id. at 185; (L.A.)., see also, Id. at 343–44 (L.A.).

One of the principal motivations behind general revision of the copyright law in 1976 was the inadequacy of existing law engendered by changes in technology. As expressed in the House Report on the 1976 Copyright Act:

> Since [1909] significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.[150]

Congress, in its deliberations on performance rights, should not be unmindful of the possibility that technological developments could well cause substantial changes in existing systems for public delivery of sound recordings. In that event, it is equally possible that a performance right would become the major source of income from, and incentive to, the creation of such works.

Summary and Conclusions

> 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.—1965 Register's Supplementary Report at 13.

The philosophy expressed in this statement from the 1965 "Register's Supplementary Report on the General Revision of U.S. Copyright Law" is basic to the evaluation of arguments raised in the debate over performance rights in sound recordings. Constitutional objections, while obviously the privilege of opponents to make, are quite simply without merit. Congress has properly and clearly exercised its discretion under article I, section 8 of the Constitution by including sound recordings among the categories of copyrightable subject matter in section 102 of the 1976 Copyright Act. The novel suggestion that Congress is powerless to act in this area without a prior showing of proven need is unheard of in the history of copyright law, and contrary to its basic principles.

Economic arguments, raised primarily by broadcasters, may appear at first glance to have some validity. Even these positions, however, do not withstand scrutiny. While the impression might seem reasonable that substantial benefits, such as increased record sales, flow from the airplay of sound recordings, evidence adduced from public hearings and comments significantly qualifies that impression. Benefits which do result from airplay generally affect only a small proportion of the works created by the recording industry; as well as only a limited segment of the varied spectrum of performing artists. Such benefits are

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[150] H. Rep. No. 94–1476, 94th Cong., 2d sess. 47 (1976).

indirect in that they are unrelated to the use of sound recordings for commercial purposes; and are ultimately incidental, resulting merely from exposure, a phenomenon necessary for the exploitation of any copyrighted work. Regardless of the existence of incidental benefits, however valuable in a given case, the ability to commercially exploit a work, beyond the authority of a copyright owner and without compensation, is inimical to the maintenance of an environment that "provides the necessary monetary incentive to write, produce, publish, and disseminate creative works."

Overall, those opposed to a right of public performance in sound recordings are left with the "narrow view" referred to above, that is, that the use of sound recordings should be free.

One broadcaster, when questioned about the lack of any legal basis for negotiations concerning the use of sound recordings, responded, "Well, I think what they're looking for in the end is more money." (Copyright Office docket S 77–6, hearings at 137 (Newell-LA.).) Coming as it does, from one who would have to pay, such a position is understandable. Indeed, the many comment letters from individual broadcasters convey a common tone of resentment and bitterness at the idea of having now to pay for something obtained at no cost for so long.

This alone, however, is not sufficient to overcome the considerable weight of arguments in favor of establishing a performance right in sound recordings. Broadcasters, in their submissions criticizing the independent economic study prepared for the Copyright Office, suggest that their principal argument is not that stations will be forced to cease operations, but that a new royalty would cause the reduction in other programing services, such as "news, public affairs, and other 'community responsive' program types which usually are not profitable in themselves," (see Copyright Office docket S 77–6–B, comment letter No. 13, p. 7; see also, id., Comment Letter No. 11, pp. 3–4; id., comment letter No. 12, pp. 5–6). It is assumed that such statements are not meant to imply any intention to neglect the obligations of broadcasters as public trustees. If new royalties are imposed for the commercial use of sound recordings, it is inevitable that some dislocation will result, and that adjustments will be required. Broadcasters, the principal users, argue that the rates proposed by the Danielson bill, (H.R. 6063) will yield approximately $15 million or over 16 percent of the radio industry's pretax profit. (See Copyright Office S 77–6, hearings at 239, NAB-Washington.)

These figures are based on data from 1 year, 1975, and are supported by the independent economic study. (See "Economic Impact Analysis" at 45–46.) Little information is offered to place these figures in any perspective relative to other broadcasting expenses, and broadcasters provide no other persuasive evidence to reasonably support a conclusion that a performance royalty would be so disruptive as to actually cause an upheaval within the broadcast industry. It thus seems that user's arguments are founded mostly on inertia, a poor justification when compared to the concerns of other important policies.

The dislocation anticipated from having to pay fees for the use of sound recordings pales next to the dislocation already suffered among this country's performing artists from the free use of recordings for

commercial purposes, especially by broadcasters. The wholesale displacement of performers from employment in the broadcasting industry is well known. Ben Dunham, of the American Symphony Orchestra League, characterizes the effects in these terms:

> As long as broadcast could be viewed as a promotion of the live art, there was no threat, and no special reason for protection.
>
> But [currently] the diffusion of recorded performances through broadcast and other media [is] recognized as a possible *alternative to* live performance for a large segment of the public.[1]

When one considers that performing artists are the "raison d'etre" of the recording industry, which in turn provides the core of radio programing, their working environment, their incentive to create, assumes crucial significance. In her testimony on S. 1111 before the Senate Subcommittee on Patents, Trademarks, and Copyright in 1975, Register of Copyrights Barbara Ringer assessed the impact of technology:

> Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.
>
> The results have been tragic: The loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect(s) on the nature and variety of records that are made and kept in release, and on the content and variety of radio programing, have been equally malign. Most of all it is the U.S. public that has suffered from this process.

Looking forward from this experience toward copying with continued technological development in terms of the ideology of copyright, it is useful to:

> * * * adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox exemption in the present [1909] law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come.—1965 REGISTER'S SUPPLEMENTARY REPORT, AT 13–14.

Section 301 of the 1976 Copyright Act preempts performance rights in sound recordings from State law protection. The performance rights exemption in section 114, if left intact, promises to become at least what the jukebox exemption was in the 1909 law. While in one sense it may seem only an incongruity in the statute, the absence of performance rights could well lead to inconsistent treatment between different forms of what is essentially the same work, such as phonorecords containing sounds accompanying an audiovisual work, or, conversely, sound recordings used to accompany audiovisual works.

In seeking to find a resolution to this controversy through the balancing of competing interests, it is particularly helpful to consider the following statement from the 1965 Register's Supplementary Report, at 14:

> In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of the market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.

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[1] Copyright Office Docket S 77–6, hearings, at 305, emphasis by Mr. Dunham-Washington.

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. The existence of these rights will "provide(s) the necessary monetary incentive to write, produce, publish, and disseminate creative works." A compulsory licensing regime, agreed as acceptable by proponents of the rights, will "at the same time guard(s) against the danger that these works will not be disseminated and used as fully as they should because of copyrights restrictions," thereby insuring unhampered public access. Over time, all parties, users as well as producers of sound recordings, record listeners as well as record buyers, will be equal beneficiaries of legislation which can only encourage performing artists to devote the talent, dedication, energy, and discipline necessary to bring creativity to the fruition which serves us all.

PERFORMANCE RIGHTS IN FOREIGN COUNTRIES

Profiles of Performance Rights for Sound Recordings in Four Rome Convention Countries: Denmark, Austria, Federal Republic of Germany, and the United Kingdom

To fulfill Congress' direction to consult with representatives from other countries as part of the Copyright Office performance rights study, two attorneys from the Office visited representatives from six European countries and Canada to obtain representative views of each country's experience.

The views of representatives from government, performers' groups, the recording industry, and the broadcasting industry of other European, Central and South American, and Asian countries were solicited by correspondence.

This report outlines several of the most sophisticated systems for collection and distribution of royalties for the public performance and broadcast use of recorded sounds, and highlights the difficulties experienced in collecting and distributing these funds internationally.

No direct quotations are given, according to the wishes of those consulted. Our information supplements a comprehensive collection amassed by the Intergovernmental Committee of the Rome Convention, as part of its article 32 report on implementation of the Rome Convention, published in December 1977, some of which is included in this report.

Denmark: GRAMEX

Although music performing rights societies have been in existence for many years, most organizations formed to collect and distribute sound recording performance royalties are relatively young. One of the most sophisticated is the Danish organization, GRAMEX, organized in 1961 in anticipation of legislation establishing performance rights for sound recordings.

LEGISLATIVE PROVISIONS [1]

Law No. 158 of 1961 on copyright in literary and artistic works provides, in chapter V, for "other rights." Section 47 states:

> When gramophone records or other sound recordings within the period stated in section 46 (25 years), are used in radio or television broadcasts or when they are played publicly for commercial purposes, both the producer of the recording and the performing artists whose performances are reproduced shall be entitled to remuneration. If two or more performers have taken part in a performance, their claim of remuneration may only be made jointly. The rights of the performers may only be claimed through the producer or through a joint organization for producers and performers, approved by the Minister of Education * * *. The provisions in this section do not apply to sound films.

[1] A Danish commission is currently considering copyright revision, including provisions relating to performance rights in sound recordings.

The Danish law regards performance rights for sound recordings as rights "related" or "neighboring" on copyright, and awards performers and producers a right of remuneration for 25 years.[2]

To expedite administration of this right, the law provides that performers must present their claims jointly and that claims may be made only through the producer [3] or through a single organization representing both producers and performers and approved by the Minister of Education. Such an organization is GRAMEX, whose governing board consists of one representative of the Ministry of Culture, three representatives of producers, and three representatives of performers (actors, musicians, and soloists).

MEMBERSHIP

Membership is predicated on producers and performers assigning to GRAMEX their present and future article 47 rights for broadcasting and public performances of sound recordings in Denmark. Further, full membership requires that producers belong to the Danish group of the International Federation of the Phonographic Industry (IFPI) and that performers belong either to an organization affiliated with the Joint Council of Performing Artists or the Danish Actors' Union. Nonmembers of these organizations may be associate members of GRAMEX.[4] Nonnationals may also join GRAMEX. For example, a British performer may become an associate member of GRAMEX upon executing a document stating inter alia, that his or her performance took place and was recorded in the United Kingdom. Because both Denmark and the United Kingdom are parties to the Rome Convention, they reciprocate Rome's article 12 rights. Therefore, if records fixed in the United Kingdom are broadcast in Denmark, the British performer will be compensated if he belongs to GRAMEX.[5]

Similar memberships are available to other foreign national performers and producers.

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[2] Copyrightable works normally enjoy a term based on the life of the author plus 50 years. Some efforts are afoot to increase the performance rights term to equal that of copyright.

[3] This provision echoes the so-called Lenoble principle, which provides for royalty claims to be made through the producer, who in turn pays the performer.

[4] GRAMEX 1961–71: "Throughout the Ten Years That Passed at 7" (undated printed pamphlet).

[5] British performers who are not affiliated with GRAMEX may not receive payment for Danish performances, in spite of the Rome Convention. See pp. 15–17 infra.

Original for Gramex.

Application for admission to membership
OF
GRAMEX

I ..... (BLOCK CAPITALS)

domiciled at .....

known professionally as .....

hereby apply for admission as an associate member of GRAMEX.

I declare that I am a performing artist who has participated in performances taking place in the United Kingdom of Great Britain and Northern Ireland such performances being there recorded on grammophone records or other sound recordings.

I have received and read the Statutes of GRAMEX the organisation approved by the Danish Ministry of Cultural Affairs in connection with the application of Article 47 of the Danish Copyright Act 1961 and hereby agree to observe the provisions of the said Statutes.

I have also received and read the Working Regulations adopted by the Board of GRAMEX and accept the principles for the administration and the distribution of revenue set forth therein, and shall comply with the GRAMEX Statutes and regulations in force.

In accordance with the Statutes and the Working Regulations of GRAMEX I hereby assign to GRAMEX the rights held by me under Article 47 of the Danish Copyright Act 1961 insofar as broadcasting and public performances in Denmark are concerned – existing as well as future rights – and the assignment of these rights shall continue until my membership of GRAMEX ceases as provided by the Statutes of GRAMEX.

I indemnify GRAMEX against any claims by any person regarding any payments made in pursuance of this authorisation.

Interest arising on monies held by GRAMEX pending distribution may be used for administration expenses as decided by the GRAMEX Board.

If requested, I agree to furnish GRAMEX with evidence of my participation in the recorded performances abovementioned.

I undertake to notify GRAMEX immediately of any change in my address.

.....
(signed)

.....
(date)

Extract of the Danish Copyright Act
No. 158 of 31st May, 1961 – Art. 47:

"When grainophone records or other sound recordings within the period stated in section 46 (25 years), are used in radio or television broadcasts or when they are played publicly for commercial purposes, both the producer of the recording and the performing artists whose performances are reproduced shall be entitled to remuneration. If two or more performers have taken part in the performance, their claim of remuneration may only be made jointly. The rights of the performers may only be claimed through the producer or through a joint organization for producers and performers, approved by the Minister of Cultural Affairs (GRAMEX). The provisions in this section do not apply to sound films."

I authorise ..... (hereinafter called the agent) during the currency of my GRAMEX membership

- to receive any sums payable to me in respect of my membership of GRAMEX and
- to pay such sums annually to me.

I acknowledge that the agent has no responsibility

- for the terms on which the broadcasting and public performance in Denmark of my recordings are authorised or
- for the calculation of the amounts which are credited to me or
- to act for me otherwise than in respect of sums received under the terms hereof by the agent from GRAMEX for allocation to me in accordance with the Statutes and Working Regulations of GRAMEX.

I undertake to notify the agent immediately of any change in my address.

.....
(signed)

.....
(date)

Section 1 of the GRAMEX statute authorizes it to assert the performance right of performers and producers of sound recordings. To this end, GRAMEX "makes efforts to secure the best possible remuneration from the users of phonograms through negotiations with them or, if necessary, by taking legal action against them."[6] It has achieved some success: the GRAMEX hourly rate for broadcasting a protected sound recording is 1½ times the cost of hiring a live musician in Denmark.

GRAMEX and Danmarks Radio are parties to the contract on broadcasting use.[7] The broadcasting organization pays GRAMEX quarterly on account and is billed annually for the balance. The per-minute rate for radio broadcasting in August 1977, was 40 kroner (about $7 U.S.). The contract calls for adjustment of the rate to parallel state salaries. Government salaries, however, have recently been frozen in an effort to curtail inflation. The question whether the rate should remain the same or should rise with the price index, without regard to the Government freeze, will probably be submitted to the Tribunal.

GRAMEX also negotiates individual public performance payments with theaters and movie houses and with organizations such as the Association of Hotel and Restaurant Owners.

No figures are available to show the total fees paid to GRAMEX for either broadcasting or public performances of recorded sounds.

According to regulations issued by the Danish Ministry for Cul- final administrative decisions in rate disputes.[8] Tribunal decisions may be appealed to civil courts by either party.

Collection of License Fees

GRAMEX collects radio broadcasting fees, the largest sums on the basis of logs which identify the music played on the radio within a certain time period and the play time for each recording.[9] Because the data requirements of the authors' performing rights organization (KODA) and GRAMEX overlap, the two organizations share the task of analyzing this data. Both organizations use the information in a common log, each extracting what it needs.

GRAMEX maintains its own register of records. When a recording is introduced, the broadcaster assigns it an identification number and sends a list showing that number, the record company's serial number, and the producers' nationality to GRAMEX. This data is entered on a form and is sent to the local record producer, who provides information about the recording artists and/or accompanying musicians. The information is entered in GRAMEX's data registry, which is updated quarterly. The registry is computer-matched with the broadcast log, and individual payments are machine-calculated.

KODA and GRAMEX also cooperate in collecting other public performance funds. KODA collects 50 percent above its established tariff [10] on behalf of GRAMEX, and after deducting a 10-percent han-

[6] GRAMEX 1961–71: "Throughout the Ten Years That Passed" at 2 (undated printed pamphlet).

[7] Broadcasters collect revenues from radio and television tariffs.

[8] See Copyright Act, art. 54.

[9] This system reportedly works well, albeit broadcasters occasionally fail to identify which band of an LP was played.

[10] The tariff is a subscription fee for various classes of users.

dling charge, passes the remainder to GRAMEX. Although GRAMEX makes no attempt to quantify the exact amount of public performance use of phonograms, users have found this arrangement beneficial because it allows a single payment clearance for all non-broadcast performances. Moreover, GRAMEX is relieved of the expense and difficulty of policing public performance use.

Calculation of royalties

Performer royalties are calculated on the basis of points amassed annually. Point values are assigned according to music performed, play time, and the type of performing group. Section 6 of the working regulation for GRAMEX states:

1. Revenue from Radio and TV shall be distributed in proportion to the number of points accumulated by each right owner, computed as the product of the relevant figures set forth in clauses I, II and III below.

I. Recording shall be divided into value groups, to each of which a certain factor shall be assigned:

(*a*) Dance music and other light music	1
(*b*) Musical comedies, revenue, light operas, sketches, jazz music, marches, concert waltz music, folk music, and other such music	2
(*c*) Symphonic music, concerts, operas, oratorios, lieder, romanzas, chamber music, serious solo performances, recitation with orchestral accompaniment, recitals, plays and similar music	3

In case of doubt, the higher value group will be chosen.

II. Proportion of total needle time * * * effective number of minutes played to be stated exactly.

III. Distribution of points according to the following scale:

(*a*) Soloist or soloist group	10
(*b*) Soloist/accompanist	6–4
(*c*) Soloist or soloist group/ensemble	5–5
(*d*) Soloist or soloist group/ensemble/conductor	4–2–4
(*e*) Soloist or soloist group/ensemble/choir/conductor	3–2–2–3
(*f*) Orchestra or choir/conductor	5–5
(*g*) Orchestra/choir conductor	3–2–5

If this scale cannot be applied directly, the question shall be submitted to the board of GRAMEX for its decision. Annual amounts of remuneration totaling less than D. kr. 25. shall not be paid to the individual right owners but shall be pooled with Other Revenue for collective allocation.[11]

A performer's total payment is tallied by multiplying his or her points by the uniform point value.

Distribution of license fees

Following a 1961 agreement, performers and producers split equally the revenue from the public performance and broadcast of sound recordings. However, performers pay two-thirds of the costs of administering these performance rights, because of the proportionately larger effort required to calculate and distribute performer payments. The cost of administering the GRAMEX fund in fiscal 1975 did not exceed 9 percent of the total fees collected, owing largely to the high short-term interest rates earned by moneys deposited throughout the year.

Performers are paid annually. Section 47 of the statute is viewed as assuring the Danish performer an "individual right" to remunera-

[11] Id., at 22–23. Assigning different point values to various performing roles and genres of music is the most criticized feature of the Danish system.

tion. Payments are made individually insofar as the performers can be identified from the record sleeve. Orchestras and similar large performing bodies receive lump payments, which are divided as the members agree. And, when fees are collected without measuring the precise use, as are nonbroadcasting performance fees, distribution cannot be individual. GRAMEX distributes these funds to performers' unions for members' collective benefit.

Producers' shares are normally paid quarterly to the national IFPI group, who makes payments to individual labels according to record sales. Money owed to foreign producers are typically channeled through Danish subsidiaries or affiliates; or, a foreign producer may become an associate member of GRAMEX.[12]

Multilateral agreements

Denmark has belonged to the Rome Convention since 1965. Section 59 of the Danish copyright law provides that remuneration for performances of sound recordings shall apply to those recordings produced in Denmark.

> The provisions in sections 45, 47, and 48 shall apply to performances, sound recordings, and radio or television broadcasts which take place in Denmark * * *.[13]

Section 60 adds:

> By royal decree, the application of the act may be extended to other countries conditional upon reciprocity.
>
> By royal decree, the act may also be made applicable to works first published by international organizations and to unpublished works which such organizations are entitled to publish * * *.[14]

To facilitate the exchange of payments with Rome Convention countries, GRAMEX has made bilateral agreements with Germany, Sweden, and Austria for mutual enjoyment of performance royalty payments. A keystone principle of these agreements is the London principle of 1969, which states that undistributable performance royalties need not be paid out of the country. This principle has been employed to resolve an administrative conflict with respect to German performers whose works are performed in Denmark. GRAMEX views the Danish law's "individual payment" requirement as incompatible with Germany's payment of lump sums to performers based on their income. Therefore, by agreement with GVL of Germany, all moneys which GRAMEX would otherwise transfer to Germany are retained in Denmark, and the German-originated funds destined for Denmark are retained in Germany. GRAMEX thus compensates Danish artists for German performances of recorded sounds.

Because GRAMEX reads the Danish law as requiring all payments to be made to individual performers (within the limits discussed above) based on playtime, significant problems arise in meeting other international obligations. For example, since the corresponding United Kingdom performance rights legislation provides for all payments to be made to the record producer,[15] GRAMEX believes that no pay-

[12] Users pay only for the use of records from Rome Convention countries. Approximately 51 percent of all records played in fiscal 1975 were protected.

[13] Law No. 158 of 1961 on copyright in literary and artistic works, sec. 59, May 31, 1961.

[14] Id., sec. 60.

[15] See discussion of United Kingdom provisions infra.

ments may be made to the United Kingdom unless the individual performer has become an associate member of GRAMEX.

GRAMEX maintains that under the "Principles Relating to Undistributable Revenue Due to Performers, 1969" (the London principles"), sums owed to individual British performers who cannot be identified may be retained on account in Denmark for 5 years. The collecting state (Denmark) may appropriate the unclaimed funds thereafter. United Kingdom performers' unions have argued forcefully that these Danish sums should be transferred to British unions to inure to the collective benefit of British performers.

The United Kingdom sponsored meetings at Cambridge beginning in June 1976 to resolve this debate consistent with the Rome Convention's principle of national treatment. The meetings considered a proposal [16] to have the country of origin collect performance royalties, deduct administrative expenses, and transfer the balance to the performer's local collecting society to be distributed in accordance with its rules. The record industry favors this solution, but GRAMEX believes that the plan is incompatible with Danish law and would deter small countries from joining Rome, since a proportionately larger share of royalties would have to be paid to nonnational performers.

Unless parties agree to a solution of national treatment problems or form a mutinational collection-distribution organization, fragmented distribution formula, such as those employed by GRAMEX seem inevitable. Performers are benefiting, but the Rome Convention has not spawned uniform systems for collecting and distributing royalty payments.

American records are extremely popular in Denmark as elsewhere in Western Europe, and are apparently played on the radio without restriction.[17] Since broadcasters pay only for Rome country recordings, neither producers nor performers are directly compensated for these performances.[18] Nonetheless, those interviewed favored U.S. adherence to the Rome Convention, with the caveat that Rome countries should continue to employ the London principles, to permit collecting countries to retain undistributable sums.

CONCLUSION

It is difficult to assess accurately the effect of performance rights for recorded sounds in Denmark. The right has existed, at least for producers, since 1911. With the increased popularity of electrical records and radio, and the corresponding popular sympathy for the plight of a famous World War II performer, Axel Schiots, performers succeeded in obtaining legal rights to the revised copyright law. Producers were instrumental here, as elsewhere, in prompting and enacting the current performance legislation. Their continued activities may eventually spawn a solution to international collection problems.

Although the performance royalty rates for recorded music exceed those of live music, the amount of live music on Danish radio has

[16] This proposal is known as the Stewart-Chesnais doctrine or the Cambridge principle.
[17] American recordings constitute approximately 49 percent of the records played on Danish radio.
[18] By contract, Danish licensees of American recording companies pay 50 percent of their performance royalty receipts to the parent company. No figures are released on these sums.

diminished greatly since World War II. Moreover, although an advisory board monitors radio's legal obligation to maintain varied programing, the amount of radio time devoted to serious music has diminished from 40 percent before World War II to approximately 12 percent in 1977. Danish radio reportedly does not follow a "top ten" format, but radio's switch to recorded music has eroded air play of serious music here as elsewhere.

AUSTRIA: LSG (WAHRNEHMUNG VON LEISTUNGSSCHUTZRECHTEN GESELLSCHAFT M.B.H.)

Austria, like Denmark and other western countries, legislates performance rights as secondary or related rights. Performers, record producers, and broadcasting organizations' rights and obligations are dictated by the Austrian Copyright Amending Act of 1972.[19]

Section 76(3) states:

> Where a sound recording produced for commercial purposes is used for a broadcast (Article 17) or for public communication, the user shall pay equitable remuneration to the producer * * *. [The performer has] a claim on the producer to a share in such remuneration. In the absence of agreement between the parties entitled thereto, such share shall be one-half of the renumeration remaining to the producer after deduction of collecting costs.

This act recognizes in producers and performers a right of equitable remuneration covering commercial performances of recorded sounds, whether published or unpublished, for a term of 50 years from fixation or publication, whichever is longer.

By law, all performance payments, including those for radio broadcast of protected sound recordings, are paid to the record producer, who is legally obligated to pay some share to the performer. This statutory provision is implemented by a joint nonprofit trade organization for the exploitation of performing rights: LSG. LSG is not regulated by the law governing collecting societies, as is AKM, the composers' and authors' performing right society; but its activities are supervised by a board equally representing performers and producers and chaired by a neutral member from the Federal Ministry of Justice.

FEES

Oesterreichische Rundfunk Gesellschaft m.b.h. (ORF) the sole broadcasting corporation in Austria, contracts with LSG to pay a negotiated annual lump sum for performance rights.[20] In 1974 and 1975, ORF paid 5,761,920 Austrian shillings for using commercially produced sound recordings in its broadcasts.[21]

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[19] Austrian Copyright Act of 1936, Federal Law Gazette No. 111, 1936, as amended Dec. 29, 1972, Federal Law Gazette No. 492.

[20] The current contract, in force since May of 1968, will be renegotiated in 1978.

[21] Broadcasting revenues are derived from user license fees (324 schillings per radio; 1,140 schillings per television receiver) and from advertising fees, whose limits are regulated by sec. 5 of the Austrian Broadcasting Act. The Broadcasting Act prohibits ORF from making a commercial profit. LSG reportedly received approximately 0.25 percent of the broadcasters' net revenues last year, or somewhat more than 1 schilling per receiver. The broadcasting lump sum performance tariff has graudated steadily from the 1968–1969 rate of 3,000,000 schillings, to the 1970–71 rate of 4,000,000 schillings, and the 1972 rate of 5,000,000 schillings. At the same time, broadcasters' revenues have reportedly increased at a greater rate than the standard of living.

See also, ORF: Der Orf Und Seine 5 Programme (1977).

Public performance fees for nonbroadcast uses of sound recordings are based on a percentage of the fees normally charged by the authors' society, AKM (Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger). For example, the organization representing hotel owners, Konzertlokabesitzerverband, pays an additional 15 percent of its authors' performance fees for producers and performers of sound recordings. Similar use fees are collected from the owners and users of jukeboxes, the Movie Theater Guild, and a telephone recording service, Disc-of-the-Day. Fees for aural public performances totaled 3,234,196 Austrian schillings in 1974, and 4,018,408 schillings in 1975; 25,811 schillings were paid for cinema and telephone use in 1974, and 32,678 schillings in 1975. The Austrian law does not provide a statutory fee scale, and all disputes as to what constitutes an equitable remuneration must be resolved by litigation.

COLLECTION

LSG collects the lump sum payment from ORF for broadcasting uses.[22] Administrative costs of this collection reportedly may cost as much as 10 percent of the fees collected.

Fees for nonbroadcast performances are collected by the authors' society, AKM. AKM deducts 22 percent of these sums for administrative costs, and delivers the balance to LSG for distribution.

CALCULATION OF ROYALTIES

Performers' royalties are calculated individually, wherever possible, on the basis of playtime. LSG has adopted the scheme legislated for AKM to weight payments in favor of serious music, and in favor of soloists.[23]

DISTRIBUTION

As in most Rome Convention countries, funds from the performance right for sound recordings are split equally between producers and performers, with each group of beneficiaries paying the administrative costs of its respective collection and distribution. Performers receive individual payments, calculated from playtime, and no performers' funds are used collectively, although proposals are being considered to use undistributable funds for the collective benefit of young musicians.

Producers' funds are distributed to individual labels by the national Austrian IFPI group, as in Denmark.

MULTILATERAL AGREEMENTS

Austria has been a member of the Rome Convention since 1973. Reciprocal agreements for exchanging performers' royalties are in effect with Sweden, Denmark, and the Federal Republic of Germany. Payments to Sweden,[24] and Denmark for Austrian performances are re-

[22] ORF provides a broadcasting log, similar to that used by Gramex, identifying each record played and giving its playtime.

[23] See, pp. 1–2. Attachment to annex V, IFPI response to Rome Enquiry, infra.

[24] Austrian officials prefer the type of bilateral agreement concluded with Sweden's collecting society, SAMI, a copy of which is attached at the end of this section. It authorizes payments originating from Austrian broadcasts to be distributed individually by SAMI, and other public performance payments to be distributed according to the London Principles.

portedly satisfactory; but distributing payments to Germany poses a problem because Germany's performer distributions are not calculated on the basis of individual playtime. Austria followed Denmark's lead with respect to this conflict, and agreed to retain all money collected in Austria, with Germany likewise keeping all (Austrian) funds collected in Germany. This solution, seemingly the only practical one at present, obviously works to the detriment of those Austrian performers whose works are frequently played in Germany.

Austria has reached no bilateral agreement to pay performance royalties to United Kingdom's performers because they have no legal right to performance royalties under British law. However, Austrian parties anticipate that British unions will establish a performance collection society, patterned after Germany's GVL, to enable Austria and other Rome Convention countries to conclude collective agreements with respect to extraterritorial performance royalties.

Austrian officials expressed hopes of concluding bilateral agreements with other Rome Convention countries, especially Italy,[25] Mexico, Brazil, and Czechoslovakia.[26] They would welcome U.S. membership in the Rome Convention, although Austrian payments for the public performance of U.S. music would far exceed those made by the United States for use of Austrian works.

CONCLUSION

Austrian record producers, soloists, and directors have enjoyed neighboring rights in sound recordings since 1936, but no claims for equitable remuneration for public performances were pressed by either party until Austria joined the Rome Convention in 1973 and awarded full performance rights to all performers. Between 1969 and 1972, largely owing to the efforts of the Austrian IFPI group, the Musicians Trade Union and record producers contracted with ORF for the latter to pay an annual lump sum use fee, proportionate to the sums ORF receives from consumer tariffs. Because Austrian performers' unions were not strong,[27] and because broadcasters prefer to deal with producers, the 1972 Austrian Copyright Act legislated a record performance royalty to be collected by producers and shared with performers.

Since the advent of performance royalties (although not necessarily causally related thereto (the number of Austrian musicians has decreased, but the living standard of well-known musicians continues to increase.

Austrian broadcasting is, of course, a public entity, and programing (as in most Western countries) is supervised by a supervisory board. As elsewhere in Europe, this system guarantees that some serious music will be broadcast,[28] but the majority of air time is devoted to light or popular recorded music.

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[25] Italy and Czechoslovakia are currently working to establish national collecting organizations for performance royalties for sound recordings.

[26] Czechoslovakia is the only Eastern European country who belongs to the Rome Convention.

[27] Austrian unions became independent of the state but fractionalized following World War II. The musicians' union is largely apolitical, and is typically independent of the International Federation of Musicians.

[28] One of ORF's five radio channels, Osterreich 1, is devoted to serious music, literature, science, and information. Channel 3 broadcasts jazz, pop, and dance music round-the-clock.

Sample Agreement for Exchange of Performers' Royalties Between the Swedish Collecting Society and LSG

Annex 3

Between the undersigned SAMI, Svenska Artisters och Musikers Interesseorganisation, Karlbergsvägen 48, 113 34 Stockholm, Sweden, and L.S.G.-Wahrnehmung von Leistungsschutzrechten G.m.b.H., 1121 Wien, Postfach 104, Austria, the following agreement was signed this day for the clearing of remunerations payable under present legislation and in accordance with contracts based thereon to performing artists who are members of LSG or SAMI, respectively, for the use of their phonograms in sound or television broadcasts or any other public rendition thereof in Austria or Sweden.

SECTION 1

This agreement is based on the so-called "London Principles" laid down in 1969 which were later approved by the International Federation of the Phonographic Industry (I.F.P.I.) and the International Federation of Musicians (F.I.M.) and which read as follows:

"I. Revenue arising from broadcasting of phonograms which cannot be distributed to individual performers because after the exercise of due diligence the collecting agency concerned cannot trace and pay the individuals who are entitled, shall be devoted to the general benefit of the performers' profession provided that the organization receiving such revenue shall give to the collecting agency a suitable indemnity absolving the agency from liability for individual claims relating to the broadcasting of those phonograms.

"II. Revenue arising from the public performance of phonograms which cannot be distributed to individual performers because the necessary information is not available, will be devoted to the general benefit of performers' professions, provided that the organization receiving such revenue shall give to the collecting agency a suitable indemnity absolving the agency from liability for individual claims related to the public performance of those phonograms.

"III. Revenue arising from broadcasting or public performance of phonograms which cannot be distributed to individual performers either because the beneficiary cannot be traced or because the necessary information is not available, should remain in the country in which it has arisen."

This agreement is the concrete embodiment of these principles as applicable between Austria and Sweden.

SECTION 2

The individual remunerations collected by LSG in Austria for performing artists who are members of SAMI and collected by SAMI in Sweden for performing artists who are members of LSG, for the use of their phonograms in sound or television broadcasts or in any other form of rendition, shall be settled between LSG and SAMI once yearly for each calendar year by transmitting a schedule of the

remunerations payable to the individual performing artists or established groups of performing artists. This settlement shall take place at the same time as the disbursement of the individual to each organization's own members.

SECTION 3

As soon as both settlement schedules have been received, the balance of the two sums of individual remunerations shall be transferred without undue delay in the form of a lump sum by the organization liable for payment to the other organization.

SECTION 4

LSG and SAMI agree to make these disbursements to performing artists or groups of performing artists without charging a special administrative fee.

SECTION 5

Any other remunerations, whether they be individual remunerations owing to persons who are unknown or who cannot be traced (cf. section I of the London Principles) or remunerations for the use of phonograms in respect of which it is impossible to obtain information on the length of play (cf. section II of the London Principles), shall remain in the country where the claim has arisen, in order to be used for the general benefit of the performing artists of that country (cf. section III of the London Principles).

This shall also apply to any remunerations collected by LSG or SAMI for any other than the above-mentioned uses of phonograms.

SECTION 6

This agreement shall enter into force retroactively from June 1, 1973. The remunerations collected from that time until the end of 1975 shall be settled by December 31, 1977, at the latest. The transfer of the balance shall be governed by section 3 mutatis mutandis.

SECTION 7

In keeping with the "London Principles" cited in section 1, LSG shall defend any action against and save harmless SAMI in respect of any claims by Austrian entitled parties, and SAMI shall defend any action against and save harmless LSG in respect of any claims by Swedish entitled parties.

SECTION 8

This agreement shall remain in force until it is terminated by any of the parties to the agreement with effect from the end of a calendar year, giving 6 months' notice.

Vienna, November 5, 1976 Stockholm, October 26, 1976

[Signature illegible.]

Contract Concluded Between the Austrian Radio Network, "ORF," and the "LSG"—Society for Protection of Performing Rights

PREFACE

(1) The object of this agreement is the fixing of a prescribed remuneration for the use of sound recordings particularly records for radio broadcast over the ORF.

(2) While at the present time the only existing mandatory payment of any kind of remuneration is for the reproduction of sound transmissions carried by the ORF, but not however for the direct use of sound recordings for radio broadcasts, both parties are agreed to regulate the remuneration in the manner of a statutory license, as provided by Article 12 of the International Convention on Protection of Practicing Artists, Producers of Sound Recordings, and Broadcasters, of October 26, 1961, which is already in effect. Therefore, the regulation of this (present) contract shall be understood as if the established mandatory license were already in legal force in the said article 12 at the time of the conclusion of this contract.

I. SUBJECT OF THE CONTRACT

(1) The subject of this contract is the use of commercially produced sound recordings for radio broadcast over the ORF. Bv sound recordings is meant particularly records or other commercially produced sound transmitters, which are fixed through acoustical channels for reproduction, (and) generally are contained in the catalogs of collected commercially (available) sound recordings.

(2) The contract extends to all commercially produced sound recordings, with no limitations regarding specific manufacturing firms.

II. FIXED FEE

(1) For all broadcasters of sound recordings intended by this contract, as well as for the right to reproduce sound recordings for broadcasting purposes, the ORF is required to make monetary remunerations as follows:

Beginning January 1, 1968, the ORF shall pay 3 million (Austrian) shillings for each of the years 1968 and 1969; 5 million shillings for each of the years 1970 and 1971; and beginning 1972, 5 million shillings annually. This fixed fee shall always be payable for the current year in four equal installments, due at the end of (each) calendar quarter.

(2) Fixed fees referred to in paragraph 1 shall be arrived at in their sum in such a way that they are increased by the same incremental percentage as the sum from the paying radio and television subscribers of the ORF is increased in the comparable year.

(3) The first increase in accordance with paragraph 2 shall only take effect, however, when the sum from the paying radio and TV subscribers, which at the time of the (original) agreement was set at 3 million shillings, rises by 10 percent over the amount on January 1, 1968. This increase will be due the following year. After surpassing

the 10-percent rate increase point, a new increase shall only go into effect when the sum from the paying radio and TV subscribers rises by a further 5 percent fraction in comparison with (that of) January 1, 1968.

These latter increases shall in all cases be in effect for the half-year following the increase.

(4) In the event that the sum of the monthly radio and television income [sec. 15, Radio Laws, BGBL (Federal Law Register) no. 195/1966] should rise—at the present time it amounts to 61 shillings (specifically, 18 shillings for radio and 43 shillings for TV)—then the established fee in accordance with paragraphs 1 through 3 shall rise by the same amount as the combined radio—and—television expenditures budget of the ORF rises; in the year in which the radio and/or television income rose. This (shall be done) insofar as the budget increase is caused solely by the increase in fees.

(5) With the payment of the sums cited above all claims from this contract shall be acquitted (paid off).

III. DELIVERY OF RECORDS

(1) The ORF shall as a rule order its needed sound recordings from the manufacturing firms, or alternatively from their authorized Austrian representatives. In instances when such record manufacturers or representatives are members of the International Federation of the Phonographic Industry ("IFPI") or have a special contractual relation with the LSG, they shall sell to the ORF these needed sound recordings at the set or recommended selling price minus a discount of 30 percent, and upon the opening of a cash account such as businessmen have. "Single" records shall also be made available to the ORF, so far as possible, copies of original tapes, on payment of replacement cost.

(2) The manufacturing firms and representatives named in paragraph 1 shall at all times make promptly available to the ORF their catalogs, always in final (current) state, and shall fill the orders of the ORF without delay.

IV. BROADCASTING TIME

It is mutually established that the ORF shall suffer no time or programing limitation concerning the use of sound recordings for broadcast purposes, and can, therefore, use the sound recordings in any radio or television programs of the ORF, including shortwave programs, without invitation on time.

V. EXCLUSIVE CLAUSES

(1) The members of the IFPI as well as any and all companies who conclude contracts with the LSG (contractor companies) recognize that (any) exclusive clauses in their performer contracts for certain broadcasts and events of the ORF are null, even where these are transmitted directly abroad.

(2) The ORF accepts the responsibility to utilize its own contacts with exclusive performers (artists) only for broadcast purposes.

VI. NOTICE OF BROADCASTS

(1) The ORF accepts the responsibility of handing over to the LSG, by the 20th day of each month, a declaration of all the sound recordings covered by this contract which were broadcast during the preceding month. (It shall be) ordered according to programs and local broadcasts, shall indicate length of the broadcast of individual sound recordings and the record brand name and order number. It is mutually established that the sending of a "AKM"-notice in the currently correct form suffices for this said requirement, and the obligation of the ORF shall be met by sending a carbon copy of such a notice.

(2) The ORF accepts the responsibility, circumstances permitting to hand over to the LSG, in place of the lists mentioned in paragraph 1, mechanically processed data (magnetic tapes or punched cards), insofar as its own data processing operation permits.

VII. NOTICE

Insofar as records are not broadcast merely as introduction or musical background, the ORF accepts the responsibility of pointing out, in the preliminary or concluding commentary as well as in its published announcements and program schedules, that it is records (that are being played); brands or order numbers do not need to be named there. Furthermore, in every case without exception, the name of the orchestra and of the soloists, as well as the title of the work, shall be announced.

VIII. REPRODUCTION OF SOUND RECORDINGS

(1) The ORF is entitled to record record selections on tape and to use such copies for its own broadcasting purposes, including transmittal of these broadcasts directly abroad. Such copies may not be given to any other party, unless it be to broadcasters who have a contractual relation with the IFPI, one of its provincial groups, or an organization with which the IFPI, one of is provincial groups or members of the IFPI, have a contract. In the event of giving (recordings) to other broadcasters, the ORF must in every case notify the consignee which sound recording (order number, brand, work, playing duration) was reproduced, and must arrange for the consignee an appropriate settlement of the broadcast fees.

(2) The ORF can be prohibited from recording individual records, to the extent that the produced demonstrates that this is forbidden by contract. Such a proscription, however, may apply to not more than 100 longplaying records annually.

IX. TECHNICAL QUALITY

The ORF accepts the responsibility of broadcasting only records which guarantee a faultless reproduction. Any reproduction is hereby considered faultless if it is provided by the production company on an unblemished disc having an ordinary degree of use.

X. GUARANTEE

(1) The LSG as well as the IFPI which enters this contract, and the Austrian Unions of Artists and Professionals ("Artists' Union")

likewise entering this contract, hold the ORF nondamageable and nonliable for all claims by sound-recording producers and practicing artists (performers), whose performances are fixed on sound recordings. The ORF is responsible for advising the LSG of any claims, and for giving over (relinquishing) to the LSG the disposition of admission or denial of claims.

(2) The ORF, for its part, holds the LSG as well as other party organizations nondamageable and nonliable for claims by sound-recording producers and practicing artists, insofar as these claims are raised (lodged) on account of a practice granted (authorized) by this contract (but) not properly done according to (the terms of) the contract.

(3) Any monetary debts of (claims against) one of the parties to the contract through claims for which the other party is liable according to paragraph (1) or (2) are to be reimbursed to (the former); the costs of the defense, however, (are to be reimbursed) only if the choice of counsel was given to the liable party of the contract, and this counsel was authorized to keep the liable party continually informed about the proceedings.

XI. THE ROME CONVENTION

(1) As already explained in the preface, this contract is concluded under the presumption as if the mandatory license cited in article 12 of the above-named convention were in effect in Austria.

(2) The partners in the contract are, therefore, agreed that any eventual ratification of the Rome Convention, and the consequent change in Austrian copyright law with regard to establishment of statutory mandatory license, shall in no way affect this contract.

(3) On this matter the partners to the contract, the ORF, the LSG, the IFPI, and the artists' union, are further agreed that the conclusion of this agreement implies as always no prejudice whatsoever concerning positions taken by said parties on any eventual ratification of the Rome Convention by Austria. The conclusion of this agreement may also not be permitted to be brought to bear as argument concerning eventual ratification. They declare ("certify"), moreover, that this agreement represents a solution arrived at specifically for Austrian relations and gives rise thereby to no prejudice in the international sphere.

XII. ACCESSION

The artists' union and the IFPI accede expressly with regard to point X (Guarantee) and point XI (Rome Convention).

XIII. TERM OF THE CONTRACT

(1) This contract goes into effect on January 1, 1968, and replaces the former agreements in force between the parties to the contract or their legal predecessors. The contract is concluded for an unspecified period of time. It can be canceled by the LSG as well as by the ORF under observance of a 6-month period of notice, on December 31. Such a notice of dissolution, however, will first be possible only on December 31, 1977.

(2) This notice shall be in the form of a written letter directed to the last known address of the partners to the contract. The postmarked date shall serve as the date of computation.

Vienna, July 17, 1969.

(Signed) ——— ———,
Austrian Radio Network.

Vienna, March 28, 1969.

(Signed) ——— ———,
LSG—Society for Protection of Performance Rights.

Vienna, March 31, 1969.

(Signed) ——— ———,
International Federation of the Phonographic Industry.

Vienna, July 15, 1969.

(Signed) ——— ———,
Art and Independent Professions Union of the Austrian Trade Unions Federation.

FEDERAL REPUBLIC OF GERMANY: GVL (GESELLSCHAFT ZUR VERWERTUNG VON LEISTUNGSSCHUTZRETHTEN M.B.H.)

Although Germany worked closely with Austria on early drafts of national performance rights legislation, legislative progress was deferred by World War II, and the German legislation which finally emerged differed significantly from that in Austria and Denmark. All three countries, however, regard performance rights as related rights, rather than copyrights. Owners of related rights are protected against unauthorized duplication or reproduction, but not against similar uses.

The 1965 German copyright law [29] recognizes a 25-year right of remuneration in the performer, with the record producer enjoying the right to share the proceeds.

Article 76(2) provides:

A performance which has been lawfully fixed on visual or sound records may be broadcast without the consent of the performer if such records have previously been published; however, in such circumstances the performer shall be paid an equitable remuneration.

Article 77 states:

If a performance is publicly communicated by means of visual or sound records or if a broadcast performance is publicly communicated, the performer shall have the right to an equitable remuneration with respect thereto.

And article 86 adds:

If a published sound record on which a performance has been fixed is used for public communication, the producer of the sound record shall have a right as against the performer to an equitable participation in the remuneration which the performer receives pursuant to article 76, paragraph (2), and article 77.

The joint collecting society organized in 1955 in anticipation of enacting a revised copyright law is GVL. Its composition and activities are more closely regulated by statute than are those of other West-

[29] Copyright Act of 1965, as amended Aug. 14, 1973.

ern societies. A law enacted simultaneously with the 1965 Copyright Act, the act dealing with the administration of copyrights and related rights, September 9, 1965, establishes general guidelines for the activities and operation of GVL.

For example, the society must be authorized, must conduct its business in a fair and open manner, and must contract with users, setting forth the rights owned and the charges for use.[30]

GVL administers performer-producer rights relating to broadcasting, public performance, and private duplication of sound recordings.[31] In addition, it is directed by statute to "arrange welfare and assistance facilities for the owners of the rights or privileges administered by it." [32]

MEMBERSHIP

In 1976, 18,000 performers and 200 record producers were affiliated with GVL. Membership is available to any performer or producer who owns performing rights, regardless of nationality. Most performer affiliates also belong to the German Orchestra Union, and most producers are members of the German National IFPI group, though neither membership is mandatory. Members typically unconditionally assign their performance rights to GVL.

FEES

Article 13 of the 1965 Administration Act provides:

> In establishing such charges and in collecting the remuneration, the collecting society shall pay due regard to the religious, cultural and social interest of the persons liable to pay remuneration, including youth welfare interests.[33]

GVL contracts with broadcasters for an annual lump sum payment for performance rights, based upon the license fees received by broadcasters.[34] Separate contracts are negotiated with ARD (Arbeitsgemeinschaft der Rundfunkanstalten der Bundesrepublik Deutschland), the federal and regional broadcasting corporation; with commercial broadcasting stations such as Bayerische Rundfunk, Radio Bremen, and South- North- and West German Radio; and with radio corporations such as Radio Free Europe.[35]

The current yearly rate paid by federal and regional stations (ARD) is 36 pfennigs per radio or television owner.[36] Commercial stations pay 3½ percent of gross advertising revenue, less commissions. The total sum received by GVL for broadcasters' use of sound recordings in 1976 was DM 15 million.

Fees for nonbroadcast uses of sound recordings, as in Denmark and Austria, are based on a percentage of the performance fees charged

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[30] An Act Dealing with the Administration of Copyrights and Related Rights, art. 7, Sept. 9, 1965.

[31] Performers' and producers' rights to remuneration for private duplication of sound recordings are administered by GVL. An organization called ZPU collects fees from producers and importers of home taping equipment. This fee is currently 5 percent of the machine's net sales value. The fund in 1976 totaled DM 6,000,000. 40 percent of the total is given to GVL, 40 percent to GEMA, and 20 percent to the authors' society, Naucht.

[32] An Act Dealing with the Administration of Copyrights and Related Rights, art. 8, Sept. 9, 1965.

[33] An Act Dealing with the Administration of Copyrights and Related Rights, art. 13, Sept. 9, 1965.

[34] Private television and radio owners paid a broadcast license fee DM 36 for radio, DM 90 for television, or DM 126 radio and television combined, in 1975.

[35] See IFPI response to the Rome Enquiry, at 13, Annex IV. (1977).

[36] This contract will soon be renegotiated, and rates are expected to increase.

by the authors' society, GEMA. This fee is typically 20 percent of the relevant fee collected for authors and composers. In fiscal 1976, this public performance sum totaled DM 5 million.

Fees and distributions may be appealed to the Patent Office on grounds of "unreasonableness," and then to the administrative courts.

COLLECTION

GVL collects broadcasters' lump sum performance payments. These payments are accompanied by broadcasting logs, identifying each record by the producer's code number, and listing corresponding playtime.

GEMA collects fees for nonbroadcasting performances, deducts 20 percent for collection administrative costs, and transfers the residue to GVL for distribution. In 1976, GEMA transferred DM 4,200,000 to GVL for distribution.

CALCULATION OF ROYALTIES

Article 7 of the 1965 Administration Act provides the following general guidelines:

Article 7: Apportionment of income

The collecting society shall apportion the income resulting from its activity according to definite rules (apportionment plan) which will prevent any arbitrary system of apportionment. The apportionment plan shall conform to the principle that culturally important works and performances are to be promoted. The principle of the apportionment plan shall be incorporated in the collecting society's articles.

Unlike the systems prevalent in other Western countries, performers' royalties in Germany are calculated on the basis of each individual's recording-related earnings (including recording session fees and record sales) from the previous year, according to a scale approved by a performers' bargaining agent, the German Orchestra Association.

Performer's payments are determined by the relationship his or her income from sound recordings bears to the total distributable fund, except that the share of a performer earning more than DM 45,000 annually is scaled down thus:

Under DM 45,000: 100 percent of share.
Over DM 45,000 to DM 135,000: 50 percent of share.
Over DM 135,000 to DM 265,000: 30 percent of share.
Over DM 265,000 to DM 700,000: 10 percent of share.
Over DM 700,000: Minimum share.[37]

Producers' shares for public performances are 36 percent of the net distributable revenue. Performers' total share is 64 percent of the net distibutable revenue, of which 36 percent goes to individual performers who have recorded, in the same proportion as their broadcasting share, and 28 percent is earmarked for individual performers em-

[37] Few union members are affected by this ceiling. Background musicians arguably benefit by a scale limiting maximum earnings. However, any system keyed to sales will necessarily be detrimental to performers of less popular or salable music, such as classical selections.

ployed by the broadcasting organizations. Individual shares are calculated on the basis of information supplied to GVL.

DISTRIBUTION OF LICENSE FEES

Article 9 of the 1965 Administration Act provides that GVL's books will be inspected regularly by chartered accountants, but does not limit the acceptable costs of administration. GVL deducts its administration costs before making any distributions to performers and producers. Because it makes no calculations based on air play, these costs are extremely low, and last year amounted to less than 5 percent. Unlike beneficiaries in Denmark and Austria, German performance rights beneficiaries split administrative costs.

GVL is legally permitted to designate 5 percent of its total distributable funds to a collective performers' fund for cultural, religious, and educational purposes, and did so in 1976.[38]

Distributable funds emanating from the public broadcast of recorded works are paid semiannually—50 percent to performers and 50 percent to producers. Performers' shares are paid individually; but producers receive a lump sum, which they allocate to individual labels on the basis of air play listed in broadcasting logs.

Public performance fees, from which GEMA's 20 percent administrative expenses have been deducted, are split 64 percent to performers, 34 percent to producers.[39] Of the performers' 64 percent, 28 percent is paid to performers employed by broadcasting corporations, and the remaining 36 percent is divided among recording artists in proportion to their record-related earnings.

MULTILATERAL AGREEMENTS

Germany has belonged to the Rome Convention since 1966.

GVL has made bilateral agreements with Denmark, Austria, and Sweden to pay for performances of their recordings in Germany. But, as discussed above, because Germany's performer payments are calculated as a ratio of each performer's recording-related earnings, rather than by the playtime of his or her recording, GVL cannot calculate foreign nationals' shares. Therefore, by mutual agreement, each of these collecting societies retains the sums it would otherwise exchange with GVL. Although German officials express satisfaction with this system and foresee no possibility of altering the GVL distribution scheme to one based upon performers' air playtime,[40] and although GVL's system comports with the rather vague criteria of the Rome convention,[41] Austrian, Danish, and Swedish performers whose re-

[38] The fund provides pension and unemployment benefits, and is used to promote "serious music." All remaining GVL moneys are distributed.

[39] The performance split differs from the broadcasting split because it reflects the division of funds practiced by GEMA before the 1965 law was enacted.

[40] The German system was one of the earliest in Western Europe, and officials are understandably reluctant to abandon it. However, some persons doubt whether the agreement to retain foreign funds would continue to be acceptable if larger sums of money were involved.

[41] Germans interpret Rome's national treatment principle to require only that eligible foreign performers enjoy a right to remuneration. Local collecting societies may decide how that right is administered, they say for example, under the London principles drafted by the International Federaltion of Musicians, the International Federation of Actors, and the International Federation of Producers of Phonograms and Videograms (IFPI) to comply with Rome convention principles, reciprocity without exchanging distribution systems are irreconcilable.

cordings are played in Germany obviously suffer financially from their inability to receive royalties based upon German air playtime.

Finally, GVL's system precludes any bilateral arrangements with the United Kingdom because Germany feels bound to the principle of individual payments as opposed to collective payments to British unions.

American recordings are played frequently by German radio stations; but, of course, GVL pays neither American companies nor performers (other than those who belong to GVL and make German recordings) for performances of these works in Germany.[42] However, all persons interviewed enthusiastically favored the possibility of U.S. adherence to the Rome convention, albeit developing countries who import large volumes of U.S. music might then reserve performance rights under article 16 of the Rome convention.

CONCLUSION

Germany's performance rights legislation for sound recordings is unique in the West in naming the performer as the right holder, and giving the producer a subsidiary right to a share. As in other Western legislation, the performance right is not an exclusive right to authorize, but a secondary right to compensation for the broadcast or public performance of recorded sounds. The law's provisions reflect an earlier agreement between performers (who previously had a full copyright in performances as adaptations, which was not enforced),[43] broadcasters and authors (who opposed the principle of performance royalties), and producers (who had no previous legal rights that sought to share royalty payments);[44] and no efforts are underway to alter it. GVL's unique distribution system practically precludes German performers from receiving payments for air play or public performances in Britain, Austria, Denmark, or Sweden. At the same time, GVL's payment scale ceilings assue a more balanced distribution of public performance funds than occurs under the Gramex or LSG systems. Further, GVL legally assigns approximately 5 percent of its receipts to a performers' fund, for collective performer uses.

Broadcasting in the Federal Republic of Germany, as elsewhere in Europe, is a public entity whose activities are loosely monitored by an advisory board representing various social groups.[45] Broadcasters' obligation to maintain varied program content is conscientiously observed. To assure the continued exposure of classical music, each of the nine German radio stations supports one or more live orchestras. However, live music is seldom played on radio.[46] Rather, broadcasters normally tape live performances for delayed air play. Broadcasting stations frequently coproduce sound recordings of their house orches-

[42] German licensees of American record companies pay an undisclosed contracted amount of performance royalties to American record companies.

[43] West German performers' unions were not, and are not now, strong. They have never concluded any needle time agreements with broadcasters, although efforts to do so are underway.

[44] See. E. Schulze. "L'Artiste et la Technique: Protection de la Prestation de Service de L'artiste Executant" (Berlin: F. Vahlen 1960, 77 pp). Translation.

[45] Religious groups, unions, political parties, and the like are represented. The board selects the chairman of broadcast stations and may criticize general programing format, but private programing boards select specific programs without supervision.

[46] The broadcast of live music costs approximately 2,395 marks per minute, as contrasted with 6 marks per minute for recorded music.

tras' performances. Performance royalties from air play of these recordings, of course inure to the broadcaster-producer, as well as to the performers.

Although no information is available on the financial status of musicians in the Federal Republic of Germany, evidence shows that the number of German musicians is increasing and is higher per capita in West Germany than in other highly populated Western countries.[47]

[Translation From the German]

Contract number:

CEPR-Contract of Administration for Performing Artists

Please print:

The following contract of administration has been concluded between the undersigned

Last name	First name	Professional pseudonym	Date of birth
Address		Citizenship	
Profession		Instrument	
Repertoire		Independent or where employed	

hereafter referred to as the entitled party, and the Society for the Exploitation of Performing Rights, with limited liability, Esplanade 36a, 2000 Hamburg 36, hereafter referred to as CEPR:

I.

All performing rights which at the present belong to the entitled party as the performing artist and which will accrue to him during the duration of this contract are hereby transferred to the CEPR for administration in its own name, especially:

1. The right of consent when—

(*a*) His performance should be made publicly perceptible outside the location where it takes place by means of screen, loudspeaker, or similar technical devices;

(*b*) His performance should be fixed on visual or sound records;

(*c*) The visual or sound records should be reproduced;

(*d*) His performance should be broadcast [by radio].

[47] The number of musicians in West Germany decreased from 48,500 to 29,500 between 1950 and 1970. But, as of 1971, 1 of every 4,000 West Germans was a musician, as compared with 1 of every 5,000 persons in the United Kingdom and 1 of every 7,000 Frenchmen. International Labor Office, "Show Business is No Business for Many Performers" (ILO mimeographed press release, Geneva, Aug. 1, 1977).

2. The claim for payment of compensation when—

(*a*) The previously published visual or sound records are broadcast;

(*b*) His performance is made publicly communicable by means of visual or sound records;[47a]

(*c*) His broadcast performance is publicly communicated;[47a]

(*d*) His performance is reproduced by recording for a broadcast or by a transfer from one visual or sound record to another for personal use.

3. The claims for injunction, destruction, or compensation for damage resulting from violation of the rights of consent.

The entitled party may limit the type and the extent of the administered rights and claims at his choice as well as restrict their administration to the Federal Republic of Germany and West Berlin. If the entitled party has undertaken a limitation or restriction of his administered rights and claims this must adequately be taken into consideration in the apportionment.

II.

Paragraph I does not apply to producers of the sound records and the visual and sound records on whom their apportionment plans are binding on the basis of the contracts of administration made with the CEPR.

III.

If the entitled party himself gives the required consent then he is under the duty to observe the communicated principles of the contract by the CEPR.

IV.

1. The entitled party has the duty to furnish the CEPR with information and instructions necessary to establish and administer his rights and claims, further to give necessary details to establish and execute the apportionment plan and to make available the documents related thereto.

The changes of addresses and banking accounts must always be immediately communicated to the CEPR by registered mail.

2. In establishing and executing of the apportionment plan only that information will be taken into consideration which is made and documented within the announced period of time. The allocated apportionment quotas are forfeited when they cannot be remitted to the person entitled to receive [them] within 12 months for a reason for which the entitled party is accountable.

Every year up to April 30, the CEPR sends to the entitled party so-called supporting records. The entitled party who for whatever circumstance does not receive such supporting records has to make timely request of the CEPR (up to June 15 at the latest and, as a matter of expedience, by regisered mail) to forward them to him.

[47a] After respective agreements have been concluded with the payers of compensation.

V.

1. The claims of the entitled party against the CEPR are transferrable only with the consent of the CEPR. The CEPR is authorized to make the grant of the approval dependant upon the payment of a handling fee.

2. For the assignees the general legal provisions apply. If the entitled party dies and more heirs are in existence, then the heirs have to appoint an agent who represents them against the CEPR.

VI.

1. The contract takes effect on_____.

After expiration of 2 years the entitled party may give 6 month's notice of withdrawal from the contract of administration by the end of the calendar year.

2. With the expiration of the contract the rights revert to the entitled party without [the need for] any special transfer by the end of the calendar year in which the contract with the CEPR ceases to exist.

3. The place of performance and that of jurisdiction is the seat of the CEPR.

VII.

The articles of incorporation of the CEPR in their present version are the part of this contract.

VIII.

If the entitled party receives overpayments through incorrect, incomplete, or unclear information in the supporting records, then he is under obligation to reimburse the CEPR.

Hamburg, on_____ _____, on_____

Society for the Exploitation of Performing Rights, with limited Liability

CEPR

Entitled party

_____ _____

UNITED KINGDOM: PPL (PHONOGRAPHIC PERFORMANCE LIMITED)

The United Kingdom first intentionally legislated performance rights for sound recordings in the current Copyright Act of 1956.[47] Although a producer's right to remuneration for performance of his or her sound recordings was judicially read into the precedent copyright law by the 1934 decision in *Gramophone Co., Ltd.* v. *Stephen Carwardine & Co.*[48]

Section 12(1) of the current Copyright Act states: "Copyright shall subsist * * * in every sound recording of which the maker was a qualified person at the time when the recording was made." Section

[47] An act in respect of copyright and related matters (1956).

[48] The judge in this case said, "I see considerable objection to the view that persons might take, without doing anything more than buying a record, the advantages of all the skill and labour expended by makers of records for the purpose of public performance." The opinion read producers' performance rights in sound recordings into sec. 19 of the 1911 Copyright Act.

12(4) grants the copyright exclusively to the record producer. Section 12(5) secures the producer's exclusive right to control the following acts with respect to his or her copyright sound recordings: "(*a*) Making a record embodying the recording; (*b*) causing a recording to be heard in public; (*c*) broadcasting the recording."

The term of protection is from the time of the making to first publication plus 50 years thereafter.

The performer has no legal rights in his recorded performances under the Copyright Act, but his or her interests are protected by criminal law. Performers' Protection Acts from 1958 to 1972[49] provide criminal penalties from the unauthorized public performance of sound recordings:

Section 1 of the 1972 act provides:

> [A] person [who] knowingly uses for the purpose of a public performance a record so made, shall be guilty of an offense under this Act, and shall be liable, on a summary conviction to a point not to exceed £20 for each record in respect of which an offense is proved, but not exceeding £400 in respect of any one transaction * * *.

Section 3 provides for a maximum penalty of £400 for broadcasting a sound recording without the performer's consent.

Phonographic Performance Limited (PPL) is a nonprofitmaking organization established by record producers in 1934 to administer the performance rights recognized in the *Carwardine* case.[50] It administers funds to both producers and performers, following a formula agreed upon by IFPI and the British musicians' unions, although producers are the only party legally entitled to such royalties. PPL has dispensed performance payments since 1944 and is the oldest collection society.

MEMBERSHIP

PPL membership is available to record producers, who assign all their legal performance rights to the society. This transfer authorizes PPL to restrist user licenses according to union sanctioned conditions known as needletime agreements.[51] 150 producers are members of PPL; and, as of 1976, more than 31,550 performers shared in revenue distributions.

FEES

PPL negotiates sound recording licensing fees with both broadcasters and other users. The largest broadcaster, BBC,[52] is a public entity,[53] and makes quarterly payments of £128 per hour for network radio uses of sound recordings. The television rate is higher but television broadcasts fewer recordings.[54] The total BBC fee paid to PPL in fiscal 1976, was £1,250,000.

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[49] The current act, the Performers' Protection Act of 1972, affords criminal remedies for fixing a performance (other than for private use), performing a fixation, or broadcasting a live performance without the performer's written consent.

[50] See sample PPL–IBA contract at the end of this section. PPL is not involved with home taping licenses. Rather. MCPS, a private licensing society for mechanical rights, issues licenses for $1.62 annually that permit the licensee to make a single copy from each record purchased, provided the tape is used exclusively for domestic purposes.

[51] Needletime restrictions are discussed infra.

[52] BBC consists of three television channels, four domestic radio stations, 20 local stations and three regional services. A complete discussion of BBC services and operation is found in BBC Handbook 1977 (incorporating the annual report and accounts 1975–76) at 195–224; 293–340 (1976 ed.).

[53] BBC's revenue source is Government-authorized annual license fees for owners of television sets. No license fee is levied on radio owners.

[54] The PPL–BBC contract is currently being renegotiated.

At its inception in the early 1970's, the Independent Broadcasting Association, an association of independent commercial radio broadcasters, negotiated a 5-year graduated scale rate for performing copyright sound recordings based on members' net advertising revenues. The scale began at 3 percent and is now 7 percent of the 19 affiliated radio stations' net advertising revenue, or approximately 11 million in fiscal 1976.[55]

PPL has contracted with IBA television affiliates to pay license fees for performing sound recordings based on audience size and minutes of use. Stations serving audiences larger than 1.75 million persons pay £7.50 per minute for feature use, and £1.20 per quarter minute of incidental use.[56] Commercial television stations serving smaller populations pay £3.90 per minute for feature use and 60 p. for each quarter minute of incidental use.[57]

Individual rates are negotiated for public performance use, and these comprise approximately one-third of total public performance license fees, or about 1 million last year.

PPL's license fees and terms are not legislated, and dissatisfied parties may appeal them to a performing rights tribunal on grounds of "unreasonableness." [58]

COLLECTION OF LICENSE FEES

PPL collects license fees from the BBC, IBA affiliates, and Manx Radio, Isle of Man. Broadcasters submit logs identifying the selections played and corresponding play time. PPL currently maintains a computerized master index identifying more than 200,000 recordings, the performing artists, and corresponding playtime for each.

CALCULATION OF ROYALTIES [59]

PPL calculates performers' performance royalties on the basis of seconds of air playtime as shown in broadcasting logs, according to contracts between performers and approximately 600 United Kingdom record producers. Record producers get a lump sum of 67½ percent of total performance royalties.

PPL has found that public performances typically follow the use patterns of broadcasts, and therefore, calculates these performer royalties according to the broadcast formula.

DISTRIBUTION OF LICENSE FEES

Although producers enjoy the only legal right to British performance royalties for sound recordings, they have agreed to split these

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[55] IBA affiliated radio stations grossed $16½ million in 1976.

[56] Total IBA payments to PPL for television licenses in fiscal year 1976 were "nominal."

[57] BBC television payments in 1976 were likewise described as "low", but no precise figures are known.

[58] 1956 Copyright Act § 27(3). The most celebrated of the rate cases that have come to the tribunal was the 1965 *Manx Radio* case, in which IBA contested the PPL terms for the local commercial radio station on the Isle of Man. The performing rights tribunal, in an opinion which spelled victory for the station, liberalized the contested needletime restrictions to 50 percent of broadcast time, and affirmed that Manx Radio must pay a rate graduated from 5 percent to 8 percent of 85 percent of its gross advertising revenue for broadcasting sound recordings (Copyright Act, 1956, Performing Right Tribunal. Application Under Section 27, between Isle of Man Broadcasting Co. Ltd. and Phonographic Performance Limited and the British Broadcasting Corporation and the Musicians' Union, Ref. No. PRT. 18/64 (May 29, 1965)).

[59] See sample PPL forms at the end of this section.

sums with performers. Implementing this agreement, PPL annually distributes 67½ percent of distributable performance funds to producers, 20 percent to performers under the terms of their respective contracts with producers,[60] and 12½ percent to the musicians' union, to be used collectively.[61] PPL retains on account all funds owed to performers who cannot be located. These sums to date total between $400,000 and $500,000.

PPL has unusually low administration costs, typically ranging from 3 to 4 percent.[62] These are deducted from total collections before any shares are calculated. PPL reports that 70 percent of administration costs are incurred in enforcing needle time agreements applicable to public performances. Therefore, unions are in effect receiving a split substantially higher than 12½ percent.

MULTILATERAL AGREEMENTS

The United Kingdom has belonged to the Rome Convention since 1964. However, PPL makes no extraterritorial performance payments to other Rome countries[63] because performers have no intellectual property rights in the public performance of their recordings under British law.[64] Morover, as discussed earlier, Gramex, GVL, and LSG have to date been unwilling to make any payments to British unions for performances of sound recordings in their countries, principally on grounds that collective payments contravene their national laws' principle of individual performer payments.

The Cambridge meetings are attempting to facilitate agreements between these countries and the United Kingdom by establishing a principle which will permit royalties collected locally to be distributed in accordance with the rules of the performer's national society. Meantime, a move is underway in Britain to organize a society to administer performers' rights internationally.[65]

The resolution of the conflict between the United Kingdom and other industrialized Western countries has been described as "the key to the future success of the Rome Convention." Although the Cambridge meetings and the active efforts of the record industry have

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[60] These shares are paid to individuals insofar as possible, but groups larger than quartets typically are paid a lump sum, to be divided among the membership.

[61] These PPL revenues are segregated in a union fund used to support live musical performances, to commission music, to support educational and training programs, to purchase instruments, and to make some sick pay payments. No unemployment or pension payments are made from the fund.

[62] Administration expenses were 3.77 percent in 1977, 4 percent in 1976 and 3.6 percent in 1975, but would have been twice as high had they not been offset against returns from invested capital.

[63] Rights could legally be extended to nationals of countries on a reciprocal basis under sec. 32 of the Copyright Act. Foreign artists may, of course, participate by virtue of their private contractual agreements with United Kngdom record producers.

[64] Because British performers have no legal copyright rights, foreign collecting societies will not transfer funds to PPL. They maintain that PPL cannot legally represent British performers and hence cannot indemnify foreign collecting societies for funds transferred to PPL on behalf of British performers. These funds are retained by the foreign societies, notwithstanding the countries' mutual membership in the Rome Convention.

[65] Interpar, a society privately organized in the United Kingdom to collect international royalites on behalf of performers, is soliciting membership, but to date has not been a strong international organization. At present the musicians' union is attempting to establish a performers' organization to receive performers payments from foreign societies. However, practical problems remain. For example, nonunion British performers might automatically be precluded from receiving foreign originated funds if the organization were union sponsored.

made progress toward an eventual compromise, no solution seems imminent.[66]

The United Kingdom makes no payments for the performance of U.S. records, although some United Kingdom companies pay their American affiliates by contract. Should the United States join the Rome Convention, it would presumably face the same problems as Denmark, Austria, and Germany in exchanging performance royalty payments with the United Kingdom.

CONCLUSION

The United Kingdom's performance profile is unique for several reasons. First, it legislates a full copyright, with an attendant right to withhold or restrict publication.[67] Second, the performer enjoys no legal copyright or related right to control or receive royalties for public performance of his recorded performances. And, finally, performers unions are stronger in Great Britain then anywhere else in the West.

The British musicians' union is solely responsible for the current healthy status of live music in the United Kingdom. Its focus has been collective: To emphasize the economic health of the musicians' profession, at the expense of individual recording artists, insofar as it is possible.[68] Thus, the union bargains with users, through PPL, for needletime restrictions to assure employment opportunities for live musicians.[69] Under these agreements, a broadcaster or other public performance user may perform copyrighted sound recordings for limited times,[70] provided that he or she hires live musicians to perform for designated periods.

Current needletime agreements with BBC limit radio record play time to 97 hours per week for the four home radio services, 12 hours per week for regional services, 7 hours a week for local radio stations, and 50 hours each week for extended services. IBA radio station affiliates may use recorded music 63 hours each week, or a maximum of 9 hours per day—50 percent total broadcasting time.

Television needletime restrictions are more strict. For example, BBC is limited to 5 hours per week and commercial IBA television needletime cannot exceed 1 hour per week per station for main feature

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[66] Even if mutually acceptable bilateral royalty agreements could be reached, the amounts collected within the United Kingdom for foreign distribution would be limited by the media's informal native content rules. The British Television Act and BBC's royal charter both impose an obligation that a "proper proportion" of programs broadcast be British in origin and performance. The IBA unofficially fixes the so-called native content at 86 percent, while the BBC's percentage is at least 86.

[67] The fear that such a right could operate to the detriment of authors or composers by enabling producers or performers to restrict the dissemination of the underlying works was frequently voiced during drafting sessions of the Rome Convention. CISAC's arguments to this effect resulted in the Convention recognizing performance rights as neighboring rights rather than as full copyrights. Britain's national response to the fear was to legislate a full right, but to give it only to producers, who would have no incentive to restrict dissemination of sound recordings and who could easily negotiate broadcaster use licenses. See Whitford Report, infra, note 73, at ch. 7, p. 94. From a union vantage point, this solution benefits performers as a group, because needletime agreements would be impossible if performers controlled the performance of their individual recordings.

[68] Performers are, of course, individually compensated through their share of the 20 percent split of PPL funds.

[69] The United Kingdom is the only Western country where unions and broadcasters have needletime agreements. Live music in the United Kingdom, as in most other countries, is far more costly than recorded music.

[70] Needletime restrictions are subject to review on the basis of "public need" by the Performing Rights Tribunal.

use or 2½ hours each weekday and 1 hour per weekend per station for incidental use.

As a corollary to needletime limitations, BBC in 1976 supported 13 house orchestras [71] (at a cost exceeding 3 million pounds), funded live musical events, and sponsored serious music composition competitions. At the same time, IBA affiliates spent approximately 3 percent of their total revenues to employ musicians for live performances. Nonbroadcasting users of recorded music similarly agreed to hire musicians as conditions of obtaining performance licenses from PPL.[72]

Government studies of British musicians' union activities and performance rights, including the Whitford Committee Report,[73] the earlier Gregory Report,[74] and the broadcasters' Annan Report,[75] reaffirm the current principles of performance protection and attribute the superior economic position of British musicians, in comparison with other union members, to needletime agreements.[76]

Finally, because BBC, the major British broadcasting channel, is a public enterprise, program variety is assured.[77] As in Denmark, Austria, and Germany, BBC operates under a charter that establishes its programing obligations. And, the Minister may by law direct the BBC to initiate or cease a given programing practice. Although programing is weighted in favor of popular and light music, classical, jazz, and other less marketable music is consistently available on BBC. A balance of live and recorded music is guaranteed by needletime agreements.

Perhaps most remarkable is the comparable program variety [78] and balance between live and recorded music on commercial IBA stations.

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[71] Since the demise of big bands, BBC light orchestras afford the only contract jobs of that type available in the United Kingdom.

[72] For example, discos hire live musicians for 3 appearances for every 6 occasions on which they play recordings.

[73] Report of the Committee to Consider the Law on Copyright and Designs Presented to Parliament by the Secretary of State for Trade, (Whitford Committee Report) Cmnd. 6732 at p. 102 ff. (March 1977).

[74] Report of the Copyright Committee, Presented by the President of the Board of Trade to Parliament, (Gregory Report) Cmnd. 8662 at p. 51 ff. (October 1952).

[75] Report of the Annan Committee on the Future of Broadcasting at Ch. 21, 24.

[76] See Annan Report at sec. 27.35.

[77] For example, BBC regularly sponsors radio originated dramas, a genre of entertainment which has nearly disappeared from American radio.

[78] An act of 1973 establishes the IBA and authorizes it to own television transmitting stations and to broadcast programs provided by independent affiliated stations. IBA programing is bound to similar standards of decency, political impartiality, etc., as BBC.

PHONOGRAPHIC PERFORMANCE LTD.

PAGE REFERENCE A | 1 | 2 | 3 | 4 | 5

ACCOUNT MASTER FILE UPDATE FORM

NOTE: ENTER EITHER CLASS OR NAME, NOT BOTH

ACCOUNT NO. (6–10)	T C (11)	CLASS (12)	ORIGINAL ARTISTS NAME (13–42)	E/M (43)
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£
	2			£

FORM NO. 2230/11A

M

PHONOGRAPHIC PERFORMANCE LTD.

2 3 4 5

MASTER INDEX INSERTION FORM

NAME OF LABEL OR TRADEMARK _____ RECORD SUPPLEMENT FOR _____ 19_

PPL USE ONLY T/M	RECORD SERIAL NUMBER PREFIX	RECORD SERIAL NUMBER SUFFIX	PPL USE T/C	PPL USE C/No	* CODE	FOR CODE B ARTISTES ONLY NAMES OF ARTISTES/CONDUCTORS/ ACCOMPANISTS. ACCOMPANISTS TO BE MARKED (ACC) SURNAME	CHR/NAMES	FOR PPL USE ONLY A/C No.	RATE
6 9	10 19	20 29	30	31				32	

NOTE:-
USE ONE BOX FOR EACH RECORDING BUT IF MORE THAN FIVE ARTISTES APPEAR ON ONE RECORDING USE LINES IN NEXT BOX.

When completed return to:-
Phonographic Performance Limited
Ganton House
14-22 Ganton Street
London W1V 1LB

Form No. P33/Q/3/B

*CODE:-

A = CONTRACTED TO AMERICAN PRODUCERS

B = CONTRACTED TO BRITISH PRODUCERS

C = CONTRACTED TO CONTINENTAL PRODUCER

THIS FORM IS TO BE USED TO SUPPLY THE NAME & ADDRESS OF ANY ARTISTE CONTRACTED TO BRITISH PRODUCERS. (I.e. CODE B) WHOSE NAME HAS BEEN ENTERED ON A MASTER INDEX INSERTION FORM, BUT WHOSE ADDRESS IS NOT ALREADY KNOWN BY PPL.
WHEN COMPLETED, THIS FORM SHOULD BE RETURNED TO PHONOGRAPHIC PERFORMANCE LTD. WITH THE CORRESPONDING MASTER INDEX INSERTION FORMS.

IMPORTANT: Please enter one name & address only in each box using the lines as in postal correspondence.

10 1 2 3 4 5

EXAMPLE:

BUDDY RETCH ESQ
47 RAILWAY TERRACE,
MILLHOUSES,
BARNSLEY,
8A2 1OU.

FOR PPL USE ONLY			ARTIST NAME AND ADDRESS DETAILS Please use block capitals	E/M
ACCOUNT No. 6–10	TC 11	C. No. 12	13–48	49
				£ £ £ £ £
				£ £ £ £ £
				£ £ £ £ £
				£ £ £ £ £

FORM NO. 2240/2/A

NAME AND ADDRESS OF PREMISES: .....

.....

PROPRIETOR(S) : .....

ADDRESS : .....

TELEPHONE NUMBER : .....

DATE USE OF RECORDS COMMENCED : .....

SIZE OF ROOM : .....SQUARE FEET.

TYPE OF EQUIPMENT : STANDARD TURNTABLE/PRE-RECORDED TAPES/JUKE BOX?

IF A DISCOTHEQUE SERVICE IS ENGAGED, PLEASE STATE NAME AND ADDRESS :

.....

.....

HAVE MUSICIANS BEEN EMPLOYED IN THE PAST? .....

	AFTERNOON	EVENING	ARE RECORDS USED FOR (A) SPECIALLY FEATURED ENTERTAINMENT E.G. DANCING, DISCOTHEQUE SESSIONS, OR D.J. PRESENTATIONS, ETC. (B) BACKGROUND MUSIC		RECORD PLAYING TIME	MUSICIANS PLAYING TIME	AVERAGE ATTENDANCE	ADMISSION FEE	
MONDAY				(A) (B)					
TUESDAY				(A) (B)					
WEDNESDAY				(A) (B)					
THURSDAY				(A) (B)					
FRIDAY				(A) (B)					
SATURDAY				(A) (B)					
SUNDAY				(A) (B)					

DATE: .....

SIGNATURE: .....

PHONOGRAPHIC PER)RMANCE LIMITED

GANTON HOUSE, 14-22 GANTON STREET, LONDON W1V 1LB

CHEQUE DETAILS

GROSS PAYMENT
£
LESS TAX AT
£
NET PAYMENT
£

ACCOUNT NUMBER

HUNDREDS OF POUNDS	TENS OF POUNDS	UNITS OF POUNDS

DAY	MONTH	YEAR

Dear Sir/Madam,

We have the pleasure to enclose our cheque for the net amount stated above being an ex-gratia allocation of revenue in respect of the public use of sound recordings embodying your performances. This payment is not subject to VAT and should not be included in your returns of VAT to H.M. Customs & Excise nor should any tax invoice be issued for this payment.

Tax returns are sent to the Inland Revenue in respect of gross amounts totalling £15 or over paid in any one tax year, ending 5th April, for residents in the U.K.

For artistes without tax exemption and residing abroad, the gross payments and tax deductions are given in addition, in order that this letter can be submitted to the tax authorities in the artiste's country of domicile to enable any claim to be established to which the artiste may be entitled in respect of double taxation.

Yours faithfully,
PHONOGRAPHIC PERFORMANCE LIMITED

K. Roy

ACCOUNTANT.

Registered in England—No. 228046. Registered Office:—Finsbury Court, Finsbury Pavement, London, EC2A 1NB

"PPL LICENSE"

DEAR SIR: We set out below the terms and conditions on which we are prepared to authorize the use of sound recordings embodied in records issued under marks subject to the control of Phonographic Performance Limited (hereinafter called the Company) in sound radio programs made by Radio (hereinafter called the Licensee) for transmission by the Independent Broadcasting Authority (hereinafter called the IBA):

1. The license shall be for a period of 5 years commencing on December 31, 1973 or until the licensee shall cease to provide programs as a program contractor to the IBA (whichever shall first occur).

2. The authorized use of sound recordings shall not exceed 50 percent of total broadcasting time but with a maximum of the equivalent of 9 hours per day averaged over each 12-month period of this license.

3. In consideration of the license granted the Licensee shall pay to the Company the following proportions of net advertising revenue during each year of the license. Net advertising revenue is defined as gross revenue derived and actually received by the Licensee from sale of advertising time within its broadcasting time less actual agency discounts in relation to such sales but such deductions shall not exceed 15 percent—

First year commencing December 31, 1973, 3%;
Second year commencing December 31, 1974, 4%;
Third year commencing December 31, 1975, 5%;
Fourth year commencing December 31, 1976, 6%;
Fifth year commencing December 31, 1977, 7%.

4. No sound recording shall be used for the following purposes:

(*a*) As an introduction to and also during commercial advertising spots unless advertising the record used;

(*b*) as station identity signals;

(*c*) as signature tunes for programs in which sound recordings are not presented as the main feature.

5. The fees due hereunder shall be paid quarterly within 30 days of the termination of each accounting period of 3 months, and the Licensee shall render a statement certified by their accountant showing the gross revenue as aforesaid and the agency discounts allowed during the relevant period and finally net advertising revenue.

6. The Licensee shall render a return of sound recordings broadcast during each accounting period indicating:

(*a*) The title, date, and time of each program transmitted in which sound recordings have been used;

(*b*) the mark, number, names of artists, title, and playing duration of each record so used.

7. Notwithstanding the License hereby granted the Company reserves the right to prohibit at any time during the continuance of this license by giving due notice in writing to the Licensee the broadcasting of any sound recording in respect of which broadcasting is prohibited under any agreement between the recording company and the recording artist or the owner of the copyright in the recorded work or any other third party but shall at all times use its best endeavors to secure and retain the right to include in this license all recordings issued under marks subject to the Company's control.

8. The producers of sound recordings in membership with the Company have agreed that they will permit the re-recording of their commercial sound recordings, the use of which is covered by this license, in prerecorded programs and accordingly the Licensee is hereby granted such license for the term hereof, on condition that such prerecorded programs are only to be broadcast in the United Kingdom over transmitters provided by and subject to the control of the IBA where the IBA is transmitting programs either on behalf of the Licensee or any other program contractor of the IBA who has a similar License with the Company as the Licensee set forth herein hereinafter called an authorized third party it being agreed and understood that all periods of usage of such prerecorded programs whether by the Licensee or other authorized third party shall form part of the permitted hours of use of the Licensee of authorized third party as the case may be.

9. Wherever the Licensee itself takes programs originated by authorized third parties in like circumstances (only in reverse) to those referred to in paragraph 8 above then all the provisions of this License shall apply to the use of such programs by the Licensee whether the same shall be transmitted simultaneously with the transmission for the originating authorized third party of otherwise.

10. In this License the expression "sound recordings" means the aggregate of sounds embodied in and capable of being reproduced or performed by means of a record of any discription being such a record as is issued under the marks subject to the control of the Company.

11. The Licensee shall at all times exercise a proper discretion in the choice and use of sound recordings so that due justice may be done to their artistic qualities and to the artists whose performances are recorded thereon.

12. The Licensee shall so far as concerns programs made or originated by it but excluding all transmitters and other apparatus supplied and operated by or under the control of the IBA maintain at all times an efficient apparatus for the broadcasting of sound recordings and no individual sound recording shall be broadcast a greater number of times than will insure satisfactory reproduction and due justice to the artistic merits of the sound recording.

13. The Company shall not be liable for any claims which may be made by the owners of any literary, dramatic, or musical works protected by copyright and embodied in sound recordings, for breach of such copyright where such claim arises either by virtue of the broadcast of the sound recordings by the IBA in programmes made or originated by the Licensee or by virtue of the Licensee's exercising its right under clause 8 above and it shall be the sole liability of the Licensee to discharge all such claims.

14. The Licensee shall be solely liable in respect of any claims which may be made by artists whose recorded performances are reproduced on the sound recordings by reason of any misrepresentation, mistake, or omission made by the Licensee in the presentation of sound recordings either in the announcements made before the microphone or in printed programs in any publicity issued by the Licensee.

15. If any producer of sound recordings not being a member of the Company as on the date of this agreement shall subsequently become a member of the Company then the name and registered address of that producer shall on such admission to membership of the Company be notified by the Company to the Licensee and as from the receipt of such notification the terms of the license hereby granted shall be extended so as to cover all sound recordings issued to the public by that producer and any previous license granted by the producer to the Licensee for the broadcasting of sound recordings shall thereupon terminate.

16. The permitted maximum broadcasting time for sound recordings in each day and week may be distributed over a period of 12 months commencing with the 21st day of December of each year of this agreement but in no circumstances may any unused hours in any 12-month period be accumulated and used as excess hours in any subsequent 12-month period.

17. Subject only to the provisions of paragraph 9 above this license relates only to the use of sound recordings in programs originated by the licensee. However nothing herein contained, whether express or implied shall prevent the licensee providing such programs (subject to the terms hereof) to any other person firm or company having a current licensee from the IBA to provide commercial radio programs provided such other person firm or company also has a license from the company in similar terms, mutatis mutandis, as that contained herein.

Will you please confirm that insofar as commercial sound recordings subject to the company's control are included in the sound broadcasts of radio it will be in accordance with the above-mentioned terms and conditions.

Yours faithfully,

PHONOGRAPHIC PERFORMANCE LTD.,

_____,

General Manager.

PROFILE OF PERFORMANCE RIGHTS FOR SOUND RECORDINGS IN A WESTERN COUNTRY WHO HAS NOT JOINED THE ROME CONVENTION: CANADA

Canada is sometimes characterized as a country which "had performance rights and then abolished them." Because of Canada's geographical proximity to the United States, the dovetailing of our countries' broadcasting and recording industries, our common economic and international interests, and the similarities in our legal systems, the Copyright Office believes that a careful analysis of the history and present status of performance rights for Canadian sound recordings may be particularly useful to Congress.

The Office consulted representatives of Canadian broadcasting, record producing, union, and government interests. We concluded that Canadian legal history closely parallels that of Great Britain. That is, following the *Carwardine* case in England, Canadian interests interpreted a similar Canadian copyright law to afford record producers' a full copyright in the public performance (and broadcast) of their copyrighted sound recordings. But, when a Canadian organization was established to administer these rights, broadcasting interests persuaded the Canadian Economic Council to thwart its operation and the Canadian Parliament to revoke the performance right.

A renewed effort to legislate performance rights in Canadian recordings gained impetus with the April 1977 publication of a Government advisory group's recommendation to enact performance rights.[1] These recommendations are being considered by private interests, and will be sent to the Government for further study and possible legislative action in late 1978.

Legal History

Owing to activities of record producers, particularly on an international level, broadcasters' contracts to pay producers for licenses to perform copyrighted sound recordings frequently precede the legislation of a performance right.[2]

Canada is no different. Once the 1934 *Carwardine* case in England interpreted the 1911 United Kingdom copyright law as awarding producers a full copyright in their broadcast or other public performance of their copyrighted sound recordings Canada followed suit. Thus, the 1921 Canadian Act, which paralleled the British law, was deemed to confer on producers alone an identical right.

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[1] A. Keyes and C. Brunet, "Copyright in Canada: Proposals for a Revision of the Law" at pp. 83–89; 113–17 (Apr. 1977).

[2] For example, contracts preceded legislation in Germany, Austria, Denmark and, at least arguably, in the United Kingdom. The British *Carwardine* case (*Gramophone Co. Ltd. v. Stephen Carwardine & Co., Chanc.* 450 (1934), was decided in 1934; but broadcasters and producers had been contracting for performance licenses for sound recordings before that time.

That act is still in effect.[3] Sections 4 and 10 provide for protection for sound recordings:

4. (3) Subject to subsection (4) copyright shall subsist for the term hereinafter mentioned in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical, literary or dramatic works.

10. The term for which copyright shall subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced shall be 50 years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such plate at the time when such plate was made shall be deemed to be the author of such contrivance, and where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within Her Majesty's Realms and Territories if it has established a place of business therein.

Thus, sound recordings are regarded as musical, literary, or dramatic works for copyright purposes, and producers enjoy a 50-year term of protection.

These statutory provisions, which had been construed to embrace performance rights in sound recordings as in England,[4] were amended in 1971 to restrict producers' rights to dubbing rights, and to expressly exclude performance rights in sound recordings. The amending act of December 23, 1971, provided that:

* * * for the purpose of this Act, "copyright" means, in respect of any record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced, the sole right to reproduce any such contrivance or any substantial part thereof in material form.[5]

Thus, producers' performance rights were written out of the Canadian law.

LEGISLATIVE HISTORY

Why the about face? The answer echoes that heard in the United States: broadcasters' political power (abetted by Government studies in the United Kingdom and in Canada).

In 1952, preparing for the 1956 revision of their copyright act, the U.K. Board of Trade appointed a committee to report and make recommendations, if any, on how to amend the copyright law in response to technical developments and to the Brussels revision of the Berne Convention. The Gregory Committee considered whether "the right of public performance as hitherto enjoyed and as interpreted in the courts is unreasonably wide or has been exercised in a manner prejudicial to the public interest." [6]

Although it recommended retaining performance rights in records, the report was highly critical of the society formed to administer performance rights in British sound recordings, Phonographic Performance Ltd. (PPL). It noted that PPL could (and did) withhold licenses from prospective users, to the obvious [financial] detriment of the authors or composers of underlying works recorded on phonorecords. Although a producer's performance right in sound recordings was legislated into the revised U.K. Copyright Act of 1956, the Gregory Committee's criticisms were heard in Canada.

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[3] Canadian Copyright Act 1921.

[4] The *Carwardine* opinion held that sound recordings were original artistic works; therefore, their proprietors enjoyed the same performance rights accorded other literary or musical works.

[5] Act of Dec. 23, 1971, codified as subsection 4(4) of the Canadian Copyright Act.

[6] Report of the Copyright Committee, H.M.S.O. Cmd. 8662, United Kingdom (1952).

In fact, a contemporaneous Canadian study by the Canadian Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (the 1957 Ilsley report), rejected arguments proffered by the musicians' union, gramophone companies, and PPL. It noted that the right existed in Canada as in England [7] and that it could be effected only by a licensing-collecting society similar to PPL. Averring that phonorecords were not literally recognized as original works in the [1921] act, and that the committee preferred to abolish the right rather than have a Canadian society encounter criticisms such as those made of PPL, the Isley report recommended that the Canadian term of protection for sound recordings be reduced to 40 years [8] and that producers of Canadian sound recordings enjoy only exclusive rights to reproduction or "dubbing".

While this report was circulating throughout Canada, record producers, with counsel from their international trade association, created an association to administer performance rights in sound recordings.

Sound Recording Licenses, Ltd. (SLR) filed its initial schedule of 1971 rates for publicly performing sound recordings in 1970. The filing with the Copyright Appeal Board postdated repeated Government requests to postpone rate actions [9] pending a governmental resolution of the performing rights controversy. The rate proposed by SRL was modest: 2.6 percent of gross receipts for broadcasting uses of recorded works. But, the Copyright Appeal Board after extensive hearings, on May 13, 1971, granted the substantially lower radio tariff of 0.15 percent of radio's gross receipts.[10]

Meantime, S–9, an amendment similar to the earlier S–20, to abolish performance rights in sound recordings, was referred to the Standing Senate Committee on Banking, Trade and Commerce for hearings.[11]

The performance rights controversy was publicly aired at the 1971 Senate hearings, as well as at the Appeal Board hearings and in later Federal Court of Appeal litigation instituted by the Canadian Association of Broadcasters to review and set aside tariffs approved by the Appeal Board.

Broadcasters, aided by the European Broadcasting Union, were politically strong.[12] They argued that a performing right would be detrimental to Canadian authors and composers, and that performance royalties would benefit foreign recording interests since Canada is a net importer of recorded music.

These arguments were persuasive, and SRL's 11-hour proposal to compromise by restricting performing rights to Canadian recordings came too late.

In addition, one performers' union opposed the institution of performance rights. The Union des Artistes, representing French-Canadian chanteuses, opposed performance rights on the strength of their extant contracts with record producers to enjoy a (favorable) percentage of record sales receipts.

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[7] The right had apparently never been enforced by Canadian producers.
[8] The term was 50 years, as for other copyrightable works.
[9] Proposed tariffs for 1969 and 1970 were waived by agreement between SRL and the Minister of Consumer and Corporate Affairs.
[10] This rate would have yielded approximately $210,000 for the full year 1971.
[11] Hearings were held on May 12, 19, 26, and June 2, 16, and 23, 1971.
[12] Record producers maintain that neither they nor any other proponent of performance lights wielded comparable power with Parliament.

The Government's fear that 90 percent of performance royalties would inure to U.S. companies, with no reciprocal payments to Canadian companies,[13] is credited with defeating a performance right in Canada.[14]

A simultaneous 1971 report of the Economic Council on revision of the Canadian Copyright Act endorsed a performance right in underlying literary or musical works as the only means by which a composer can realize the market value of his work.[15] But the Council recommended that record producers not enjoy performing rights, both because they might detract from componsers' rights and because the producer's technical contribution is adequately rewarded through record sales.[16]

These positions spawned the enactment of amendment S–9 which abolished performing rights in sound recordings as of January 1, 1971. Efforts are underway to revive the right, but to limit royalty payments to Canadian recordings.

Present Status

The concern over Canadian balance of payments reflected in the adoption of amendment S–9 to abolish performance rights in Canada remains. A corollary effort to encourage increased production of Canadian recordings is reflected in the so-called Canadian content ruling. That regulation, promulgated by the Canadian Radio-Television Commission on January 18, 1971, requires that 30 percent of radio broadcast time be devoted to programs whose content (considering composer, lyricist, performer, and producer) is predominately Canadian.[17]

Record companies report an upsurge in native or Canadian recording in response to this regulation. It has also fostered a Canadian Talent Library, composed of recordings produced by member broadcasters with union assistance, and financed by subscription fees paid by members. Talent Library recordings bear labels prohibiting their performance without payment. Fees from the sales of Talent Library recordings are used to finance additional native recordings.

Interested parties' positions on the desirability of performance rights in sound recordings have not changed markedly since the controversy raged publicly in 1971. Broadcasters, of course, contend that native content rulings have protected performers' interests, and that no additional legislative protection is warranted.

Record producers, buoyed by the active international interests of IFPI and by their American affiliates, favor legislation creating a right to be shared by producers and performers, and eventual membership in the Rome Convention. They believe U.S. enactment of

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[13] The record industry in 1971 estimated that between 85 and 90 percent of records pressed in Canada were made from non-Canadian masters. Brief presented by SRL to the Standing Commons Committee on Justice and Legal Affairs with respect to the bill S–9 at 26 (Nov. 30. 1971).

[14] See Canadian Royal Commission on Patents, Copyright, Trade Marks, Industrial Designs (Ilsley Report). Report on Copyright 76–8 (1957).

[15] The Council said: "To say that he (the record producer) merits an extra fee each time his physical unit is publicly used is rather like saying that a book publisher should be paid an extra amount each time the book is read." Economic Council of Canada. Report on Intellectual and Industrial Property, Information Canada, at 158 Cat. EC 22–1370 (Jan. 1971).

[16] Id.

[17] Interested parties predict that the required percentages of Canadian content broadcasts will escalate in the near future.

performance rights legislation would remove many of the nationalistic fears which have barred similar Canadian legislation.

In addition, there is some indication that composers' societies in Canada, as in the United States, are more neutral than before on the question of performance rights.

Finally, although the Government has not formally reconsidered its opposition since the 1971 debates, it has commissioned an advisory body to report on the question, in connection with an examination of omnibus Canadian copyright revision.

Revision Proposals

The 1977 proposal for revision of the Copyright Act suggests that a performance right be reinstituted for sound recordings, but that the right be extended only to Canadian recordings. Specifically, the report recommends establishing separate rights for producers and performers, contingent upon the parties' ability to create an effective licensing mechanism to administer them. The producers' rights would be defined thus:

Recommendations

1. That sound recordings be protected by copyright as subject matter distinct from literary, dramatic, musical or artistic works.
2. That, subject to recommendations 6 and 7 below, the exclusive rights in a sound recording be the right to reproduce and the right to publish.
3. That such rights accrue to the "maker" of the recording except that ownership of the copyright in a commissioned recording belongs to the person commissioning, in the absence of any agreement to the contrary.
4. That the "maker" be defined as the person or entity by whom the arrangements necessary to make the recording were undertaken.
5. That copyright subsist for 50 years from the end of the calendar year in which the recording was first made.
6. That, providing it can be satisfactorily demonstrated that mechanisms can be established to exercise the rights, Canadian sound recordings be further protected by an exclusive right to perform in public and an exclusive right to broadcast.
7. That a "Canadian sound recording" be defined as one where the majority of the elements required to produce the recording are Canadian.[18]

Recommended performers' rights are described thus:

Recommendations

1. That, subject to resolving the difficulties of viable collective mechanisms, revenue sharing, and multiple licensing, a right in performances by Canadian performers be provided in any new Copyright Act.
2. That the exclusive rights granted to a performer be:
   (*a*) to make a recording of a performance;
   (*b*) to reproduce recordings of a performance;
   (*c*) to broadcast and perform in public a performance.

[18] A. Keyes and C. Brunet, supra n.1, at 89.

3. That the term of protection be 20 years calculated from the date of the first fixation of the performance.[19]

The report does not clarify how collection and distribution problems might be handled, nor why performers should enjoy a term less than one-half as long as that awarded producers.

The report is consistently nationalistic, iterating earlier Government concern with Canada's economic position as a record importer. Thus, it makes no recommendation that Canada adhere to the Rome Convention, presumably because membership would not be to Canada's economic advantage unless Canadian content requirements increase. In short, copyright policy will be dictated by Canadian economic concerns. Factors which cannot be predicted, such as the type of collection-distribution proposed,[20] and the legislative fate of U.S. performance rights legislation, will obviously be determinative.

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[19] Id., at 117.

[20] For example, a system such as GVL in Germany pays no money outside national boundaries.

PROFILES OF PERFORMANCE RIGHTS IN TWO LATIN AMERICAN COUNTRIES WHO BELONG TO THE ROME CONVENTION: BRAZIL, AND MEXICO, AND ONE NON-MEMBER: ARGENTINA

Of the regional areas of countries belonging to the Rome Convention, the Southern Hemisphere is more widely represented than any other. Nine of the Rome Convention's 20 member states are from South and Central American. Two-thirds of these states have joined since 1969, and experts predict that three more (Venezuela, El Salvador, and the Dominican Republic) will join by 1979.

Further, South and Central American countries have generally accorded more domestic legal protection to performers than have other Rome Convention countries. Whereas the majority of performance rights' laws accord legal protection to the record producer, sometimes with an accompanying obligation to share royalties with the producer,[1] Mexico's law awards performance right in sound recordings solely to the performer. Several other Latin American laws give a similar exclusive right to the performer, but the right is nominal because performers' royalties are not presently collected.

In spite of the proportionately large membership of South and Central American countries in Rome, execution of performance rights is imperfect. Because international conventions are self-executing in Latin American, a country may join the Rome Convention before it enacts implementing national legislation. Through interviews and correspondence, profiles have been drafted for three countries from the southern hemisphere: Brazil, Mexico, and Argentina.

Brazil

Neighboring rights were introduced in Brazil by law No. 4.944, of April 6, 1966, followed by regulating decree No. 61.123, of August 1, 1967. Rights are enjoyed by producers and endure for a term of 60 years from publication of the sound recording.

Article 4 of law No. 4.944 provides:

> It shall be the exclusive right of the producer of phongrams to authorise or prohibit their reproduction, whether direct or indirect, broadcasting or rebroadcasting by broadcasting and public performance organisations, regardless of which processes may have been used by the said organisations.

Further, law No. 5.988 of December 14, 1973, effective from January 1, 1974, provides:

Article 95

> The performer, his heir or his successor shall have the right to prevent the recording, reproduction, transmission or retransmission by a broadcasting organi-

[1] The common practice in Rome Convention countries is for producers and performers to share performance royalties for sound recordings, whether or not they are required to do so by law. This practice is reflected in 1976 "FIM–IFPI Resolution Concerning Relations with Performers," which recommends that all future legislation embrace an equal royalty split between producers and performers.

sation, or the use in any form of communication to the public, whether for a consideration or free of charge, of his performance, when he has not given his express prior consent thereto * * *.

Article 98

The phonogram producer shall have the right to authorise or prohibit direct or indirect reproduction, transmission and retransmission by a broadcasting organisation, and public performance by any means.

Brazil has been a member of the Rome Convention since 1965 and sound recording royalty collections and distributions began in 1969.

The Brazilian system of collecting and distributing royalties for the public performance of sound recordings has changed significantly as a result of Law No. 5.988, which promulgates new rules for collecting societies.[2]

Prior to 1973, the collecting society SOCINPRO (Sociedad Brasiliera de Interpretes e Produtores Fonographicas) received funds collected by SDDA (Servico de Defesa do Direito Autoral) and distributed them to performers and producers equally.[3] From the total sums collected, 30 percent was deducted by the authors' society as handling charges, 16 2/3 percent was contributed to the Musicians' Union, and additional amounts were deducted for performers' insurance and for contributions to a fund for social purposes.[4]

SOCINPRO distributed the remainder to performers, and producers under a point system generated by the 1966 law. The system dictated that when several performers were recorded on one performance, two-thirds of the distributable performers' royalty would be paid to the lead performer or performers, and the remaining one-third would be shared equally by the accompanying musicians and chorus members. The shares would be distributed equally to an unaccompanied vocal group through its leader.[5]

An individual producer or performer would receive his share on a point system reflecting both needletime and factors such as the work's hit parade status. Moreover, performers would receive additional points for their previous recordings, with increased weight given to recent releases.[6]

Critics of this earlier system argued that copyright and neighboring rights had become incompatible with the current social conditions in Brazil and with cultural progress. They cited the management of the performing rights' societies, and noted that as much as 50 to 60 percent of the fees collected were diverted to managerial costs, and that even so, royalties were not equitably distributed throughout the country. They viewed SOCINPRO's high administrative charges, caused largely by the cost of operating remote branch offices, as its major deficiency.[7]

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[2] The new law did not revoke the earlier law, which remains in force.

[3] Article 6 of the 1966 law invested the phonogram producer with the power to collect performance royalties and distribute them as follows, in the absence of other contractual agreements: producer: 50 percent; main performer: 33 percent; musicians: 17 percent.

[4] G. Davies, "La Proteccion Del Produtor De Fonogramas," at 11 (October 1975). (Speech presented at Regional Seminar on Protection of Performers, Producers and Broadcasting Organizations, Oaxtepec, Mexico, October 27–31, 1975).

[5] C. Leduc, "National Applications of the Rome Convention on Neighboring Rights," Copyright, vol. 8, No. 101, at 232 (1972).

[6] Id.

[7] A. Chaves, "News From Brazil," 93 Revue Internationale Du Droit D'Auteur at 58 (July 1977).

In response to these criticisms, the National Copyright Council by Decision No. 1 suspended SOCINPRO's collection activities and consolidated collecting and distributing functions throughout the national Brazilian territories.[8] Articles 115 of the 1973 law calls for the creation of a Central Collection and Distribution Bureau, ECAD,[9] to oversee the collection and distribution of public performance royalties, according to National Council standards. SOCINPRO and several authors' societies are authorized to operate, with each society designating representatives to the Bureau.[10]

In addition, the Council established maximum amounts which ECAD may deduct from the collected fees. Deductions may not exceed 30 percent of the total sum for the first quarter of 1977, and the percentage rate must decrease 5 percent each succeeding calendar quarter to 15 percent by October of 1977. The societies, including SOCINPRO, may not charge more than 5 percent for administrative costs during the first half of 1977, and may not charge more than 3 percent thereafter.[11]

Public performance royalty rates may reflect the nature of the use, and the user's financial capacity. Broadcasters are to pay fees calculated on their gross commercial income from musical performances or the use of phonograms.[12] User fees for public performance of sound recordings are: TV: 10 percent; Radio: 10 percent; other users: 30 percent.[13]

Under the new law, distributions for the public of performance of sound recordings must reflect play time estimated from air play samples. Computer calculations are expected to assure efficiency and objectivity.

In sum, the new law effected an omnibus reform of Brazilian collection and distribution societies, and regulated their statutes, administration, accounting methods, and user fees. Experts are optimistic that the reform will institute uniformity and increased amounts of revenue for performers and producers. At the 1975 Oaxtepec Seminar on Neighboring Rights, M. H. Jessen, member of the Interamerican Institute of Copyright, offered evidence that in Brazil, performance royalties for sound recordings have not reduced authors' or composers' royalties. The following table shows comparative revenue from authors' societies and the neighboring rights' society, from the latter's inception in 1968, to 1975.

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[8] Resolution No. 011 CNDA pursuant to article 115 of the 1973 law formally established ECAD.

[9] Escritorio Central de Arrecadacao e Distribuicao (ECAD).

[10] A. Chaves, supra note 7, at 64. As of January 1, 1977, ECAD has assumed responsibility for the collection of performance royalties on behalf of SOCINPRO. ECAD has contracted with the Government Computer Service for a complete accounting of all royalties collected and for a detailed printout showing how much each member of SOCINPRO should be paid

SOCINPRO sued successfully in 1976 to increase its representation on the board of directors, but some authorities believe that its influence is limited and that it cannot continue to operate under the present administration costs restrictions. Producers and performers need not belong to SOCINPRO to receive performance royalties. They may petition ECAD directly to receive payments.

[11] *Id.*, at 66.

[12] *Id.*

[13] C. de Souza Amaral, "Neighbouring Rights in Brazil," Escritorio de Avocacia, (1977).

Year	Copyright		Neighboring rights	
	In thousands of cruzeiros	In thousands of U.S. dollars	In thousands of cruzeiros	In thousands of U.S. dollars
1968	13.086	3.601	433	119
1969	18.108	4.379	1.207	292
1970	19.977	4.274	1.817	388
1971	26.061	5.285	2.756	519
1972	36.914	6.151	3.704	617
1973	49.639	8.100	4.754	776
1974	67.172	9.740	6.399	928
1975	100.311	12.158	9.277	1.124

Note: The amounts collected for both the authors' societies and the neighboring rights' society have steadily increased.

[Translation From the Portuguese]

National Board of Copyright (Conselho Nacional de Direito Autoral)

Establishes regulations concerning the foundation, operation, and fiscal control of the Ecritório Central de Arrecadaçã e Distribuição (ECAD) [Central Office of Collection and Distribution].

RESOLUTION NO. 001—CNDA OF APRIL 6, 1976

The Conselho Nacional de Direito Autoral (CNDA), empowered by articles 115 of law 5988 of December 14, 1973, and 11 of decree 76,275 of September 15, 1975, decrees:

Article 1. The establishment, operation, and fiscal control of the Escritorio Central de Arrecadação e Distribuição (ECAD) shall be regulated by this resolution.

Article 2. The association of titleholders of copyright and other related matters, which are in operation by authorization of the CNDA in the terms of article 105 of law 5988 of December 14, 1973, shall organize the ECAD which shall be in operation by January 1, 1977.

Section 1. The asociations established pursuant to law 5988/73, after the creation of ECAD, shall be assured the right to become its members.

Section 2. The ECAD can be liquidated only by law.

Article 3. The essential purpose of the ECAD shall include the exclusive collection and distribution in the entire national territory of royalties related to the public performance of musical or lyrical musical compositions and phonograph recordings, including radiobroadcasting and motion pictures.

Article 4. The ECAD shall be established as a nonprofit organization, for an undetermined period of time, subject to the regulations issued by the CNDA, and shall have its headquarters and forum in Brasilia, Federal District.

Article 5. The ECAD shall be administered by an executive board consisting of five members: one superintendent, one administrative secretary, and three members of the board.

Paragraph 1. The superintendent, the administrative secretary, and one member of the board shall be appointed by the president of CNDA after hearing the opinion of the board (Plenário do Conselho), and the two other members shall be nominated by the member associations of ECAD in the manner established in this resolution.

Paragraph 2. The members of the executive board shall be entitled to a monthly salary not to exceed the maximum established in article 112 of law 5988/73.

Article 6. The ECAD shall have an advisory commission consisting of one representative of each member association.

Paragraph 1. The advisory commission, besides being entitled to appoint two members of the board, shall advise the executive board in matters with which it is entrusted.

Paragraph 2. The members of the advisory commission who attend at least two-thirds of its monthly meetings shall be entitled to a monthly salary which shall not exceed 50 percent of the maximum value established in article 112 of law 5988/73.

Article 7. The ECAD shall have an administrative secretary who shall handle the staff pursuant to the provisions of labor law.

Article 8. Revenues for the management of the ECAD and its operations shall proceed from the percentage deducted from the gross collection of royalties and related matters.

Sole paragraph. The CNDA shall establish the percentage foreseen by this article.

Article 9. The titleholders of copyrights and other related matters who do not wish to make use of the right granted by article 103 of law 5988 of December 14, 1973, shall have their royalties guaranteed by the ECAD from the moment of their registration, with the respective conferral of mandate, especially for the purpose of article 73 of the aforementioned law.

Sole paragraph. In the cases of dissolution or intervention of the associations or their separation from ECAD for any reason, the associates shall be guaranteed equal rights in the terms of this article.

Article 10. The associations of titleholders of copyrights and of related matters shall receive a percentage, to be established by the CNDA, which shall be deducted from the gross collection of royalties and related matters.

Section 1. The amount of the percentage mentioned in this article shall be distributed to the associations according to the royalties of their associates.

Section 2. In the cases that the associations do not belong to ECAD or when the copyright titleholders do not make use of the right granted by article 103 of law 5988/73, the amount of percentage shall be given to the Fundo de Direito Autoral pursuant to item V of article 120 of that law.

Article 11. The royalties, after deductions of the percentages established in articles 8 and 10 of this resolution, shall be given in their entirety to the titleholders of copyrights and of related matters through the ECAD member associations, or directly, in the case of article 9, forbidding the associations to deduct any [additional] amount from the values to be distributed.

Article 12. The ECAD shall keep a current register of all musical compositions with the following information:

(*a*) name or title of the composition;

(*b*) authorship, as defined in articles 13 through 16 of law 5988/73;

(*c*) ownership of rights;

(*d*) information on publication contract.

Section 1. The information can be provided by the author or authors in person or by proxy, or by the publisher.

Section 2. The register mentioned in this article can be made by agreement with private or public agency.

Article 13. The system of collection and distribution shall be approved by the CNDA, complying with the following basic principles:

(*a*) the control of collection of royalties, the verification of the frequency of performance of musical compositions and the distribution of royalties shall be made through an electronic data processing system;

(*b*) the data processing system mentioned in the preceding paragraph shall be established in ECAD-owned equipment or under contract with specialized public agency, semi-public corporation or public enterprise;

(*c*) royalties proceeding from public performance through radiobroadcasting, motion pictures, bars, nightclubs, loudspeakers, background music, balls, carnivals and the like, shall be distributed in proportion to the frequency of performance and estimated according to the programs supplied and approved by the Serviço da Divisão de Censura e Diversões Públicas do Departamento de Policía Federal (Service of the Censorship and Public Amusements Division of the Department of the Federal Police);

(*d*) the evaluation of frequency of performance mentioned above shall be made through statistical sampling procedures;

(*e*) the royalties related to public performances in shows, theaters, balls with box offices and similar public shows shall be collected according to the number of persons, and shall be distributed according to the approved program.

(*f*) the distribution of royalties shall be made quarterly, and payment made within 30 (thirty) days, counting from the last day of the 3 months mentioned;

(*g*) the collection of royalties and other related matters shall be made through one or more agencies of the financial system.

Article 14. The ECAD shall establish a system of control for the enforcement of the programs submitted and approved by the Serviço de Censura da Divisão de Censura e Diversões Públicas do Departamento de Policía Federal, and a system of verification of frequency [of performance] at theaters and musical shows, following regional peculiarities.

Article 15. Authorization for public performance of musical or lyrical-musical compositions, foreseen by article 73 of law 5988/73, and the collection of the respective royalties shall be processed through the ECAD.

Article 16. The collection of royalties by ECAD shall be done strictly pursuant to provisions established by CNDA, pursuant to item IV of article 117 of law 5988/73.

Article 17. The ECAD shall submit to CNDA, in the manner established by this [resolution], its reports and balance sheets.

Article 18. ECAD accounting shall follow commercial accounting rules and its books shall be approved by the CNDA.

Article 19. The agreements of any nature in which the ECAD appears under any title as a party shall be previously submitted to CNDA for approval.

Article 20. The ECAD shall present the following to CNDA on March 30 of each year, in relation to the previous year:

(*a*) an annual report on its activities;

(*b*) a legal copy of the balance;

(*c*) a report of expenses;

(*d*) a report on the amount paid to the associations or directly distributed to the titleholders of copyrights and related matters.

Article 21. The CND shall be immediately informed of any change in the composition of the [Executive] Board, considered under article 5, concerning representatives of the associations.

Article 22. The ECAD shall be represented judicially or extrajudicially by its superintendent.

Article 23. The statutes of ECAD shall be submitted to CNDA before November 1, 1976, for their approval.

Sole paragraph. Any change in the statutes, once they are approved, shall require the prior approval of the CNDA.

Article 24. As of January 1, 1977, any other agency is explicitly forbidden to collect the royalties considered in this resolution.

Sole paragraph. Any existing contracts between the associations and the users shall be examined by ECAD and they shall be in force, after the creation of ECAD, only if they are in perfect agreement with the provisions of law 5988/73.

Article 25. The ECAD shall consider only those transfers of rights (cessões de direitos) which:

(*a*) if prior to the enforcement of law 5988 of 1973, have complied with the formalities established by paragraph 1 of its article 53, among others;

(*b*) if after the enforcement [of law 5988], have strictly complied with the provisions of chapter V of its title III.

Article 26. This resolution shall become effective as of the date of its publication in the Diário Oficial da União (official gazette).

CARLOS ALBERTO MENEZES DIREITO,
President.

[Translation from the Spanish]

RESOLUTION 07 OF DECEMBER 15, 1976

Establishes provisions concerning the unification of fees, and collection and distribution systems for royalties collected by the Central Office of Collection and Distribution (Escritorio Central de Arrecadação e Distribuição) [ECAD].

The National Board of Copyright (Conselho Nacional de Direito Autoral) [CNDA], empowered by paragraph 4 of article 117 of Law 5988 of December 14, 1973, decrees:

CHAPTER I. GENERAL PROVISIONS

Article 1. The unification of fees and the systems of collection and distribution of royalties for public performance, including radio broadcasting and motion pictures, of musical compositions and of

phonograph records by ECAD shall follow the rules established in this resolution.

Sole paragraph. For the purposes of this resolution, royalties (copyright) shall be understood to be the right of the author and related matters.

Article 2. The collection of royalties, established by the present resolution, shall not be lower than the amount collected before the establishment of ECAD.

Article 3. The collection of royalties shall fall primarily upon the gross revenue from the public performances of musical works, determined in article 1.

Article 4. The distribution of royalties shall be made, circumstances permitting, in direct relation to the verification of the frequency of performance of musical works.

Article 5. The control of collection in relation to the frequency of performance of musical works and phonograph records shall be made through an electronic data processing system.

CHAPTER II. UNIFICATION OF FEES

Article 6. The system of collection of royalties shall be unified in the entire national territory; equal amounts shall be paid by users with the same characteristics.

Article 7. In determining royalties, the users may be classified by groups, types, classes, levels, and regions, kinds of activity, financial capabilities, socioeconomic regions, and other recognizable characteristics.

Section 1. Royalties for radio broadcasting of musical works by broadcasting stations shall be determined in accordance with the power of the equipment.

Section. 2. Royalties for airing of musical works by television stations shall be determined pursuant to their characteristics (production, rebroadcast, or rerun).

Article 8. Royalties for public performance of musical works and phonograph records in places or facilities with paid admission shall be collected in proportion to the gross income from tickets sold, or pursuant to economic-financial indicators of equivalent expression, taking into consideration the frequency of musical performances and the capacity of the place.

Article 9. Royalties for broadcasting by radio and television shall be collected in proportion to the gross income from musical performances and phonograph records or with the sponsors' invoice, or again, with economic-financial indicators of equivalent expression.

Article 10. Royalties that cannot be determined pursuant to the rules established in articles 8 and 9 shall be collected according to lists of values established pursuant to the classification mentioned in article 7.

Article 11. Collection of royalties may be made periodically (monthly, biweekly, or weekly) or occasionally (by occurrence or event).

Article 12. Royalties from musical performances in special events (carnivals, balls, June festivals, or the like) shall be determined at

the time of the events and collected, in a special way, by occurrence or event.

CHAPTER III. COLLECTION SYSTEM

Article 13. Royalties shall be received by ECAD and collected through one or more financial institutions using the standardized forms approved by CNDA.

Article 14. Authorization for public performance of musical works mentioned in article 73 of law 5988 of December 14, 1973 shall be processed through ECAD.

Article 15. The control of collection of royalties and the verification of frequency of performance of musical compositions shall be made through an electronic data processing system.

Article 16. In the collection of royalties by the periodical method, ECAD shall electronically issue as many receipts of equal amounts of payments as there are periods remaining to complete the financial exercise, to be paid pursuant to article 13.

Article 17. In collecting royalties through the occasional method, ECAD shall issue collection receipts concerning the specific event which shall be paid pursuant to article 13.

CHAPTER IV. DISTRIBUTION SYSTEM

Article 18. Distribution of royalties shall be made in direct proportion to the frequency of performance of the musical compositions.

Sole paragraph. If distribution pursuant to this article is impossible, sampling criteria shall be adopted which are based on statistical information, inquiries, research, or other comparative method, to include programs which permit more precise information regarding the performance of musical compositions and phonograph records.

Article 19. ECAD shall keep a system of basic registration which shall include precise information concerning the protected works, titleholders of copyrights, users, and other elements in order to facilitate the identificaiton of the royalties collected and their beneficiaries.

Article 20. The collection system shall continue to be improved until it meets the royalties distribution system outlined in article 18.

Article 21. The distribution of royalties shall be made after the deduction from the gross income of the percentages established by CNDA for the management and operational activities of ECAD and for the associations of titleholders of copyright and related matters, members of ECAD.

Article 22. The amount of percentage reserved for the copyright titleholders' associations mentioned in the preceding article shall be distributed in proportion to the rights of their associates.

Sole paragraph. The amount of this percentage shall be received by the Copyright Fund (Fundo de Direito Autoral) in case of the occurrence foreseen in section 2 of article 10 of resolution 1 of April 6, 1976.

Article 23. The distribution of royalties shall be made quarterly, and its payment shall be made within 30 days counting from the last day of the quarter.

CHAPTER V. FINAL PROVISIONS

Article 24. The copyright fees and the collection and distribution systems established shall be submitted to CNDA for approval.

Article 25. This resolution shall become effective as of the date of its publication in the Diário Oficial da União (official gazette).

CARLOS ALBERTO MENEZES DIREITO,
President.

NATIONAL BOARD OF COPYRIGHT (CONSELHO NACIONAL DE DIREITO AUTORAL)

RESOLUTION 4 OF AUGUST 17, 1976

Sets forth provisions for the establishment of the Copyright Fund (Fundo de Direito Autoral).

The National Board of Copyright (Conselho Nacional de Direito Autoral) [CNDA], taking into consideration provisions of articles 48, 49, 93, and its sole paragraph, paragraph 4 of 117, and article 120 of Law 5988 of December 14, 1973, and articles 9 and 10 of decree 76,275 of September 15, 1975, decrees:

Article 1. The Copyright Fund mentioned in law 5988 of December 14, 1973, is established according to the terms of this resolution.

Article 2. The fund mentioned in the preceding article, supervised by CNDA, shall be administered by the executive secretary.

Article 3. The following shall constitute the Copyright Fund:

I. Revenues from the authorization for use of works in the public domain;

II. Donations by national or foreign individuals or corporations;

III. Revenues from fines imposed by the CNDA;

IV. The amount distributed by ECAD to its associations which are not claimed by the associates within 5 years;

V. The amount of percentage mentioned in paragraph 2 of article 10 of resolution 1 of April 6, 1976, of CNDA; and

VI. Revenues from other sources.

Sole paragraph. The executive secretary shall rendered an account quarterly to CNDA together with a written report covering the period.

Article 4. For the purpose of item 1 of article 3 of the present resolution, the use of national or foreign intellectual works in the public domain by any means or procedure which is not free is subject to the explicit authorization by CNDA.

Sole paragraph. The president of CNDA, ad referendum for the plenary assembly, has the power to authorize the use of works mentioned in this article, and can delegate jurisdiction to the executive secretary.

Article 5. Adaption, translation, arrangement, or orchestration of works in the public domain are also subject to the explicit authorization by CNDA.

Sole paragraph. If the use mentioned in this article is aimed at profit, the applicant shall specify in the form mentioned in article 7 of the present resolution the type of work that he or she intends to perform.

Article 6. The following shall be considered works in the public domain, besides those for which the period of proprietary equity protection has expired:

(*a*) Those of deceased authors who did not leave successors;

(*b*) Those of unknown authors, handed over by oral tradition; and

(*c*) Those published in countries which do not participate in agreements signed by Brazil, and which do not grant to authors of works published in Brazil the same treatment granted to authors under their jurisdiction.

Article 7. Applications for authorization to use works in the public domain, whether for profit or not, shall be directed to CNDA using a special form to be established by the executive secretariat.

Article 8. In case of books, phonograph records, engravings, and the like, the editor or the [concerned] party shall reproduce, besides the amount authorized by CNDA, up to 10 percent of the edition for promotion and publicity, the sale of which is prohibited.

Article 9. The following is estimated as 50 percent of what shall belong to the author, for the purpose of the sole paragraph of article 93 of law 5988 of December 14, 1973:

I. Publication of books, musical compositions, and engravings of plastic works for noneducational purposes, 5 percent of the sale price to the public;

II. Phonograph records, 4.2 percent of the sale price; the estimate shall be proportional if in the same material there are works that are not in the public domain;

III. Public performance in facilities with admission charge, 5 percent of the total collection, and when in the same show there are works that are not in the public domain the collection shall be in proportion to the program presented:

Section 1. If the collections are made by ECAD, it shall be done quarterly, according to the frequency observed;

Section 2. If the works are used for educational purposes, complying with the provision of article 11 of the present resolution, the following shall be considered as 10 percent of what belongs to the author:

(*a*) In the case of item I of this article, 1 percent of the sale price to the public;

(*b*) In the case of item II, 0.84 percent of the sale price; and

(*c*) In the case of item III, 1 percent of the total collection.

Article 10. Provisions of the preceding article apply to reproductions and performances of arranged, adapted, translated, and orchestrated works.

Article 11. For the purpose of the sole paragarph of article 93 of law 5988 of December 14, 1973, a work is considered educational if the author unmistakably and intentionally has facilitated and improved the educational process, according to learning and communication principles.

Article 12. The amount of percentages mentioned in article 9 of this resolution shall be collected for the Copyright Fund until the end of the semester following the publication of the work, regarding copies actually sold, under any form, with the exception of the cases mentioned in its item III, which shall be collected the day following its presentation, and in its paragraph 1, which shall be collected quarterly.

Sole paragraph. Collection shall be made using a special form issued by the Executive Secretariat of CNDA at any branch of the Banco do Brasil, S.A., for the account of the Copyright Fund at the Central office of that bank in Brasilia, Federal District.

Article 13. The editor or producer who wants to use a work in the public domain is obliged to authorize CNDA, through its Executive Secretariat, to examine the section of accounting related to the Copyright Fund, as well as to inform it about the status of the publication or production.

Article 14. At the moment of the duly authorized publication of a work in the public domain, the party responsible for it shall submit one copy of it to CNDA.

Article 15. The person who reproduces a literary, artistic, or scientific work in the public domain without the authorization of CNDA shall forfeit the copies that were confiscated, and shall pay the Copyright Fund for the rest of the edition at the price at which it was sold or its assessed price.

Sole paragraph. If the number of copies mentioned in this article is unknown, the violator shall pay the value of 2,000 copies in addition to the ones which were confiscated.

Article 16. CNDA shall have the power to request from the Service of Censorship and Public Amusements of the Department of the Federal Police (Servico de Censura da Diversões Públicas do Departamento de Policia Federal) the prohibition of the representation, performance, broadcasting, and rebroadcasting of intellectual works in the public domain, including phonograph records without the proper authorization, as well as the seizure of the gross revenue, to guarantee their rights.

Sole paragraph. The prohibition shall remain in effect until the moment the violator exhibits the authorization.

Article 17. The authorization shall be canceled, with seizure of the rest of the copies, when the user stops collecting the amount owed to the Copyright Fund pursuant to article 12 of this resolution, and the violator shall be prohibited from reproducing works in the public domain.

Sole paragraph. Representation, performance, or broadcasting of works in the public domain without payment of the amount due to the Copyright Fund shall incur the penalties established in article 16 of the present resolution.

Article 18. Payments to the Copyright Fund established in this resolution made after the established period shall be subject to the interest on deferred payments.

Article 19. This resolution shall become effective as of the date of its publication in the Diário Oficial da União (official gazette).

CARLOS ALBERTO MENEZES DIREITO.

CONSELHO NACIONAL DE DIREITO AUTORAL (NATIONAL BOARD OF COPYRIGHT)

CNDA RESOLUTION NO. 8 (?) OF DECEMBER (?) 1976

Establishes the percentages mentioned in articles 8 and 10 of CNDA resolution 1 of 1976.

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The CNDA, in use of its jurisdiction, decrees:

Article 1. The percentage mentioned in article 8 of CNDA resolution 1 of April 6, 1976, is established as follows:

(*a*) In the 1st quarter of 1977 : 30 percent;

(*b*) In the 2d quarter of 1977 : 25 percent;

(*c*) In the 3d quarter of 1977 : 20 percent;

(*d*) As of October 1, 1977 : 15 percent.

Article 2. The percentage mentioned in article 10 of CNDA resolution 1 of April 6, 1976, is established as follows:

(*a*) In the 1st quarter of 1977 : 5 percent;

(*b*) As of July 1, 1977 : 3 percent.

Article 3. In the cases foreseen in article 9 and its sole paragraph of CNDA resolution 1 of April 6, 1976, the percentage for the association shall be collected by the Copyright Fund (Fundo de Direito Autoral).

Article 4. This resolution shall become effective as of the date of its publication.

CARLOS ALBERTO MENEZES DIREITO,
President.

NATIONAL BOARD OF COPYRIGHT (CONSELHO NACIONAL DE DIREITO AUTORAL) [CNDA]

CNDA RESOLUTION 11 OF FEBRUARY 9, 1977

Regulates the means by which the user of music shall notify [CNDA of] the identification code of the musical compositions, and other provisions.

The CNDA, empowered by paragraph 4 of article 117 of Law 5,988 of December 14, 1973, and by article 4 of decree 78,965 of December 16, 1976, decrees:

Article 1. The radio and television stations, companies producing background music, and amusement places with dancing shall hand over, at the time of payment of royalties, on a special form, a report of the musical compositions performed in the month preceding the payment, with the respective identification codes from the phonograph records or from the list of codified tapes and compositions (Relação de Obras e Gravações Codificadas) distributed by CNDA.

Sole paragraph. The completion of the document mentioned in this article shall be based upon programs actually performed.

Article 2. When paying the royalties for musical compositions performed in shows, the report of the compositions actually performed is required to be handed over on a special form without mentioning the identification codes.

Article 3. The Central Office of Collection and Distribution (Escritorio Central de Arrecadação e Distribuição) [ECAD] shall supply the forms mentioned in the preceding articles.

Article 4. This resolution shall become effective as of the date of its publication.

CARLOS ALBERTO MENEZES DIREITO,
President.

[Translation From the Portuguese by O. A. Fialho and M. J. B. Magalhães, Certified Translators]

AGREEMENT BETWEEN BRAZILIAN SOCIETY [SOCINPRO] AND ARGENTINE SOCIETY [A ADI—CAPIF]

I, the undersigned public translator and certified commercial interpreter of this place of Rio de Janeiro, certify that a document written in Spanish was presented to me to be translated into Portuguese, which I did, according to my profession; the translation is as follows: (Doc. No. 129,402/IV/77/F.)

Translation:

Agreement between SOCINPRO and A.A.D.I.—C.A.P.I.F. Asociacion Civil Recaudadora.—The Sociedad Brasileira de Interpretes e Produtores Fonograficos (SOCINPRO) [Brazilian Association of Phonograph Record Performers and Producers] located at Avenida Beira Mar 406, Grupo 1205, Rio de Janeiro, Brazil, and the A.A.D.I.—C.A.P.I.F. Asociacion Civil Recaudadora [Civil Association of Collectors] located at Corrientes 1628, 5th floor, Apt. H, Buenos Aires, Republic of Argentina, have concluded the following agreement:

(1) Each of the contracting parties entrusts the other with the representation and management of its objectives and social activities in the territory in which it operates.

(2) Each of the contracting parties shall assume the responsibility of collecting and receiving within the territory of its country, by any means or procedure, the fees for communication to the public of phonograph records and the amount due to the performers and/or phonograph record producers represented in its country by the other party.

(3) The collection shall be made according to the rates in force in the respective country, whether established by the involved party or by a State resolution.

(4) Each of the contracting parties shall have the right to deduct from the gross amount of the collected royalties up to 30 percent for collection expenses, and up to 10 percent for management expenses; that is, an accumulated total of 37 percent. Of the resulting net amount each of the parties shall have the right to deduct expenses incurred by transfer of the resulting amount to the other party.

(5) Both parties shall settle the amount of collections related to performers and/or phonograph record producers represented by the other by natural semesters, the first of which shall be June 30, 1977. The settlement of account shall be mailed by registered letter within 90 days after its closing and shall be considered approved if it is not questioned within the following 30 days. The transfer shall be made by way of money order within the 5 days after mailing the rendering of accounts.

(6) In order to enable both parties to proceed with the distribution of revenues among their principals (representados), each party, in preparing the rendering of accounts, shall provide the most information possible concerning individual phonographic reproductions communicated to the public, for which the contribution to be liquidated shall be received.

(7) Each party shall pay to the other the revenues collected, after deduction of the amount that belongs to local professionals (licenciados locais). It shall be the exclusive right of each of the parties to divide afterwards among their members the resulting revenues, pur-

suant to special agreements with their associates or according to the rate established by national legislation.

(8) Each of the contracting societies makes the commitment to grant to the members of the other equal treatment to that given its own members in matters concerning collection and distribution of revenues from public performance and radio broadcasting of phonograph records.

(9) The present agreement is based on the principle of absolute mutuality and, furthermore, it is understood that an interruption of the collection activities by one of the parties, for any reason whatsoever, including force majeure, for more than 90 days, or the nontransference of the amounts mentioned in clause 5, even when interruption is due to government provision, gives the other party the right to denounce the present agreement via telegram at any moment, with 60 days notice.

(10) This is an exclusive agreement; therefore, it is forbidden to any of the parties to make an agreement in the country of the other with a third party concerning the rights herein considered. Nevertheless, they shall be permitted to delegate to other agencies of the same country the collection of the amounts owed by the users, that is, to enter into contract with a collecting agency, preferably specialized in intellectual rights copyrights, if the total expense percentage, including that payable to said agencies, does not exceed the limit established by clause 4.

(11) This agreement is legal and satisfactory evidence of mutual substitution between the parties of the mandate conferred by their members, interpreters, or performers and phonograph record producers, to their respective societies to take care of the acts related to collection and distribution of public performances and radio broadcasting of phonograph records, and among them, the power to authorize their use for those purposes; to propose and determine prices and rates for public performances; to collect and write out receipts; to sign agreements and contracts with the users; to represent before the courts of any instance and jurisdiction the protection of said rights, for which purpose it shall be able to make personal appearance (apresentacões) ; to carry out transactions and agreements; to request appeals before the judicial and administrative authorities; and, finally, to do whatever is required to respect and protect the rights of the members of each of the contracting parties in the territory of the other.

(12) Each party shall make available to the other its accounting books and all documents and receipts of collections and distributions required for the verification of the accuracy of their credits. Each party can nominate a representative to take care of said control, with the condition that this person shall be previously accepted by the party before which he or she is going to be accredited.

(13) With the exception of the term of this agreement, the parties make the mutual commitment to grant each other the most favorable conditions possible in the future to other foreign societies representing related rights.

(14) The collection of royalties for one party by the other shall be done simultaneously and jointly with that of its own list; that is, it

shall not collect from users the amount that belongs to its members, separately or singly, without collecting also what belongs to the members of the other party.

(15) Each party shall send to the other a complete list of its members which shall be kept up-to-date by regular supplements. It is formally understood that both parties shall not sign as members, for any reason, titleholders of [copy]rights who are already members of the other, unless by previous written consent.

(16) This agreement shall be in force for a period of 2 (two) years and shall become effective on January 1, 1977; [after the 2 years] it shall be automatically renewed, unless the agreement be denounced by any of the parties, by way of telegram sent to the other 90 days before the expiration of the original term or of the successive extensions.

(17) Any disagreement between the parties shall be settled by arbitration, for which purpose an arbitral court shall be established consisting of the president of the Federação Panamericana de Intérpretes and the president of the Federação Latinoamericana de Produtores Fonográficos who, by mutual agreement, shall appoint a third member. The judgment of this court shall have executive force and can be appealed before the criminal court. [Two illegible signatures] Certified signatures in stamped paper of notarial document (Atuação Notarial) No. 018218621, stamp of notary public (Tabelião) E. Labayen.

Notarial document A 018218621. Buenos Aires, January 24, 1977. In my capacity as Notary of Cartulary Office No. 254 of this Capital, I Certify that the preceding signatures were signed before me by José Raúl Iglesias and Luis Santiago Aguado, known to me, and that they did so as President and Secretary respectively of "A.A.D.I–C.A.P.I.F. Associacion Civil Recaudadora" [Address follows]. The request of this certificate is legalized in term No. 325 of book 2 [Illegible signature] Stamp of the notary public E Labayen. Notarial act. The College of Notaries of the Federal Capital, Republic of Argentina, by power of laws 12,990 and 14,054, legalizes the signature and stamp of the notary public Mr. Enrique Labayen, as appear in the annex document * * *. [Clarification follows that this legalization does not pass a judgment on the content or form of the document.] January 27, 1977. [Signature of] Ernesto M. Miguens, Counselor of the College of Notaries. * * *. [Fee paid, and a certification by the Department of Legalization of the Ministry of Cult and Foreign Relations that the signature that says "Ernesto M. Miguens" is similar to the one in its registry.] Signature of Mario Ravera, Department of Legalization. [Signature and stamp of the Brazilian General Consulate in Buenos Aires, January 28, 1977. Ruy B. De Miranda E Silva, General Consul; amount of fee paid. And other signatures.]

Mexico

Mexico's copyright law of December 29, 1956, as amended November 4, 1963, creates legal rights for the public performance or broadcast of sound recordings, and vests them solely in the performer:

Article 80

Recordings or discs used for public performance by means of juke boxes or similar apparatus, and for direct or indirect financial gain, shall give rise to royalties in favor of authors, interpreters or performers.

The amount of these royalties shall be regulated by tariffs fixed by the Secretariat of Education * * * but without prejudice to the right * * * [of the performer et al.] to enter into contracts * * * for an increase of the amounts prescribed * * *.

All recordings imported for public performance must contain a legend stating that a fee has been paid to cover public performance in Mexico.[14]

Article 84 provides:

Interpreters and performers who participate in any performance shall be entitled to receive financial remuneration for the exploitation of their interpretations.

The article further provides that when more than one performer is recorded on a work, royalty payments shall be divided among them in any manner agreed to. Absent agreements, royalties are to be distributed "proportionately to the amounts [the performers] would receive for their respective performances." [15]

Article 86 provides that the "express authorization" of performers or interpreters is necessary "for any broadcast reemission or fixation of a broadcast thereof, and any reproduction of any such fixation."

Finally, under article 87, interpreters and performers have the right to oppose:

(I) The fixation upon a base material, the radio-diffusion, and any other form of communication to the public of their direct acting and performances;

(II) The fixation upon a base material of their acting and performance which are broadcast or televised, and

(III) Any reproduction which differs in its purpose from that authorized by them.

The term of protection for performers and interpreters is 20 years, measured from the fixation date of sound recordings, the date of performance of unrecorded works, or the date of broadcast transmission.[16]

Phonogram producers have no rights by Mexican law to royalties for the broadcast or other public performance of their recorded sounds. In practice, however, producers collect royalties for public performances other than broadcasts from record manufacturers and pay them to a performers' society.

The tariff for performing music recorded on a phono-electromechanical apparatus other than by broadcast is imposed as an addition to the cost of manufacturing the disk, and is collected when the record is sold. The manufacturer discounts from the actual number of records manufactured those destined for promotional or advertising purposes, plus 20 percent of the total to compensate for breakage, returns, and exports. He transfers a royalty based upon the remaining number of records sold. This practice conforms to a 1962 agreement which preceded the amendment of the copyright law. The performance tariff is established by law and is proportional to the manufactur-

[14] Copyright law 1956, as amended in 1963, art. 80 (III).
[15] Art. 84.
[16] Art. 90.

ing cost of the disk. It is imposed only upon manufactured 45- and 78-revolution-per-minute recordings.[17]

Additional public performance fees are imposed upon establishments where recorded public performances typically occur if they are situated in localities with a population in excess of 8,000 persons. These include bars, dancehalls, open air premises, and the like. These fees take into account the population served by the establishment, and are imposed for stated time periods. Juke box operators are taxed monthly on the basis of the number of machines operated and the disk capacity of each.

Of the total sums collected for nonbroadcasting performances, performers by law receive approximately one-fifth. Percentages for authors-composers and performers are established for specific uses by article VII of the Music Tariff Agreement.

Commercial broadcasting performances of sound recordings are taxed according to a 1966 agreement.[18] Broadcasters pay 1.10 percent of their taxable income for performance rights. Of this sum, 83.33 percent belongs to authors-composers, and 16.67 percent is owed to performers.

Both broadcasting and other public performance tariffs collected for performance rights are distributed by the Association Nacional de Interpretes, ANDI). Distributions are calculated by computer and are distributed on the basis of needletime.

ANDI, like the authors' society, is regulated by chapter VI of the copyright law.[19] Full membership in ANDI is available only to Mexican nationals or domiciliaries,[20] though foreign nationals or foreign societies may receive payments through ANDI.[21]

Chapter VI further decrees strict rules governing the societies, including rules for admitting and expelling members' rules for organizing and for administering receipts.[22] Each society must consist of a general assembly, a directive council, and a vigilance committee and must be registered in the Copyright Register.[23] Moreover, a trust must be established when the total receipts exceed 100,000 pesos.[24] The directors are bound not to exceed 20 percent for domestic administrative costs and 25 percent for foreign costs.[25] Officials of the society must denounce any irregularity known to them, or to be held liable under both civil and penal provisions for any violation committed by a predecessor.[26]

The society enjoys unusual police powers. Either a society or an individual may move to close an establishment, or to suspend or prevent reproduction, performance, or exploitation of a work where there is due cause.[27] The strong legal penalities for violating an interpreter's rights include imprisonment for up to a year, a fine up to 5,000 pesos,

[17] The agreement was never amended to reflect the recent popularity of 33⅓-revolution-per-minute albums. See appendix.
[18] See appendix.
[19] Article 117.
[20] Article 95.
[21] Article 98.
[22] Article 99.
[23] Article 101.
[25] Article 104.
[24] Article 99.
[26] Article 115.
[27] Article 115.

or both.[28] But financial status of the offender is considered. If the offender committed an offense in order to meet elementary needs, he or she may be completely absolved.[29]

When public performance fees have not been paid, the author or performer or his/her society may petition a court to seize entrance fees and mechanical apparatus and to interfere in business negotiations.[30] Such severe measures are rarely, if ever, employed because users pay the prescribed tariffs as a matter of course.

A subject of dispute is who is legally entitled to performance payments. Article 79 establishes that fees become payable when the performances are used and that they shall accrue to the benefit of authors, interpreters, and performers. However, article 82 distinguishes between interpreters and performers, and causes some to question whether all performers should be paid.

Article 82 defines an interpreter as:

> * * * a person who, with personal action, imparts, in an individual form, the intellectual or artistic manifestations necessary for the performance of a work. A performer is an orchestral or choral participant whose action, being one of defined unity, has artistic value in itself, and is not merely that of an accompanist.

Accompanists, then, arguably should receive no remuneration, because their work is deemed to have no artistic value in itself. But the Rome Convention, which Mexico joined in 1964 without reservation, provides for protection for performers without differentiating between those whose performance has defined unity and those whose performance has none. Is this requirement that an accompanist must exceed a de minimus standard consistent with the Rome Convention?

The question of who is legally entitled to payment was presented to the Direction General de Derechos de Autor about 2 years ago, but it has not yet been resolved. On the basis of the ambiguity, radio broadcasters [31] have reportedly not paid performers' royalties to the sociedad de ejecutantes, but have paid for the rights of interpreters. Televisa, a prominent Mexican television broadcasting company, alone pays ANDI about 2 million pesos annually.[32]

In sum, of all the Rome Convention countries, Mexico grants the broadest rights of remuneration to performers. However, not all performers, since nearly 50 percent of records played on Mexican radio are those who do and those who do not is difficult to rationalize. Moreover, Mexico makes no extraterritorial performance payments, nothwithstanding its early membership in the Rome Convention. Significant amounts of performance royalties are thereby lost to foreign performers, since nearly 50 percent of records played on Mexican radio are foreign recordings.

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[28] Chapter VIII, Article 137.
[29] Chapter VIII, Article 144.
[30] Although such action may be taken without advance proof, sufficient bond must be posted. Ch. IX, art. 146.
[31] Mexico's 700 radio channels are commercial.
[32] Of Mexico's six television channels, two are Government-owned and pay no performance fees. The other four channels are commercial.

MEXICO: ITEM 1B

MUSIC TARIFF AGREEMENT

AGREEMENT ESTABLISHING THE TARIFF PAYABLE IN RESPECT OF THE RIGHTS OF PUBLIC PERFORMANCE OF MUSIC BY MEANS OF PHONO-ELECTRICO-MECHANICAL APPARATUS

Date of agreement: July 17, 1962.
Official Spanish text published in "Diario Oficial", July 19, 1962, page 4.

* * * * * * *

Tariff

I. Apart from the exceptions indicated in the following articles, the amount of royalties for the public performance of music by means of phono-electro-mechanical apparatus shall be collected at the actual time of the sale of the disc upon which the music is recorded. The amount in question shall be added to the manufacturing cost of the disc and retained by the manufacturers thereof from the time when the first sale is effected. At 3-month intervals, the amounts so retained shall be remitted by the said manufacturers to the owners of the rights of public performance or their legal representatives.

For the purposes of the payment of the royalties for public performance, manufacturers shall deduct 20 percent from the total of manufactured discs in accordance with the correspondence liquidation to compensate for breakage, discs returned by retailers, and discs destined for export. Discs intended for purposes of advertisement shall also be deducted.

II. For the purposes of the foregoing article, the amount of the royalties in respect of public performance shall be:

(*a*) In respect of discs of 45 revolutions per minute, with a manufacturing cost of up to $6.65—$1.10 (1 peso,, 10 centavos).

(*b*) In respect of discs of 78 revolutions per minute, with a manufacturing cost of up to $6.50—$0.65.

(*c*) In respect of discs of 45 revolutions per minute, with a manufacturing cost in excess of $6.65—18 percent of the said manufacturing cost.

(*d*) In respect of discs of 78 revolutions per minute, with a manufacturing cost in excess of $6.50—10 percent of the manufacturing cost.

The aforesaid manufacturing cost shall include compensation to the manufacturer in respect of the costs of retaining, liquidation and payment of royalties for public performance, as well as any administrative and other costs which they may incur to this end.

The provisions of this article shall apply only to discs having the revolutions indicated above, and having one composition only on each side. Such discs shall display upon the label the following wording: Cubierto el derecho de ejecución pública en Mexico (rights of public performance in Mexico have been paid).

III. In addition to the provisions of the previous article, the establishments indicated below, and situated in localities having more than 8,000 inhabitants, shall be required to pay:

(1) Bar-restaurants and de luxe or first class bars, classified in accordance with the relevant local ordinances; $1 per month per square meter of space available to the public, with a minimum payment of $150 per month.

(2) Establishments in which dancing takes place habitually: The same payment as specified in the preceding paragraph.

(3) Open-air premises, normally capable of accommodating more than 300 persons: $100 in respect of each operative day.

(4) Establishments from which music is diffused upon or toward the public thoroughfare: In urban areas of more than 300,000 inhabitants, $2.50 for each meter of frontage, with a minimum payment of $50 per month; in urban center of less than 300,000 inhabitants, $1 per month for each meter of frontage with a minimum payment of $25.

(5) Establishments which employ loudspeakers in addition to the primary reproducing apparatus: $30 per loudspeaker per month, with a maximum of $1,000. Loudspeakers necessary for the normal functioning of stereophonic apparatus are exempt from this charge.

(6) Commercial establishments employing apparatus other than juke boxes [sinfonolos] and which are not covered by the preceding paragraphs nor by the following article: $0.50 per month for each square meter of space allotted to the public, with a minimum of $50 per month in urban center of more than 300,000 inhabitants and with a minimum of $30 in urban centers of less than 300,000 inhabitants. The provisions of this paragraph do not apply to establishment devoted exclusively or mainly to the sale of discs.

IV. Commercial establishments employing radio receivers shall pay the sum of $10 per month in respect of each apparatus installed.

Commercial establishments employing television receivers shall pay the sum of $30 per month in respect of each apparatus installed.

V. An additional sum of $30 per month shall be paid by the respective proprietors in respect of each juke box operating in localities situated in the zone to the north of the Republic and legally considered as a border zone, when such apparatus functions with foreign coins or employs foreign discs.

VI. The provisions of the preceding articles do not include payment of royalties for the public performance of music by means of broadcasts, transmission over wires, or analogous processes.

VII. The money collected in accordance with the provisions of this tariff are due

(a) In the case of paragraph (a) of article II, $0.95 to the owners of the copyright and $0.10 to the owners of the performers' rights.

(b) In the case of paragraph (b) of Article II, $0.55 to the owners of the copyright and $0.10 to the owners of the performers' rights.

(c) In all other cases, 80 percent of the moneys collected are due to the owners of the copyright and 20 percent to the owners of the performers' rights.

Transitional Provisions

1. The proprietors of juke boxes and similar apparatus designed for the public performance of music must replace the series of discs cur-

rently in use therein by phonograms the price of which includes the appropriate royalties. This obligation must be accomplished by the purchase of new discs, even if they do not bear the indication referred to in article II of the tariff.

Further, and within the periods specified in the following article, the said proprietors shall pay the sums of $0.65, multiplied by the number of discs that the apparatus can contain.

II. The proprietors of apparatus referred to in the preceding article who, at the date of coming into force of this tariff, are in arrear with the payment of royalties for public performance, shall cancel the respective debts by paying in respect of each year of arrear, $35 for each apparatus having a capacity of up to 24 discs and $70 for each apparatus having a capacity of more than 24 discs. The proprietors of a single apparatus must effect the necessary payment within a period of 3 months; proprietors of from 2 to 10 apparatuses must effect the relative payment in 2 3-monthly installments and the proprietors of more than 10 apparatuses shall make payment in 4 3-monthly installments.

The provisions of this article shall apply in all cases that are not covered by a specific contract to the contrary.

III. The first liquidation shall be effected by the disc manufacturers in respect of sales occurring between the date of the coming into force of this tariff and September 30, 1962, using as a basis the proportionate share of the sales during the 3 months of July to September. Subsequent liquidations shall be effected at normal 3-monthly intervals.

IV. This tariff shall come into force on July 21, 1962.

Mexico: Item ID

Agreements establishing the tariff regulating the payment of copyright royalities for the use of music and interpretations in the transmissions of commercial broadcasting stations of of the Mexican Republic

Date of the tariff: August 15, 1966. The official Spanish text was published in the "Diario Oficial" of August 25, 1966.

* * * * * * *

Article 1. Commercial broadcasting stations of the Mexican Republic shall pay to the authors and composers of music, and to the interpreters, in respect of the combination of musical compositions and the interpretations which they employ in their transmissions, 1.10 percent of the amount declared by them for the purpose of taxes in respect of commercial earnings, of which 83.33 percent shall be payable to the authors and composers of music and 16.67 percent to the interpreters.

Article 2. The payment referred to in the preceding article does not provide protection against violations of the moral interests of the author and/or interpreter; these interests shall be respected, integrally, within the terms of the law.

Accordingly, the use of music or of interpretations in the announcement of a given product or products must be the subject of express authorization by the owners of the rights.

Article 3. Commercial broadcasting stations may not recover from their patrons and advertisers any payments in excess of those fixed in the present tariff in respect of rights.

Violation of the provisions of the preceding paragraph shall be a ground upon which the owners of the rights may, jointly or separately, revoke the authorization for the use of the music and/or the interpretations.

Article 4. The provisions of article 1 do not extend to rights in respect of the reproduction of commercial announcements, referred to in the final paragraph of article 74 of the Federal Law of Copyright.

TRANSITIONAL

Single article. This tariff shall come into force on the day following its publication in the "Diario Oficial" of the Federation.

ARGENTINA

The following report was submitted by

Dr. Miguel A. Emery,

Executive Secretary of the
Latin American Federation of Producers of
Phonograms and Videograms

I. LEGAL FRAMEWORK

The Argentine Copyright Law was enacted on September 26, 1933, and specific reference is made therein to sound recordings and to performing artists.

Article 1 of Law N°11.723 considers phonographic recordings to be artistic works, and Article 4 of the same law acknowledges the author's copyright on the work, as likewise the rights of those who, with the author's permission, translate, compile, adapt or modify pre-existing work.

Article 56 of the law stipulates that "the interpreter of literary or musical works has the right to demand payment for his interpretation, whether transmitted or retransmitted by radio or television or recorded or impressed on records, films, tape, wire or any other device or process apt for visual or sound reproduction".

Decree 1670 of December 2, 1974, establishes that "the phonograms, records, and other carriers shall not be made public or broadcast or retransmitted by radio and/or television without the express permission of the authors thereof or their successors or assigns. Notwithstanding the rights granted by law to the authors of the lyrics and to the composers of the music, as likewise to the principal or minor interpreters, the producers of phonograms or their successors or assigns have the right to collect a remuneration from any person whatsoever who occasionally or permanently obtains a direct or indirect benefit from the public performances of a phonogram reproduction, such as radio and television stations, cinemas, theatres, social clubs, recreation centers, restaurants, night clubs and in general whomsoever

is responsible for public performances by whatsoever means, direct or indirect."

II. BRIEF HISTORICAL OUTLINE OF THE PRACTICAL APPLICATION OF THE ABOVEMENTIONED LEGISLATION.

On May 24, 1937, a company was organised in Buenos Aires under the name of COMAR S.A., the purpose of which is to administrate, publish, distribute, sell and in any other way engage in the industrialisation and marketing of musical compositions, and the lyrics and interpretation thereof, irrespective of the form of reproduction, as the representative of artists and interpreters, and persons or entities engaged in like activities.

The founders of COMAR were the better-known orchestra conductors of that time, namely Messrs. Francisco Canaro, Francisco Lomuto and Osvaldo Fresedo.

These interpreters negotiated a contract with the producers of phonograms, which contract with a few variations served as the basis for an agreement between COMAR and the producers of phonograms, and which fundamentally consisted in the following:

(a) The producers of phonograms would include in their contracts with the interpreters a clause, which became known as the "Comar Clause", whereby "the artist grants the producers of phonograms 50% of the emolument to which the performer is entitled by virtue of the provisions of Article 56 of Law 11.723 in respect of the public performance for commercial purposes of phonograms placed in circulation by the producer. The artist and the producer of phonograms agree to delegate in COMAR S.A. the collection of the interpreter's emoluments as specified in the contracts which the producer and the artist have entered with COMAR S.A."

(b) Simultaneously or following the execution of the contract

with the producer of phonograms for the recording of his interpretations, the artist entered an agreement with COMAR S.A.by which he entrusted this company with the collection of the 50% of the emoluments due to him under the contract.

(c) As a result of the above, COMAR S.A. became the agent of both the artist and the phonogram producer, and on the basis of the authorization given, organised the collection from the users (radio stations and alike) of the emoluments due on public performances of the interpretations printed in the phonograms.

This system, albeit with many shortcomings, was the first ever in Latin America which ensured the collection of emoluments by the interpreters for the public performance of their interpretations as printed in phonograms.

The more salient defects in the system were:

(A) Since COMAR S.A. was organised as a commercial entity, its original founders (orchestra directors) were soon replaced by professional managers, (businessmen, accountants, lawyers, etc.) who operated the company without a genuine representation of the interests of the interpreters.

(B) In view of the fact that COMAR S.A. was organised by orchestra conductors, up to 1974 the performing musicians did not collect any emoluments whatsoever for the public performance of their interpretations. It is to be noted that in Argentina, as in the majority of Latin American countries, the principal performing artist receives in return for his recorded performance a royalty on the sale of records, to which was added what COMAR S.A. charged on public performances. The performing musicians only received a fixed sum per hour of work in the recording room, and until 1974 did not participate in the monies collected from the users for the public performance of their works.

(C) With COMAR S.A. acting jointly with SADAIC S.A. (Sociedad Argentina de Autores Interpretes y Compositores), a non-profit society of authors which includes in its activities the collection of the authors' fee for the public performance of their works, in practice two costly organisations co-existed for the purpose of collecting revenues of a different nature but of a similar structure. The enormous difficulties encountered by all societies of "small rights" in the collection and distribution of emoluments due for public performances are well known, and these problems were increased and multiplied by the co-existence of COMAR S.A. and SADAIC S.A.

(D) With regard to many interpreters, especially foreigners, COMAR S.A. was not authorised to collect on their behalf, and therefore either their rights could not be collected or if collected were not adequately distributed.

III CURRENT SITUATION

As a result of the shortcomings of the system, the Argentine Associatinn of Interpreters (AADI) some years ago filed legal proceedings and made administrative claims. Organised in 1957, AADI claimed that Law 11.723 embraced both the principal artists and the performing musicians, establishing an important precedent in a leading case resolved on October 24, 1968, by a Court of Appeals (re AADI: Vs. Club Villa Malcolm).

Notwithstanding the abovementioned court decision, AADI failed to put into practise the collection of emoluments for public performances due to the minor interpreters. Nevertheless, in 1973 AADI was instrumental in the publication of Decree 746 which extends the scope of the word "interpreter" to include the musical performers, members of the choruses and in general all those who interpret or perform in any manner whatsoever a literary, cinematographic or musical work.

Decree 746/73 gave rise to a conflict between COMAR S.A. and AADI, which was resolved on Decemb er 2, 1974, by Decrees Nos. 1670 and 1671. Clearly influenced by the Rome Convention of 1961, these decrees adopt the solution contained in Article 12 of the Rome Convention, which provides for the secondary use of phonograms a sole payment for the producers and interpreters or performers, stipulating that the legislation of each country will establish the distribution system. To resolve the problem of the mandate of the interpreters and/or performers, Decree 1671/74 (Article 1) grants AADI the exclusive representation thereof, whether the interpreters and performers be Argentine or foreign, so as to be in a position to collect and administrate the emoluments collected for public performances, broadcasting or retransmission by radio and television of phonograms. The same decree reserves the right of the Government to determine the fees to be paid for the secondary use of phonograms (Article 4). The decree likewise specifies the proportions in which the revenue will be distributed, establishing that 33% is to be for the producers of phonograms and 67% for the interpreters.

This latter percentage will, in turn, be distributed between the main interpreters (45%) and the minor performers (22%). Reaffirming the criterium of a sole emolument for both producers and interpreters, the decree (Article 7), specifies that the collection of monies paid by the users of phonograms will be the responsibility of a non-profit organisation to be formed between AADI and the Argentine Chamber of Producers of Phonograms (CAPIF).

As from the time the two abovementioned decrees were published AADI conducted negotiations with SADAIC with a view to the authors society handling the collection of the emoluments due for public performances, but problems resulting from the unstable political situation in Argentina and the residual attitude of opposition of some authors to the principles of the Rome Convention, finally resulted in the parties not reaching an agreement, as a consequence of which AADI

resolved to organise its own structure for the collection of the emoluments due for public performances, which organisation has now been in force for more than a year.

IV PROSPECTS

The Argentine situation as well as that of all Latin America may be influenced by the recent agreement between the Latin American Federation of Producers of Phonograms and Videograms (FLAPF) and the Pan American Council of the International Confederation of Authors and Composers Societies (CISAC) which was signed during the meetings held in Mexico in August 1977 and ratified by the FLAPF Convention held in Santiago de Chile on September 5, 1977. This agreement is to be reviewed by the Pan American Council of CISAC during their Congress to be held in Asunción, Paraguay, on October 5. 1977, on the same date as the joint Anti-Piracy Committee will hold its first meeting.

Apart from a basic understanding between authors and producers of phonograms to support joint anti-piracy action in the area, in principle it has been agreed that in those Latin American countries members of the Rome Convention (Brazil, Colombia, Chile, Costa Rica, Ecuador, Guatemala, Mexico, Paraguay and Uruguay), the authors societies will collect on behalf of the interpreters and producers of phonograms their emoluments for public performances.

This understanding has already commenced to be implemented in Colombia and Chile, but specifically excludes Mexico, Brazil and Argentina because of the characteristics peculiar to each of the latter countries, but undoubtedly the spirit of the agreement will in one way or another be reflected.

Following another line of thought, COMAR S.A. acting with political opportunism has requested the Argentine Government to annul decree No.1671, but the authorities have indicated that, despite certain reservations, the solutions offered by the decree are reasonable and to date have not resolved the complaints filed by COMAR S.A.

Undoubtedly the ideal solution for Latin America is that proposed by FLAPF-CISAC, that is to say:

(a) That a society of interpreters and the local organisation of phonogram producers be legally empowered to act as agents for their associates and for non-associates for purposes of collection of the emoluments due on public performances.

(b) That the authors' society be voluntarily entrusted with the collection of the rights of the interpreters and producers of phonograms. In this way two obvious benefits are obtained. The first is that the authors society does not need a larger organisation to collect the emoluments payable to the interpreters and producers of phonograms on public performances, than that which already exists for the purpose of collecting copyrights for the authors. In this way, larger sums of money are collected with the same organisation, and this reduces the cost of collection and therefore benefits the authors. The second advantage is that joint action by the representatives of authors rights and those pertaining to producers and interpreters of phonograms, facilitates negotiating a higher rate and obtaining a larger "cake" to distribute without excessive pressure being brought to bear on the users, without any conflice arising between the different parties involved.

(d) Finally, by having just one collection organisation, the users know that by making one payment they are entitled to perform recorded music in public.

The distribution of emoluments arising out of interpreters rights will be made independantly by the societies of interpreters and of the producers of phonograms, inasmuch as it is desirable that each group should administrate and distribute through their own associations the emoluments for public performances due to their associates.

V MONIES COLLECTED FOR PUBLIC PERFORMANCES

SADAIC has collected the following sums of money on

public performances of recorded work:

1973	U$S 1,791,740.00
1974	" 1,621,594.00
1975	" 857,915.00
1976	" 1,157,560.00

It should be noted that the above figures are only of relative statistical value, since Argentina has undergone in recent years a sharp inflationary process, as a result of which the local currency has suffered repeated devaluations vis-a-vis the dollar.

The above figures were taken from the SADAIC balance sheet, and a realistic rate of exchange taken for December 31 of each year.

COMAR S.A. has refused to furnish any statistical information. Nevertheless, a copy was obtained of their balance sheet as at December 31, 1974 which is a key date inasmuch as it coincides with the last year prior to the publication of Decrees 1670 and 1671.

In the 1974 annual report of COMAR S.A. a considerable increase in collections is recorded and the balance sheet shows, under the heading "Recuperation of Collection Costs" the sum of $2,410,950. As COMAR S.A. charges a commission of 25% on the monies collected for the producers of phonograms, it is reasonable to infer that the 1974 collections totalled $9,643,800 which calculated at the same rate of exchange as for the conversion of the peso emoluments due to the authors for public performances during 1974 ($21.64 : U$S 1.00), would mean a collection of U$S 445,647.

This latter figure has had no incidence whatsoever on the collection of authors rights, and proves the relative efficiency of COMAR S.A., since it is generally accepted that the emoluments of artists and producers of phonograms for public performances are cal-

culated together as 50% of the rights which the author receives, i.e. that COMAR S.A. collected U$S 445,000 in a year in which it ought to have collected U$S 800,000.

In the light of the problems resulting from the interpretation of the new legislation, the information on 1976 has no statistical importance.

As far as AADI-CAPIF are concerned, if they continue with the current rate of collection, it may be estimated that collections for 1977 will be of approximately U$S 200,000. This figure is acceptable only if it is taken into account that this is the first year that AADI-CAPIF are acting as collection agents.

VI CONCLUSIONS

Despite the complicated nature of the matter, the Argentine experience indicates acceptance by the users of the right of interpreters and producers to charge for public performance of their works, and that the charges have the virtue of creating in the public mind the need to pay for the public performance of the works of authors, interpreters and producers of phonograms.

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S A D A I C

Public Performance of Records

Authors Rights

1973		Pesos	U$S
Day by Day		$ 10,645,920.93	954,791
Carnival		$ 1,820,509.37	163,274
Per Month		$ 7,511,476.88	673,675
	Total:	$ 19,977,907.18	1,791,740
1974			
Day by Day		$ 20,026,758.35	925,451
Carnival		$ 3,423,329.22	158,194
Per Month		$ 11,641,215.82	537.949
	Total:	$ 35,091,303.39	1,621,594
1975			
Day by Day		$ 47,438,224.90	547,659.02
Carnival		$ 6,402,859.47	73,918.94
Per Month		$ 20,471,531.39	236,337.23
	Total:	$ 74,312,623.76	857,915.19
1976			
Day by Day		$208,657,220.46	753,275.19
Carnival		$ 25,627,337,26	92,517.46
Per Month		$ 86,359,795.48	311,768.21
	Total:	$320,644,353.20	1,157,560.86

Rate of Exchange:

December 31 1973	Free Rate:	A$11.15 :	U$S1.00
" " 1974	" "	21.64 :	1.00
" " 1975	" "	60.97 :	1.00
" " 1975	Official Rate	86.62 :	1.00
" " 1976	Free Rate:	277.- :	1.00

FOREIGN REPRESENTATIVES INTERVIEWED

MR. FRAZER JAMIESON, President
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MR. ANDREW KEYES, Consultant
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Hull, Canada

MR. ALAN WOODS, President
American Federation of Music
Toronto, Canada

MR. JOHN MILLS, General Manager
Composers, Authors and Publishers Association of Canada Ltd. (CAPAC)
Toronto, Canada

MR. GERRY ACTON, Director
Industry Relations and Member Services
Canadian Association of Broadcasters
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MR. GERT KOLLE, Research Assistant
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MR. ASKER LUND CHRISTIANSEN, President
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MR. WERNER RUMPHORST, Legal Department
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MS. EDWARD THOMPSON, Consultant (IFPI)
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DR. GEORGES STRASCHNOV
(former Legal Adviser to European Broadcasting Union)
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SURVEY OF THE LEGAL PROTECTION GRANTED TO PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANISATIONS

UNDER NATIONAL COPYRIGHT/NEIGHBOURING RIGHTS LEGISLATION AND INTERNATIONAL CONVENTIONS*

Argentina
Australia
Austria
Bangladesh
Barbados
Botswana
Brazil
Bulgaria
Burma
Canada
Chile
Colombia
Congo
Costa Rica
Cyprus
Czechoslovakia
Denmark
Dominican Republic
Ecuador
Egypt (Arab Republic of)
El Salvador
Ethiopia
Fiji
Finland
France
German Democratic Republic
Germany (Federal Republic of)
Ghana
Guatemala
Guyana
Hungary
Iceland
India
Iran
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Kenya
Korea
Lebanon
Libya
Liechtenstein
Luxembourg
Malawi
Malaysia
Malta
Mauritius
Mexico
Monaco
Nepal
New Zealand
Niger
Nigeria
Norway
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Roumania
Senegal
Seychelles
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Syria
Taiwan
Tanzania
Thailand
Trinidad and Tobago
Turkey
Uganda
United Kingdom
United States of America
Uruguay
U.S.S.R.
Venezuela
Zambia

* Note - This survey only includes protection granted to performers, producers of phonograms and broadcasting organisations under Copyright and Neighbouring Rights legislation. In addition there are some countries which protect broadcasting organisations under telecommunications regulations, etc.

SURVEY OF THE LEGAL PROTECTION GRANTED TO PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANISATIONS UNDER NATIONAL COPYRIGHT/NEIGHBOURING RIGHTS LEGISLATION AND INTERNATIONAL CONVENTIONS

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
			(a) The recording, reproduction or communication to the public of a performance	(a) The reproduction of a phonogram	(a) The rebroadcasting of a broadcast	Berne Union, 1886 (Berne)
			(b) Equitable remuneration for the broadcasting or communication to the public of a performance	(b) The broadcasting of a phonogram	(b) The fixation of a broadcast	Convention for the protection of Performers, Producers of Phonograms, and Broadcasting Organisations, 1961 (Rome)
			(c) Equitable remuneration for the broadcasting or communication to the public of a recording of a performance	(c) The public performance of a phonogram	(c) The reproduction of a broadcast	Convention for the protection of Producers of Phonograms against the unauthorised duplication of their phonograms, 1971 (Phonograms).
					(d) The communication of a broadcast to the public for profit	Convention relating to the distribution of programme-carrying signals by Satellite, 1974 (Satellites)
						European Agreement on the protection of Television Broadcasts, 1960 (TV Broadcasts)

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
ARGENTINA	Law No. 11,723 of 1933; and Decree No. 1,670 of 1974	As for musical works (50 years p.m.a.)	(b)*	(a) (b) (c)		Berne, UCC, Phonograms
AUSTRALIA	Copyright Act 1968	50 years		(a) (b) (c)	(a) (b) (c)	Berne, UCC, Phonograms
AUSTRIA	Copyright Act 1936 as amended on 29 December 1972	50 years; 30 years for broadcasts	(a) (c)*	(a) (b)* (c)*	(a) (b) (c) (d)	Berne, UCC, Rome
BANGLADESH	Copyright Ordinance 1962 as amended on 25 July 1974	50 years; 25 years for broadcasts		(a) (b) (c)	(a) (b) (c)	Berne, UCC
BARBADOS	UK Copyright Act 1911	50 years		(a) (b) (c)		Berne
BOTSWANA	UK Copyright Act 1956	50 years		(a) (b) (c)	(a) (b) (c) (d)	
BRAZIL	Law No. 4,944 of 6 April 1966; and Law No. 5,988 of 14 December 1973	60 years	(a) (c)*	(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms
BULGARIA	Copyright Law 1951 as amended on 28 April 1972	20 years		(a)	(a) (b) (c) (d)	Berne, UCC
BURMA	UK Copyright Act 1911 as amended by the Union of Burma (Adaptation of Laws) Order 1948	50 years		(a) (b) (c)		

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
CANADA	Copyright Act 1921 (codified in Revised Statutes 1952) as amended on 23 December 1971	50 years		(a)		Berne, UCC
CHILE	Law No. 17,336 28 August 1970	30 years	(a) (b)* (c)*	(a)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms
COLOMBIA	Law No. 86 of 26 December 1946	As for musical works (80 years p.m.a.)	(a) (b)* (c)*	(a)	(a) (b) (c) (d)	UCC, Rome
CONGO	Rome Convention	20 years minimum	(a)	(a)	(a) (b) (c) (d)	Berne, Rome
COSTA RICA	Rome Convention	20 years minimum	(a) (c)*	(a) (b)* (c)*	(a) (b) (c) (d)	UCC, Rome
CYPRUS	Law No. 59 of 1976	20 years		(a)	(a) (b) (c) (d)	Berne, TV Broadcasts
CZECHOSLOVAKIA	Law No. 35 of 25 March 1965	25 years	(a) (b)* (c)*	(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Rome
DENMARK	Law No. 158 of	25 years	(a) (c)*	(a) (b)* (c)*	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, TV Broadcasts
DOMINICAN REPUBLIC	Law No. 1381 of 17 March 1947	As for musical works (30 years p.m.a.)		(a) (b) (c)		
ECUADOR	Copyright Law of 13 August 1976	25 years for performers; 50 years p.m.a. for phonograms; 20 years minimum for broadcasts	(a) (b)* (c)*	(a)	(a) (b) (c) (d)	UCC, Rome, Phonograms

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
EGYPT	Law No. 354 on Copyright of 26 June 1954	50 years			(a) (b) (c) (d)	
EL SALVADOR	Law No. 376 of 6 September 1963	25 years	(b)*	(a)	(a) (b)	
ETHIOPIA	Copyright Provisions of Civil Code, 1960				(a) (b) (c) (d)	
FIJI	UK Copyright Act 1956 and Copyright (Broadcasting of Gramophone Records) Act 1972	50 years	(a) under the Performers Protection Ordinance 1966	(a) (c)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms
FINLAND	Law No. 404 of 8 July 1961 as amended on 23 August 1971	25 years	(a) (c)* (broadcasting only)	(a) (b)*	(a) (b) (c) (d)	Berne, UCC, Phonograms
FRANCE				(a)		Berne, UCC, Phonograms, TV Broadcasts
GERMAN DEMOCRATIC REPUBLIC	Copyright Act of 1965	10 years	(a) (c)	(a) (b)	(a) (d)	Berne, UCC
GERMANY (FEDERAL REPUBLIC OF)	Copyright Act 1965 as amended on 14 August 1973	25 years	(a) (c)*	(a) (b)* (c)*	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, TV Broadcasts

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
GHANA	Copyright Act 1961	20 years		(a)	(a) (b) (c) (d)	UCC
GUYANA	UK Copyright Act 1956	50 years		(a) (b) (c)	(a) (b) (c) (d)	
GUATEMALA	Rome Convention	20 years minimum	(a) (c)*	(a) (b)*(c)*	(a) (b) (c) (d)	UCC, Rome, Phonograms
HUNGARY	Copyright Act 1969 and Decree No. 19 of 1975	20 years	(a) (b)	(a)	(a) (c) (c) (d)	Berne, UCC, Phonograms
ICELAND	Copyright Act 1972	25 years	(a) (c)*	(a) (b)*(c)*	(a) (b) (c) (d)	Berne, UCC
INDIA	Copyright Act 1957	50 years; 25 years for for broadcasts		(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Phonograms
IRAN	Copyright Law 1970 and Law of 6 January 1974	30 years		(a)	(a) (b) (c) (d)	
IRAQ	Law No. 3 of 21 January 1971	30 years	(a)		(a) (b) (c) (d)	
IRELAND	Copyright Act 1963	50 years	(a) under the Performers Protection Act 1968	(a) (b)*(c)*	(a) (b) (c) (d)	Berne, UCC
ISRAEL	UK Copyright Act 1911	50 years		(a) (b) (c)		Berne, UCC

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
ITALY	Law No. 633 of 22 April 1941 as amended on 5 May 1976	30 years for phonograms; 20 years for broadcasts	(a) (b)* (c)*	(a) (b)* (c)*	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms
JAMAICA	UK Copyright Act 1911	50 years		(a) (b) (c)		Berne
JAPAN	Law No. 48 of 6 May 1970	20 years	(a) (c)* (broadcasting only)	(a) (b)*	(a) (b) (c) (d)	Berne, UCC
KENYA	Copyright Act 1966 as amended on 4 May 1975	20 years		(a)	(a) (b) (c) (d)	UCC, Phonograms, Satellites
KOREA	Law No. 432 of 28 January 1957; and Sound Recording Law No. 1944 of 1967 as amended on 22 January 1971	30 years		(a)		
LEBANON	Decree No. 2,385 of 17 January 1924 as amended on 31 31 January 1946	50 years		(a)		Berne, UCC
LIBYA	Law No. 9 of 16 March 1968 on Copyright	30 years			(a) (b) (c) (d)	Berne
LIECHTENSTEIN	Copyright Law 1928 as amended on 8 August 1959	As for musical works (50 years p.m.a.)	(a) (c)	(a) (b) (c)		Berne, UCC

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
LUXEMBOURG	Law of 23 September 1975	20 years	(a)	(a)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, Satellites
MALAWI	Copyright Act 1965	20 years		(a)	(a) (b) (c) (d)	UCC
MALAYSIA	Copyright Act 1969 as amended on 29 May 1975	20 years		(a)	(a) (b) (c) (d)	
MALTA	Copyright Act 1967	25 years		(a)	(a) (b) (c) (d)	Berne, UCC
MAURITIUS	UK Copyright Act 1911	50 years		(a) (b) (c)		Berne
MEXICO	Copyright Law 1956 as amended on 4 November 1963	20 years	(a) (b) (c)	(a)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, Satellites
MONACO				(a)		Berne, UCC, Phonograms
NEPAL	Copyright Act 1965	50 years		(a)	(a) (b) (c) (d)	
NEW ZEALAND	Copyright Act 1962 as amended on 8 December 1968	50 years		(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Phonograms
NIGER	Rome Convention	20 years minimum	(a)	(a)	(a) (b) (c) (d)	Berne, Rome
NIGERIA	Decree No. 61 of 24 December 1970	20 years		(a)	(a) (b) (c) (d)	UCC
NORWAY	Copyright Law 1961	25 years	(a) (c)*	(a) (b)*(c)*	(a) (b) (c) (d)	Berne, UCC, TV Broadcasts

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
PAKISTAN	Copyright Ordinance 1962 as amended 1972	50 years; 25 years for broadcasts		(a) (b) (c)	(a) (b) (c)	Berne, UCC
PANAMA				(a)		UCC, Phonograms
PARAGUAY	Law No. 94 of 5 July 1951	20 years	(a) (b) (c)	(a)	(a) (b) (c) (d)	UCC, Rome
PERU	Law No. 13714 of 1 September 1961	25 years			(a) (b) (c) (d)	UCC
PHILIPPINES	Decree No. 49 of 14 November 1972	20 years	(a)	(a) (b)*(c)*	(a) (b) (c)	Berne, UCC
POLAND	Law No. 234 of 10 July 1952 as amended on 23 October 1975	10 years		(a) (b) (c)		Berne
ROUMANIA	Decree No. 321 of 18 June 1956 as amended to 28 December 1968	50 years		(a) (b)*(c)*		Berne
SENEGAL	Law No. 73-52 1973	As for musical works (50 years p.m.a.)			(a) (b) (c) (d)	Berne, UCC
SEYCHELLES	UK Copyright Act 1956	50 years		(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Phonograms
SIERRA LEONE	Copyright Act 1965	50 years		(a) (b) (c)	(a) (b) (c) (d)	

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
SINGAPORE	UK Copyright Act 1911; and Copyright (Gramophone Records and Government Broadcasting) Act 1968	50 years		(a) (c)		Berne
SOUTH AFRICA	Copyright Act 1965 as amended to 23 July 1975	50 years	(a) under the Performers' Protection Act 1967 (Duration of protection 20 years)	(a)	(a) (b) (c) (d)	Berne
SPAIN	Copyright Law 1879 and Decree of 10 July 1942	40 years		(a) (b) (c)		Berne, UCC, Phonograms, TV Broadcasts
SRI LANKA	UK Copyright Act 1911	50 years		(a) (b) (c)		Berne
SWEDEN	Law No. 729 of 30 December 1960 as amended on 25 May 1973	25 years	(a) (c)* (broadcasting only)	(a) (b)*	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, TV Broadcasts
SWITZERLAND	Copyright Law 1922 as amended to 24 June 1955	As for musical works (50 years p.m.a.)		(a)		Berne, UCC
SYRIA	Copyright Law 1924 as amended to 22 September 1926	As for musical works (50 years p.m.a.)		(a)		

*Right to equitable remuneration

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
TAIWAN	Copyright Law 1928 as amended 10 July 1964	10 years		(a) (b) (c)		
TANZANIA	Copyright Act 1966	20 years		(a)	(a) (c) (d)	
THAILAND	Copyright Act 1931	30 years		(a) (b) (c)		Berne
TRINIDAD AND TOBAGO	UK Copyright Act 1911			(a) (b) (c)		Berne
TURKEY	Copyright Law 1951		(a) (c)	(a) (b) (c)		Berne, TV Broadcasts
UGANDA	Copyright Act 1964	50 years		(a)	(a) (c) (d)	
(+)UNITED KINGDOM	Copyright Act 1956 as amended 17 February 1971	50 years	(a) under the Performers' Protection Acts 1958-1972	(a) (b) (c)	(a) (b) (c) (d)	Berne, UCC, Rome, Phonograms, TV Broadcasts

(+) The United Kingdom Copyright Act 1956 continues in force in the following British dependencies:

Bahamas (Berne, UCC); Belize (Berne, UCC); Bermuda (Berne, UCC, Rome, Phonograms); British Virgin Islands (Berne, UCC, Phonograms); Cayman Islands (Phonograms); Falkland Islands (Berne, UCC); Gibraltar (Berne, UCC, Rome, Phonograms); Hong Kong (Berne, UCC, Phonograms); Isle of Man (Berne, UCC, Phonograms); Montserrat (Berne, UCC, Phonograms); St. Helena (Berne, UCC); St. Lucia (Phonograms).

COUNTRIES	LEGISLATION	DURATION OF PROTECTION	RIGHTS GRANTED TO PERFORMERS	RIGHTS GRANTED TO PRODUCERS	RIGHTS GRANTED TO BROADCASTERS	MEMBERSHIP OF CONVENTIONS
UNITED STATES OF AMERICA	US Code, Title 17 of 1901 as amended 15 October 1971 and 31 December 1974	28 years (renewable)		(a)	(a) under US Code Title 47	UCC, Phonograms
	as amended by Copyright Revision Law of 19 October 1976 - date of entry into force 1 January 1978	75 years from publication or 100 years from creation				
URUGUAY	Law No. 9739 of 1937 as amended on 25 February 1938	As for musical works (40 years p.m.a.)	(a) (c)*	(a)	(a) (b) (c) (d)	Berne
U.S.S.R.	Basis of Copyright Law 1961; and Civil Code 1964 as amended to 1 March 1974	As for musical works (25 years p.m.a.) and unlimited protection for legal entities		(a) (c)	(a) (b) (c) (d)	UCC
VENEZUELA	Copyright Law 29 November 1962	As for musical works (50 years p.m.a.)			(a) (b) (c) (d)	UCC
ZAMBIA	Copyright Act 1965	20 years		(a)	(a) (b) (d)	UCC

*Right to equitable remuneration

ANNEX II

PROTECTION OF FOREIGN PRODUCERS OF PHONOGRAMS

(RECIPROCITY AND NATIONAL TREATMENT)

INTRODUCTION

Annex II contains a survey of the criteria laid down by national copyright and neighbouring rights legislation for the extension of protection to foreign phonograms or producers of phonograms. It also indicates, in respect of each country, which of the International Conventions for the protection of phonograms (Rome and Geneva Conventions) the countries listed are party to.

It should also be noted that in a number of countries Copyright (International Conventions) Orders, Regulations, Proclamations or Schedules have been issued in accordance with the national legislation, whereby national treatment is accorded to phonograms originating in countries party to the Berne Union (Canada, South Africa and Sri Lanka) or to the Universal Copyright Convention (Nigeria, Uganda) or to both (Australia, India, Israel, New Zealand, Malta and the United Kingdom).

Furthermore, there may be reciprocal protection for phonograms under bilateral treaties, for example, in accordance with the Pan-American Copyright Conventions (Buenos Aires 1910 and Washington 1948), in those countries such as Argentina, Colombia and the Dominican Republic where phonograms are specifically protected as musical works under the national copyright law.

ARGENTINA
(Acceded to Geneva Convention with effect from June 30th, 1973)

LAW No. 11723 of 1933 and DECREE No. 1670 of 1974:

Article 13

All provisions of this law ... shall be equally applicable to scientific, artistic and literary works published in foreign countries, whatever may be the nationality of their authors, provided they belong to countries which recognise copyright.

Article 14

In order to secure the protection of Argentine law, the author of a foreign work shall ... only need to prove the fulfilment of the formalities established for the protection of the work by the laws of the country in which publication took place.

AUSTRALIA
(Acceded to Geneva Convention with effect from June 22nd, 1974)

COPYRIGHT ACT 1968:

Section 84

In this part, 'qualified person' means a) an Australian citizen, an Australian protected person or a person (other than a body corporate resident in Australia or b) a body corporate incorporated under a law of the Commonwealth or of a State.

Section 89

(1) Subject to this Act, copyright subsists in a sound recording of which the maker was a qualified person at the time when the recording was made.

(2) Without prejudice to the last preceding subsection, copyright subsists, subject to this Act, in a sound recording if the recording was made in Australia.

(3) Without prejudice to the last two preceding sub-sections, copyright subsists, subject to this Act, in a published sound recording if the first publication of the recording took place in Australia.

Section 184 (1)

Subject to this section, the regulations may make provision applying any of the provisions of this Act specified in the regulations, in relation to a country (other than Australia) so specified, in any one or more of the following ways:-

(a) so that the provisions apply in relation to literary, dramatic, musical or artistic works or editions first published, or sound recordings or cinematographic films made or first published, in that country in like manner as those provisions apply in relation to literary, dramatic, musical or artistic works or editions first published, or sound recordings or cinematograph films made or first published in Australia...

AUSTRIA
(Ratified Rome Convention with effect from June 9th, 1973)

COPYRIGHT ACT 1936, as amended on December 29th, 1972:

Section 99

(1) Sound recordings shall be protected in accordance with the provisions of Section 76, regardless of whether and where they are issued, if the producer is an Austrian citizen.

(2) Other sound recordings shall be protected in accordance with the provisions of Section 76, if they have been issued in this country.

(3) Sound recordings made by foreign producers and not issued in this country shall be protected under Section 76 in accordance with international agreements or subject to reciprocity; the Federal Ministry of Justice is empowered to give notice in the Federal Official Gazette (Bundesgesetzblatt) as to whether and, where appropriate, how far reciprocity is guaranteed in accordance with the domestic legislation of the foreign state.

(4) The protection accorded by Section 76, paragraph 3, however, can be claimed by foreigners only in accordance with international agreements.

BANGLADESH

COPYRIGHT ORDINANCE 1962, as amended on July 25th, 1974:

Section 54

The Bangladesh Government may, by order published in the Official Gazette, direct that all or any of the provisions of this Ordinance shall apply:-

(a) to works first published in a foreign country to which the order relates in like manner as if they were first published within Bangladesh;

(b) to unpublished works, or any class thereof, the authors whereof were at the time of making the work, subjects or citizens of a foreign country to which the order relates, in like manner as if the authors were citizens of Bangladesh;

(c) in respect of domicile in a foreign country to which the order relates in like manner as if such domicile were in Bangladesh;

(d) to any work of which the author was at the date of the first publication thereof, or, in a case where the author was dead at that date, was at the time of his death, a subject or citizen of a foreign country to which the order relates in like manner as if the author was a citizen of Bangladesh at the date or time; ... Provided that -

(1) before making an order under this section in respect of any foreign country (other than a country with which Bangladesh has entered into a treaty or which is a party to a convention relating to copyright to which Bangladesh is also a party), the Bangladesh Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to the Bangladesh Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Ordinance...

BARBADOS

UNITED KINGDOM COPYRIGHT ACT, 1911:

Section 29 (1)

His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply:-

(a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;

(b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;

(c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act;...

BOTSWANA

UNITED KINGDOM COPYRIGHT ACT, 1956:

For full text see under UNITED KINGDOM.

BRAZIL
(Ratified Rome Convention with effect from September 29th, 1965 and ratified Geneva Convention with effect from November 28th, 1975)

LAW No. 4944 of APRIL 6th, 1966 and LAW No. 5988 of DECEMBER 14th, 1973:

No specific criteria.

BULGARIA

COPYRIGHT LAW 1951, as amended April 28th, 1972:

Section 10

Copyright in works published or located in the territory of the People's Republic of Bulgaria shall be recognised for all authors and their successors, irrespective of their nationality.

Copyright in works published or located abroad shall be recognised only if there is a special agreement between the People's Republic of Bulgaria and the country concerned.

An author who is a national of the People's Republic of Bulgaria, and his successors in title, shall be entitled to protection of their copyright in its territory for works published or located in another country, irrespective of whether there is an agreement of the kind referred to in the preceding paragraph between the People's Republic of Bulgaria and the country concerned.

BURMA

UNITED KINGDOM COPYRIGHT ACT, 1911, as amended by the UNION OF BURMA (ADAPTATION OF LAWS) ORDER 1948:

For text see under BARBADOS.

CANADA

COPYRIGHT ACT 1921, as amended to December 23rd, 1971:

Section 4

1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in the Second Schedule, or resident within Her Majesty's Dominions; and if, in the case of a published work, the work was first published within Her Majesty's Dominions or in such foreign country; but in no other works, except so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

2) Where the Minister certifies by notice, published in the 'Canada Gazette', that any country that has not adhered to the Convention and the Additional Protocol thereto, set out in the Second Schedule, grants or has undertaken to grant, either by treaty, convention agreement or law, to citizens of Canada the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to that conferred by this Act, such country shall, for the purpose of the rights conferred by this Act, be treated as if it were a country to which this Act extends; ....

CHILE
(Ratified Rome Convention with effect from September 5th, 1974 and acceded to Geneva Convention with effect from March 24th, 1977)

DECREE LAW No. 17336 of August 28th, 1970:

Article 2

The present law protects the rights of all Chilean authors and foreigners domiciled in Chile. The rights of foreign authors not domiciled within the country enjoy the protection to which they are entitled by virtue of the international conventions which Chile has subscribed to and ratified.

COLOMBIA
(Acceded to Rome Convention with effect from September 17th, 1976)

LAW No. 86 of December 26th, 1946:

Article 44

The provisions of this Law ... shall be applicable to scientific, artistic and literary works published in foreign Spanish-speaking countries, without need of entering into international agreements to this effect, provided the country in question recognises the principle of reciprocity in its legislation.

In order to secure in Colombia protection of a foreign work under the present Article, it shall be sufficient to prove the fulfilment of the formalities established for the protection of copyright by the laws of the country in which publication took place.

CONGO
(Acceded to Rome Convention with effect from May 18th, 1964)

No specific criteria.

COSTA RICA
(Acceded to Rome Convention with effect from September 9th, 1971)

No specific criteria.

CYPRUS

LAW No. 59 of 1976:

Article 18

This Law shall be applied with respect to works created prior to the effect thereof in the same manner as this is applied in regard to works subsequently created. This Law shall likewise be applicable to works which should enjoy protection by virtue of international treaties or international agreements binding upon the Republic.

CZECHOSLOVAKIA
(Acceded to Rome Convention with effect from August 14th, 1964)

LAW No. 35 of March 25th, 1965:

Section 50

... 2) The provision of this law shall apply to works of foreign nationals in accordance with international agreements or, in the absence

thereof, when reciprocity is assured.

3) If none of the conditions provided for in paragraph 2) is fulfilled, this law shall apply to the works of authors who are not Czechoslovak nationals if their works were first published or made public in the Czechoslovak Socialist Republic or if the author has his domicile therein.

DENMARK
(Ratified Rome Convention with effect from September 23rd, 1965 and ratified Geneva Convention with effect from March 24th, 1977)

LAW No. 158 of May 31st, 1961:

Section 60

By Royal Decree, the application of this Act may be extended to other countries conditional upon reciprocity.

By Royal Decree, the Act may also be made applicable to works first published by international organisations and to unpublished works which such organisations are entitled to publish.

DOMINICAN REPUBLIC

LAW No. 1381 of March 17th, 1947:

No specific criteria.

ECUADOR
(Ratified Rome Convention with effect from May 18th, 1964 and ratified Geneva Convention with effect from September 14th, 1974)

No specific criteria.

EL SALVADOR

LAW No. 376 of September 6th, 1963:

No specific criteria.

FIJI
(Acceded to Rome Convention with effect from April 11th, 1972 and ratified Geneva Convention with effect from April 18th, 1973)

UNITED KINGDOM COPYRIGHT ACT, 1956 and COPYRIGHT (BROADCASTING OF GRAMOPHONE RECORDS) ACT 1972:

For text see under UNITED KINGDOM.

FINLAND
(Ratified Geneva Convention with effect from April 18th, 1973)

LAW No. 404 of JULY 8th, 1961, as amended on August 23rd, 1971:

Article 65

On condition of reciprocity, the President of the Republic may provide for the application of this Act in relation to other countries and similarly for application to works first published by an international organisation and to unpublished works which such organisation has a right to publish.

FRANCE
(Ratified Geneva Convention with effect from April 18th, 1973)

No specific criteria.

GERMAN DEMOCRATIC REPUBLIC

COPYRIGHT ACT 1965:

Section 96

1) The provisions of this Act shall apply to authors or other holders of rights who are citizens of the German Democratic Republic, irrespective of whether or where their works have been published.

2) In the case of works and performances of which the first publication takes place in the German Democratic Republic, this Act shall also apply if the author or holder of rights is a citizen of another State or is a stateless person.

3) In the case of works and performances by citizens of other States or by stateless persons published outside the German Democratic Republic, this Act shall apply in accordance with the international agreements to which the German Democratic Republic is party. In default of such agreements, protection shall be accorded to the author and performance subject to the principle of reciprocity.

4) Paragraphs (1) to (3) shall apply analogously to bodies corporate.

GERMANY (FEDERAL REPUBLIC OF)
(Ratified Rome Convention with effect from October 21st, 1966 and ratified Geneva Convention with effect from May 18th, 1974)

COPYRIGHT ACT 1965:

nationals and German enterprises which have their headquarters within the jurisdiction of this Act with respect to all of their sound records, irrespective of whether and where they have been published...

2) Foreign nationals and foreign enterprises which do not have their headquarters within the jurisdiction of this Act shall enjoy protection for their sound records published within such jurisdiction unless the record was published outside the jurisdiction of this Act more than thirty days before it was published within such jurisdiction.

3) In any case, foreign nationals and foreign enterprises which do not have their headquarters within the jurisdiction of this Act, shall enjoy protection as provided by international treaty....

GHANA

COPYRIGHT ACT 1961:

Section 2

1) Copyright is conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made a qualified person, that is:-

(a) an individual who is a citizen of, or is domiciled or resident in, Ghana or any country specified in the Schedule to this Act, or

(b) a body corporate which was incorporated under the laws of Ghana or any such country.

GUATEMALA
(Acceded to Rome Convention with effect from January 14th, 1977 and acceded to Geneva Convention with effect from January 14th, 1977)

No specific criteria.

GUYANA

UNITED KINGDOM COPYRIGHT ACT, 1956:

For text see under UNITED KINGDOM.

HUNGARY
(Acceded to Geneva Convention with effect from May 28th, 1975)

LAW No. 19 of 1975:

ICELAND

COPYRIGHT ACT 1972:

Article 61

A. The provisions of Article 45 shall apply to:

(1) the artistic performance of Icelandic nationals, irrespective of where it has taken place;

(2) ....

(b) If a sound recording has been made of an artistic performance, which is protected under the provision of section C.2 below.

B. The Provisions of Article 46 shall apply to sound recordings, wherever and by whomever they have been produced...

INDIA
(Ratified Geneva Convention with effect from February 12th, 1975)

COPYRIGHT ACT 1957:

Section 40

The Central Government may, by order published in the Official Gazette, direct that all or any provisions of this Act shall apply:

(a) to works first published in any territory outside India to which the order relates in like manner as if they were first published within India;

(b) to unpublished works, or any class thereof, the authors whereof were at the time of the making of the work, subjects or citizens of a foreign country to which the order relates, in like manner as if the authors were citizens of India;

(c) in respect of domicile in any territory outside India to which the order relates in like manner as if such domicile were in India;

(d) to any work of which the author was at the date of the first publication thereof, or, in a case where the author was dead at that date, was at the time of his death, a subject or citizen of a foreign country to which the order relates in like manner as if the author was a citizen of India at that date or time;

and thereupon subject to the provisions of this Chapter and of the order, this Act shall apply accordingly; provided that:

(i) before making an order under this section in respect of any foreign country (other than a country with which India has entered into a treaty or which is a party to a convention relating to copyright to which India is also a party), the Central Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to the Central Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Act....

IRAN

LAW GOVERNING THE TRANSLATION AND REPRODUCTION OF BOOKS AND PUBLICATIONS AND REPRODUCTION OF RECORDED SOUND MATERIALS, JANUARY 6th, 1974:

Article 6

With regard to the reproduction of books, publications and recorded sound materials, the protection provided herein shall also be extended to foreign nationals on condition that there are treaties (to this effect between Iran and the countries whose nationals are hereby protected) or reciprocal treatment (of Iranian nationals in such countries).

IRELAND

COPYRIGHT ACT 1963:

Section 43

1) The Government may, by order, make provision for applying any of the provisions of this Act specified in the order for the benefit of another country, in any one or more of the following ways, so as to secure that those provisions:

(a) apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematographic films or editions first published in that country as they apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematographic films or editions first published in the State;

(b) apply in relation to persons who, at a material time, are citizens or subjects of that country as they apply in relation to persons who, at such a time, are Irish citizens;

(c) apply in relation to persons who, at a material time, are domiciled or resident in that country as they apply in relation to persons who, at such a time, are domiciled or resident in the State;

(d) apply in relation to bodies incorporated under the laws of that country as they apply in relation to bodies incorporated under the laws of the State;

(e) apply in relation to television broadcasts and sound broadcasts made from places in that country by one or more organisations constituted in or under the laws of that country as they apply in relation to television broadcasts or sound broadcasts made from places in the State by Radio Eireann. ....

3) The Government shall not make an order under this section applying any of the provisions of this Act in respect of any country which is not a party to a Convention relating to copyright to which the State is also party, unless the Government is satisfied that, in respect of the class of works or other subject matter to which those provisions relate, provision has been or will be made under the laws of that country whereby adequate protection will be given to owners of copyright under this Act.

ISRAEL

UNITED KINGDOM COPYRIGHT ACT, 1911:

For text see under BARBADOS.

ITALY
(Ratified Rome Convention with effect from April 8th, 1975 and ratified Geneva Convention with effect from March 24th, 1977)

LAW NO. 633 of 1941:

Article 185

Subject to the provisions of Article 189, this Law shall apply to all works of Italian authors, wherever first published. It shall likewise apply to the works of a foreign author domiciled in Italy which are first published in Italy. Apart from the conditions of protection indicated in the preceding paragraph, this Law may likewise be applied to the works of foreign authors when the conditions indicated in the following Articles are fulfilled.

Article 186

The international conventions for the protection of intellectual works shall govern the field of application of this Law to works of foreign authors.

Article 189

The provisions of Article 185 shall apply to cinematographic works, to phonograph records or like contrivances, to the rights of performing actors or artists, to photographs and to engineering works,

if such works or products are created in Italy or may be considered national works according to this Law or any other special law.

JAMAICA

UNITED KINGDOM COPYRIGHT ACT, 1911:

For text see under BARBADOS.

JAPAN

LAW No. 48 of May 6th, 1970:

Article 8

The following shall be granted protection under this Law:

(i) phonograms the producers of which are Japanese nationals;

(ii) phonograms composed of the sounds which were first fixed in this country.

KENYA
(Ratified Geneva Convention with effect from April 21st, 1976)

COPYRIGHT ACT 1966 as amended on May 4th, 1975:

Section 15

The Attorney General may make regulations for the better carrying out of the provisions of this Act, and without prejudice to the generality of the foregoing such regulations may prescribe anything to be prescribed or which may be prescribed under this Act, and may extend the application of this Act in respect of any or all of the works referred to in Section 3 (1) of this Act:

(a) to individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under the laws of; or

(b) to works, other than sound recordings, first published in; or

(c) to sound recordings made in,

a country which is a party to a treaty to which Kenya is also a party and which provides for copyright in works to which the application of this Act extends.

KOREA

LAW No. 432 of JANUARY 28th, 1957 and SOUND RECORDING LAW No. 1944 of 1967 as amended on January 22nd, 1971:

Article 46

In respect to copyrights held by foreigners the provisions of this Law shall apply, except in cases where there are special provisions set forth in a treaty. It is provided, however, that in cases where there is no provision regarding the protection of copyrights in a treaty, only the person who has first published the work in this country shall enjoy protection under this Law.

LEBANON

DECREE No. 2385 of JANUARY 17th 1924:

No specific criteria.

LIECHTENSTEIN

COPYRIGHT LAW 1928 as amended on August 8th, 1959:

Article 6

The following shall be protected:

(1) the works of nationals of Liechtenstein, whether published in Liechtenstein or abroad, as well as their unpublished works;

(2) the works of foreign authors published for the first time in Liechtenstein.

The works of foreign authors published for the first time in a foreign country, shall be protected by this Law only where and to the extent that the country in question grants like protection to nationals of Liechtenstein for their works first published in Liechtenstein. The government shall decide if, and to what extent, the above condition is fulfilled. The decision of the government shall be binding upon the courts. The provisions of international treaties shall remain unaffected.

LUXEMBOURG
(Acceded to Rome Convention with effect from February 25th, 1976, and ratified Geneva Convention with effect from March 8th 1976)

LAW of SEPTEMBER 23rd, 1975:

not provided for in this Law, shall be governed by the international conventions to which the Grand Duchy is party.

MALAWI

COPYRIGHT ACT 1965:

Section 15

The Minister may make regulations prescribing anything to be prescribed or which may be prescribed under this Act and, in particular, shall make ragulations extending the application of this Act in respect of any or all of the works referred to in subsection (I) of section 3:

(a) to individuals or bodies corporate who are citizens of or domiciled or resident in or incorporated under the laws of:

(b) to works, other than sound recordings, first published in;

(c) to sound recordings made in,

a country which is a party to a treaty to which Malawi is also a party and which provides for copyright in works to which the application of this Act extends.

MALAYSIA

COPYRIGHT ACT 1969, as amended on May 29th, 1975:

Section 20

The Minister shall make regulations prescribing anything which may be prescribed under this Act and may make regulations extending the application of this Act in respect of any or all of the works referred to in subsection (I) of section 4 of this Act:

(a) to individuals who are citizens of, or permanent residents in,

(b) to bodies corporate constituted and established in or under the laws of,

(c) to works other than sound recordings and broadcasts first published in ...

(e) to sound recordings made in ...

a country which is party to a treaty or a member of any convention or union to which Malaysia is also a party or a member as the case may be and which provides for protection of copyright in works which are protected under this Act.

MALTA

COPYRIGHT ACT 1967:

Section 16

The Minister shall make regulations prescribing anything which may be prescribed under this Act and may make regulations extending the application of this Act in respect of any or all of the works referred to in subsection (1) of Section 3 of this Act:

(a) to individuals who are citizens of or are domiciled in

(b) to bodies of persons constituted and established in or commercial partnerships registered under the laws of

(c) to works other than sound recordings and broadcasts first published in

(d) to sound recordings made in ....

a country which is party to a treaty to which Malta is also a party and which provides for the protection of copyright in works which are protected under this Act.

MAURITIUS

UNITED KINGDOM COPYRIGHT ACT, 1911:

For text see under BARBADOS.

MEXICO
(Ratified Rome Convention with effect from May 18th, 1964 and ratified Geneva Convention with effect from December 21st, 1973)

No specific criteria.

MONACO
(Ratified Geneva Convention with effect from December 2nd, 1974)

No specific criteria.

NEPAL

COPYRIGHT ACT 1965:

No specific criteria.

NEW ZEALAND
(Acceded to Geneva Convention with effect from August 13th, 1976)

COPYRIGHT ACT 1962 as amended December 8th, 1971:

Section 49

1) The Governor General may from time to time, by Order in Council, direct that any of the provisions of this Act specified in the Order shall apply in the case of another country in any one or more of the following ways, that is to say, so as to secure that those provisions:

(a) apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematograph films, or editions first published in that country as they apply in relation to literary, dramatic, musical, or artistic works, sound recordings, cinematograph films or editions first published in New Zealand;

(b) apply in relation to persons who, at a material time, are citizens or subjects of that country as they apply in relation to persons who, at such a time, are New Zealand citizens;

(c) apply in relation to persons who, at a material time, are domiciled or resident in that country as they apply in relation to persons who, at such a time, are domiciled or resident in New Zealand;

(d) apply in relation to bodies incorporated under the laws of that country as they apply in relation to bodies incorporated under the laws of New Zealand;

(e) apply in relation to television broadcasts and sound broadcasts made from places in that country by one or more organisations authorised under the laws of that country as they apply in relation to television broadcasts made from places in New Zealand by the Broadcasting Corporation.

NIGER
(Acceded to Rome Convention with effect from May 18th, 1964)

No specific criteria.

NIGERIA

LAW No. 61 of 1970:

Section 14

Where any country is a party to a treaty or other international agreement to which Nigeria is also a party and the Commissioner is satisfied that the country in question provides for protection of copyright in works which are protected under this Decree, the Commissioner may,

by order in the Federal Gazette, extend the application of this Decree in respect of any or all of the works referred to in section I (1) of this Decree:

(a) to individuals who are citizens of or domiciled in that country;

(b) to bodies corporate established by or under the laws of that country;

(c) to works, other than sound recordings and broadcasts, first published in that country, and

(d) to sound recordings made in that country.

NORWAY

COPYRIGHT LAW 1961:

Section 59

On condition of reciprocity the King may provide that the rules of this Act shall apply, wholly or in part, also to the literary, scientific or artistic works of citizens of foreign states, and to literary, scientific or artistic works which are protected in another state as belonging to that state. The King may furthermore provide that the rules of this Act shall apply to literary, scientific or artistic works published by international organisations or unpublished works of which such organisation possesses the publishing rights.

PAKISTAN

COPYRIGHT ORDINANCE 1962, as amended 1972:

Section 54

1) The Federal Government may, by order published in the Official Gazette, direct that all or any of the provisions of this Ordinance shall apply:

(a) to works first published in a foreign country to which the order relates in like manner as if they were first published within Pakistan;

(b) to unpublished works, or any class thereof, the authors whereof were at the time of making of the work subjects or citizens of a foreign country to which the order relates in like manner as if they were first published within Pakistan;

(c) in respect of domicile in a foreign country to which the order relates in like manner as if such domicile were in Pakistan;

(d) to any work of which the author was at the date of first publication thereof, or, in a case where the author was dead at that date, was at the time of his death, a subject or citizen of a foreign country to which the order relates in like manner as if the author was a citizen of Pakistan at the date or time.....

Provided that:

(i) before making an order under this section in respect of any foreign country (other than a country with which Pakistan has entered into a treaty or which is a party to a convention relating to copyright to which Pakistan is also a party), the Federal Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to the Federal Government expedient to require for the full protection in that country of works entitled to copyright under the provisions of this Ordinance.

PANAMA
(Ratified Geneva Convention with effect from June 29th, 1974)

No specific criteria.

PARAGUAY
(Ratified Rome Convention with effect from February 26th, 1970)

No specific criteria.

PHILIPPINES

ADMINISTRATIVE ORDER, SETPEMBER 18th, 1947 (REIGSTRATION OF COPYRIGHT CLAIMS):

Section 14

The following persons are entitled under the law to apply for copyright protection in the Philippines for their works:

1) The author of the work, if he is:

(a) a citizen of the Philippines; or

(b) an alien author domiciled in the Philippines at the time when he makes an application for copyright; or

(c) an alien author who is a citizen or subject of any

country which grants either by treaty, convention, agreement, or law, to citizens of the Philippines the benefit of copyright on substantially the same basis as to its own citizens; or

(d) an alien author who is a citizen or subject of a foreign state which is a party to an international agreement providing for reciprocity in the granting of copyright to which agreement the Philippines is also a party.....

POLAND

LAW No. 234 of 1952:

Article 6

The author's rights shall be protected if:

(1) the author is a Polish citizen;

(2) the work first appeared in Poland, or simultaneously in Poland and abroad;

(3) the work was published for the first time in the Polish language;

(4) copyright protection is granted under international conventions or upon the basis of reciprocity.

ROUMANIA

DECREE No. 321 of 1956:

Article 1

Copyright in literary, artistic or scientific works, as well as any other similar works of an intellectual character, created in the territory of the Roumanian People's Republic shall be guaranteed to the author in accordance with the provisions of this decree. Copyright in works created in other countries and used in the territory of the Roumanian People's Republic shall be guaranteed:

(1) to Roumanian citizens, in the terms of the present decree;

(2) to those who are not Roumanian citizens as provided in the terms of the international conventions to which the Roumanian People's Republic is a party.

SEYCHELLES

UNITED KINGDOM COPYRIGHT ACT, 1956:

For text see under UNITED KINGDOM.

SIERRA LEONE

COPYRIGHT ACT, 1965:

Article 25

1) The Governor-General may by Order make provision for applying any of the provisions of this Act specified in the Order, in the case of a country outside Sierra Leone, in any one or more of the following ways, that is to say, so as to ensure that those provisions:

(a) apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematographic films or editions first published in that country as they apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematographic films or editions first published in Sierra Leone;

(b) apply in relation to persons who, at a material time, are citizens or subjects of that country as they apply in relation to persons who, at such a time, are Sierra Leone citizens;

(c) apply in relation to persons who, at a material time, are domiciled or resident in that country as they apply in relation to persons, who at such a time, are domiciled or resident in Sierra Leone;

(d) apply in relation to bodies incorporated under the laws of that country as they apply in relation to bodies incorporated under the laws of Sierra Leone;

(e) apply in relation to television broadcasts and sound broadcasts made from places in that country, by one or more organisations constituted in, or under the laws of, that country as they apply in relation to television broadcasts made from places in Sierra Leone by the Service or the Authority.....

3) The Governor-General shall not make an Order under this section applying any of the provisions of this Act in the case of a country, other than a country which is a party to a Convention relating to copyright to which Sierra Leone is also a party, unless he is satisfied that, in respect of the class of works or other subject matter to which those provisions relate, provision has been or will be made under the laws of that country whereby adequate protection will be given to the owners of copyright under this Act.

SINGAPORE

UNITED KINGDOM COPYRIGHT ACT, 1911; and COPYRIGHT (GRAMOPHONE RECORDS AND GOVERNMENT BROADCASTING) ACT, 1968:

SOUTH AFRICA

COPYRIGHT ACT, 1965:

Section 32

1) The State President may, by proclamation in the Gazette, provide that any provision of this Act specified in the proclamation shall in the case of any country so specified apply:

(a) in relation to literary, dramatic, musical or artistic works, cinematograph films or editions first published, and sound recordings first made in that country, as it applies in relation to literary, dramatic , musical or artistic works, cinematograph films or editions first published, and sound recordings first made in the Republic;

(b) in relation to persons who at a material time are subjects or citizens of that country as it applies in relation to persons who at such a time are South African citizens;

(c) in relation to persons who at a material time are domiciled or resident in that country as it applies in relation to persons who at such a time are domiciled or resident in the Republic;

(d) in relation to bodies incorporated under the laws of that country as it applies in relation to bodies incorporated under the laws of the Republic;

(e) in relation to television broadcasts and sound broadcasts made from places in that country or by one or more organisations constituted in or under the laws of that country as it applies in relation to television broadcasts and sound broadcasts made by the Corporation.

SPAIN
(Ratified Geneva Convention with effect from August 24th, 1974)

COPYRIGHT LAW, 1879:

Article 50

Nationals of States whose legislation grants to Spanish nationals rights corresponding to those granted by this Law shall enjoy in Spain the rights which this law accords, without the necessity of any treaty or diplomatic negotiations; these rights shall be asserted by private action instituted before the competent judge.

SRI LANKA

UNITED KINGDOM COPYRIGHT ACT, 1911:

For text see under BARBADOS.

SWEDEN
(Ratified Rome Convention with effect from May 18th, 1964 and ratified Geneva Convention with effect from April 18th, 1973)

COPYRIGHT ACT, 1960:

Section 62

On condition of reciprocity, the King in Council may provide for the application of this Act in relation to other countries. Provision may also be made for application to works first published by an international organisation and to unpublished works which such organisation has a right to publish.

SWITZERLAND

COPYRIGHT LAW of 1922, as amended to June 24th, 1955:

Article 6

The following shall be protected:

(1) the works of Swiss nationals (ressortissants), whether published in Switzerland or abroad, as well as their unpublished works;

(2) the works of foreign authors, published for the first time in Switzerland.

The works of foreign authors, published for the first time in a foreign country, shall be protected by this Law only where and to the extent that the country in question grants like protection to Swiss nationals for their works first published in Switzerland. The Federal Council shall decide if, and to what extent, the above condition is fulfilled. The decision of the Council shall be binding upon the courts. The provisions of international treaties shall remain unaffected.

SYRIA

COPYRIGHT LAW of 1924:

Article 158

The creation of a work shall, without any other formality, give rise to the right of literary and artistic copyright; but the exercise of this right shall be subject to the formality of deposit. Deposit is a

prerequisite to the institution of action before the courts by the aggrieved author, publisher or successors in title. Deposit may be effected before or after the fact which gives rise to the action. Notwithstanding the foregoing provisions, the enjoyment and exercise throughout the territory of the States under mandate of the literary and artistic copyright of authors who are nationals of one of the countries of the Union shall, in accordance with the provisions of Article 4 of the revised Berne Convention, be free of all preliminary formality. An action before the court instituted by the injured author, publisher or successors in title shall be admissible in all such cases.

TAIWAN

COPYRIGHT LAW of 1928, as amended July 10th, 1964:

Article 1

Copyright means the exclusive privilege of reproducing or multiplying the following intellectual productions duly registered in accordance with the provisions of this Law:.....

Article 2

The Ministry of the Interior shall be in charge of the registration of intellectual productions.

TANZANIA

COPYRIGHT ACT, 1966:

No specific criteria.

THAILAND

COPYRIGHT ACT, 1931:

Section 28

The provisions of this Act shall, subject to the conditions hereinafter set forth, apply to all works published in any foreign country which is a member of the International Union for the Portection of Literary and Artistic Works as if they had first been published in His Majesty's Kingdom; to all literary and artistic works the authors whereof were, at the time of making of the works, subjects or citizens or residents of a foreign country which is a member of the said Union inlike manner as if the authors had been Siamese subjects or citizens or residents of Siam;

provided that, if the period of protection conferred by the law of the country of origin of the works is less than that provided by this Act, the protection in His Majesty's Kingdom shall not exceed the shorter period.

TRINIDAD AND TOBAGO

UNITED KINGDOM COPYRIGHT ACT, 1911:

For text see under BARBADOS.

TURKEY

COPYRIGHT LAW of 1951:

Article 88

The provisions of this Law shall apply: .....

(3) to all works of foreigners either not yet presented to the public or first presented to the public in a foreign country, in accordance with the provisions of international treaties to which Turkey is a party. If the country of which the author is a national sufficiently protects the rights of Turkish authors, or if an international treaty authorises certain exceptions or restrictions in respect of foreign authors, the Council of Ministers may decree exceptions to the provisions contained in Items 1) and 3) of this Article.

UGANDA

COPYRIGHT ACT, 1964:

Section 2 (1)

A copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made a qualified person, that is to say:

(a) an individual who is a citizen of, or is domiciled or resident in, Uganda or any country specified in the Second Schedule to this Act, or

(b) a body corporate which was incorporated under the laws of Uganda or any such country.....

Section 3 (1)

A copyright shall be conferred by this section on every work, other than a broadcast, which is eligible for copyright and which:

(a) is first published in Uganda or any country specified in the Second Schedule to this Act; and

(b) has not been the subject of copyright conferred by the immediately preceding section.

UNITED KINGDOM
(Ratified Rome Convention with effect from May 18th, 1964 and ratified Geneva Convention with effect from April 18th, 1973)

COPYRIGHT ACT 1956, as amended February 17th, 1971:

Section 12

(1) Copyright shall subsist, subject to the provisions of this Act, in every sound recording of which the maker was a qualified person at the time when the recording was made.

(2) Without prejudice to the preceding subsection, copyright shall subsist, subject to the provisions of this Act, in every sound recording which has been published, if the first publication of the recording took place in the United Kingdom or in another country to which this section extends.

Section 32

(1) Her Majesty may by Order in Council make provision for applying any of the provisions of this Act specified in the Order, in the case of a country to which those provisions do not extend, in any one or more of the following ways, that is to say, so as to secure that those provisions:

(a) apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematograph films or editions first published in that country as they apply in relation to literary, dramatic, musical or artistic works, sound recordings, cinematograph films or editions first published in the United Kingdom;

(b) apply in relation to persons who, at a material time, are citizens or subjects of that country as they apply in relation to persons who, at such a time, are British subjects;

(c) apply in relation to persons who, at a material time, are domiciled or resident in that country as they apply in relation to persons who, at such a time, are domiciled or resident in the United Kingdom;

(d) apply in relation to bodies incorporated under the laws of that country as they apply in relation to bodies incorporated under the laws of any part of the United Kingdom;

(e) apply in relation to television broadcasts and sound broadcasts made from places in that country, by one or more organisations constituted in, or under the laws of, that country, as they apply in relation to television broadcasts and sound broadcasts made from places in the United Kingdom by the Corporation or the Authority. .....

(3) Her Majesty shall not make an Order in Council under this section applying any of the provisions of this Act in the case of a country, other than a country which is a party to a Convention relating to copyright to which the United Kingdom is also a party, unless Her Majesty is satisfied that, in respect of the class of works or other subject-matter to which those provisions relate, provision has been or will be made under the laws of that country whereby adequate protection will be given to owners of copyright under this Act.

UNITED STATES OF AMERICA
(Ratified Geneva Convention with effect from March 10th, 1974)

US CODE, TITLE 17 of 1909 as amended October 15th, 1971 and December 31st. 1974:

Section 9

The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators or assigns, shall have copyright for such work under the conditions and for the terms specified in this title, provided, however, that the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only under the conditions described in subsections (a), (b), or (c) below:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) when the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation

is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto. The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: .....

URUGUAY

LAW No. 9739 of 1937 as amended on February 25th, 1938:

Article 64

As provided in Article 18 of the Berne Convention of 1886, the Executive shall communicate with the International Bureau of Intellectual Property located in Berne and shall give official notification of the approval of this Law and of the adhesion of the Eastern Republic of Uruguay to the Convention, in order to establish immediate reciprocity with the countries signatory thereto.

UNION OF SOVIET SOCIALIST REPUBLICS

BASIS OF COPYRIGHT LAW 1961; and CIVIL CODE, 1964 as amended March 1st, 1974:

Article 97

Copyright in respect of a work first published on the territory of the USSR or in respect of an unpublished work in any material form, located within such territory shall belong to the author and his heirs, irrespective of their nationality, and also to other successors in title of the author. The citizens of the USSR and their successors in title shall also enjoy copyright in respect of a work first published abroad in any material form. Other persons shall enjoy copyright in respect of a work first published or located on the territory of a foreign State in any material form in accordance with international treaties or international agreements to which the USSR is a party. Foreign successors in title of authors who are citizens of the USSR shall enjoy copyright on the territory of the USSR if this right has been transferred to them in accordance with the legislation of the USSR.

ZAMBIA

COPYRIGHT ACT, 1965:

Section 15

The Minister may make regulations prescribing anything to be prescribed or which may be prescribed under this Act and, in particular, shall make regulations extending the application of this Act in respect of any or all of the works referred to in Subsection (I) of Section 3:.....

(c) to sound recordings made in:

a country which is a party to a treaty to which Zambia is also a party and which provides for copyright in works to which the application of this Act extends.

ANNEX III

SUMMARY OF NATIONAL LAWS GRANTING PERFORMING RIGHTS IN PHONOGRAMS

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SUMMARY OF NATIONAL LAWS GRANTING PERFORMING RIGHTS

ARGENTINA - Law No. 11.723 of 28th September 1933 on Copyright and Decree No. 1.670 of 1974

Article 1 of Law No. 11.723

For the purposes of this law, scientific, literary and artistic works shall include:

..... phonographic records; .....

Article 56 of Law No. 11.723

The performer of a literary or musical work shall have the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radiotelephony or television, or which are recorded or printed on a disc, film, tape, wire or any other medium capable of being used for sound or visual reproduction. If an agreement cannot be reached, the amount of the remuneration shall be established in a summary proceeding by the competent judicial authority...

Article 1 of Decree No. 1.670

Phonographic records and other material supports of phonograms cannot be publicly performed or broadcast or rebroadcast by radio and/or television without the specific authorization of its authors or right owners.

Without prejudice to the rights which the law already grants to authors of the lyrics, composers of music and to the principle and secondary performers, producers of phonograms or their representatives, have the right to collect remuneration from any person who, directly or indirectly, occasionally or regularly, profits from the public performance of a phonographic reproduction; such as: broadcasting organisations, television organisations, etc., bars, cinematographers, theatres, social clubs, recreation centres, restaurants, cabarets and generally anybody who communicates them to the public by whatever medium, either directly or indirectly....

AUSTRALIA - Copyright Act 1968

Article 85

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a sound recording, is the exclusive right to do all or any of the following acts:-

(a) to make a record embodying the recording;

(b) to cause the recording to be heard in public;

(c) to broadcast the recording.

AUSTRIA - Copyright Act 1936, as amended on 29th December 1972

Article 76 (3)

Where a sound recording produced for commercial purposes is used for a broadcast or for public communication, the user shall pay equitable remuneration to the producer... The persons specified in Article 66 (1) shall have a claim on the producer to a share in such remuneration. In the absence of agreement between the parties entitled thereto, such share shall be one half of the remuneration remaining to the producer after deduction of collecting costs.

BANGLADESH - Copyright Ordinance of 1962, as modified by Copyright (Amendment) Act, 1974

Section 3 (1)

For the purposes of this Ordinance, "copyright" means the exclusive right, by virtue of, and subject to the provisions of, this Ordinance, - ...

(d) in the case of a record, to do or authorise the doing of any of the following acts by utilising the record, namely:-

(i) to make any other record embodying the same recording;

(ii) to use the record in the sound track of a cinematographic work;

(iii) to cause the recording embodied in the record to be heard in public;

(iv) to communicate the recording embodied in the record by broadcast.

BARBADOS - United Kingdom Copyright Act 1911

Section 19 (1)

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works...

BOTSWANA - United Kingdom Copyright Act 1956

Section 12 (5)

The acts restricted by the copyright in a sound recording are the following, where a record embodying the recording is utilised directly or indirectly in doing them, that is to say,

(a) making a record embodying the recording;

(b) causing a recording to be heard in public;

(c) broadcasting the recording.

BRAZIL - Law No. 4944 of 6th April 1966 and Law No. 5988 of 14th December 1973

Article 4 of Law No. 4944

It shall be the exclusive right of the producer of phonograms to authorise or prohibit their reproduction, whether direct or indirect, broadcasting or rebroadcasting by broadcasting and public performance organisations, regardless of which processes may have been used by the said organisations.

Article 95 of Law No. 5988

The performer, his heir or his successor shall have the right to prevent the recording, reproduction, transmission or retransmission by a broadcasting organisation, or the use in any form of communication to the public, whether for a consideration or free of charge, of his performance, when he has not given his express prior consent thereto...

Article 98 of Law No. 5988

The phonogram producer shall have the right to authorise or prohibit direct or indirect reproduction, transmission and retransmission by a broadcasting organisation, and public performance by any means.

BURMA - United Kingdom Copyright Act 1911 Section 19 as modified by Union of Burma (Adaptation of Law 5) Order 1948.

Section 19 (1)

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works...

CHILE - Decree No. 17,336 of 28th August 1970

Article 65

Rights related to copyright shall be those afforded by this law to performers allowing them to permit or prohibit the communication of their performances to the public, and to receive remuneration in respect of public use of such performances, without prejudice to any rights to which the author of the work is entitled.

None of the provisions of this law regarding related rights may be interpreted as prejudicing the protection which it affords to copyright.

Article 66

It shall be prohibited to record, reproduce, broadcast or re-broadcast by any radio or television broadcasting organisation, or to use by any other means for profit-making purposes, any performance of a performer, without his consent or the consent of his heir or assign.

Article 67

Any person who uses, for profit-making purposes, a phonogram or a reproduction thereof, in order to broadcast it by radio or television or by any other means of communication to the public, shall be required to pay a remuneration to the performers; the amount of the remuneration and the method of collection shall be established in the Regulations.

Article 67 (contd.)

In determining the related rights, the Regulations shall accord preferential treatment to national artistic activities, by establishing different amounts depending on whether or not the performers are Chilean nationals, and whether the fixation was made in Chile or abroad...

COLOMBIA - Law No. 86 of 26th December 1946 on Copyright

Article 2

Copyright shall apply to scientific, literary and artistic works.

The expression scientific, literary and artistic works shall include .... the productions made by means of mechanical instruments destined for the rendering of sounds;...

Article 43

The performer of a theatrical, musical or literary work shall have the following rights:

(1) He shall be entitled to demand remuneration for his performance from anyone who transmits it by radiotelephony or television, or who makes a recording on a disc, film, tape or any other medium capable of acoustic or visual reproduction. Where there was no previous agreement or where agreement cannot be reached at a later stage, the remuneration shall be fixed by the judge, after summary proceedings...

COSTA RICA - Rome Convention Provisions

Article 7 (1)

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

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

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

Article 7 (1) (contd.)

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

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

Article 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

CZECHOSLOVAKIA - Law No. 35 of 25th March 1965 on Copyright

Section 36

(2) Without the consent of performers, their performances may not be used for:

Section 36 (contd.)

(a) fixation of sounds or images or of both sounds and images (hereinafter called "fixation") made for the manufacture of copies intended for public sale, or for the making of films intended to be shown in public (hereinafter called "copies of fixation");

(b) making copies of fixations intended for public sale or the use of fixations or their copies for a purpose different from that for which the consent has already been granted, unless these are cases provided for in Section 37 (1);

(c) sound and visual broadcasts;

(d) projecting in public or disseminating by other means, if the performance is conveyed to a person different from the organisation intended to use it.

(3) Performers shall be entitled to remuneration for the use of their performances.

Section 45

(1) The subject of the rights of producers of phonograms provided by this law shall be the phonograms of performances given by performers or of other sounds.

(2) The consent of the producer of phonograms shall be necessary:

(a) for the sound or visual broadcast of phonograms and their copies;

(b) for making reproductions of a phonogram or its copy for other than personal use;

(c) for communication to the public of phonograms or their copies.

(3) The producer may demand compensation for the consent under paragraph (2).

DENMARK - Law No. 158 of 31st May 1961 on Copyright

Article 47

When gramophone records or other sound recordings within the period stated in Section 46 are used in radio or television broadcasts or when they are played publicly for commercial purposes, both the producer of the recording and the performing artist whose performances are reproduced shall be entitled to remuneration. If two or more performers have taken part in the performance, their claim to remuneration may only be made jointly. The rights of performers may only be claimed through the producer or through a joint organisation for producers and performers, approved by the Minister of Education....

DOMINICAN REPUBLIC - Law No. 1381 of 17th March 1947 on Copyright

Artcile 2

Copyright extends to the work in its entirety, as well as to its constituent parts. It includes the right to publish the work in any form or by any means, and to perform it publicly in any manner, in any medium, or by any method.

Article 3

Scientific, artistic and literary productions of any kind and length, such as the following, are protected by this Law:...

(e) Plastic works, photographs, photogravures, phonographic records, microfilms and microphotographs;...

ECUADOR - Copyright Law of 13th August 1976

Article 140

Performers have the right to remuneration in respect of their performances fixed on a material support for the purpose of retransmission or rebroadcasting over the radio, television, television by cable, video cassettes or re-recording on phonographic discs, tapes, wire, film or any other similar means. Article 26 to 32 of this law will be observed in so

Article 140 (contd.)

far as they are applicable in order to establish the amount of remuneration payable to the performers.

EL SALVADOR - Law No. 376 of 6th September 1963

Article 57

The performers referred to in the preceding Article are entitled to receive financial remuneration for the exploitation of their performances diffused by means of broadcasting, television, cinematography, phonographic discs, or any other means for the reproduction of sounds or images.

Broadcasting or television organisations which record programmes may not subsequently exploit them without making the requisite payment to the performers.

FIJI - United Kingdom Copyright Act 1956 Section 12 and Copyright (Broadcasting of Gramophone Records) Act 1972

Section 12 (5) of the United Kingdom Copyright Act

The acts restricted by the copyright in a sound recording are the following, where a record embodying the recording is utilised directly or indirectly in doing them, that is to say,

(a) making a record embodying the recording;

(b) causing a recording to be heard in public;

(c) broadcasting the recording.

Article 2 of Copyright (Broadcasting of Gramophone Records) Act 1972

Notwithstanding the provisions of any other written law -

(a) the manufacturers' and performers' copyright in a musical recording on gramophone records, tapes or other mechanical contrivance, shall not be infringed if such a recording is broadcast, by means of radio or television, by the Fiji Broadcasting Commission;

Article 2 of Copyright (Broadcasting of Gramophone Records) Act 1972 (contd.)

(b) where a radio or television broadcast is made and a person by the reception of that broadcast causes a musical work or recording to be heard in public, he shall not thereby infringe the copyright in that musical work or recording.

FINLAND - Law No. 404 of 8th July 1961, as amended to 23rd August 1971

Article 45

A performing artist's performance of a literary or artistic work may not without his consent be recorded on phonographic records, films, or other instruments by which it can be reproduced, and it may not without such consent be made available to the public, broadcast over radio or television or by direct communication....

Article 47

If a sound recording mentioned in Article 46 is used before the end of the term therein provided in a radio or television broadcast, a compensation shall be paid both to the producer of the recording and to the performer whose performance is recorded. If two or more performers have participated in a performance, their right may only be claimed jointly. As against a radio or television organisation, the performer's right shall be claimed through the producer.

GERMAN DEMOCRATIC REPUBLIC - Copyright Act 1965

Article 75

The productions of undertakings engaged in the making of sound recordings may be used only with the consent of the undertaking:

(a) for further sound recordings;

(b) for broadcasting by radio or television;...

GERMAN FEDERAL REPUBLIC - Copyright Act 1965, as amended to 10th November 1972

Article 76 (2)

A performance which has been lawfully fixed on visual or sound

records may be broadcast without the consent of the performer if such records have previously been published; however, in such circumstances the performer shall be paid an equitable remuneration.

Article 77

If a performance is publicly communicated by means of visual or sound records or if a broadcast performance is publicly communicated, the performer shall have the right to an equitable remuneration with respect thereto.

Article 86

If a published sound record on which a performance has been fixed is used for public communication, the producer of the sound record shall have a right as against the performer to an equitable participation in the remuneration which the performer receives pursuant to Article 76, paragraph (2), and Article 77.

GUATEMALA - Rome Convention Provisions

Article 7 (1)

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

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

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

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

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

Article 7 (1) (contd.)

(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

Article 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

GUYANA - United Kingdom Copyright Act 1956

Section 12 (5)

The acts restricted by the copyright in a sound recording are the following, where a record embodying the recording is utilised directly or indirectly in doing them, that is to say,

(a) making a record embodying the recording;

(b) causing a recording to be heard in public;

(c) broadcasting the recording.

HUNGARY - Copyright Act 1969

Article 49

(1) The consent of the performer - of the conductor and the principal participants (soloists) in the case of ensembles - shall be required for:

(a) recording the performance for purposes of putting the recording into circulation or of public performance, or

(b) transmitting the performance, without recording it, to an audience not present.

(2) No consent shall be required in cases where the law does not require the author's consent for the use of works enjoying copyright protection.

(3) If the performers are professional performing artists, a remuneration shall be due in return for a recording made for purposes of

putting it into circulation or of public performance and in return for transmission, unless otherwise agreed, and except in cases of free use.

ICELAND Copyright Act 1972

Article 47

When a sound recording, which has been published for commercial purposes, is used within the period stated in Article 46: (1) in radio broadcasts or (2) in other public dissemination of artistic performances for commercial purposes, whether by direct use or by radio, then the user shall be required to pay a composite remuneration both to the producer and the performing artists.

Further rules may be laid down by administrative regulations concerning these matters, including who shall act on behalf of artistic performers, if two or more performers have taken part in the same performance, the collection of their remuneration and how this shall be divided between the producer and the performers. These rules shall not be applied, however, if a joint organisation of producers and artistic performers, approved by the Minister of Education, has made a composite contract with a user or users, or if separate contracts exist in individual instances.

With the consent of a joint organisation of artistic performers and producers, mentioned under the second paragraph of this Article, it may be decided by administrative regulations that the remuneration paid in accordance with the first paragraph shall revert to a special fund operated in two separate divisions, one for the artistic performers, the other for the producers. The custody of this fund, and the allocations from its divisions shall be governed by rules laid down in administrative regulations, with the consent of the aforementioned organisation...

INDIA - Copyright Act 1957

Section 14 (1)

For the purposes of this Act, "copyright" means the exclusive right,

by virtue of, and subject to the provisions of, this Act - ....

(d) in the case of a record, to do or authorise the doing of any of the following acts by utilising the record, namely:-

(i) to make any other record embodying the same recording;

(ii) to cause the recording embodied in the record to be heard in public;

(iii) to communicate the recording embodied in the record by radio-diffusion.

IRAQ - Law No. 3 of 21st January 1971

Article 5

Performers shall enjoy protection and anyone who executes or transmits to the public an artistic work produced by another shall be considered as a performer, whether such performance was made by singing, playing rhythm, addressing, photographing, painting, motions, steps or any other way, provided that it does not injure the right of the author of the original work.

IRELAND - Copyright Act 1963

Section 17 (4)

The acts restricted by the copyright in a sound recording are:

(a) making a record embodying the recording;

(b) in the case of a published recording, causing the recording or any reproduction thereof to be heard in public, or to be broadcast or to be transmitted to subscribers to a diffusion service, without the payment of equitable remuneration to the owner of the copyright subsisting in the recording;

(c) in the case of an unpublished recording, causing the recording or any reproduction thereof to be heard in public, or to be broadcast, or to be transmitted to subscribers to a diffusion service.

ISRAEL - United Kingdom Copyright Act 1911, as modified by Copyright Ordinance of 1924 and amended to 26th July 1971

Section 19

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works....

ITALY - Law No. 633 of 12th April 1941, as amended to 5th May 1976

Article 73

The producer of a phonograph record or other like contrivances for the reproduction of sounds or voices shall, independently of the exclusive right recognised in the preceding Article, be entitled to demand remuneration for the utilisation for profit of the record or contrivance by means of broadcasting, cinematography, or television, or in connection with any public dancing or in any public establishment.

Article 80

Artists who act or interpret dramatic or literary works, as well as artists who perform musical works or compositions, even if such works or compositions are in the public domain, shall, independently of any remuneration in respect of their acting, interpretation, or performance, have the right to equitable remuneration from any person who diffuses or transmits by broadcasting, telephony, or like means, or who engraves, records or reproduces in any manner, upon a phonograph record, cinematographic film or other like contrivance, their acting, interpretation or performance.....

This shall not apply where the recitation or performance is given for the purpose of such broadcasting, telephony, cinematography, engraving or recording upon the mechanical contrivances indicated above, and remuneration is paid therefor.....

JAMAICA - United Kingdom Copyright Act 1911

Section 19

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works...

JAPAN - Law No. 48 of 6th May 1970

Article 91 (1)

Performers shall have the exclusive right to make sound or visual recordings of their performances.

Article 92 (1)

Performers shall have the exclusive right to broadcast and diffuse by wire their performances.

Article 95 (1)

When broadcasting organisatio ns and those who engage in wire diffusion service principally for the purpose of offering music (hereinafter in this Article and Article 97, paragraph (1) referred to as "broadcasting organisations, etc.") have broadcast or diffused by wire commercial phonograms incorporating performances with the authorisation of the owner of the right mentioned in Article 91, paragraph (1) (except rebraodcast or diffusion by wire made upon receiving such broadcast), they shall pay secondary use fees to the performers whose performances (in which neighbouring rights subsist) have been so broadcast or diffused by wire.

Article 96

Producers of phonograms shall have the exclusive right to reproduce their phonograms.

Article 97

(1) When broadcasting organisations, etc. have broadcast or diffused by wire commercial phonograms (except rebroadcast or diffusion by wire made upon receiving such broadcast), they shall pay secondary use fees to the producers whose phonograms (in which neighbouring rights subsist) have been so broadcast or diffused by wire.

(2) Where there is an association (including a federation of associations) which is composed of a considerable number of producers practising in this country and which is designated with its consent, by the Commissioner of the Agency for Cultural Affairs, the right to secondary use fees mentioned in the preceding paragraph shall be exercised exclusively through the intermediary of such association.

(3) The provision of Article 95, paragraphs (3) to (11) shall apply mutatis mutandis to secondary use fees mentioned in paragraph (1) and to the association mentioned in the preceding paragraph.

LIECHTENSTEIN - Copyright Law of 1928, as amended to 8th August 1959

Article 4

The following shall be protected in like manner as original works:

(1) translations;

(2) any other reproduction of a work, in so far as it has the character of an original literary, artistic or photographic work.

When a literary or musical work is adapted by the personal action of performers to instruments serving to recite or to perform the owrk mechanically, such adaptation shall constitute a reproduction protected by law.

Article 12

Copyright as guaranteed by this Law shall include the exclusive rights:

(1) to reproduce the work by any process;

(2) to sell, place on sale, or put into circulation in any other manner, copies of the work;

(3) to recite, perform, or exhibit the work publicly; or to transmit publicly over wires the recitation, performance or exhibition of the work;

(4) to display copies of the work publicly, or to disclose the work to the public in any other manner when the work has not otherwise been made public;

(5) to broadcast the work;

(6) to communicate the broadcast work publicly, over wires or otherwise, when such communication is made by an organisation other than the originating organisation;

(7) to communicate publicly by loudspeaker or by any other like instrument transmitting signs, sounds or images, the broadcast work or the work publicly transmitted over wires.

Public communication of the work by any other means serving, without wires to diffuse signs, sounds or images is assimilated to broadcasting.

MAURITIUS - United Kingdom Copyright Act 1911

Section 19 (1)

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works...

MEXICO - Copyright Law of 29th December 1956, as amended to 4th November 1963

Article 80

Recordings or discs used for public performance by means of juke boxes or similar apparatus, and for direct or indirect financial gain, shall give rise to royalties in favour of authors, interpreters or performers.....

Article 84

Interpreters and performers who participate in any performance shall be entitled to receive financial remuneration for the exploitation of their interpretations,....

Article 86

The express authorisation of the interpreters or performers is necessary for any broadcast, re-emission or fixation of a broadcast thereof, and any reproduction of any such fixation.

Article 87

Interpreters and performers have the right to oppose:

(I) the fixation upon a base material, the radio-diffusion, and any other form of communication to the public, of their direct acting and performances;

(II) the fixation upon a base material of their acting and performances which are broadcast or televised, and

(III) any reproduction which differs in its purpose from that authorised by them.

NEW ZEALAND - Copyright Act 1962, as amended to 8th December 1968

Section 13 (5)

The acts restricted by the copyright in a sound recording are the following, whether a record embodying the recording is utilised directly or indirectly in doing them, that is to say,-

(a) Making a record embodying the recording;

(b) Broadcasting the recording;

(c) Causing the recording to be heard in public, if:

(i) The recording is performed in a place to which a charge is made for admission; or

(ii) The recording is performed by or upon a coin-operated machine; or

(iii) The person causing the recording to be heard in public receives any payment in respect of the performance.

NORWAY - Fund Law of 14th December 1956

Section 1

A fund for performing artists is herevy established. The money of the fund shall be used to support Norwegian artists and their heirs. Of the fees which are annually paid into the fund a part stipulated by the King shall be allotted to manufacturers of records, tape recordings and similar technical contrivances for sound recordings of works by performing artists.

Section 3

Fees shall be paid to the fund by anyone who publicly for professional purposes:

(a) by means of gramophone records, tape recordings or similar technical contrivances for sound recording performs recordings of works by a performing artist

(b) from a radio receiver relays broadcasting programmes in which performing artists take part or in which recordings of the work by a performing artist are used.

PAKISTAN - Copyright Ordinance of 1962, as amended in 1972

Section 3 (1)

For the purposes of this Ordinance, "copyright" means the exclusive right, by virtue of, and subject to the provisions of, this Ordinance, - ....

(d) in the case of a record, to do or authorise the doing of any of the following acts by utilising the record, namely:-

(i) to make any other record embodying the same recording;

(ii) to use the record in the sound track of a cinematographic work;

(iii) to cause the recording embodied in the record to be heard in public;

(iv) to communicate the recording embodied in the record by radio-diffusion.

PARAGUAY - Law No. 94 of 1951

Article 37

Persons who perform viz., sing, declaim, play, etc., shall have intellectual rights under the same terms and conditions as authors.

Article 39

The performer of a litarary or musical work, or of a work susceptible of any other form of artistic expression, shall have the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radiotelephony or television, or which are recorded upon discs, films, tapes, wires, or any other medium capable or being used for sound or visual reproduction.

PHILIPPINES - Decree No. 49 of 1972 on Intellectual Property

Section 42

Performers shall have the exclusive right:

(a) to record or authorise the recording of their performance to the public on any recording apparatus for image and/or sound.

(b) to authorise the broadcasting and the communication to the public of their performance. .....

Section 47

When a sound recording is used with the intention of making or enhancing profit, the producer of the recording has the right to a fair remuneration from the user.

POLAND - Law No.234 of 10 July 1952 on Copyright, as amended to 23 October 1975

Article 2

(1) Copyright shall subsist in a work produced by means of a photographic or other similar process if it bears an express reservation of copyright

(2)..... the year of the recording shall be indicated on recordings prepared for mechanical instruments, and on perforated rolls and other contrivances by means of which sounds may be mechanically reproduced.

Article 15

Within the limits fixed by law, copyright shall consist of the right:

(1) to the protection of the personal rights of the author;

(2) to the exclusive disposal of the work;

(3) to remuneration for any use of the work by other persons.

ROUMANIA - Decree No. 321 of 18th June 1956 on Copyright, as amended to 28th December 1968

Article 3

Copyright shall consist of: .....

(5) the right to derive economic benefits from:

(i) reproduction and distribution of copies;

(ii) performance and exhibition of the work;

(iii) any other lawful method of using the work. ....

Article 11

Motion picture and broadcasting studios and organisations for making mechanical recordings shall have copyright in the collective works they produce. .....

Article 13

The following shall be allowed without the author's consent but with due regard for all his other rights:

(a) the mechanical recording of musical compositions of artistic, literary or scientific works on records, tape, film and by any other means, if these compositions or works have been reproduced and distributed;

(b) the broadcasting by radio or television, or the recording or filming for the purposes of broadcasting, of works of any kind from theatres or public halls where they are performed or exhibited;

(c) the insertion in collections, albums, or other items of the same kind of a literary, musical or scientific work, in part or in whole, for the exemplification of their contents, or in the press for the illustration of a theme, or the reproduction of works of plastic art;

(d) the mechanical recording of musical, literary or artistic works, in part or in whole, for the purpose of broadcasting by radio or television or for their use in news reels.

The provisions of paragraphs (c) and (d) shall be applied only to works previously brought to the public's attention by reproduction and the distribution of copies, or by performance or exhibition.

SEYCHELLES - United Kingdom Copyright Act 1956

Section 12 (5)

The acts restricted by the copyright in a sound recording are the following, where a record embodying the recording is utilised directly or indirectly in doing them, that is to say,

(a) Making a record embodying the recording;

(b) Causing a recording to be heard in public;

(c) Broadcasting the recording.

SIERRA LEONE - Copyright Act 1965

Section 14 (5)

The acts restricted by the copyright in a sound recording are the following, whether a record embodying the recording is utilised directly or indirectly in doing them, that is to say, -

(a) making a record embodying the recording;

(b) causing the recording to be heard in public;

(c) broadcasting the recording.

SINGAPORE - United Kingdom Copyright Act 1911 and Copyright (Gramophone Records and Government Broadcasting) Act 1968

Section 19 (1) of United Kingdom Copyright Act

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works ....

Article 6 of the Copyright (Gramophone Records and Government Broadcasting) Act 1968

(1) Notwithstanding anything contained in any other written law:

(a) the copyright in a musical work or in a gramophone record is not infringed by the Government when it causes the the musical work or gramophone record to be heard in public by means of a radio or television broadcast; and

(b) the copyright in a musical work is not infringed by the Government when it makes a record, tape or other device in respect of that musical work solely for the purpose of broadcasting that musical work by means of a radio or television broadcast.

(2) Where a radio or television broadcast is made by the Government and a person by the reception of that broadcast causes a musical work or gramophone record to be heard in public, he does not thereby infringe the copyright in that musical work or gramophone record.

SPAIN - Decree of 10th July 1942 on Phonographic Works

Article 2

The author of the original work and the phonograph record company recording it shall, each as regards his own work, enjoy such rights as are conferred upon the owners of musical works by Article 19 et seq. of the Law of Copyright. Consequently, in the absence of any prior arrangement between them, each of the owners of these rights shall be entitled to oppose the use of such records, or of any analogous objects derived from the original phonographic recording, for the reproduction or transmission of sounds for purposes of profit by such known methods as broadcasting, cinematography, television or sound-reproducing devices or amplifiers used in theatres, bars, cafes, dance-halls and places of amusement in general, as well as by means of any analogous processes which may hereafter be invented for the same or like purposes.

SRI LANKA - United Kingdom Copyright Act 1911

Section 19 (1)

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works....

SWEDEN - Law No. 729 of 30th December 1960, as amended on 25th May 1973

Article 45

A performing artist's performance of a literary or artistic work may not without his consent be recorded on phonographic records, films, or other instruments by which it can be reproduced, and it may not without such consent be broadcast over radio or television or made available to the public by direct communication.

Article 47

If a sound recording mentioned in Article 46 is used before the end of the term therein provided in a radio or television broadcast, a compensation shall be paid both to the producer of the recording and to the performer whose performance is recorded. If two or more performers have participated in a performance, their right may only be claimed jointly. As against a radio or television organisation, the performer's right shall be claimed through the producer.

TAIWAN - Copyright Law of 1928, as amended to 10th July 1964

Article 1

Whoever possesses the copyright on musical notes, dramatic works, phonetic records or motion pictures shall also have the exclusive right to perform or represent them in public.

THAILAND - Copyright Act of 1931

Section 4

In this Act:

"Copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever to perform, or in the case of a lecture, to deliver, the work or any substantial part thereof in public; .....

Section 17

The term of copyright for records, perforated rolls and other contribances by means of which sounds may be mechanically reproduced shall be 30 years from the date when the original plate was made from which the contrivance was derived.

TRINIDAD AND TOBAGO - United Kingdom Copyright Act 1911

Section 19 (1)

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works...

TURKEY - Copyright Law of 1951

Article 81

If the recital or performance of a scientific, literary or musical work is recorded whether directly or indriectly (viz. when the diffusion of the recital or performance by radio or similar devices is recorded) on instruments for the reproduction of signs, sounds and images, said instruments may be reproduced or diffused only with the permission of the performing artist...

Article 84

The person who records signs, sounds or images on instruments for their reproduction, or who lawfully reproduces or diffuses the same for commercial purposes, may prohibit others from reproducing or diffusing the same signs, sounds and images by the use of the same means.

The provisions concerning unfair competition shall apply to violators of the prohibition of the foregoing paragraph, even though the violator is not a manufacturer by profession...

UNITED KINGDOM - Copyright Act 1956, as amended to 17th February 1971

Section 12 (5)

The acts restricted by the copyright in a sound recording are the following, where a record embodying the recording is utilised directly or indirectly in doing them, that is to say,

(a) making a record embodying the recording;

(b) causing a recording to be heard in public;

(c) broadcasting the recording.

URUGUAY - Law No. 9739 of 1937, as amended on 25th February 1938

Article 36

The performer of a literary or musical work shall have the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radio or television, or which are recorded or printed on a disc, film, tape, wire, or any other medium capable of being used for sound or visual reproduction. If an agreement cannot be reached, the amount of the remuneration shall be established in a summary proceeding by the competent judicial authority.

U.S.S.R. - Fundamentals of Copyright Law of 8th December 1961, and Civil Code of 11th June 1964 as amended on 1st March 1974

Article 96 of the Fundamentals of the Copyright Law

.... Copyright extends to published or unpublished works, expressed in any material form permitting reproduction of the product of the creative activity of the author (manuscript, drawing technique, picture, public performance or execution, recording upon films, mechanical or magnetic tape recording, etc.)

Article 479 of the Civil Code

The author has the right;

to publish, to reproduce and to disseminate his work by all lawful means,... to be compensated for the utilisation of the work by other persons, except in the cases specified by the law.

The amount of compensation is fixed by the Council of Ministers of the Soviet Socialist Republic of Russia, except when the legislation of the USSR refers the approval of the rates to the authorities of the USSR.

In the absence of an official rate, the amount of the compensation paid to the author for the utilisation of his work is determined by agreement between the parties.

Article 495 of the Civil Code

The following are authorised, without the consent of the author, but subject to the requirement that his name is indicated and to the payment of royalties;

(1) the public performance of published works;....

(2) the recording on a film, on discs, on magnetic tapes or other media with a view to public reproduct on or to the diffusion of published works, other than the utilisation of works by the cinema by radio or television .....

ANNEX IV

BROADCASTING CONTRACTS AND SYSTEMS IN OPERATION FOR THE COLLECTION OF PUBLIC PERFORMANCE REVENUE

Countries

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AUSTRALIA

Broadcasting

Parties to Broadcasting Contracts	:	PPCA (Phonographic Performance Company of Australia Limited) has contracts with the following broadcasting organisations: (1) ABC (Australian Broadcasting Commission) the State broadcasting organisation - separate contracts for the broadcasting of phonograms on radio and on television; (2) The Federation of Australian Commercial Television Stations; (3) The Federation of Australian Commercial Broadcasters; (4) Community FM Radio Stations.
Date of Contracts	:	26 July 1975 - contracts with ABC covering the period 1 May 1975 to 30 April 1979. (Former contract dated November 1970 was for a five-year period) 2 November 1970 - contracts with each commercial broadcasting station are for a five-year period and thereafter shall continue in force until terminated by six months' notice in writing by either party Contracts with FM Radio Stations are for a one-year period and thereafter shall continue in force until terminated by six months' notice in writing by either party
Basis of Remuneration	:	Lump sum per annum under contracts with ABC and the commercial television stations. By contractual arrangement, the commercial radio stations make air time available in lieu of remuneration. $10 fee on grant plus 1% per annum of gross income under contracts with FM Radio Stations
Share to Performers	:	As from 1973, 25% of the net distributable revenue from the broadcasting of phonograms is paid into a Trust Fund for performers
Total number of radio and television receivers (1975)	:	17,700,000
Radio	:	14,000,000
Television	:	3,700,000
Annual Licence or Fee	:	No licence or fee

ARGENTINA

Broadcasting

Parties to Broadcasting Contracts	:	AADI/CAPIF collects broadcasting revenue in respect of performers' and producers' rights. AADI (Asociación Argentina de Intérpretes) and CAPIF (Camara Argentina de Productores e Industriales de Fonogramas) distribute this revenue to performers and producers respectively.
Date of Contracts	:	From 1976 broadcasting revenue is collected by AADI/CAPIF
Basis of Remuneration	:	The secretary of press and broadcasting of the National Presidency shall via AADI and CAPIF fix and modify the tariffs.
Share to Performers	:	67% of the net distributable revenue: 45% to principal performers; and 22% to the musicians.
Total number of radio and television receivers (1975)	:	10,020,000
Radio	:	6,120,000
Television	:	3,900,000

Public Performance

Name of Collecting Organisation	:	AADI/CAPIF also collects public performance revenue. Similarly AADI representing performers and CAPIF representing producers distribute this revenue to performers and producers respectively.
Date of Commencement of Public Performance Collections	:	1976
Basis of Charge to Public Performance Users	:	Tariff of Public Performance charges for various types of use to be fixed by the secretary of press and broadcasting of the National Presidency.
Share to Performers	:	67% of the net distributable revenue: 45% to principal performers; and 22% to the musicians

AUSTRALIA (continued)

Public Performance

Name of Collecting Organisation	:	PPCA also collects and distributes public performance fees payable in respect of the producers' rights
Date of Commencement of Public Performance Collections	:	1969
Basis of Charge to Public Performance User	:	Tariff of public performance charges for various types of use
Share to Performers	:	As from 1973, 25% of the net distributable revenue from the public performance of phonograms is paid into a Trust Fund for performers

AUSTRIA

Broadcasting

Parties to Broadcasting Contract	:	LSG (Leistungsschutzrechten Gesellschaft) and ORF (Oesterreichische Rundfunk Gesellschaft mbH), the State broadcasting organisation
Date of Contract	:	16 May 1968 - contract covers the period January 1968 to 31 December 1977 and thereafter shall remain in force until terminated by six months notice in writing
Basis of Remuneration	:	Lump sum per annum (subject to adjustment in accordance with number of radio and television subscribers and licence fees)
Share to Performers	:	As from 1973, 50%
Total number of radio and television receivers (1975)	:	4,423,950
Radio	:	2,575,000
Television	:	1,848,950
Annual Licence Fee (1975)		
Radio	:	AS 324
Television	:	AS1,140

Public Performance

Name of Collecting Organisation	:	LSG has an agreement with the authors' society, AKM (Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger), whereby AKM collects public performance fees payable in respect of producers' and performers' rights. LSG distributes to producers and performers
Date of Commencement of Public Performance Collections	:	End of 1973
Basis of Charge to Public Performance Users	:	15% of the AKM Tariff charged for authors' public performance rights is charged for producers' and performers' rights under contract with KBLV (Konzertlokalbesitzerverwand) representing hotel owners, restaurants and supermarkets. LSG also has an agreement with AKM regarding juke box users; a small sum is also payable direct to LSG under contract with the Movie Theatre Guild AKM's handling charge is 22%
Share to Performers	:	50%

BANGLADESH

Broadcasting

Contract now under negotiation.

Public Performance

No collection of public performance revenue is made.

BARBADOS

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and Barbados Rediffusion Service Limited
Date of Contract	:	1 July 1944 - contract was initially for a one-year period, modified in 1956 and 1957, and thereafter continues in force until terminated by either party giving six months' notice in writing
Basis of Remuneration	:	Half IFPI Standard Tariff based on three-quarters of total number of subscribers to rediffusion service
Needletime Limitations	:	30 minutes per day or 15 hours per month
Share to Performers	:	50% of the net distributable revenue is voluntarily paid to a Fund established for performers
Total number of radio and television receivers (1975)	:	170,000
Radio	:	130,000
Television	:	37,500
Colour Television	:	2,500
Annual Licence Fee (1975)		
Television	:	$ 6

Public Performance

No collection of public performance revenue is made

BELGIUM

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and BRT/RTB (Belgische Radio en Televisie (Omroep)/Radiodiffusion Television Belge), the State broadcasting organisation
Date of Contract	:	January 1976 - contract covers the period 1975 to 1981. (Former contract with BRT/RTB dated 15 April 1954, extended by Protocol dated 12 May 1970, expired in 1975)
Basis of Remuneration	:	Lump sum per annum increasing annually over a seven-year period
Share to Performers	:	33 1/3% under FIM/FIA/IFPI Protocol 1977
Total number of radio and television receivers (1975)	:	6,109,960
Radio	:	3,609,960
Television	:	2,500,000
Annual Licence Fee (1975)		
Radio	:	B.Fr. 390
Television	:	B.Fr. 1,470
Combined Radio and Television	:	B.Fr. 1,680
Colour Television	:	B.Fr. 2,295
Combined Radio and Colour Television	:	B.Fr. 2,505

Public Performance

No collection of public performance revenue is made

BRAZIL

Broadcasting

Parties to Broadcasting Contracts	:	SOCINPRO (Sociedade Brasiliera de Interpretes e Produtores Fonograficas) delegates the necessary powers to the central collecting organisation for copyright owners, SDDA (Servicio de Defesa do Direito Autoral), for the collection of broadcasting revenue in respect of producers' and performers' rights. SOCINPRO distributes the revenue to producers and performers
Date of Contracts	:	
Basis of Remuneration	:	
Share to Performers	:	50%
Total number of radio and television receivers (1975)	:	16,980,000
Radio	:	6,300,000
Television	:	10,680,000

Public Performance

Name of Collecting Organisation	:	SDDA also collects public performance revenue in respect of producers' and performers' rights. SOCINPRO distributes the revenue to producers and performers.
Date of Commencement of Public Performance Collections	:	1969
Basis of Charge to Public Performance Users	:	Tariff of Public Performance charges for various types of use SDDA's handling charge is 30%
Share to Performers	:	50%

CZECHOSLOVAKIA

Broadcasting

Parties to Broadcasting Contract	:	Supraphon has contracts with Ceskoslovensicy Rozhlas A Televise, the State radio and television Organisation. (Panton and Opus, the other two recording companies in Czechoslovakia, have also concluded similar contracts with the State broadcasting organisation)
Date of Contracts	:	19 January 1970 - radio contract
		1 January 1971 - television contract
Basis of Remuneration	:	Lump sum per annum
Share to Performers	:	OSVU (Ochranny Svaz Vykonnych Umelcu), representing performers, has concluded separate contracts whereby revenue is collected from the broadcasting of phonograms by the State broadcasting organisation
Total number of radio and television receivers (1975)	:	7,320,375
Radio	:	3,916,375
Television	:	3,404,000
Annual Licence Fee (1975)		
Radio	:	Kcs. 120
Television	:	Kcs. 300

Public Performance

Name of Collecting Organisation	:	Supraphon collects revenue from the use of their phonograms on juke boxes
Date of Commencement of Public Performance Collections	:	1969
Basis of Charge to Public Performance Users	:	5% of the gross earnings of juke boxes plus an additional 2.5% for performing artists
Share to Performers	:	2.5% of the gross earnings of juke boxes

DENMARK

Broadcasting

Parties to Broadcasting Contract	:	GRAMEX (Grammofonindustriens og de Udøvende Kunstneres institution) and Danmarks Radio, the State broadcasting organisation
Date of Contract	:	30 June 1966. Minute rates fixed by Tribunal on 19 May 1965
Basis of Remuneration	:	Tariff per minute for the broadcasting of protected phonograms subject to adjustment in accordance with the cost of living index: DKr. 37.64 in 1975
Share of Performers	:	50%
Total number of radio and television receivers (1975)	:	3,229,000
Radio	:	1,672,000
Television	:	1,228,790
Colour Television	:	328,210
Annual Licence Fee (1975)		
Radio	:	DKr. 98
Combined Radio and Television	:	DKr. 398
Combined Radio & Colour Television	:	DKr. 664

Public Performance

Name of Collecting Organisation	:	GRAMEX has an agreement with the authors' society, KODA (Selskabet Til Forvaltning Af Internationale Komponistrettighed ea I Danmark), whereby KODA collects public performance fees payable in respect of the producers' and performers' rights. GRAMEX distributes to producers and performers
Date of Commencement of Public Performance Collections	:	1961
Basis of Charge to Public Performance Users	:	50% of the KODA Tariff charged for the authors' public performance rights. KODA's handling charge is 10%
Share to Performers	:	50%

FINLAND

Broadcasting

Parties to Broadcasting Contract	:	Oy Suomen Yleioradio AB, the state broadcasting organisation is required by Law to pay remuneration to the producers and performers for the broadcasting of their phonograms
Date of Contract	:	Minute rate fixed by Tribunal on 20 May 1966
Basis of Remuneration	:	Tariff per minute for the broadcasting of protected phonograms subject to adjustment in accordance with the cost of living index: FMk. 14.02 in 1976
Share to Performers	:	50%
Total number of radio and television receivers (1975)	:	3,476,337
Radio	:	2,036,000
Television	:	1,281,107
Colour Television	:	159,230
Annual Licence Fee (1975)		
Radio	:	FMk. 30
Television	:	FMk. 160
Colour Television	:	FMk. 290

Public Performance

No collection of public performance revenue is made

FRANCE

Broadcasting

Parties to Broadcasting Contracts	:	IFPI National Group had a broadcasting contract with ORTF (Organisation de la Radiodiffusion-television Francaise), the former State broadcasting organisation which has now been replaced by seven new organisations. To date contracts have been concluded with only two television stations and one radio/television station: Television Francaise 1; Antenne II; and France Regions 3
Date of Contracts	:	31 December 1975 - contracts with television stations cover the period 1 January 1975 to 31 December 1977. (Former contract of 30 August 1954 with ORTF was terminated as from 31 December 1974.)
Basis of Remuneration	:	Lump sum per annum per station. (Under former contract 0.22% of gross receipts of ORTF)
Needletime Limitations	:	None (Under former contract 60 hours per month per station)
Share to Performers	:	As from 1975, 33 1/3%. FIM/FIA/IFPI Protocol 1977 applies
Total number of radio and television receivers (1975)	:	18,197,000
Radio	:	4,000,000
Television	:	12,592,000
Colour Television	:	1,605,000
Annual Licence Fee (1975)		
Radio	:	FFr. 30
Television	:	FFr. 140
Colour Television	:	FFr. 210

Public Performance

No collection of public performance revenue is made

GERMANY

Broadcasting

Parties to Broadcasting Contract	:	GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten) has contracts with the following broadcasting organisations: (1) ARD (Arbeitsgemeinschaft der Rundfunkanstalten der Bundesrepublik Deutschland) the association of federal/regional broadcasting organisations; (2) Deutschlandfunk, Deutsche Welle, RIAS, Berlin, Zweites Deutsche Fernsehen, Radio Free Europe, Radio Liberty, British Forces Network; (3) Bayerische Rundfunk, Hessischer Rundfunk, Saarlandischer Rundfunk, Suddeutscher und Westdeutscher Rundfunk, Radio Bremen, Sender Freies Berlin, Sudwestfunk, Norddeutscher Rundfunk - stations broadcasting commercial programmes
Date of Contract	:	Contract with ARD covers the period 1 January 1972 to 31 December 1977 Contracts with Deutschlandfunk etc - various dates Contracts for commercial programmes cover the period 1971 to 31 December 1977
Basis of Remuneration	:	Lump sum per annum DM. 0.36 per licensee as stated on 1 July each year (subject to adjustment in accordance with licence fees) under contract with ARD Lump sum contracts with Deutschlandfunk etc. 3½% of gross advertising revenue, minus rebates and agency commissions under contracts for commercial programmes from 1 July 1974 (formerly 3% from 1971 to 1974)
Share to Performers	:	50%
Total number of radio and television receivers (1975)	:	39,828,525
Radio	:	20,908,462
Television	:	18,920,063
Annual Licence Fee (1975)		
Radio	:	DM. 36
Television	:	DM. 90
Combined Radio and Television	:	DM. 126

GERMANY (Continued)

Public Performance

Name of Collecting Organisation	:	GVL has an agreement with the authors' society, GEMA (Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte) whereby GEMA collects public performance fees payable in respect of the performers' and producers' rights. GVL distributes to performers and producers
Date of Commencement of Public Performance Collections	:	1966
Basis of Charge to Public Performance Users	:	20% of the GEMA Tariff charged for the authors' public performance rights GEMA's handling charge is 20%
Share to Performers	:	64% of the net distributable revenue: 36% to individual performers who have participated in the making of recordings; and 28% to individual performers employed by the broadcasting organisations

ICELAND

Broadcasting

Parties to Broadcasting Contract	:	SFH (The Federation for Performing Artists and the Icelandic National Group of IFPI) and ISBS, the State broadcasting organisation
Date of Contract	:	12 May 1972 - contract with ISBS covers a five-year period following date of entry into force of the new Copyright Act on 29 May 1972 and will expire on 31 December 1976
Basis of Remuneration	:	Lump sum (subject to adjustment in accordance with the cost of living index)
Share to Performers	:	50%
Total number of radio and television receivers (1975)	:	124,397
Radio	:	63,543
Television	:	50,854
Annual Licence Fee (1975)		
Radio	:	I.Kr. 3,800
Television	:	I.Kr. 8,400

Public Performance

Name of Collecting Organisation	:	SFH has an agreement with the authors' society, STEF (Samband Tonsklada og Eigenda Flutningsrettar), whereby STEF collects public performance fees payable in respect of the producers' and performers' rights. SFH distributes to producers and performers
Date of Commencement of Public Performance Collections	:	1972
Basis of Charge to Public Performance Users	:	25% of the STEF Tariff charged for the authors' public perfromance right STEF's handling charge is 10%
Share to Performers	:	50%

INDIA

Broadcasting

Parties to Broadcasting Contracts	:	Phonographic Performance (Eastern) Private Limited and AIR (All India Radio), the State broadcasting organisation
Date of Contracts	:	28 July 1964 - contract for sustaining programmes initially for a two-year period from 1 January 1962 and thereafter continues in force until terminated by six months' notice in writing 9 July 1975 - contract for commercial programmes covers the period 1 July 1974 to 30 June 1980
Basis of Remuneration	:	Tariff based on total number of radio licences (subject to adjustment in accordance with needletime excess or shortfall) for sustaining programmes 2% of net air time cost for commercial programmes
Needletime Limitations	:	14 hours per week per station (plus an additional 75 hours per week for all stations)
Share to Performers	:	Fund for the benefit of performers proposed
Total number of radio and television receivers (1975)	:	14,237,724
Radio	:	14,075,000
Television	:	162,724
Annual Licence Fee (1975)	:	Rs. 10 to 60

Public Performance

Name of Collecting Organisation	:	Phonographic Performance (Eastern) Private Limited also collects and distributes public performance fees payable in respect of the producers' rights
Date of Commencement of Public Performance Collections	:	1941
Basis of Charge to Public Performance Users	:	Tariff of public performance charges for various types of use
Share to Performers	:	Fund for the benefit of performers proposed

IRELAND

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and Radio Telefis Eirem, the State broadcasting organisation
Date of Contract	:	10 November 1966 - contract for sustaining programmes covers the period 1 October 1966 to 31 March 1970 and thereafter will remain in force until terminated by six months' notice in writing
		Licences for commercial programme sponsors - various dates
Basis of Remuneration	:	Lump sum per annum (subject to adjustment in accordance with needle time excess or shortfall) under contract for sustaining programmes
		Tariff of approximately £1 per record side collected from programme sponsors
Share to Performers	:	25% under FIM/IFPI Agreement, 1954
Total number of radio and television receivers (1975)	:	1,465,000
Radio	:	865,000
Television	:	600,000
Annual Licence Fee (1975)		
Radio	:	No radio licence or fee
Television	:	£12
Colour Television	:	£20

Public Performance

No collection of public performance revenue is made

ISRAEL

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and the IBA (Israeli Broadcasting Authority), the State broadcasting organisation
Date of Contract	:	24 March 1976 - contract covers the period 1 April 1975 to 31 March 1980
Basis of Remuneration	:	Lump sum per annum (subject to adjustment in accordance with the cost of living index)
Share to Performers	:	25% under FIM/IFPI Agreement, 1954
total number of radio and television receivers (1975)	:	1,029,000
Radio	:	450,000
Television	:	579,000
Annual Licence Fee (1975)		
Combined Radio and Television	:	Isr. L. 225

Public Performance

Name of Collecting Organisation	:	IFPI National Group collects and distributes public performance fees payable in respect of the producers' rights
Date of Commencement of Public Performance Collections	:	1972
Basis of Charge to Public Performance Users	:	Annual licence agreements
Share to Performers	:	Nil

ITALY

Broadcasting

Parties to Broadcasting Contract	:	IFPI National Group and RAI (Radio Televisione Italiane) the State broadcasting organisation
Date of Contract	:	1969 - contract covered the period 1 January 1969 to 31 December 1971 and thereafter continued in force until 1975, the rate of remuneration being negotiated separately each year
Basis of Remuneration	:	Lump sum per annum (plus additional payment for copying facilities in respect of the producers' re-recording rights) By Decree dated 15 July 1976 the rate of remuneration shall be fixed at 1.5% of that proportion of RAI's gross receipts referable to the music content of its radio and television programmes, in the absence of an arrangement to the contrary
Needletime Limitations	:	14,000 hours per year for all radio and television programmes (equivalent to 6 hours per day per programme)
Share to Performers	:	As from 1976, 50%
Total number of radio and television receivers (1975)	:	23,900,000
Radio	:	12,400,000
Television	:	11,500,000
Annual Licence Fee (1975)		
Radio	:	L. 3,585
Combined Radio and Television	:	L. 21,005 for the first 2 years and L. 18,890 thereafter

Public Performance

No collection of public performance revenue is made

By Decree dated 1st September 1975 the basis of charge to public performance uses shall be fixed at 2% of the gross receipts or the percentage of the gross receipts that corresponds to the proportion represented by the public performance of phonograms

JAMAICA

Broadcasting

Parties to Broadcasting Contracts	:	Members of IFPI and the following broadcasting organisations: (1) Radio Jamaica Limited (2) Jamaica Broadcasting Corporation, the State broadcasting organisation
Date of Contracts	:	23 November 1962 - contract for sustaining programmes for Radio Jamaica 24 November 1962 - contract for commercial programmes for Radio Jamaica 1 March 1962 - contract for sustaining programmes for Jamaica Broadcasting Corporation 2 March 1962 - contract for commercial radio programmes for Jamaica Broadcasting Corporation 31 May 1967 - contract for television programmes for Jamaica Broadcasting Corporation
Basis of Remuneration	:	Lump sum per annum 12½% of net air time cost for commercial programmes on Radio Jamaica
Needletime Limitations	:	5 hours per day for Radio Jamaica 6 hours per day for Jamaica Broadcasting Corporation.
Share to Performers	:	50% of net distributable revenue is voluntarily paid to Fund established for performers
Total number of radio and television receivers (1975)	:	660,000
Radio	:	550,000
Television	:	110,000

Public Performance

No collection of public performance revenue is made

JAPAN

Broadcasting

Parties to Broadcasting Contracts	:	IFPI National Group has contracts with the following Broadcasting organisations: (1) NHK, the State broadcasting corporation; (2) JFCBC, the Japanese Federation of Commercial Broadcasting Companies; (3) the National Association of Wired Diffusion Operators; (4) the Japanese Federation of Wired Diffusion Operators
Date of Contracts	:	Contracts with NHK, JFCBC and the National Association of Wired Diffusion Operators covered the period 1 April 1971 to 1 April 1974 and new contracts are now being negotiated Contract with the Japanese Federation of Wired Diffusion Operators covers the period 1 April 1972 to 1 April 1975 and is currently being renegotiated.
Basis of Remuneration	:	Lump sum per annum under contracts with NHK and JFCBC. Percentage of gross revenue under contracts with wired diffusion operators
Share to Performers	:	The Japan Council of Performers' Organisations also collects remuneration from the broadcasting organisation above on behalf of performers.
Total number of radio and television receivers (1975)	:	51,630,000
Radio	:	25,600,000
Television	:	4,900,000
Colour Television	:	21,130,000
Annual Licence Fee (1975)		
Television	:	Yen 3,780
Colour Television	:	Yen 5,580

Public Performance

No collection of public performance revenue is made

MEXICO

Broadcasting

Parties to Broadcasting Contracts	:	All commercial broadcasting stations are required by Law to pay remuneration to the performers for the broadcasting of phonograms. ANDI (Asociación Nacional de Interpretes) distributes to performers
Date of Contract	:	
Basis of Remuneration	:	By Decree dated 15 August 1966 the rate of remuneration was fixed at 1.10% of the tax on broadcasting stations' revenue
Share to Performers	:	16.6% (the authors and composers being entitled to the remaining 83.33%)
Total number of radio and television receivers (1975)	:	8,704,000
Radio	:	4,204,000
Television	:	4,500,000

Public Performance

Name of Collecting Organisation	:	ANDI also collects and distributes public performance fees payable in respect of the performers' rights
Date of Commencement of Public Performance Collections	:	1962
Basis of Charge to Public Performance Users	:	Official tariff is laid down in Articles III, IV and V of Decree dated 17 July 1962
Share to Performers	:	20% (the authors and composers being entitled to the remaining 80%)

NETHERLANDS

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and NOS (Nederlandse Omruep Stichtiing), the State broadcasting organisation
Date of Contract	:	15 April 1969 - contract covers the period 1 April 1969 to 31 March 1975 and thereafter shall continue in force until terminated by six months' notice in writing
Basis of Remuneration	:	Lump sum per annum (subject to adjustment in accordance with the cost of living indices)
Share to Performers	:	33 1/3% under FIM/FIA/IFPI Protocol 1977
Total number of radio and television receivers (1975)	:	7,202,040
Radio	:	3,601,020
Television	:	2,551,020
Colour Television	:	1,050,000
Annual Licence Fee (1975)		
Radio	:	H.Fl. 33
Combined Radio and Television	:	H.Fl. 108

Public Performance

No collection of public performance revenue is made

NEW ZEALAND

Broadcasting

Parties to Broadcasting Contracts	:	Phonographic Performance (NZ) Limited has contracts with the following broadcasting organisations: (1) NZBC (New Zealand Broadcasting Corporation), the State broadcasting organisation; (2) New Zealand Federation of Independent Commercial Broadcasters Limited
Date of Contracts	:	6 July 1965 - contract with NZBC initially for the period 1 September 1964 to 31 December 1968, extended in 1969 1973, and thereafter remains in force during renegotiations 7 December 1971 - contract with commercial stations covers the period 1971 to 1975
Basis of Remuneration	:	Lump sum per annum under contract with NZBC Percentage of gross advertising revenue per station - 1% in 1971/72 rising to 3% in 1975 (currently under review)
Needletime Limitations	:	None under contract with NZBC 66 2/3% of total air time for commercial stations
Share to Performers	:	25% of net distributable revenue is voluntarily paid to performers
Total number of radio and television receivers (1975)	:	3,682,778
Radio	:	2,704,000
Television	:	978,778
Annual Licence Fee (1975)		
Radio	:	
Television	:	NZ $ 27.5
Colour Television	:	NZ $ 45.0

NEW ZEALAND (Continued)

Public Performance

Name of Collecting Organisation:	Phonographic Performance (NZ) Limited also collects and distributes public performance fees payable in respect of the producers' rights.
Date of Commencement of Public Performance Collections:	1936
Basis of Charge to Public Performance Users:	Tariff of public performance charges for various types of use
Share to Performers:	25% of net distributable revenue is voluntarily paid to performers

NORWAY

Broadcasting

Parties to Broadcasting Contract	:	The King's Fund for Performing Artists (Fond for Utøvende Kunstnere) and NRK (Norsk Rikskringkasting), the State broadcasting organisation
Date of Contract	:	7 March 1974 - contract covered the period 1 January 1974 to 31 December 1974 and thereafter continues in force, the rate of remuneration being negotiated separately each year
Basis of remuneration	:	Lump sum per annum
Share to Performers	:	The performers' share is determined by the recommendation of Fund Committee to the Church and Education Department and is currently over 80%
Total number of radio and television receivers (1975)	:	2,297,784
Radio	:	1,276,784
Television	:	1,021,000
Annual Licence Fee (1975)		
Radio	:	NKr. 60
Combined Radio & Television	:	NKr. 320
Combined Radio & Colour Television	:	NKr. 420

Public Performance

Name of Collecting Organisation	:	The King's Fund for Performing Artists (Fond for Utøvende Kunstnere)
Date of Commencement of Public Performance Collections	:	1957
Basis of Charge to Public Performance Users	:	All users of phonograms for broadcasting and public performance pay directly to this Fund
Share to Performers	:	The performers' share is determined by the recommendation of Fund Committee to the Church and Education Department and is currently over 80%

PAKISTAN

Broadcasting

Parties to Broadcasting Contracts	:	Members of IFPI have contracts with the following state broadcasting organisations: (1) Pakistan Broadcasting Corporation (2) Pakistan Television Corporation
Date of Contracts	:	30 September 1958 - contract with Pakistan Broadcasting Corporation for sustaining radio programmes initially for a two-year period from 1 July 1957 and thereafter continues in force until terminated by six months' notice in writing 28 July 1964 - contract with Pakistan Broadcasting Corporation for commercial radio programmes initially for a three-year period commencing 16 November 1961 and thereafter continues in force until terminated by three months' notice in writing 26 June 1972 - contract with Pakistan Television Corporation for television programmes initially for a ten-year period and thereafter will continue in force until terminated by three months' notice in writing
Basis of Remuneration	:	IFPI Standard Tariff based on total number of radio licences for sustaining programmes 7½% - 12½% of net air time cost for commercial radio programmes Lump sum per annum for television programmes
Share to Performers	:	Nil
Total number of radio and television receivers (1975)	:	1,350,000
Radio	:	1,100,000
Television	:	250,000

Public Performance

No collection of public performance revenue is made

SINGAPORE

Broadcasting

Parties to Broadcasting Contract	:	Members of IPPI and Rediffusion (Singapore) Private Limited
Date of Contract	:	
Basis of Remuneration	:	IPPI Standard Tariff covers three hours broadcasting of phonograms
Share to Performers	:	Nil

Public Performance

No collection of public performance revenue is made.

SPAIN

Broadcasting

Parties to Broadcasting Contracts	:	IFPI National Group and RN and TV (Radio Nacional de España y Television Española), the State broadcasting organisation SGAE, the authors' society, also has contracts with the commercial broadcasting stations and collects remuneration for the broadcasting of phonograms on behalf of producers as well as authors and composers
Date of Contracts	:	
Basis of Remuneration	:	10% of the total remuneration payable to SGAE under RN and TV contract 2% of the gross advertising revenue and 5% of revenue from sponsored programmes of commercial stations
Share to Performers	:	10% of the gross remuneration is voluntarily paid to performers
Total number of radio and television receivers (1975)	:	14,600,000
Radio	:	8,075,000
Television	:	6,525,000
Annual Licence Fee	:	No licence or fee

Public Performance

Name of Collecting Organisation	:	IFPI has an agreement with the authors' society SGAE (Sociedad General de Autores de España) whereby SGAE collects public performance revenue in respect of the producers' rights. The National Group distributes to producers.
Date of Commencement of Public Performance Collections	:	1940s
Basis of Charge to Public Performance Users	:	15%-30% of the SGAE Tariff charged for the authors' public performance rights SGAE's handling charge is approximately 32%
Share to Performers	:	10% of the gross revenue is voluntarily paid to performers

SWEDEN

Broadcasting

Parties to Broadcasting Contract	:	IFPI National Group and Sveriges Radio, the State broadcasting organisation
Date of Contract	:	13 February 1969 - contract covered the period 1 July 1968 to 30 June 1973 and continued in force until it expired on 30 June 1976 (now under renegotiation)
		Minute rates fixed by decision of Swedish Supreme Court on 22 March 1968
Basis of Remuneration	:	Tariff per minute for the broadcasting of protected phonograms subject to adjustment in accordance with the cost of living index: SKr. 26.25 in 1975/76
Share to Performers	:	50%
Total number of radio and television receivers (1975)	:	3,113,632
Radio	:	231,938
Television	:	2,881,694
Annual Licence Fee		
Radio	:	SKr. 50
Combined Radio & Television	:	SKr. 220
Combined Radio & Colour Television	:	SKr. 320

Public Performance

No collection of public performance revenue is made

SWITZERLAND

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and SBC (Swiss Broadcasting Corporation), the State broadcasting organisation
Date of Contract	:	26 February 1966 and modified as of 14 February 1973 - contract covers the period 1 January 1966 to 31 December 1975 and thereafter shall continue in force until terminated by six months' notice in writing
Basis of Remuneration	:	Lump sum per annum
Needletime Limitations	:	12 hours per day for radio programmes and one hour per day for TV programmes averaged out over one month - for each language area
Share to Performers	:	33 1/3% under FIM/FIA/IFPI Protocol 1977
Total number of radio and television receivers (1975)	:	3,807,284
Radio	:	2,060,927
Television	:	1,306,351
Colour Television	:	440,000
Annual Licence Fee (1975)		
Radio	:	Sw.Fr. 60
Television	:	Sw.Fr. 120

Public Performance

No collection of public performance revenue is made

TRINIDAD & TOBAGO

Broadcasting

Parties to Broadcasting Contracts	:	Members of IFPI have contracts with the following broadcasting organisations: (1) Trinidad Broadcasting Company Limited (2) Trinidad & Tobago Television Company Limited (3) Trinidad Publishing Company Limited - Radio 610 (formerly Radio Guardian)
Date of Contracts	:	13 September 1947 - contract for sustaining radio programmes with Trinidad Broadcasting Company Limited 30 October 1950 - letter licences for commercial radio programmes 26 February 1964 - contract with commercial television station 7 July 1964 - contract with commercial radio
Basis of Remuneration	:	Three-quarters of IFPI Standard Tariff based on total number of radio licences for sustaining programmes 12½% of net air time cost for commercial radio programmes Standard Tariff based on total number of viewers for commercial television programmes Lump sum per annum for commercial radio
Needletime Limitations	:	2 hours per day for sustaining and 1 hour per day for commercial radio programmes; 4½ hours per day for Radio 610
Share to Performers	:	50% of net distributable revenue is voluntarily paid to Fund established for performers
Total number of radio and television receivers (1975)	:	593,500
Radio	:	500,000
Television	:	93,500

Public Performance

No collection of public performance revenue is made

TURKEY

Broadcasting

Parties to Broadcasting Contract	:	Members of IFPI and TRT (Turkish Radio-Television Authority), the State broadcasting organisation
Date of Contract	:	24 August 1966 and modified as from 1 July 1976 - contract was initially for a one-year period and thereafter shall continue in force until terminated by one month's notice in writing
Basis of Remuneration	:	Lump sum per annum
Share to Performers	:	Fund for benefit of producers and performers under consideration
Total number of radio and television receivers (1975)	:	4,547,066
Radio	:	4,096,346
Television	:	451,720
Annual Licence Fee (1975)		
Radio	:	TL 10-14
Television	:	TL100-250

Public Performance

No collection of public performance revenue is made

UNITED KINGDOM

Broadcasting

Parties to Broadcasting Contracts	:	PPL (Phonographic Performance Ltd) has contracts with the following broadcasting organisations: (1) BBC (British Broadcasting Corporation), the state broadcasting organisation; (2) Manx Radio, the Isle of Man; (3) IBA (Independent Broadcasting Authority) - formerly the ITA (Independent Television Authority) representing commercial broadcasters
Date of Contracts	:	27 January 1970 - contract with BBC (now under renegotiation); The rate of remuneration payable by Manx Radio was fixed by the Performing Rights Tribunal on 29 May 1965. 27 September 1972 - standard terms and conditions agreed with IBA (PPL has entered into agreements for a five-year period embodying these terms and conditions with each of the 19 commercial radio stations at present operating in the UK); 1955 - standard terms and conditions agreed with the ITA (now IBA) (PPL has entered into agreements with each of the 16 commercial television stations, the terms of which have been approved by the Independent Television Contractors' Association)
Basis of Remuneration	:	Lump sum per annum (subject to adjustment in accordance with the retail price index) under contract with BBC; 8% of 85% of gross advertising revenue under contract with Radio Manx; 3% of net advertising revenue per station in the first year of operation, rising to 7% over a period of five years under contracts with commercial radio stations For commercial television programme contractors broadcasting in a catchment area with a population in excess of 1.75 million - £7.80 per minute for main feature use and £1.20 for each 15 seconds for incidental use; and for a population of less than 1.75 million £3.90 per minute for main feature use and 60p for each 15 seconds for incidental use

UNITED KINGDOM (Continued)

Needletime Limitations	:	BBC - 97 hours per week main home services; 12 hours per week regional radio services; 7 hours per week per local radio station; 50 hours per week overseas services; and 5 hours per week television services; Radio Manx - one half of the station's broadcasting time, or a maximum of 42 hours per week; Commercial radio - 63 hours per week or a maximum of 9 hours per day (i.e. 50% of the commercial stations' total broadcasting time); Commercial television - Maximum 1 hour per week per station where sound recordings are the main feature of the programmes; an aggregate of 2½ hours per week from Monday to Friday inclusive and 1 hour for Saturday and Sunday per week per station for incidental use.
Share to Performers	:	32½% of net distributable revenue is voluntarily paid to performers: 20% to individual performers under contract to UK record producers; and 12½% to the Musicians' Union for social purposes.
Total Number of radio and television receivers (1975)	:	57,100,000
Radio	:	39,200,000
Television	:	17,900,000
Annual Licence Fee (1975)		
Radio	:	No radio licence or fee
Television	:	£ 8
Colour Television	:	£18

Public Performance

Name of Collecting Organisation	:	PPL also collects and distributes broadcasting and public performance fees payable in respect of the producers' rights.
Date of Commencement of Public Performance Collections	:	1930's
Basis of Charge to Public Performance Users	:	Tariff of Public Performance charges for various types of use

UNITED KINGDOM (Continued)

Share to Performers	32½% of the net distributable revenue is voluntarily paid to performers; 20% to individual performers under contract to UK record producers; 12½% to the Musicians' Union for social purposes.

HONG KONG

Broadcasting

Parties to Broadcasting Contracts	:	Members of IFPI have contracts with the following broadcasting organisations: (1) Radio Hong Kong, the government broadcasting organisation; (2) HKCBC (Hong Kong Commercial Broadcasting Company Limited) (3) TVB (Television Broadcasts Limited)
Date of Contracts .	:	Contract with Radio Hong Kong now under renegotiation (former contract dated 3 October 1962 expired 1972 - interim agreement for the years 1973 - 1975) Contract with HKCBCfor sustaining and sponsored radio programmes - March 1977 (former contract dated 28 March 1960 replaced by monthly licences for sustaining and sponsored radio programmes in April 1976) Contract with TVB - 5 October 1976
Basis of Remuneration	:	Lump sum per annum under contract with Radio HK and TVB Percentage of net advertising revenue under contract with HKCBC rising over a three year period
Share to performers	:	Under consideration
Total number of radio and television receivers (1975)	:	3,185,000
Radio	:	2,505,000
Television	:	680,000

Public Performance

Name of Collecting Organisation	:	Members of IFPI and City Hall
Date of Commencement of Public Performance Collections	:	
Basis of Charge to Public Performance User	:	Lump sum for incidental use
Share to Performers	:	Under consideration

ANNEX V

COLLECTION AND DISTRIBUTION OF REMUNERATION FROM THE BROADCASTING AND PUBLIC PERFORMANCE OF PHONOGRAMS

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Austria - LSG's Rules of Distribution

The performers' shares shall be ascertained on a two-dimensional basis, according to time and according to the type of performer

TIME OF UTILIZATION OF THE WORK (Z)

The time shall be ascertained according to seconds: 1 second = 1 point

PERFORMERS (I)

(a) Individual performer (E)

$$Z \times I = P_a \text{ (share of points)}$$

(b) Group performer (G)

The lump sum available after deduction of the administrative costs and of the above mentioned allocation to the Promotion Fund, shall be divided by the performer's total share of points, which results in a point value (P_w).

$$\frac{\text{Lump sum}}{\text{Total share of points}} = \frac{PS}{GP} = P_w \text{ (point value)}$$

The total share of points shown in the individual performers' accounts shall be multiplied by this point value and it will indicate the amount of Austrian Schillings to be paid out to the performers.

$$\underset{\text{(Performer's share)}}{I_{(a)}} \times \underset{\text{(Point value)}}{P_{(w)}} = \text{Amount in Austrian Schillings}$$

Classification of Individual Performers (Z)

Music:	Conductor, Instrumental Soloist, Vocal Soloist	) as far as
Spoken Word:	Individual Dramatic Performance	) mentioned by
Spectacle:	Solo Dancer, Variety Artiste, Pantomime	) name

Classification of Group Performers (G)

Music:	Orchestra, Vocal Choir, Accompaniment
Spoken Word:	Speech Chorus
Spectacle:	Ballet Ensemble, Folk Dancing Ensemble, Show Ensemble, Supernumaries

Multiplier Allocation

Individual Performer (E) uniform	Multiplier	5	for ensemble up to (illeg.)
Group Performer (G) invariable	"	8	for ensemble up to (illeg.)

If the number of performers is known, that number is the multiplier, for example:

Trio	"	3
Quartet	"	4
Octet	"	8

If the number of performers is variable, the multiplier is allocated according to average figures.

Symphony and Opera Orchestra	Multiplier	85
Opera Chorus	"	48
Light Music Orchestra	"	40
Chamber, Male, Female, Children's Chorus	"	24
Chamber and small light Music Orchestra, Speech and Folksong Chorus, Brass Bands	"	20
Dance Orchestra, Folk Music Ensembles	"	15
Chamber Ensemble	"	10
Combo (Pop Group)	"	6

In the case of opera and operetta performances all persons mentioned by name shall be treated as soloists (including the person mentioned in connection with the rehearsing of the chorus), and this in respect of the full performance time. Where the time is shown of purely orchestral pieces (overture, prelude, interlude, etc.), that time shall only be credited to the orchestra and the conductor.

In the case of vague description such as "a chorus", "an orchestra", "a large operetta orchestra", "children's chorus", etc., without any more specific designation, no value shall be computed.

In the case of an opera and operetta concert performance where several soloists are mentioned, all soloists shall be credited with the full performance time, to the exclusion of purely orchestral pieces.

If in the case of a record performance of several orchestras and conductors and it is not indicated which of them performed when and where, the total performance time shall be divided by the number of orchestras and conductors, respectively, and the result credited to the orchestra and conductor, respectively, subject to application of the relevant multiplier.

If a name is mentioned twice (dual role), account shall be rendered to the performer once only.

The value of one point shall be 50 Groschen.

BRAZIL - SOCINPRO's Rules of Distribution

Allocation Plan for Performers as from 1st April, 1971

TITLES

A 1	New Releases (as from 1st April, 1971)	20 points per phonogram
A 2	Releases from 1st April 1970 to 31st March 1971	20 points " "
A 3	Releases from and up to 31st March 1970	10 points " "
A 4	Releases up to March 31st 1969	1 Point " "

HIT PARADE (IBOPE) MONTHLY REVIEW

1st place in Rio de Janeiro and São Paulo	300 points
2nd place in Rio de Janeiro and São Paulo	250 points
3rd to 5th place in Rio de Janeiro and São Paulo	200 points
6th to 10th place in Rio de Janeiro and São Paulo	150 points
11th to 20th place in Rio de Janeiro and São Paulo	100 points

HIGHEST SALE OF RECORDS MONTHLY REVIEW

1st place for each producer	50 points
2nd place for each producer	40 points
3rd to 10th place for each producer	30 points

PROGRAMME SCHEDULE

With regard to the programme statements received showing what records have been performed, 10 points shall be accorded to each performance.

ORIGIN

MEMBERS	10 points
ASSOCIATES	2 points (increasing by a further 2 points per year up to the 5th year)

The distribution will be made on a basis of 100 (one hundred) points or fractions thereof.

TECHNICAL MERIT 20%

a) TITLES (phonograms released in the last six months) (1 point per phonogram) 26%
b) HIT PARADE - IBOPE. Points equal to those granted to the performers 16%
c) PERFORMANCE. The total number of points of the artists are accredited to the recording company which is listed in the programme schedule used to establish the performers' share. In the absence of an indication of any name of the recording company in the discotheque charts, the points will be granted to that company which had most recently notified the performers' repertoire. 28%
d) ORIGIN - Member or Associate. 10 points for member. 2 points for associate. Index 1. 10%

APPLICABLE SOLELY TO PROGRAMMES PRODUCED IN THE COUNTRY

The distribution will be made on basis of 100 (one hundred) points or fractions.

Operative from distributions made after January 1971

DENMARK - GRAMEX's Rules of Distribution

Under Section 6 of the Working Regulations for GRAMEX revenue shall be allocated to the performing artists as follows:

Revenue from Radio and TV shall be distributed in proportion to the number of points accumulated by each right owner, computed as the product of the

figures set forth in clauses I, II and III below.

(I) Recordings shall be divided into value groups, to each of which a certain factor shall be assigned:

a) Dance music and other light music 1

b) Musical comedies, revues, light operas, sketches, jazz music, marches, concert waltz music, folk music, and other such music 2

c) Symphonic music, concerts, operas, oratories, lieder, romanzas, chamber music, serious solo performances, recitation with orchestral accompaniment, recitals, plays, and similar music 3

In case of doubt, the higher value group shall be chosen.

(II) Proportion of total needle time ..... effective number of minutes played to be stated exactly.

(III) Distribution of points according to the following scale:

a) Soloist or soloist group	10
b) Soloist/accompanist	6-4
c) Soloist or soloist group/ensemble	5-5
d) Soloist or soloist group/ensemble/ conductor	4-2-4
e) Soloist or soloist group/ensemble/ choir/conductor	3-2-2-3
f) Orchestra or choir/conductor	5-5
g) Orchestra/choir/conductor	3-2-5

If this scale cannot be applied directly, the question shall be submitted to the Board of GRAMEX for its decision. Annual amounts of remuneration totalling less than D.Kr. 25 shall not be paid to the individual right owners but shall be pooled with the revenue distributed to the various performers' unions for collective allocation.

FINLAND - FINNISH GRAMEX's Rules of Distribution

The share of the performers is distributed at first in relation to the real playing time of the pieces (tracks) on the phonograms and after that to the performers on each track in accordance with the following table:

a)	100%	Soloist or group of soloists
b)	50-50%	Soloist and accompanist
c)	40-45-15%	Soloist, accompaniment (orchestra) and the conductor
d)	40-45-15%	Soloist, accompaniment (orchestra and background chorus) and the conductor
e)	60-40%	Orchestra and the conductor (or chorus and the leader).

In addition in the Rules of Distribution there are detailed rules about the distribution of only partly protected phonograms, about the shares of several conductors, electronical music, about the shares of the musicians who have played several instruments on the same phonogram, etc.

ARGENTINA

LAW NO. 11,723 OF 1933; AND DECREE NO. 1,670 OF 1974

Performers have a right to remuneration from the broadcasting and public performance of their performances. Decrees Nos. 1.670 and 1.671 published in the Official Bulletin on 12 December 1974 grant both producers of phonograms and performers the right to remuneration from the broadcasting and public performance of their phonograms and regulates the manner in which these rights are to be exercised.

In implementation of the 1974 Decrees two local associations, AADI (Asociacion Argentina de Intérpretes) representing Argentinian and foreign performers and CAPIF (Cámara Argentina de Productores e Industriales de Fonogramas , Corrientes 1628/32 - 5° piso"H", Buenos Aires-Argentina (1042)), representing Argentinian and foreign producers, have administered these rights with effect from 1976. Formerly, SADAIC, the authors' society, collected broadcasting revenue on behalf of the performers only, and COMAR, the organisation representing performers, distributed this revenue, of which 50% was paid to the producers by contractual arrangement.

Remuneration is collected by a joint organisation made up of AADI and CAPIF and, after deduction of a handling charge of approximately 25%, is distributed by AADI and CAPIF to the performers and producers respectively:

(1) Performers whose performances have been fixed on phonograms receive 67% of the net distributable revenue, of which 45% goes to the principal artist and 22% to the other performers

(2) Producers of phonograms receive 33% of the net distributable revenue

Remuneration payable for the use of foreign phonograms in Argentina shall, in the absence of any other rules for its distribution via the collecting organisation, the right owners or their representatives, be paid into a National Fund for the Arts.

AUSTRALIA

COPYRIGHT ACT 1968

The law grants to producers a copyright in their phonograms. This includes the exclusive right to broadcast and to cause phonograms to be heard in public.

PPCA (Phonographic Performance Company of Australia Limited, 340 Pitt Street, Sydney, New South Wales), is the organisation set up in 1969 to administer these rights on behalf of producers of phonograms.

Remuneration is collected from the broadcasting organisations and public performance users and, after deduction of administrative expenses, is distributed to producer members of PPCA and 25% of the net distributable revenue is paid voluntarily into a Trust Fund for performers.

AUSTRIA

COPYRIGHT ACT 1936 AS AMENDED ON 29 DECEMBER 1972
ROME CONVENTION - Date of entry into force - 9 June 1973

The amendment to the Copyright Law, effective as from 1 January 1973, grants producers the right to equitable remuneration for the broadcasting and public performance of their phonograms and grants performers a right to share this remuneration.

LSG (Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.h., Lothringerstrasse 20, Konzerthaus, A - 130 WIEN), is the joint organisation set up in 1973 by the producers and performers to administer these rights.

Remuneration is collected from the state broadcasting organisation and the public performance users and, after deduction of administrative expenses, is distributed by LSG to producers and performers on a 50:50 basis.

(1) Individual producers receive their shares of the broadcasting revenue on the basis of the quarterly logs supplied by the broadcasting organisation showing playing time. Public performance and other revenues are distributed in the same proportions as the broadcasting revenue. Producers who are not members of LSG may be entitled to participate in the distribution of remuneration for the broadcasting of their phonograms, but LSG makes a 20% handling charge in such cases.

(2) Individual performers' shares to remuneration are also calculated on the basis of the broadcasting logs in accordance with a sophisticated points system (details of this system are attached).

Foreign performers are entitled to remuneration from the broadcasting and public performance of phonograms only if the phonogram was fixed by a national of, or first published in, another Rome Convention country on the basis of reciprocity.

LSG has concluded reciprocal agreements with other joint collecting organisations, GRAMEX (Denmark) and GVL (Germany) in respect of the remuneration collected on behalf of each others' performers.

BANGLADESH

COPYRIGHT ORDINANCE 1962 AS AMENDED ON 25 JULY 1974

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting or public performance of their phonograms.

So far, only broadcasting revenue has been collected and the contract is now under negotiation.

BARBADOS

UK COPYRIGHT ACT 1911

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting or public performance of their phonograms.

So far, only broadcasting revenue has been collected through IFPI. The present practice is that the producers' revenue is distributed to national producers only and 50% is voluntarily paid into a Fund established for performers.

BELGIUM

The IFPI National Group (Syndicat de L'Industrie Belge d'Enregistrements Sonores et Audio-Visuels, Rue de la Chancellerie 14, 1000 Brussels) has for over twenty years collected remuneration from the broadcasting organisation for the use of phonograms in its broadcasts, although phonograms are not yet protected under copyright or neighbouring rights legislation in Belgium. The FIM/IFPI Agreement 1954 has applied for many years and performers now receive 33 1/3% of the producers' revenue. In February 1977, the producers and performers reached agreement on the establishment of a joint organisation to collect and distribute the broadcasting revenue and any public performance revenue that may arise in the future.

BRAZIL

LAW NO. 4,944 OF APRIL 6 1966; AND LAW NO. 5,988 OF 14 DECEMBER 1973
ROME CONVENTION - Date of entry into force - 29 September 1965

The law grants to both producers and performers rights to remuneration for the broadcasting and public performance of their phonograms.

SOCINPRO (Sociedade Brasileira de Intérpretes e Productores Fonográficos, Rua Mexico 98 - Grupo 805/617, RIO DE JANEIRO - Guanabara) is the joint organisation representing producers and performers set up in 1962 to administer these rights. It has now almost 1,000 members, of which 60 are producers of phonograms and the remainder performers.

Remuneration is collected by SDDA (Servico de Defesa do Direito Autoral - Bureau de Cobrança) and, after deduction of a handling charge of 30%, is distributed by SOCINPRO to the producers and performers:

(1) the Musicians' Union receives 16.6% of the net distributable revenue under Article 20(2)g, Decree Law No. 61.123

(2) 3% is paid into a Fund for social purposes;

(3) The remainder is distributed to the producers and performers on a 50:50 basis after deduction of SOCINPRO's administrative expenses of approximately 10%.

Individual performers' shares are calculated according to a points system based on broadcasting logs, hit parades, record sales, new releases and other factors (details of this system are attached).

Although there is an agreement between SOCINPRO and the collecting organisation in Argentina, there is no distribution as yet to foreign producers or performers under the Rome Convention.

CHILE

LAW NO. 17,336 OF 28 AUGUST 1970
ROME CONVENTION - Date of entry into force 5 September 1974

The law grants the right to remuneration to performers only for the broadcasting and public performance of their performances. It is provided under that law that regulations shall be passed governing the amount of remuneration payable and the method of collection. It also provides that a percentage of the remuneration shall be paid to the Chilean Cultural Corporation.

To date no regulations have been issued under this law and no remuneration collected.

COLOMBIA

LAW NO. 86 OF 26 DECEMBER 1946
ROME CONVENTION - Date of entry into force-17 September 1976

The law grants the right to remuneration to performers only for the broadcasting and public performance of their performances.

Negotiations are under way for the setting up of a joint organisation of producers of phonograms and performers to administer these rights. As yet no remuneration has been collected.

COSTA RICA

ROME CONVENTION - Date of entry into force - 9 September 1971

There is no specific national legislation in respect of Rome Convention rights. However, a draft law is now under consideration by the legislature. As yet no remuneration has been collected on behalf of producers of phonograms and performers.

CZECHOSLOVAKIA

LAW NO. 35 OF 25 MARCH 1965
ROME CONVENTION - Date of entry into force-14 August 1964

The law grants the right to remuneration to both producers and performers for the broadcasting and public performance of their phonograms.

Remuneration is collected for the broadcasting and public performance of phonograms. Foreign producers and performers do not participate in this remuneration under the Rome Convention.

DENMARK

LAW NO. 158 OF 31 MAY 1961
ROME CONVENTION - date of entry into force - 23 September 1965

The law grants rights to both producers and performers to remuneration for the broadcasting and public performance for commercial purposes of their phonograms.

GRAMEX (Grammofonindustriens og de Udøvende Kunstneres institution, Mynstervej 1, 1827 Kobenhaven V, Denmark) is the joint organisation set up with government approval in 1961 by the producers and performers to administer these rights.

Remuneration is collected from the broadcasting organisation and public performance users and, after deduction of administrative expenses, is distributed by GRAMEX to producers and performers on a 50:50 basis.

(1) Individual producers receive their shares of the broadcasting revenue on the basis of broadcasting logs showing the daily use of phonograms and each minute of needle time. Public performance remuneration is distributed to producers according to each company's label's share of the market.

Foreign producers entitled to receive revenue from the broadcasting of their recordings in Denmark (namely, producers of phonograms first fixed in another Rome Convention country on the basis of reciprocity) may participate in the distribution of revenues either directly by becoming members of GRAMEX or through their local representatives in Denmark.

(2) Individual performers' shares of broadcasting revenue are also calculated on the basis of the broadcasting logs in accordance with a points system (details of this system are attached). Public performance revenue is distributed collectively to the various performers' unions: Danish Musicians' Union 40%, Danish Conductors' Society 15%, Danish Choir Organisation 10%, Soloist Organisations (through the Joint Council of Performing Artists) 15%; Danish Actors' Union 15%; and Non-members of the above organisations (cf. Section 4 of the Working Regulations for GRAMEX) 5%.

Foreign performers may be entitled to revenue under Danish law (as for foreign producers above). Where such revenue cannot be distributed to individual foreign performers, the London Principles apply (see Annex VI). Thus the undistributable revenues due to foreign performers remain in Denmark and are treated in the same way as undistributable revenues arising in Denmark. GRAMEX has made reciprocal agreements with other collecting organisations in GVL (Germany), LSG (Austria) and SAMI (Sweden). Under the agreement with GVL (Germany), the London Principles have been extended to cover all undistributable revenue derived from both broadcasting and public performance, as the distribution systems in Denmark and Germany are quite different. However, under the agreement with SAMI (Sweden), the revenues collected from the broadcasting of phonograms in Sweden are distributed to the individual performers in Denmark and vice versa.

ECUADOR

COPYRIGHT LAW OF 13 AUGUST 1976
ROME CONVENTION - date of entry into force - 18 May 1964

The law grants the right to remuneration to performers only for the broadcasting and public performance of their performance recorded on phonograms. As yet no remuneration has been collected.

FIJI

UNITED KINGDOM COPYRIGHT ACT 1956
ROME CONVENTION - date of entry into force - 11 April 1972

Reserved Article 12.

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms. However, it should be noted that the Copyright (Broadcasting of Gramophone Records) Act 1972 exempts the Fiji Broadcasting Corporation from payment of any broadcasting remuneration in respect of its use of phonograms.

FINLAND

LAW NO. 404 OF 1961, as amended to 23 August 1971

The law grants rights to both producers and performers to remuneration for the broadcasting of phonograms first fixed in Finland. There is no public performance right.

FINNISH GRAMEX (Lauttasaarentie 1, 00200 Helsinki) is the joint organisation set up to administer these rights by the Association of Record Producers, the Association of Record Soloists and Musicians and the Musicians' Union.

Remuneration is collected from the broadcasting organisation and, after deduction of administrative expenses, is distributed by the FINNISH GRAMEX to local producers and performers on a 50:50 basis.

(1) Individual producers receive their shares of the revenue on the basis of the broadcasting logs.

(2) Individual performers' shares are calculated on the same basis and in accordance with a points system (details attached)

FRANCE

The IFPI National Group (Sundicat National de l'Edition Phonographique et Audio-Visuelle, 1 Rue de Courcelles, 75008 Paris) has for over twenty years collected remuneration on behalf of IFPI from the broadcasting organisation(s) for the use of phonograms in its broadcasts, although phonograms are not yet protected under copyright or neighbouring rights legislation in France.

Formerly, the performers were entitled to 25% of this remuneration under the FIM/IFPI Agreement 1954. This share has now been increased by national agreement to 33 1/3% as from 1 January 1975. The producers and performers are now in the process of setting up a joint collecting society to administer this broadcasting remuneration and any public performance revenue that may arise in the future.

GERMANY (FEDERAL REPUBLIC OF)

COPYRIGHT ACT 1965
ROME CONVENTION - date of entry into force - 21 October 1966

The law grants performers the right to remuneration for the broadcasting and public performance of phonograms, and grants producers the right to share this remuneration.

GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten, Charlotte Niese Strasse 8, 2 Hamburg 52) is the joint organisation set up to administer these rights. Performers and producers register their recordings with GVL and the performers transfer their recording rights to the producers of phonograms who in turn transfer them to GVL.

Remuneration is collected from the broadcasting organisations and the public performance users and is distributed by GVL, after deduction of administrative expenses, to performers and producers as follows:

(1) 50% of the broadcasting revenue and 64% of the public performance revenue collected by GVL is distributed to performers. Up to 5% of the performers' total share may be paid into a Fund for social purposes.

As the broadcasting stations do not supply GVL with sufficient information to enable them to make distributions to performers on a broadcasting minute basis, a registration system is used. The performers provide GVL with a list of all recordings made and fees paid in the previous year. Individual performers' shares of broadcasting revenue are then calculated in proportion to the performer's income. However, the shares of those performers with high incomes is scaled down in accordance with the following table:

Performer's Income

under DM 45,000.00	100% of the share is received
between DM 45,000.00 - DM 135,000.00	50% "
between DM 135,000.00 - DM 265,000.00	30% "
between DM 265,000.00 - DM 700,000.00	10% "
over DM 700,000.00	Minimum share

Thus a performer with an income of under DM 45,000.00 receives his full entitlement, whereas a performer with an income of over DM 700,000.00 receives a proportionate share based on a notional earning of DM172,500.00.

Public performance revenue is distributed to performers on the following basis:

(a) Individual performers who have participated in making recordings receive 36% on the same system as for broadcasting revenue.

(b) Individual performers employed by the broadcasting organisations receive 28%; their shares are worked out on the basis of information supplied to GVL on a special form.

Foreign performers entitled to revenue from the broadcasting or public performance of phonograms in Germany do not generally participate in GVL distributions. GVL has concluded agreements with other joint collecting organisations, LSG (Austria), GRAMEX (Denmark) and SAMI (Sweden) in respect of the remuneration collected on behalf of each other's performers.

(2) 50% of the broadcasting revenue is distributed to producers. Their individual shares are calculated on the basis of the returns from the broadcasting organisations showing only the record labels used by each station and the total playing. Producers also receive 36% of the public performance revenue which is distributed to individual producers in the same proportions as the broadcasting revenue.

GVL distributes broadcasting revenue to the foreign producers entitled only where they have not already assigned their rights to record companies in Germany.

GUATEMALA

ROME CONVENTION - date of entry into force - 14 January 1977

There is no specific legislation in respect of Rome Convention rights. However, a draft law is under consideration. As yet no remuneration is collected on behalf of producers of phonograms and performers.

ICELAND

COPYRIGHT STATUTE OF 29 MAY 1972

The law grants rights to both producers and performers to equitable remuneration for the broadcasting and public performance of their phonograms. There is a joint organisation set up in 1972 by the Icelandic National Group of IFPI and the unions representing performers to administer these rights.

Remuneration is collected from the broadcasting organisation and public performance users and, after deduction of administrative expenses, is distributed to local producers and performers on a 50:50 basis.

INDIA

COPYRIGHT ACT 1957

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms.

Phonographic Performance (Eastern) Limited (5 Old Court House Street, Calcutta 1) is the organisation set up to administer these rights on behalf of producers of phonograms. There is no representative organisation for performers in India, but a Fund for the benefit of performers has been proposed.

Remuneration is collected from the broadcasting organisations and from public performance users and, after deduction of administrative expenses, is distributed to producer members of Phonographic Performance (Eastern) Limited.

IRELAND

COPYRIGHT ACT 1963

The law grants producers the right to equitable remuneration where their published phonograms are heard or performed in public.

PPL Ireland (Phonographic Performance (Ireland) Limited, 63 Lower Gardiner Street, Dublin 1) is the organisation set up in 1968 to administer these rights on behalf of producers of phonograms.

At present only broadcasting remuneration is collected by PPL Ireland and distributed to producers: 25% of the net distributable revenue is voluntarily paid to the performers' organisations under the FIM/IFPI Agreement 1954.

ISRAEL

UNITED KINGDOM COPYRIGHT ACT 1911

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms.

Remuneration is collected from the broadcasting organisations and public performance users by the IFPI National Group (Israel National Group of IFPI, 18 Haim Veelisha Street, Tel Aviv) and is distributed to the producers: 25% of the net distributable revenue is voluntarily paid to the performers under FIM/IFPI Agreement 1954.

ITALY

LAW NO. 633 OF 1941, as amended to 5 May 1976
ROME CONVENTION - date of entry into force - 8 April 1975

The law grants the right to remuneration to producers for the broadcasting and public perfomrance of their phonograms, and grants performers similar rights in respect of their performances subject to certain conditions.

At present, only broadcasting remuneration is collected by the IFPI National Group (Associazione dei Fonografici Italiani, Via Vittor Pisani 22, 20124 Milan) and distributed to producers and the local performers' organisations. Negotiations are now under way for the setting up of an organisation representing performers. Following the entry into force of Italy's ratification of the Rome Convention in 1976, the FIM/IFPI Agreement whereby performers received 25% of the broadcasting revenue was terminated and the remuneration will now be shared on a 50:50 basis between producers and performers.

Foreign producers and performers do not as yet participate in this remuneration under the law under the Rome Convention.

JAMAICA

UNITED KINGDOM COPYRIGHT ACT 1911

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms.

So far, only broadcasting revenue has been collected through the IFPI National Group (Jamaica National Group of IFPI, 2 Ardenne Road, Kingston 10). The present practice is that the producers' revenue is distributed to national producers only and 50% is voluntarily paid into a Fund established for performers.

JAPAN

LAW NO. 48 OF 1970

The law grants both producers and performers the right to equitable remuneration from the broadcasting of phonograms made by nationals of, or first fixed in Japan. There is no public performance right.

Remuneration is collected separately from the broadcasting organisations by the IFPI National Group (Japan Phonograph Record Association, Record Building, 8-9, 2-Chome, Tsukiji, Chuo-Ku, Tokyo) set up in 1942, and by JCPO (Japan Council of Performers' Organisations, Fujita Building, 2-12-8 Shimbashi, Minato-ku, Tokyo), set up in 1967. Both organisations have been designated by the Commissioner of the Agency for Cultura Affairs to administer these rights on behalf of producers of phonograms and performers respectively.

MEXICO

COPYRIGHT LAW 1956 as amended to 4 November 1963
ROME CONVENTION - date of entry into force - 18 May 1964

The law grants the right to remuneration to performers only for the broadcasting and public performance of their performances.

ANDI (Asociación Nacional de Intérpretes, SDEI, Lebinitz 187, Mexico5, D.F.) is the organisation set up to administer these rights on behalf of performers.

Foreign performers do not, as yet, participate in this remuneration under the Rome Convention.

NETHERLANDS

The IFPI National Group (Nederlandse Vereniging Voor de Phonographische Industrie, "Rivierstaete", Amsteldijk 166, P.O. Box 7000., Amsterdam) has for over twenty years collected remuneration from the broadcasting organisation for the use of phonograms in its broadcasts, although phonograms are not yet protected under copyright or neighbouring rights legislation in the Netherlands.

25% of this remuneration is paid to the two performers' organisations under the FIM/IFPI Agreement 1954 and this share is to be increased to 33 1/3% under the FIM/FIA/IFPI Protocol 1977.

NEW ZEALAND

COPYRIGHT ACT 1962 as amended to 8 December 1968

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms.

Phonographic Performance (NZ) Limited (76-78 Courtney Place, Wellington) is the organisation set up in 1957 to administer these rights on behalf of producers of phonograms.

Remuneration is collected from the broadcasting organisations and public performance users and, after deduction of administrative expenses, is distributed to producer members of Phonographic Performance (NZ) Limited and 25% of the net distributable remuneration is paid voluntarily to the performers.

NORWAY

LAW NO. 4 of 14 DECEMBER 1956

Remuneration for the broadcasting and public performance of phonograms is paid directly into the Fund set up by the law and both performers and producers participate in the distribution. The distribution of remuneration

is determined each year on the recommendation of the Fund Committee to the Church and Education Department and finally enacted by the King. In 1976 the performers received approximately 80% of the total remuneration, the remainder was paid to the IFPI National Group for producers of phonograms.

PAKISTAN

COPYRIGHT ORDINANCE 1962 as amended in 1972

The law grants producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms.

So far only broadcasting revenue has been collected through IFPI Head Office and its representative in Pakistan. No payments have been received for the use of phonograms on radio in recent years.

PARAGUAY

LAW NO. 94 OF 1951
ROME CONVENTION - date of entry into force - 26 February 1970

The law grants the right to remuneration to performers only for the broadcasting and public performance of their performances.

No remuneration has as yet been collected.

SINGAPORE

UNITED KINGDOM COPYRIGHT ACT 1911

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting and public performance of their phonograms. However, it should be noted that the Copyright (Gramophone Records and Government Broadcasting) Act 1968 exempts the Singapore Broadcasting Corporation from payment of any broadcasting remuneration in respect of its use of phonograms.

So far only broadcasting revenue has been collected through IFPI. At present the producers' revenue is not distributed, but it is proposed to set up a Fund.

SPAIN

MINISTERIAL DECREE OF 10 JULY 1942 ON PHONOGRAPHIC WORKS

The law grants producers the exclusive right to authorise and prohibit the use of their phonograms for broadcasting and public performance purposes. The IFPI National Group (Industria Fonografica Española, Avenida del Brasil, 17 - 8° D, Madrid) administers these rights on behalf of producers of phonograms.

Remuneration from both the broadcasting and public performance of phonograms is collected through the authors' society, SGAE, and after deduction of SGAE's administrative expenses, is distributed by the National Group of IFPI to local producers of phonograms: 10% of the gross remuneration collected from the broadcasting and public performance of phonograms is paid voluntarily to the performers.

SWEDEN

LAW NO. 729 OF 1960
ROME CONVENTION - date of entry into force - 18 May 1964

The law grants rights to both producers and performers to remuneration for the broadcasting of phonograms. There is no public performance right.

Remuneration from the broadcasting of phonograms is collected by the IFPI National Group (IFPI Svenska Gruppen, Rodabergsgatan 8nb, 11 333 Stockholm) which distributes 50% of this to producers.

The other 50% is paid to SAMI (Karlbgsv. 48, Stockholm), the performers' organisation, and is distributed to the performers. SAMI has made reciprocal agreements with collecting organisations, GRAMEX (Denmark) and GVL (Germany) in respect of remuneration due to foreign performers in those countries.

Foreign producers and performers may be entitled to receive revenue from the broadcasting in Sweden of their phonograms first fixed in any Rome Convention country on the basis of reciprocity.

SWITZERLAND

The IFPI National Group (IFPI Schweiz, Toblerstrasse 76A, 8044 Zurich) has for over twenty years collected remuneration from the broadcasting organisation for the use of phonograms in its broadcasts, although performing rights in phonograms are not at present recognised under national copyright or neighbouring rights legislation.

Until the adoption of the IFPI/FIM/FIA Protocol in 1977 producers of phonograms received 73% of this remuneration and SIG, the performers' organisation, distributed the remaining 27% to the performers. The performers' share has now been increased to 33 1/3%.

TRINIDAD AND TOBAGO

UK COPYRIGHT ACT 1911

The law grants to producers a copyright in their phonograms. This includes the exclusive right to authorise and prohibit the broadcasting or public performance of their phonograms.

So far, only broadcasting revenue has been collected through IFPI. The present practice is that the producers' revenue is distributed to national producers only and 50% is voluntarily paid into a Fund established for performers.

TURKEY

COPYRIGHT LAW 1951

The law grants to performers the right to authorise the use of their recorded performances, and grants producers rights to prohibit the reproduction or rediffusion of their phonograms.

Remuneration is collected for the broadcasting of Phonograms by IFPI (formerly through the IFPI National Group). A Fund for the benefit of producers and performers is under consideration.

UNITED KINGDOM

UNITED KINGDOM COPYRIGHT ACT 1956
ROME CONVENTION - date of entry into force - 18 May 1964

The law grants to producers a copyright in their phonograms. This includes the right to authorise and prohibit the broadcasting and public performance of their phonograms.

PPL (Phonographic Performance Ltd., Evelyn House, 62 Oxford Street, London) is the organisation set up in 1934 to administer these rights on behalf of producers of phonograms. PPL receives a transfer of performing rights in phonograms from producers thus enabling it to institute proceedings on their behalf when necessary.

Remuneration is collected from the broadcasting organisations and public performance users, and after deduction of administrative expenses is distributed by PPL as follows:

(1) 67½% of the broadcasting and public performance revenue is distributed to producers. The producers' individual shares of the broadcasting remuneration are calculated on the basis of broadcasting logs showing playing time. Public Performance and other revenues are distributed in the same proportions as broadcasting revenue.

Foreign producers regardless of their country of origin receive a proportionate share of the broadcasting revenue through IFPI.

(2) 32½% of the net distributable revenue is paid voluntarily by PPL to the performers and is distributed as follows:

(a) 20% is paid to individual performers under contract with UK phonogram-producers members of PPL.

(b) 12½% is paid to the Musicians' Union for the benefit of the musical profession and benevolent purposes.

Foreign performers are not entitled to participate in any remuneration arising from the broadcasting or public performance of phonograms in the UK since the law does not grant British performers right to such remuneration.

Note HONG KONG

The UK Copyright Act 1956 has been extended to Hong Kong with certain local amendments. Revenue is collected by IFPI from the broadcasting organisations and public performance users in Hong Kong. It is proposed to set up an organisation, Phonographic Performance (Hong Kong) Ltd. (PPHK Ltd.) to collect this revenue on behalf of the producers.

COLLECTION AND DISTRIBUTION OF REMUNERATION FROM THE BROADCASTING AND PUBLIC PERFORMANCE OF PHONOGRAMS

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
ARGENTINA	Producers/Performers	AADI/CAPIF jointly collect revenue on behalf of producers and performers. AADI distributes to performers and CAPIF to producers	33:67	
AUSTRALIA	Producers	PPCA collects and distributes revenue	75:25	25% of producers' net revenue is voluntarily paid to a joint Fund for performers
*AUSTRIA	Producers/Performers	LSG collects and distributes broadcasting revenue on behalf of producers and performers	50:50	
		AKM collects public performance revenue on behalf of producers and performers. LSG distributes all the revenue and also makes some small collections	50:50	
BANGLADESH	Producers	IFPI collects and distributes broadcasting revenue (contract under negotiation)	50:50	Fund for performers proposed
BARBADOS	Producers	IFPI collects and distributes broadcasting revenue	50:50	50% of producers' net revenue is voluntarily paid to Fund established for performers

*Countries which have ratified or acceded to the Rome Convention

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
BELGIUM	No legal rights (Broadcasting contract with producers)	IFPI National Group collects broadcasting revenue	67:33	IFPI/PIM/FIA Protocol *applies*
*BRAZIL	*Producers/Performers*	SDDA collects revenue on behalf of producers and performers. SOCINPRO distributes its revenue	50:50	
*CHILE	Performers	No collections made		
*COLOMBIA	Performers	No collections made		
*COSTA RICA	Producers/Performers	No collections made		
*CZECHOSLOVAKIA	Producers/Performers	Collections of broadcasting and public performance revenue made by producers and performers		
*DENMARK	Producers/Performers	GRAMEX collects and distributes broadcasting revenue on behalf of producers and performers	50:50	
		KODA collects public performance revenue on behalf of producers and performers which is distributed by GRAMEX	50:50	
*ECUADOR	Performers	No collections made		

*Countries which have ratified or acceded to the Rome Convention

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
*FIJI	Producers (State broadcasting exempt)	No collections made		Reserved Article 12
FINLAND	Producers/Performers (Broadcasting only)	FINNISH GRAMEX collects and distributes broadcasting revenue on behalf of producers and performers	50:50	
FRANCE	No legal rights (Broadcasting contracts with producers)	IFPI National Group collects broadcasting revenue	67:33	IFPI/FIM/FIA Protocol applies
*GERMANY - FEDERAL REPUBLIC OF	Performers/Producers	GVL collects and distributes broadcasting revenue on behalf of producers and performers	50:50	
		GEMA collects public performance revenue on behalf of producers and performers which is distributed by GVL	36:64	
*GUATEMALA	Producers/Performers	No collections made		
ICELAND	Producers/Performers	The Federation of Performing Artists and the Phonographic Industry collects and distributes broadcasting revenue	50:50	
		STEF collects public performance revenue on behalf of producers and performers which is distributed by the Federation of Performing Artists and the Phonographic Industry	50:50	

*Countries which have ratified or acceded to the Rome Convention

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
INDIA	Producers	PPL (Eastern) collects and distributes revenue	100:0	Fund for the benefit of performers proposed
IRELAND	Producers	PPL (Ireland) collects and distributes broadcasting revenue	75:25	IFPI/FIM/FIA Protocol proposed
ISRAEL	Producers	IFPI National Group collects and distributes broadcasting revenue	75:25	IFPI/FIM/FIA Protocol proposed
*ITALY	Producers/Performers	IFPI National Group collects and distributes broadcasting revenue (pending implementation of the Rome Convention)	50:50	
JAMAICA	Producers	IFPI National Group collects and distributes broadcasting revenue	50:50	50% of producers' net revenue is voluntarily paid to Fund established for performers
JAPAN	Producers/Performers (Broadcasting only)	IFPI National Group collects and distributes broadcasting revenue on behalf of producers. Council of Performers' Organisations collects and distributes on behalf of performers	50:50	
*MEXICO	Performers	ANDI collects and distributes revenue	0:100	

*Countries which have ratified or acceded to the Rome Convention

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
NETHERLANDS	No legal rights (Broadcasting contract with producers)	IFPI National Group collects broadcasting revenue	67:33	IFPI/FIM/FIA Protocol applies
NEW ZEALAND	Producers	PPL (NZ) collects and distributes revenue	75:25	25% of producers' net revenue is voluntarily paid to performers
NORWAY	Producers/Performers	Revenue is paid directly to a Fund and is distributed to performers and producers	20:80	
PAKISTAN	Producers	IFPI collects and distributes broadcasting revenue	100:0	
*PARAGUAY	Performers	No collections made		
SINGAPORE	Producers (State broadcasting exempt)	IFPI collects broadcasting revenue due to producers	100:0	Fund proposed
SPAIN	Producers	SGAE collects broadcasting public performance revenue on behalf of the producers. IFPI Spanish National Group distributes the revenue	90:10	10% of producers' gross revenue is voluntarily paid to performers

*Countries which have ratified or acceded to the Rome Convention

COUNTRIES	RIGHTS TO REMUNERATION GRANTED TO	MECHANISM FOR COLLECTION AND DISTRIBUTION	PRODUCERS'/PERFORMERS' SHARES	REMARKS
*SWEDEN	Producers/Performers (Broadcasting only)	IFPI National Group collects and distributes broadcasting revenue on behalf of producers. SAMI distributes to performers	50:50	
SWITZERLAND	No legal rights (Broadcasting contract with producers)	IFPI National Group collects and distributes broadcasting revenue on behalf of producers. SIG distributes to performers	67:33	IFPI/FIM/FIA Protocol applies
TRINIDAD AND TOBAGO	Producers	IFPI collects and distributes broadcasting revenue	50:50	50% of producers' net revenue is voluntarily paid to Fund established for performers
TURKEY	Producers/Performers	IFPI collects broadcasting revenue on behalf of producers	100:0	Fund for the benefit of producers and performers under consideration
*UNITED KINGDOM	Producers	PPL collects and distributes revenue	67:33	33% of producers' gross revenue is voluntarily paid to performers: 12½% is paid to the Musicians' Union and the remainder to individual performers

*Countries which have ratified or acceded to the Rome Convention

ANNEX VI

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FIM AGREEMENT 1954

1962 PRINCIPLES

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A G R E E M E N T

between the

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI)

and the

INTERNATIONAL FEDERATION OF MUSICIANS (FIM)

on the

PARTICIPATION IN BROADCASTING REVENUES

The International Federation of the Phonographic Industry (to be referred to herein as IFPI) and the International Federation of Musicians (to be referred to herein as FIM) having voluntarily agreed together both in principle and in detail on the participation by FIM or its affiliated associations in certain revenues which are receivable by IFPI or its members are desirous by this document of placing the terms and conditions of their agreement on permanent record.

The IFPI is a Federation representative of gramophone record manufacturers throughout the world the Head Office of which is located at 123 Pall Mall London England. The IFPI has affiliations in many countries which are termed and are herein referred to as "National Groups". The revenues which accrue to IFPI its National Groups or members and which are the subject of this agreement are derived from contracts licensing the use of records for the purpose of broadcasting and other forms of public performance. The term "records" shall be taken to include disc records and tape and wire recordings as commercially produced and sold to the public by the members of IFPI.

FIM is a Federation of associations of artists and musicians the Head Office of which is located at Talacker 35 Zürich Switzerland. The artists and musicians who are members of the associations affiliated to FIM include those whose services are engaged from time to time by the members of IFPI for the purposes of recording and those who although not so engaged claim to be affected by the broadcasting and public performance of records as aforesaid.

The terms and conditions on which FIM or its affiliated associations shall be entitled to participate in the above mentioned revenues accruing to IFPI or its National Groups and members are the following:

.../

1) FIM or its affiliated associations shall be entitled to receive 25 percentum of the net distributable revenue received by IFPI its National Groups or members and derived from the broadcasting of its members'records. Revenue which may be derived from the use of records for the purpose of public performance other than broadcasting shall be excluded from the 25 percentum share above mentioned and shall be the subject of separate negotiations and agreement between IFPI and FIM on a national basis. The term "net distributable revenue" is understood to mean such revenue as is actually available for distribution by the IFPI, its National Groups or members, after due allowance has been made for meeting administrative expenses and other charges.

2) The obligation on the part of IFPI to pay such 25 percentum share of revenues derived from the broadcasting of records shall operate in respect of every accounting period which shall not have been closed as on the 5th day of November 1952, but the possibility is not excluded of further negotiations between the National Groups of IFPI and the affiliated associations of FIM in certain countries regarding the question of retroactivity.

3) Although the principle of participation is accepted by IFPI as applying to all countries of the world where revenue from the broadcasting of records is derived the obligation to pay 25 percentum share shall apply for the time being to the countries of Europe only and the application of the principle to other countries as well as the details conditions and amount of payment shall be the subject of further discussion and agreement between IFPI and FIM country by country.

4) The payments to be made in accordance with this document shall be on a national basis that is to say the 25 percentum share shall in each case be calculated on the revenue derived in each individual country in respect of the broadcasting of records in that country and shall be paid by IFPI or by the National Group or the members of IFPI in such country to such association or organisation in the country concerned as may be appointed by agreement between IFPI and FIM to receive such monies on behalf of the performing musicians located in such country. All such payments shall be accepted in each country in full discharge of the liability of IFPI under this agreement in respect of such country and it is fully understood between IFPI and FIM that no claim shall be made upon or be entertained by IFPI its National Groups and members on behalf of musicians' organisations or individual performing musicians located in other countries.

5) No payment shall be made in any one country by IFPI its National Groups or members unless and until it shall be shown to the reasonable satisfaction of IFPI that such payment can be accepted in full discharge of the liability of IFPI hereunder by such associations and organisations of performing musicians in such country whether affiliated to FIM or not as taken together are truly and substantially representative of performing musicians in such country.

.../

6) The payments to be received by FIM its associations or members under this agreement shall be applied for the benefit of performing musicians and shall not in any circumstances be used for any purpose which may be contrary to or adversely affect the interests of IFPI or its members but no objection will be raised on behalf of IFPI if a portion of such payments not exceeding five percentum are received by FIM as a contribution towards the administrative expenses of the FIM organisation.

7) If in any country an agreement is already in operation by which performing musicians receive a share of the revenue derived in such country by the members of IFPI from the broadcasting of records such arrangement shall be unaffected by this agreement and shall continue in operation unless and until it is terminated by agreement between the parties concerned.

8) All liability accepted under this agreement by IFPI its National Groups and members shall cease immediately upon the happening of any of the following events and in respect of the country concerned namely:-

   (1) If in any country it should be made legally compulsory on the part of the IFPI members in such country to pay over to performing musicians any part of the revenue derived by the members of IFPI from the broadcasting of records.

   (2) If in any country legislation should be introduced creating in favour of performing musicians rights in records which are not assigned or assignable to the record manufacturers enabling such performing musicians to demand payment in respect of or otherwise to exercise control over the broadcasting and public performance of records.

   (3) If in any country performing musicians or their representative organisations obtain by contract whether supported by the national laws or not a right to receive payment in respect of the broadcasting and public performance of records.

9) In the event of any dispute arising as to the interpretation or method of operation of this agreement the same shall be referred for settlement to a Joint Committee representative of IFPI and FIM.

.../

10) This agreement shall remain in operation until the 31st December 1954 but shall continue thereafter unless and until terminated by either IFPI or FIM giving to the other at any time six months notice in writing and in the event of such notice of termination being given this agreement shall cease to have effect in each country as at the end of the accounting period current at the time of the expiry of such notice.

ZUrich 11th March 1954
Sch

Signed on behalf of IFPI:

H. Landis
J. Dougnac
C.B. Dawson Pane
R. Thalheim
O. Grauding
Brian Brammall

Signed on behalf of FIM:

Hardie Ratcliffe
Sven Wassmouth
V. Hauser
R. Leuzinger

The application of this agreement for Switzerland shall remain in suspense until the Swiss Performers Society (SIG) for the duration of this agreement has given back the rights assigned to it by its members for the production of commercial records, so that they (the members of SIG) are in a position according to article 4/2 of the Swiss Copyright Law to assign directly to the record manufacturers these rights when performing for commercial records.

ZUrich, 11th March 1954
drH-Sch

Signed on behalf of IFPI:

B.B.

on behalf of FIM:

H.R.

.../

IFPI / FIM Principles, 1962

(1) No recording of performances should be undertaken, either directly or indirectly, without the knowledge of the performers concerned. In other words, all forms of clandestine recording are condemned.

(2) The use of commercial records for the provision of music on film sound-tracks is not in the best interests of the Industry and should be discouraged. Authorisations for the reproduction of records for such purposes should only be given in exceptional cases.

(3) The use of commercial records for the purpose of providing the complete music for any stage production, including ballets, should be strongly discouraged. (N.B. This general principle is not intended to be applied to television presentations because the use of records in such presentations is so widely varied, each special case having to be taken on its merits. There might well be, however, individual cases of television presentations where the above principles could and should be applied).

(4) Recordings made and intended primarily for sound film track and recordings made by broadcasting organisations for broadcasting purposes should not be used for the purpose of making commercial records without the recording company in question first taking every reasonable step to satisfy itself that the performers whose recordings are concerned have given permission for such use to the film company or the broadcasting organisation concerned.

(5) It is considered that the use of commercial records in connection with non-musical live productions, whatever the precise purpose may be, is likely to create problems and difficulties affecting the interests not only of record producers but also of performers. Authorisations for such use may be justified in special and exceptional cases, but great discretion should be exercised. It is considered desirable that such problems and difficulties should be the subject of discussion on a national basis between the respective IFPI National Groups and the respective organisations of performers.

AUGUST, 1962

.../

PRINCIPLES RELATING TO UNDISTRIBUTABLE REVENUE DUE TO PERFORMERS, 1969

(1) First Principle

Revenue arising from broadcasting of records which cannot be distributed to the individual performers because after the exercise of due diligence the collecting agency concerned cannot trace and pay the individuals who are entitled shall be devoted to the general benefit of the performers' professions provided that the organisation receiving such revenue shall give to the collecting agency a suitable indemnity absolving the agency from liability for individual claims relating to the broadcasting of those records.

(2) Second Principle

Revenue arising from the public performance of records which cannot be distributed to individual performers according to needle time because the necessary information is not available will be devoted to the general benefit of the performers' professions provided that the organisations receiving such revenue shall give to the collecting agency a suitable indemnity absolving the agency from liability for individual claims related to the public performance of those records.

(3) Third Principle

In countries where performers are entitled to remuneration for broadcasting or public performance of records and such remuneration cannot be distributed to individual performers either because the necessary information is not available or because the beneficiary cannot be traced it is desirable that such undistributable remuneration should remain in the country in which it has arisen.

THE VIDEOGRAM PRINCIPLE, 1973

The principle is as follows:-

> "Existing phonograms (recordings made for the purpose of being issued as discs, tapes, cassettes) should not be used for the making of videograms without the permission of the performers who had made the original sound recording."

PROTOCOL to the

AGREEMENT

between the

IFPI (INTERNATIONAL FEDERATION OF PRODUCERS OF PHONOGRAMS AND VIDEOGRAMS)

and the

INTERNATIONAL FEDERATION OF MUSICIANS (FIM)

on the

PARTICIPATION IN BROADCASTING REVENUES

of 11th March 1954

The Agreement made between IFPI, formerly known as "the International Federation of the Phonographic Industry (IFPI)" and the International Federation of Musicians (FIM), in Zürich, on 11th March 1954, hereinafter referred to as "the 1954 Agreement", is hereby revised as follows:

(1) The International Federation of Actors (FIA) will become party to the 1954 Agreement and its members will be entitled to participate in the same way as FIM or its affiliated organisations in the remuneration paid under the 1954 Agreement by IFPI with effect from the date of entry into force of this Protocol.

(2) The parties agree that no separate national agreements to implement the 1954 Agreement shall be made in future.

(3) Any payments made to associations and organisations of performers whether affiliated to FIM or FIA or not under the 1954 Agreement shall be applied for the benefit of performers and shall be made on condition that the monies so received shall not in any circumstance be used for any purposes which may be contrary to or adversely affect the interests of IFPI, FIM or FIA.

(4) In every country where, pursuant to the 1954 Agreement, IFPI has agreed to pay 25% of the net distributable revenue received by IFPI, its National Groups or members and derived from the broadcasting of its members' records, that figure shall be increased to 33 1/3% with effect from the date of entry into force of this Protocol.

.../

(5) If, in any country where IFPI, its National Groups or members, do not receive revenue from the broadcasting of records and FIM, FIA or their affiliated associations derive revenue from the broadcasting of records, they will share the net distributable revenue with the record producers of that country by paying them 33 1/3% of the said revenue.

(6) In substitution for Article 9 of the 1954 Agreement, it is agreed that, in the event of any dispute arising out of the interpretation or method of operation of the 1954 Agreement or of this Agreement, such dispute shall be referred for arbitration to a joint committee of IFPI, FIM and FIA consisting of one or more representatives of IFPI, an equal number of representatives of FIM and FIA and a further member to be appointed jointly by agreement between IFPI, FIM and FIA. The decision of such joint committee shall be final.

(7) This Protocol will enter into force three months after its ratification by the competent authorities of IFPI, FIM and FIA.

Done in London on the ..NINTH..... day of .NOVEMBER..... 1976.

Signed on behalf of IFPI:

S.M. STEWART
Director-General

Signed on behalf of FIM:

J. MORTON
President

Signed and Accepted on Behalf
of the International Federation
of Actors (FIA):

G. CROASDELL
General Secretary

R. LEUZINGER
General Secretary

RESOLUTION CONCERNING RELATIONS WITH PERFORMERS

IFPI (INTERNATIONAL FEDERATION OF PRODUCERS OF PHONOGRAMS AND VIDEOGRAMS)

REPRESENTING

505 producers of phonograms and videograms in 59 countries at its Council Meeting held in Vienna on 2nd June 1976

CONSIDERING

- that the interests of producers of phonograms and videograms and those of performers are closely related and complementary

- the existence of the Agreement between IFPI and the International Federation of Musicians (FIM) on the participation in broadcasting revenues (1954), the Five FIM Principles of August 1962 concerning the use of sound recordings for purposes other than private use, the London Principles relating to undistributable revenue due to performers, 1969, and the Videogram Principle, 1973

- the effect of technological change on the employment and working conditions of performers and the need to preserve live music and theatre in the interests of maintaining the highest standards of execution and performance so as to conserve and enrich the world's cultural heritage

- the need to promote comptemporary musical creation

RECOGNISING

- the need to maintain and promote, as a matter of principle, good relations with international organisations representing performers so as to further the mutual interests of both producers and performers

- the particular importance of strengthening these relations at the international level with a view to furthering cooperation between producers and performers so as to obtain the widest possible protection through international instruments and national legislation.

.../

- the desirability for relations between producers and performers to be established on the basis of equality and in mutual respect of the other's independence and integrity

RESOLVES

1. To continue to cooperate with international and national organisations of performers in all matters of common concern.

2. To seek in collaboration with international and national organisations of performers the widest possible acceptance of the Convention for the protection of performers, producers of phonograms and broadcasting organisations, Rome, 1961, and the Convention for the protection of producers of phonograms against the unauthroised duplication of their phonograms, Geneva, 1971 .

3. To propose to Governments considering the introduction of legislation on neighbouring rights and ratification of the Convention for the protection of performers, producers of phonograms and broadcasting organisations that any equitable remuneration payable in respect of broadcasting and/or public performance rights in phonograms should be shared equally between the producers and performers following the entry into force of the Convention in the countries in question.

June 1976

VIII. ROME CONVENTION

I. International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations

(*a*) *Text of Convention*[1]

The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organizations,

Have agreed as follows:

Article 1

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

Article 2

1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

(*a*) To performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;

(*b*) To producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;

(*c*) To broadcasting organizations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

Article 3

For the purposes of this Convention:

(*a*) "Performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;

(*b*) "Phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

(*c*) "Producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

(*d*) "Publication" means the offering of copies of a phonogram to the public in reasonable quantity;

(*e*) "Reproduction" means the making of a copy or copies of a fixation;

(*f*) "Broadcasting" means the transmission of wireless means for public reception of sounds or of images and sounds;

(*g*) "Rebroadcasting" means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organisation.

[1] XIV Unesco Copyright Bulletin 173–182 (1961).

Article 4

Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(*a*) The performance takes place in another Contracting State;

(*b*) The performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(*c*) The performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

Article 5

1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

(*a*) The producer of the phonogram is a national of another Contracting State (criterion of nationality);

(*b*) The first fixation of the sound was made in another Contracting State (criterion of fixation);

(*c*) The phonogram was first published in another Contracting State (criterion of publication).

2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Article 6

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:

(*a*) The headquarters of the broadcasting organisation is situated in another Contracting State;

(*b*) The broadcast was transmitted from a transmitter situated in another Contracting State.

2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Article 7

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

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

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

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

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

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

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

Article 8

Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connexion with the exercise of their rights if several of them participate in the same performance.

Article 9

Any Contracting State, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

Article 10

Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

Article 11

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of

claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.

Article 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Article 13

Broadcasting organisations shall enjoy the right to authorize or prohibit:

(*a*) The rebroadcasting of their broadcasts;

(*b*) The fixation of their broadcasts;

(*c*) The reproduction: (i) of fixation, made without their consent, of their broadcasts; (ii) of fixation, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

(*d*) The communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

Article 14

The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

(*a*) The fixation was made—for phonograms and for performances incorporated therein;

(*b*) The performance took place—for performances not incorporated in phonograms;

(*c*) The broadcast took place—for broadcasts.

Article 15

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(*a*) Private use;

(*b*) Use of short excerpts in connexion with the reporting of current events;

(*c*) Ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;

(*d*) Use solely for the purposes of teaching or scientific research.

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

Article 16

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

(*a*) As regards Article 12: (i) it will not apply the provisions of that article; (ii) it will not apply the provisions of that Article in respect of certain uses; (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article; (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection.

(*b*) As regards Article 13, it will not apply item (d) of that Article; if a contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, Item (d), to broadcasting organizations whose headquarters are in the State.

2. If the notification referred to in paragraph 1 of this Article is made after the date of the deposit of the instrument of ratification, acceptance or accession, the declaration will become effective six months after it has been deposited.

Article 17

Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declares that it will apply, for the purposes of Article 5, the criterion of fixation alone and, for the purposes of paragraph 1 (a) (iii) and (iv) of Article 16, the criterion of fixation instead of the criterion of nationality.

Article 18

Any State which has deposited a notification under paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 or Ar-

ticle 17, may, by a further notification deposited with the Secretary-General of the United Nations, reduce its scope or withdraw it.

Article 19

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

Article 20

1. This Convention shall not prejudice rights acquired in any contracting State before the date of coming into force of this Convention for that State.

2. No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

Article 21

The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.

Article 22

Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms as broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.

Article 23

This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until June 30, 1962 for signature by any State invited to the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations which is a party to the Universal Copyright Convention or a member of the International Union for Protection of Literary and Artistic Works.

Article 24

1. This Convention shall be subject to ratification or acceptance by the signatory States.

2. This Convention shall be open for accession by any State invited to the Conference referred to in Article 23, and by any State Member of the United Nations, provided that in either case such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

Article 25

1. This Convention shall come into force three months after the date of deposit of the sixth instrument of ratification, acceptance or accession.

2. Subsequently, this Convention shall come into force in respect of each State three months after the date of deposit of its instrument of ratification, acceptance or accession.

Article 26

1. Each Contracting State undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention.

2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

Article 27

1. Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for whose international relations it is responsible, provided that the Universal Copyright Convention or the International Convention for the Protection of Literary and Artistic Works applies to the territory or territories concerned. This notification shall take effect three months after the date of its receipt.

2. The notifications referred to in paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Articles 17 and 18, may be extended to cover all or any of the territories referred to in paragraph 1 of this Article.

Article 28

1. Any Contracting State may denounce this Convention, on its own behalf, or on behalf of all or any of the territories referred to in Article 27.

2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect twelve months after the date of receipt of the notification.

3. The right of denunciation shall not be exercised by a Contracting State before the expiry of a period of five years from the date on which the Convention came into force with respect to that State.

4. A Contracting State shall cease to be a party to this Convention from that time when it is neither a party to the Universal Copyright Convention nor a member of the International Union for the Protection of Literary and Artistic Works.

5. This Convention shall cease to apply to any territory referred to in Article 27 from that time when neither the Universal Copyright Convention nor the International Convention for the Protection of Literary and Artistic Works applies to that territory.

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Article 29

1. After this Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a conference be convened for the purpose of revising the Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a revision conference in co-operation with the Intergovernmental Committee provided for in Article 32.

2. The adoption of any revision of this Convention shall require an affirmative vote by two-thirds of the States attending the revision conference, provided that this majority includes two-thirds of the States which, at the time of the revision conference, are parties to the Convention.

3. In the event of adoption of a Convention revising this Convention in whole or in part, and unless the revising Convention provides otherwise:

(*a*) This Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;

(*b*) This Convention shall remain in force as regards relations between or with Contracting States which have not become parties to the revising Convention.

Article 30

Any dispute which may arise between two or more Contracting States concerning the interpretation or application of this Convention and which is not settled by negotiation shall, at the request of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

Article 31

Without prejudice to the provisions of paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Article 17, no reservation may be made to this Convention.

Article 32

1. An Intergovernmental Committee is hereby established with the following duties:

(*a*) To study questions concerning the application and operation of this Convention; and

(*b*) To collect proposals and to prepare documentation for possible revision of this Convention.

2. The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be six if there are twelve Contracting States or less, nine if there are thirteen to eighteen Contracting States and twelve if there are more than eighteen Contracting States.

3. The Committee shall be constituted twelve months after the Convention comes into force by an election organized among the Contracting States, each of which shall have one vote, by the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, in accordance with rules previously approved by a majority of all Contracting States.

4. The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.

5. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works, designated by the Directors-General and the Director thereof, shall constitute the Secretariat of the Committee.

6. Meetings of the Committee, which shall be convened whenever a majority of its members deems it necessary, shall be held successively at the headquarters of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works.

7. Expenses of members of the Committee shall be borne by their respective Governments.

Article 33

1. The present Convention is drawn up in English, French, and Spanish; the three texts being equally authentic.

2. In addition, officials texts of the present Convention shall be drawn up in German, Italian, and Portuguese.

Article 34

1. The Secretary-General of the United Nations shall notify the States invited to the Conference referred to in Article 23 and every State Member of the United Nations, as well as the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works:

(*a*) Of the deposit of each instrument of ratification, acceptance or accession;

(*b*) Of the date of entry into force of the Convention;

(*c*) Of all notifications, declarations or communications provided for in this Convention;

(*d*) If any of the situations referred to in paragraphs 4 and 5 of Article 28 arise.

2. The Secretary-General of the United Nations shall also notify the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works of the requests communicated to him in accordance with Article 29, as well as of any communication received from the Contracting States concerning the revision of the Convention.

In faith whereof, the undersigned, being duly authorized thereto, have signed this Convention.

Done at Rome, this twenty-sixth day of October 1961, in a single copy in the English, French and Spanish languages. Certified true copies shall be delivered by the Secretary-General of the United Nations to all the States invited to the Conference referred to in Article 23 and to every State Member of the United Nations, as well as to the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

(b) *State of Ratifications, Acceptances or Accessions as of Sept. 1, 1977* [2]

Contracting state:	*Entry into force*
Austria	June 9, 1973
Brazil	Sept. 29, 1965
Chile	Sept. 5, 1974
Colombia	Sept. 17, 1976
Congo	May 18, 1964
Costa Rica	Sept. 9, 1971
Czechoslovakia	Aug. 14, 1964
Denmark	Sept. 23, 1965
Ecuador	May 18, 1964
Fiji	Apr. 11, 1972
Germany, Federal Republic of	Oct. 21, 1966
Guatemala	Jan. 14, 1977
Italy	Apr. 8, 1975
Luxembourg	Feb. 25, 1976
Mexico	May 18, 1964
Niger	May 18, 1964
Paraguay	Feb. 26, 1970
Sweden	May 18, 1964
United Kingdom	May 18, 1964
Uruguay	July 4, 1977

II. Preliminary International Consideration of Protection for Performers, Producers of Phonograms and Broadcasting Organizations

The International Labour Office (ILO) began studies on the protection of performers in 1926 when, at the request of the International Union of Musicians, it undertook to examine the status of performers' rights. Subsequently, on the basis of its discussions with the interested parties, and contacts with such organizations as the International Union for the Protection of Literary and Artistic Works—known as the Berne Union, the International Wireless Committee and the International Broadcasting Union, the ILO prepared a preliminary report on the rights of performers in broadcasting and mechan-

[2] 1 Copyright 9 (Jan. 1977); 5 Copyright 115 (May 1977); see also Rome Convention, 1961: Item B–2, Copyright Laws and Treaties of the World.

ical reproduction for submission, in 1929, to the second session of its Advisory Committee on Professional Workers. In light of this report, the advisory committee "took the view that the only appropriate solution lay in international regulations and that a new code of rights should be drafted which would not interfere with the recognized right of authors." [3]

After further consultation with the parties concerned, a committee of experts, under the auspices of the ILO, met at Geneva in 1938 to consider the question of the protection of performers in broadcasting, television and the mechanical reproduction of sound, with a view to assisting the governing body of the ILO to find an appropriate solution to the problems raised.[4]

During the same period, action with respect to the protection of performers as well as manufacturers of records and similar devices was also undertaken by the Berne Union and the International Institute for the Unification of Private Law. In order to draft proposals for the Brussels Conference for the revision of the Berne Convention, then scheduled for 1936, a committee of experts was convened at Samaden (Switzerland) in 1939. The committee prepared a draft convention concerning the protection of performing artists and of producers of phonographic disks and similar instruments.[5]

When the draft convention was finally submitted to the Brussels Revision Conference in 1948, it met with strong opposition from representatives of authors who felt the Berne Convention should be limited to the protection of authors' rights. "The delegations also were predominantly of the opinion that a regulation on neighboring rights should preferably be achieved by means of a separate agreement." [6] The Brussels Conference formally recommended that governments of countries of the Berne Union study means to assure, without prejudice to the rights of authors, the protection of "manufacturers of instruments for the mechanical reproduction of musical works" and "broadcasts effectuated by broadcasting organizations in order to prevent unauthorized use of them"; moreover, considering the artistic character of interpretations, the Conference also recommended "that studies on neighboring rights be actively pursued, especially in regard to the protection of performing artists." [7]

Pursuant to the recommendations of the Brussels Conference, the Permanent Committee of the Berne Union, at its meeting in 1949, instructed the Bureau of the Berne Union:

(a) To make inquiries of the Governments of the countries of the Union as to the result of the studies which they might have made in regard to the protection by appropriate measures of the manufacturers of gramophone records and similar devices, of broadcasts and of performing artists; (b) to communicate to the Governments of countries members of the Union, as well as to the Governments of nonmember countries, as a basis of discussion and without actually

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[3] Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sound, ILO Advisory Committee on Salaried Employees and Professional Workers, 2d sess. (third item on the agenda), report III, at 55 (1951).

[4] Id. at 56.

[5] For English text of draft convention (Samaden, July 31, 1939), see Compilation of Official Documents of Intergovernmental Organizations concerning Neighboring Rights, Translation Service, Copyright Society of U.S.A. (1928–57) [hereinafter cited as Compilation].

[6] E. Ulmer, Protection of Performing Artists, Producers of Sound Recordings, and Broadcasting Organizations, at 2 (1957).

[7] See Voeux Nos. VI, VII, and VIII, Berne Union, Conference for Revision (June 26, 1948), Compilation, supra note 5.

approving them, the outlines of conventions resulting from the work of the Committee of Experts at Samaden.[8]

The Permanent Committee then took the initiative to convene a Committee of Experts to prepare an international convention on neighboring rights. Representatives of the ILO and the United Nations Educational, Scientific and Cultural Organization (UNESCO), together with representatives of the International Federation of the Phonographic Industry, the International Federation of Musicians, and the European Broadcasting Union, met at Rome in November 1951, and were successful in the preparation of a preliminary draft international convention regarding the protection of performers, manufacturers of phonographic records and broadcasting organizations.[9] The results of the Rome Committee of Experts are particularly noteworthy in that, for the first time, the rights of all three interested parties were dealt with in a single instrument. This pattern was to continue throughout the preparatory work that culminated in the adoption of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations at Rome on October 26, 1961 [hereinafter cited as the Rome Convention].

In 1955, the protection of the so-called neighboring rights was included for the first time on the agenda of the Interim Copyright Committee of the Universal Copyright Convention. It was the opinion of the committee that UNESCO should thereafter play an active role in any project "directed towards finding solutions for the problems of neighboring rights, because these rights are closely related to copyright and to the Universal Copyright Convention," and recommended that the Director-General of UNESCO continue studies on the legal, economic and social implications of the protection of performers, producers of phonograms and broadcasting organizations.[10] Thus, when a working group met in November 1955 to lay the ground work for a committee of experts to draft an international convention on neighboring rights, the Director-General of UNESCO collaborated closely with the members of the group appointed by the permanent committee of the Berne Union.

As work progressed in this area, certain differences arose between the efforts of the Berne Union and UNESCO on the one hand, and the ILO on the other. The ILO invited interested parties to send experts to a meeting in Geneva in July 1956. The work of the ILO committee of experts, attended primarily by representatives of interested private international organizations, was inspired by a felt need to protect performers against the threat to their livelihood posed by the growing use of techniques for the recording and broadcasting of their performances, not as a matter of copyright, but rather as a social and economic problem.[11] It was also thought that the problems involved should be dealt with in a separate new instrument that would provide

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[8] Supra note 3, at 57.

[9] For English text of preliminary draft, see Compilation, supra note 5.

[10] Report of Authur Fisher, Interim Copyright Committee, 2d sess., annex A, at 3 (October 21, 1955). Compilation, supra note 5.

[11] See Report on the meeting of the committee of experts convened to discuss the proposed international convention concerning the protection of performers, manufacturers of phonographic records, and broadcasting organizations, para. 20 (Geneva, July 10–17, 1956). Documentation Prepared by the International Labour Office for the Information of Governments, at 2 (1957).

protection not only for performers, but also for record manufacturers and broadcasting. After a thorough discussion of the various proposals submitted to it by the interested parties, the ILO committee approved the text of a proposed international convention concerning the protection of performers, manufacturers of phonographic records and broadcasting organizations.[12]

Work on a draft international convention on neighboring rights was continued in a parallel fashion by the Berne Union and UNESCO. After detailed studies of various aspects of protection for neighboring rights, a committee of experts was convened in Monaco in March 1957, under the auspices of the Berne Union and UNESCO, to adopt a draft agreement on the protection of certain rights ancillary to copyright, or so-called "neighboring rights".

The Berne/UNESCO draft agreement differed on several points from the proposed international convention prepared by the ILO committee of experts. One of the primary differences between the two instruments concerned rights connected with the broadcasting or other public communication of phonograms.[13] Under the ILO draft, broadcasting organizations would be allowed:

> to use phonograms under a compulsory license, that is, subject to payment of an "equitable remuneration" to the manufacturer of the record used for broadcasting. The record manufacturer in turn would pay a "reasonable part" of such remuneration to a "collectivity" of performers (organization of performers or body representing the interests of performers). The beneficiary collectivity would always belong to the same country to which the manufacturer making the payment belongs.[14]

On the other hand, the provision on secondary uses of phonograms in the Berne/UNESCO draft (article 4) was based on the principle of national treatment, subject to reciprocity. Accordingly, a contracting State could deny protection to phonograms recorded in another contracting State to the extent to which the latter did not accord similar rights in connection with phonograms recorded on the territory of the former.

Fortunately, the interested parties were able to reconcile the differences between the ILO and Berne/UNESCO approaches during the course of a committee of experts that met at the Hague from March 9 to 20, 1960. The committee was convened jointly by the Directors-General of the ILO and UNESCO, and the director of the Bureau of the Berne Union. The Hague committee prepared and unanimously approved a draft international convention concerning the protection of performers, makers of phonograms and broadcasters that was to serve as the basis for the discussions at the diplomatic conference in October 1961.[15]

When the diplomatic conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organiza-

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[12] For text of draft convention proposed by ILO committee of experts, see id. at 18.

[13] For discussion of differences between two texts on this point, see explanatory statement accompanying the draft [Berne/Unesco] agreement, para. 5, committee of experts on neighboring rights (Monaco, March 4–13, 1957). Supplement to Compilation of Official Documents of Intergovernmental Organizations concerning Neighboring Rights, Translation Service, Copyright Society of U.S.A. (1956–59).

[14] Id.

[15] For text of draft international convention prepared by Hague committee of experts, see Records of the Committee of Experts on the International Protection of Performers, Producers of Phonograms and Broadcasters, CDR/1 (Paris, 1960).

tions finally met at Rome from October 10 to 26, 1961, under the auspices of the ILO, UNESCO and the Berne Union, for the purpose of drawing up and adopting an international convention for the protection of the rights of performers, producers of phonograms, and broadcasting organizations, the documentation submitted to the conference included the draft international convention prepared by the Hague committee, as well as a draft of the final or formal clauses prepared by the secretariats of the three sponsoring organizations.

In reviewing the preparatory work that preceded the adoption of the Rome convention, no attempt has been made to analyze in depth the texts of the various preliminary drafts. It seemed useful, however, to describe briefly the preparatory work undertaken on an international level in order to stress that the issue of an international convention for the protection of performers, producers of phonograms, and broadcasting organizations had been the subject of thoughtful consideration in numerous international forums prior to 1961, and that the provisions finally adopted at Rome were the result of deliberate action on the part of all parties concerned

III. Summary of Main Provisions of Rome Convention Based on Report of Rapporteur-General Mr. Abraham Kaminstein

The following summary of the main provisions of the Rome convention is based on the report of Mr. Abraham Kaminstein, rapporteur-general of the diplomatic conference held at Rome from October 10–26, 1961. Views cited in the text are taken from Mr. Kaminstein's report.[16]

Articles 1, 23, and 24 (Safeguarding of copyrights)

Article 1 specifically states that no provision of the Rome convention may be interpreted as prejudicing the protection of copyright in literary and artistic works. Moreover, pursuant to article 23 on signature and deposit and article 24 on adherence, a State must be a party to the Universal Copyright Convention, or a member of the International Union for the Protection of Literary and Artistic Works, to sign the Rome convention, or to adhere to that instrument.

The intent of the Conference was to establish a link between the new convention on neighboring rights and the two principal international copyright conventions. It was argued during the Conference that performers usually made use of literary and artistic works and, therefore, it would be inequitable to protect performers, producers of phonograms and broadcasting organizations in countries where authors were denied protection for their works.

Article 2 (Protection granted by the Rome Convention)

As noted in the report, the Conference dealt separately with the issues of (*a*) the persons protected and the circumstances under which protection is granted to them, and (*b*) the nature and extent of this

[16] For full text of report of rapporteur-general, see Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, October 10–26 1961), at 33–59 (1968); see also Hon. R. V. Libonati, Report on the Diplomatic Conference for the Adoption of an International Convention concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, House Committee on the Judiciary, at 7–14 (Comm. Print 1962).

protection. Thus, article 2 treats the subject of nature and extent of protection, while articles 4, 5 and 6 set forth who is to be protected and in what cases.

In accordance with article 2, protection under the Rome Convention is based on the principle of national treatment, i.e., "the treatment accorded [to domestic performances, phonograms, and broadcasts] by the domestic law of the Contracting State in which protection is claimed," subject to the minimum protection provided for particularly in articles 7, 10, 12 and 13. Contracting States undertake to grant this minimum protection, with specific reservations and exceptions, even if they do not grant it to domestic performances, phonograms, or broadcasts.

Article 3 (Definitions)

For purposes of the Convention, the following terms were defined in article 3:

(*a*) *Performers* "means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works." As reported by Mr. Kaminstein, the Conference agreed that "the expression 'literary and artistic works,' used in the definition of 'performers' and in other provisions of the Convention, has the meaning which those words have in the Berne and Universal Copyright Conventions, and in particular that they include musical, dramatic, and dramatico-musical works. Furthermore, it was agreed that conductors of musicians or singers are to be considered as included in the definition of 'performers.'" It was thought superfluous to define "performance" since it was assumed that the term obviously means the activities of a performer as such.

(*b*) *Phonogram* "means any exclusively aural fixation of sounds of a performance or of other sounds." It was suggested during the Conference that bird songs and other nature sounds are examples of sounds not coming from a performance. As reported, a distinction was drawn between the terms "phonogram" and "fixation," the former being used exclusively for aural fixations, while the latter also includes visual or audio-visual fixations.

(*c*) *Producer of phonograms* is defined as "the person who, or legal entity which, first fixes the sounds of a performance or other sounds." It was observed "that when an employee of a legal entity fixes the sounds in the course of his employment, the employer legal entity, rather than the employee, is to be considered the producer."

(*d*) *Publication* "means the offering of copies of a phonogram to the public in reasonable quantity."

(*e*) *Reproduction* is defined as "the making of a copy or copies of a fixation." Under this definition, reproduction means copying; any activity which does not result in new tangible copies is excluded.

(*f*) *Broadcasting* is defined as "the transmission by wireless means for public reception of sounds or of images and sounds." It was noted that only transmission by hertzian waves or other wireless means constitutes broadcasting. The words "transmission for public reception" is used in the definition to indicate that broadcasts intended for reception by one person or by a well-defined group—such as ships at sea, planes in the air, taxis circulating in a city, etc.—are not to be considered as broadcasts.

(*g*) *Rebroadcasting* means "the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." During the consideration of a proposed definition of "broadcasting organization," the following points were clarified: (i) "If the technical equipment is a contracting state is owned by the postal administration, but what is fed into the transmitter is prepared and presented by such organizations as the Radio-diffusion-Télévision Française or the British Broadcasting Corporation, the latter, and not the postal administration, is to be considered that broadcasting organization"; and (ii) "if a given program is sponsored by an advertiser, or is prerecorded by an independent producer of television films, and is transmitted by such organizations as the Columbia Broadcasting System in the United States, the latter, rather than a sponsor or the independent producer, is to be considered the broadcasting organization."

Article 4 (Protected performances)

This article provides that a contracting state must grant protection to a performer whenever: (*a*) The performance takes place in another contracting state; (*b*) the performance is incorporated in a phonogram protected under article 5; and (*c*) the performance, not being fixed on a phonogram, is carried by a broadcast protected under article 6. It was noted during consideration of article 4, that "the purpose of items (*b*) and (*c*) was to establish a system under which performances recorded on phonograms are protected when the phonogram producer is protected, and under which broadcast performances (other than those fixed on phonograms) are protected when the broadcasting organizations transmitting them are protected."

Articles 5 and 17 (Protected phonograms and criterion of fixation)

With certain exceptions, article 5 stipulates that a contracting state must grant national treatment whenever: (*a*) The producer of the phonogram is a national of another contracting state; (*b*) the first fixation of the sound was made in another contracting state; and (*c*) the first publication of the phonogram took place in another contracting state. However, article 5 permits a contracting state to declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Moreover, under article 17, any state whose law in effect on October 26, 1961, grants protection solely on the basis of the criterion of fixation, may deposit a notification with the Secretary-General of the United Nations that it will apply, for purposes of article 5, the criterion of fixation alone.

Article 6 (protected broadcasts)

Article 6 provides that a contracting state must grant national treatment to broadcasting organizations whenever: (a) The headquarters of the broadcasting organization is situated in another contracting state; that is, the state under the laws of which the broadcasting entity was organized; and (b) the broadcast was transmitted from a

transmitter situated in another contracting state. This article also provides that a contracting state may reserve the right to protect broadcasts only if both the criterion of nationality and the criterion of territoriality are met.

Article 7 and 19 (minimum protection of performers)

In order for countries like the United Kingdom to continue to protect performers under criminal statutes, article 7 sets forth certain acts that a performer shall have the "possibility of preventing." This provision differs from the wording of the articles enumerating the minimum rights of producers of phonograms (art. 10) and broadcasting organizations (art. 13), where the expression "shall have the right to authorize or prohibit" is employed. It was noted, however, in the report, that the acts listed in article 7(1) require consent by the performer, and that the institution of a compulsory license system would therefore be incompatible with the convention.

Among the acts performers are given the possibility of preventing under article 7 are: (a) The broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation; (b) the fixation, without their consent, of their unfixed performance; and (c) the production, under certain circumstances, of a fixation of their performance. Once performers consent to the broadcasting of their performances, they must look to the domestic law of the contracting state where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes, and the reproduction of such fixation for broadcasting purposes; however, the domestic law governing such uses must not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organizations, it being understood that "contract," for purposes of article 7(2) (1) and (2), "includes collective contracts, and also the decisions of an arbitration board if arbitration was the mode of settlement ordinarily applying between the performers and broadcasters."

Although it was recognized that neither the communication to the public nor the fixation of a live performance ordinarily involves the crossing of national frontiers, the Conference did not regard their occurrence as "outside the realm of the possible," and therefore retained the reference. Moreover, with respect to the fixation of a performance, it was understood that the consent of the performer would be required "not only in the case of the fixation of a live broadcast performance, but also in the case of the fixation of a live performance communicated to the public by any means." As set forth in article 19, however, it was agreed that, where a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, article 7 would have no further application.

Concerning the reproduction of a performance under article 7(1) (c), it was generally thought that, where a phonogram incorporating a performance was copied by a person other than one licensed by the authorized producer, the producer of the phonogram could be expected

to enforce his right of reproduction and, therefore, it was sufficient to grant this right to the producer alone.

Articles 8 and 9 (group performances and variety artists)

Article 8 deals with the manner in which members of a group of performers will be represented in connection with the exercise of their rights, while article 9 covers the extent of protection a state may, under its domestic laws and regulations, provide for artists who do not perform literary and artistic works. Article 9 was included as a reminder for countries that they were not obliged to limit protection to performers of literary or artistic works.

Article 10 (reproduction right of producers of phonograms)

Article 10 stipulates that producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Direct or indirect reproduction, including rights against partial reproduction, was understood as covering, among other things, reproduction by means of: "(a) Molding and casting; (b) recording the sounds produced by playing a preexistent phonogram; and (c) recording off the air a broadcast of the sounds produced by playing a phonogram."

As for the right of producers to prohibit placing copies of phonograms in circulation without their consent, or when the terms of their consent had been exceeded, or to prohibit the importation into a contracting state of copies that would have been unlawful if made in that state, according to the report, the Conference felt that, since similar rights were not afforded under the copyright conventions to literary and artistic works, the resolution of the matter should be left to the discretion of member states.[17]

Articles 12, 16 and 17 (secondary uses of phonograms)

The term "secondary uses" in relation to article 12 means the use of phonograms in broadcasting and communication to the public. The provision applies only to phonograms published for commercial purposes, or reproductions of such phonograms, that are used directly for broadcasting or for any communication to the public. Although use through rebroadcasting would not be deemed a direct use, "the mere transfer by a broadcasting organization of a commercial disk to tape and the broadcast from the tape, would not make the use indirect." Under article 12, users of phonograms are required to pay a single equitable remuneration to the performers, or to the producers of the phonograms, or to both.

With respect to secondary uses, it should be noted that, pursuant to article 16, contracting states are permitted reservations involving

[17] It should be noted that the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms was adopted at Geneva on Oct. 29, 1971. Under art. 2 of the convention, that entered into force for the United States on Mar. 10, 1974, a contracting state must "protect producers of phonograms who are nationals of other contracting states against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public."

article 12, and my even declare that they will not apply any of the provisions of that article. Under article 16, a state may restrict the protection given to secondary rights under its domestic law, even if the phonogram was fixed by a producer who is a national of another contracting state, to the extent that, and for as long as, similar protection is granted in the latter state. This enables a state to limit the protection it grants to the extent of the protection it receives, except insofar as the beneficiaries of the protection are concerned. Moreover, under article 17, contracting states which, on October 26, 1961, granted protection to producers of phonograms solely on the basis of the criterion of fixation, may deposit a notification to the effect that they intend to substitute, for purposes of article 16(1)((iii) and (iv) with respect to limitations on the protection given to secondary use rights, the criterion of fixation for the criterion of nationality.

Article 13 (*minimum protection of broadcasts*)

This article provides that broadcasters shall enjoy the right to authorize or prohibit: (a) The rebroadcasting of their broadcasts; (b) the fixation of their broadcasts, including parts of the broadcasts; and (c) the reproduction: (i) of fixations, made without their consent, of their broadcasts; and (ii) of fixations, made in accordance with exceptions provided for under article 15, of their broadcasts, if the reproduction is made for purposes different than those referred to in the appropriate provisions on exceptions. Broadcasting organizations are also granted a television exhibition right, i.e., a right to prohibit the communication to the public of television broadcasts, if the communication is made in places accessible to the public, and if an entrance fee is charged.

Article 11 (*formalities*)

In general, contracting states are not required to enact domestic laws requiring any formalities; however, it was agreed that, if the domestic law does require compliance with formalities as a condition of the protection of phonograms, the requirement shall be considered satisfied if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection. Furthermore, the notice must contain the names of the owners of the rights of the producer or performers only where the copies or containers do not indicate the producer or the principal performers—the ownership of the rights to be decided "on the basis of the law and factual situation existing in the country where the phonogram was fixed."

Article 14 (*minimum term of protection*)

The convention provides for a minimum term of protection of 20 years. As for the starting point of the term, it was decided that the period of 20 years shall be computed from the end of the year in which: (a) The fixation was made, in the case of phonograms and for performances incorporated therein; (b) the performance took place, in the case of performances not incorporated in phonograms; and (c) the

broadcast took place. Although there was some discussion of providing for a comparison of terms, particularly in connection with secondary use rights, it was felt that such a provision was not essential since the situation was adequately covered by article 16(1)(a)(iv), which expressly permits material reciprocity with respect to duration.

Article 15 (possible exceptions)

Article 15(1) permits contracting states to provide, in their domestic laws and regulations, for certain exceptions to the minimum protection guaranteed by the convention. These exceptions may relate to: (a) Private use; (b) use of short excepts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; and (d) use solely for the purposes of teaching or scientific research.

A contracting state may also establish the same kinds of limitations on the rights of performers, producers of phonograms and broadcasting organizations as it does in relation to copyright in literary and artistic works; however, any compulsory license provisions must be compatible with the convention.

Article 32 (Intergovernmental Committee)

Under this article, an Intergovernmental Committee, consisting of representatives of the contracting states, was established to study questions concerning the application and operation of the Rome convention, and to collect proposals and prepare documentation for possible revision of the Convention. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization, and the World Intellectual Property Organization [formerly the Bureau of the Berne Union], designated by the Directors-General thereof, comprise the Secretariat of the Committee.

IV. Activities of the Intergovernment Committee Established Under Article 32 of the Rome Convention

The Intergovernmental Committee established under article 32 of the Rome convention was constituted at a meeting in Geneva on May 18, 1965, 12 months after the entry into force of the Convention. At its first ordinary session in December 1967, the Committee adopted its rules of procedure and approved the list of intergovernmental and international nongovernmental organizations to be invited to be represented by observers at its sessions.[18] On that occasion, the Committee also considered a communication received from the Government of Norway on whether, in light of certain arrangements made under Norwegian law, it could adhere to the convention without reservations concerning article 12. The Committee felt that it could not, as a body, consider itself as competent to give any sort of firm ruling on such matters which concerned essentially the interpretation of the Rome convention and of a national law.[19]

[18] The Committee's rules of procedure and the list of organizations invited to be represented at meetings has since been revised. The current rules of procedure were adopted by the Committee at its fourth session (see report of fourth session of Intergovernmental Committee, ILO/Unesco/ICR. 4/10, pars. 9–13 (December 20, 1973)).

[19] See report of first session of Intergovernmental Committee, pars. 18–27, 2 Copyright 32, 33 (1968).

In accordance with the duties assigned to it under article 32 of the Rome convention, the Committee examined at subsequent sessions, usually held at 2-year intervals, a variety of questions concerning the implementation of the Convention. In addition to the collection and dissemination of information on the application and operation of the convention, the Committee studied possible methods to assist states party to the universal copyright convention or members of the Berne Union drafting domestic laws compatible with the requirements of the Rome convention in order to encourage wider adherence to that instrument. Of particular interest in this respect is the Committee's efforts to prepare a model law concerning the protection of performers, producers of phonograms, and broadcasting organizations.

Efforts to draft a model law began in 1971 when the Intergovernmental Committee, at its third ordinary session, approved the preparation of a draft model law to facilitate the application of the Rome convention or accession to it. As consideration of the text of a model law progressed, five distinct areas of disagreement emerged: The problem of performers who are permanent employees of a broadcasting organization; the problem that arose where performers had previously ceded their rights to a trade union, a collecting society or another third person; the problem of exceptions and their concordance with copyright legislation; the period during which ephemeral recordings might be retained; and the problem of presentation of the optional character of the provisions of the draft model law relating to the secondary use of phonograms and formalities.[20]

In an attempt to resolve these differences, the Secretariat convened a nongovernmental study group consisting of representatives of performers, producers of phonograms and broadcasting organizations at Geneva in January 1974. The timing of the study group was particularly important in light of the linkage that had developed between the efforts to reach agreement on a model law on neighboring rights and the proposed new convention on transmissions by satellite:[21] during consideration of a draft model law prepared by the Secretariat, representatives of broadcasters stated their willingness to withdraw their opposition to the Rome convention, if legislatures adopted provisions based on a model law that met with their approval, while representatives of performers and producers of phonograms indicated that their attitude toward the proposed satellite convention would depend directly on the attitude of broadcasters to the Rome convention.

On the basis of the negotiations that took place between the interested parties following the meeting of the nongovernmental study group, agreement was eventually reached on the provisions of a draft model law, and the committee was able to adopt the final text of the model law, together with a commentary thereon, at an extraordinary session held at Brussels, in May 1974, immediately preceding the open-

[20] See report of fourth session of Intergovernmental Committee, ILO/Unesco/ICR. 4/10, par. 52 (December 20, 1973).

[21] The convention relating to the distribution of phonogram-carrying signals transmitted by satellite was eventually adopted at Brussels on May 21, 1974. In general, States party to the convention agree to "take measures to prevent the distribution on or from its territory of any program carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended" (article 2(1)).

ing of the International Conference of States on the distribution of program-carrying signals transmitted by satellite.[22]

With respect to the use of phonograms for broadcasting of communication to the public, it should be noted that, throughout the negotiations on the model law and commentary, representatives of broadcasting organizations, and in particular the European Broadcasting Union (EBU), were categorical in their opposition to article 12 of the Rome convention, as well as any corresponding provisions in the model law that were not clearly marked as optional. In general, the broadcasters felt that the Rome convention contained few benefits for broadcasting organizations, particularly since it did not provide protection against cable transmissions; and stressed that article 12 was wholly unacceptable in that they saw no reason why broadcasters should pay for advertising phonograms. In reply to the allegations of the broadcasters concerning article 12, a representative of phonogram producers on the occasion of the nongovernmental study group noted that broadcasters use records indiscriminately, often to the detriment of the recording, and to call such use advertising was a misnomer. "The fundamental point, in his opinion, was that broadcasters used phonograms for the bulk of their music programs because they cost only a fraction of live programs and the EBU was saying that they should not pay for them at all." [23]

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[22] For summary of discussions prior to adoption of model law and commentary, see report of non-governmental study group, ILO/UNESCO/WIPO/MLRC/II/6 (April 16, 1974); and report of 2d extraordinary session of Intergovernmental Committee ILO/UNESCO/WIPO/ICR (Extr.)/II/6 (June 10, 1974). For text of the model law concerning the protection of performers, producers of phonograms and broadcasting organizations together with the commentary, see 6 Copyright 163–174 (June 1974).

[23] Id. Report of nongovernmental study group, para. 32.

APPENDIXES

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Performance rights in sound recordings

Comment letter	*Party*
1	David Robinson, Miami, Fla.
2	Charles E. Bouton, Chairman, Patents, Trademarks, and Trade Practices Committee.
3	George W. F. Simmons, Berwyn, Pa.
4	James D. Boyd, FEL Publications, Ltd.
5	Nicholas E. Allen, Counsel for Amusement & Music Operators Association.
6	Wade H. Hargrove, Counsel for the North Carolina Association of Broadcasters
7	Erwin G. Krasnow and James J. Popham, NAB.
8	Norman P. Leventhal, ABC.
9	Norman P. Leventhal, Radio and TV Broadcast Station Licensees.
10	Edward M. Cramer, BMI.
11	Alan I. Wally, Record & Tape Association of America.
12	Recording Industry Association of America.
13	Alan W. Livingston, 20th Century-Fox.
14	Jack Golodner, AFL-CIO Unions for Professional Employees.
15	Woody Herman.
16	Major Short, KOBH-AM (Hot Springs, S. Dak.).
17	Paul Artman, WBAQ (Greenville, Miss.).
18	Gary Cummings, KRPL, Inc. (Moscow, Idaho).
19	L. John Miner, KDXU (St. George, Utah).
20	Kenneth Radant, WBCH (Hastings, Mich.).
21	Tom Fletcher, KAOK (Lake Charles, La.).
22	Elliot Field, KPSI (Palm Springs, Calif.).
23	E. J. McKernan, Jr., KLRF (Emporia, Kans.).
24	J.A.L. Sterling Wardell Chambers Telegram—Sydney, Australia.
25	Ralph S. Gregory—Mailgram—Eaton County Broadcasting, Charlotte, Miss.
26	H. Craig Hayes, Pittsboro, N.C.
27	Lester G. Spencer, WKVB—Richmond, Ind.
28	Hal C. Davis, President—American Federation of Musicians.
29	Sanford Wolff, American Federation of Television and Radio Artists, AFL-CIO.
30	W. F. Askew, KWFC (Springfield, Mo.).
31	George G. Anderson, WPVM (Cumberland, Md.).
32	Ken Bryant, WKEY (Covington, Va.).
33	Bobby Martinez, WCKW and WKZT (Garyville, La.).
34	Sidney J. Levet, III, WCKW and WKZT (Garyville, La.).
35	Malcolm Greep, WVJS/WSTO/WVJS-TV, (Owensboro, Ky.).
36	A. G. Fernandez, WKXY (Sarasota, Fla.).
37	C. J. McDonald, WJZZ (Streator, Ill.).
38	(The Real) Howard Johnson, WZYQ (Frederick, Md.).
39	Harold L. Norman, KQAD-AM and FM (Luverne, Minn.).
40	Frazier Reams, Jr., Reams Broadcasting Corp., Toledo, Ohio.
41	Art Cooley, WHKP (Hendersonville, N.C.).
42	Eugene E. Umlor, WPHM (Port Huron, Mich.).
43	John R. Linn, WWCK (Flint, Mich.).

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44---------- B. Len Phillips, WAGL (Lancaster, S.C.).
45---------- Joseph R. Fife, WIGO (Atlanta, Ga.).
46---------- Allen H. Embury, WKXK (Pana, Ill.).
47---------- Philip T. Kelly, WDBQ (Dubuque, Iowa).
48---------- Paul Miles, CBC (Charleston, W. Va.).
49---------- Vern McKee, KSDR (Watertown, S.D.).
50---------- David L. Arnold, KMYR (Albuquerque, N.M.).
51---------- Ruth B. Nelson, WLDY (Ladysmith, Wis.).
52---------- Roy E. Morgan, WILK (Wilkes-Barre, Pa.).
53---------- Simon Goldman, WJTN (Jamestown, N.Y.).
54---------- Robert Wade, National Endowment for the Arts.
55---------- Richard V. Surles, WISP (Kinston, N.C.).
56---------- Robert W. Campbell, KSGT (Jackson Hole, Wyo.).
57---------- M. L. Street, WQDW (Kinston, N.C.).
58---------- Ken Jennison, KSAL (Salina, Kans.).
59---------- Murray J. Green, WNYR (Rochester, N.Y.).
60---------- James V. McMahon, Jr., WVOB (Bel Air, Md.).
61----------Sam A. Burk, KIRX and KRXL (Kirksville, Mo.).
62----------Fred B. Hunnes, KATL (Miles City, Mont.).
63----------Steve Shannon, KCMO (Kansas City, Mo.).
64----------Ray Odom, KJJJ (Phoenix, Ariz.).
65----------David L. Baudoin, KDWA (Hastings, Minn.).
66----------Ron Petersen, KDMO and KRGK (Carthage, Mo.).
67----------Bernard Wilson, KFBR (Nogales, Ariz.).
68----------Alan W. Livingston, 20th Century-Fox.
69----------Kenneth L. Lillard, KLBM (La Grande, Oreg.).
70----------Roger Elm, Sr., WWJC (Duluth, Minn.).
71----------Edith A. Stricklin, WORM (Savannah, Tenn.).
72----------David A. Donlin, WBAX (Wilkes-Barre, Pa.).
73----------Jerry T. Gerson, WAGQ (Athens, Ga.).
74----------John H. Coe, WCSM (Celina, Ohio).
75----------Dale Moudy, WRMF (Titusville, Fla.).
76----------Bob Holtan, WAXX and WEAU–FM (Wis.).
77----------Robert A. Marmet, Marmet Professional Corp., Washington, D.C.
78----------James B. Stevenson, WIQT and WQIX (Horseheads, N.Y.).
79----------E. E. Koepke, KVOD (Denver, Colo.).
80----------Donald J. Newberg, WGBF (Evansville, Ind.).
81----------Norman Knight (Massachusetts and New Hampshire stations).
82----------Lewis Kurlantzick, University of Connecticut School of Law.
83----------Harrey R. Shriver, WFBR (Baltimore, Md.).
84----------Eric Anderson, WNOE AM and FM (New Orleans, La.).
85----------Alton Broussard II, WMOB (Mobile, Ala.).
86----------Sylvia R. Henkin, KSOO (Sioux Falls, S.D.).
87----------Bernard Dittman, WABB (Mobile, Ala.).
88----------Donald F. Whitman, KITN and KITI (Olympia, Wash.).
89----------Eric Hauenstein, NBS, Ltd. (Arizona).
90----------Pat Murphy, KNID and KCRC (Oklahoma).
91----------Lamar Trammell, WDIG (Dothan, Ala.).
92----------Norman P. Leventhal, attorney, Washington, D.C.
93----------Richard N. Larsen, KTIL (Tillamook, Oreg.).
94----------James H. Ranger, KUHL (Santa Maria, Calif.).
95----------Paul L. King, Indiana Broadcasters Association, Inc.
96----------Richard Brussow, KFMN (Abilene, Tex.).
97----------Michael R. Walton, WHBL (Sheboygan, Wis.).
98----------Thomas M. Jones, KBON (San Bernardino, Calif.).
99----------Norman P. Leventhal, attorney, Washington, D.C.
100----------Thomas Schattenfield, attorney, Washington, D.C.
101 ---------- Richard R. Zaragoza, attorney, Washington, D.C.
102 ---------- Stephen A. Herman, attorney, Washington, D.C.
103 ---------- R. C. Embry, WMAR (Baltimore, Md.).
104 ---------- Samuel S. Carey, WBOC–TV AM and FM (Salisbury, Md.).
105 ---------- J. A. L. Sterling—Wendell Chambers, Australia.
106 ---------- Helen Holmes—INTERPAR.
107 ---------- Verl Thomson, South Dakota Broadcasters Association.
108 ---------- Robert H. Maurer, Pennsylvania Association of Broadcasters.

109 ---------- Burt Oliphant, KDBM (Dillon, Mont.).
110 ---------- Earl J. Glade, Jr., Utah Broadcasters Association.
111 ---------- James V. Dunbar, Jr., South Carolina Broadcasters Association.
112 ---------- Michael C. Rice, Nutmeg Broadcasting Co.
113 ---------- Brian Danzis, KWTO, Springfield, Mo.
114 ---------- Reese C. Anderson, KWHO AM and FM, attorneys, Salt Lake City, Utah.
115 ---------- Omar Burleson, Congressman (Texas).
116 ---------- Don Davis, KACY (Oxnard, Calif.).
117 ---------- Jim Throneberry, KUPK (Garden City, Kans.).
118 ---------- Brad S. Miller, Mobile Fidelity Productions, Inc., Olympic Valley, Calif.
119 ---------- G. S. Kester, Jr., attorney, Columbia, S.C.
120 ---------- James A. Mitchell, attorney, Grand Rapids, Mich.
121 ---------- Iain Adam, solicitor, London, England.
122 ---------- F. Robert Fenton, KFIV (Modesto, Calif.).
123 ---------- John R. Rieger, WLIR-FM (Garden City, N.Y.).
124 ---------- Jerry Moss, A & M Records, Hollywood, Calif.
125 ---------- Benny Goodman, New York, N.Y.
126 ---------- Harrison Music Corp., Hollywood, Calif.
127 ---------- Paula Watson, performer.
128 ---------- Cynthia Leba, performer.
129 ---------- Alan I. Wally, president, Record & Tape Association of America.
130 ---------- John T. Staub, president, Hagerstown Broadcasting Co., Inc.
131 ---------- Thomas Gramuglia, vice president, Michele—Audio Corp. of America.
132 ---------- Robert P. Joseph, president, WDYX/WGCO, Buford, Ga.
133 ---------- Karen Maas, assistant general manager, Radio San Juan, Inc.
134 ---------- Stephen Sell, executive director, Minnesota State Arts Board.
135 ---------- Norman G. Gallant, executive director, Maine Association of Broadcasters.
136 ---------- Joseph P. Tabback, president, KAZM Radio, Sedonia, Ariz.
137 ---------- Robert Laird, General Manager, KSUM, Fairmont, Minn.
138 ---------- Jim Roberts, music director, Scantland Broadcasting—Marion, Ohio.
139 ---------- Robert W. Crites, president, KBLU, Yuma, Ariz.
140 ---------- William L. Viands, Jr., WIOD, Miami, Fla.
141 ---------- Bill Hillman, San Rafael, Calif.
142 ---------- H. Wayne Hudson, Plough Broadcasting Co., Inc., Memphis, Tenn.
143 ---------- Craig Scott, vice president, programing, Plough Broadcasting, Co., Inc., Memphis, Tenn.
144 ---------- Robert J. Hensler, station manager, WSST, Largo, Fla.
145 ---------- Dal Stallard, general manager, KAAA, Kingman, Ariz.
146 ---------- Jacqueline M. Frantz Cusic, Nashville, Tenn.
147 ---------- Louis D. Nunley, national chairman, AFTRA Singers' Caucus—N.Y.
148 ---------- Comments of Metromedia, Inc. before the Copyright Office, Library of Congress, Washington, D.C., dated August 8, 1977, James A. Stabile, Thomas J. Dougherty, Preston R. Padden.
149 ---------- Lowell E. Hamburger, president, KQXE/K104FM, Phoenix, Ariz.
150 ---------- Cary H. Sherman/Arnold and Porter, Washington, D.C., supplemental statement by RIAA, dated August 26, 1977.
151 ---------- Eleanor D. O'Hara, National Broadcasting Co., Inc., N.Y.
152 ---------- Kathleen F. O'Reilly, executive director, Consumer Federation of America, Washington, D.C.
153 ---------- James J. Popham, assistant general counsel, NAB, Washington, D.C.
154 ---------- Bette Jerome, American Women in Radio and Television, Inc., Washington, D.C.
155 ---------- John A. Dimling, Jr., National Association of Broadcasters, Washington, D.C.
156 ---------- Raymond E. Michael, performer, Arlington, Va.

157 ---------- Jimmy O'Neill, program director, KRCB–AM Radio, Council Bluffs, Iowa.
158 ---------- E. L. Byrd, general manager, WILS, Lansing, Mich.
159 ---------- Comments of Maryland, District of Columbia, Delaware Broadcasters Association, Inc., Alfred C. Cordon, Jr. Esq., Washington, D.C., before Copyright Office, dated August 24, 1977.
160 ---------- Larry E. Manuel, president and general manager, Radio Station WADR, N.Y.
161 ---------- S. James English III, board member, Washington-Baltimore Local of AFTRA.
162 ---------- Jim Farr, general manager, KKUB—Brownfield, Tex.
163 ---------- Congressional inquiry from Hon. Richard C. White re: Memo from Mr. Jim Taber, Texas.
164 ---------- Ester Karim, student, Phoenix, Ariz.
165 ---------- Harvey Allen, program director, KANC Radio, Anchorage, Alaska.
166 ---------- Fred Hildebrand, vice president, Wyoming Association of Broadcasters.
167 ---------- Dean Smith, president and general manager, Central West Broadcasting Co., Inc., Ballinger, Tex.
168 ---------- John A. Goeman, general manager, KJAM, Madison, S. Dak.
169 ---------- Rebecca Galloway and Dana Scott Galloway, Floydada, Tex.
170 ---------- Kenneth W. Heady, executive director, Arizona Broadcasters Association, Scottsdale, Ariz.
171 ---------- Justin Tubb, recording artist, Nashville, Tenn.

COMMENT LETTER NO. 1

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS, AND PUBLISHERS,
Miami, Fla., May 9, 1977.

HARRIET OLER,
Senior Attorney General Counsel's Office,
Library of Congress, Copyright Office,
Washington, D.C.

DEAR SIR: These comments concern the Notice of Inquiry that I received yesterday entitled Performance Rights In Sound Recordings, ML–151. The date of the Notice of Inquiry is April 21, 1977.

I am a newly elected associate member of the American Society of Composers, Authors and Publishers. My interest consists of Copyright Certificate Number Eu 626650 and a Notice of Use recorded in notice of use records in volume 143 on page 321. The name of the song is "From the Barren Sky." The Notice of Use pertains to a demonstration recording that was made for me by Bill Randell when I contracted with him and paid him to write the music for my song. According to my contract with Bill Randell (Broadway Music Productions) I shall receive 100 percent of all royalties up to the first $2,000 and thereafter I shall receive 95 percent and Broadway Music Productions 5 percent of all royalties. My contract allows Bill Randell to promote and negotiate with "From the Barren Sky." My contract does not mention the American Society of Composers, Authors and Publishers. The demonstration recording was given to me free as an inducement to accept the contract. To my knowledge the sound recording was not and indeed should not have been copyrighted in itself. The royalty agreements are binding on Broadway Music Productions only.

I have been a professional musician and music is nothing new to me. I was an honors student in Junior High School and in Senior High School in band. I took two music courses in college, one in appreciation and one in theory. Recently I was appointed as a member of the Music Industry Success Association.

I suggest that you write to the American Society of Composers, Authors and Publishers if you want comments and views about the Note of Inquiry.

Yours truly,

DAVID ROBINSON, B.A., Sc.M.

Announcement

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

COPYRIGHT OFFICE REQUESTS COMMENTS REGARDING PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

The following excerpt is taken from Volume 42, No. 81 of the Federal Register for Wednesday, April 27, 1977 (pp. 21527-28).

LIBRARY OF CONGRESS

Copyright Office

[S 77-6]

PERFORMANCE RIGHTS IN SOUND RECORDINGS

Notice of Inquiry

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry.

SUMMARY: This notice of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is preparing a report to Congress under section 114(d) of Pub. L. 94-553 (90 Stat. 2541), the Act for General Revision of the Copyright Law, pertaining to performance rights in copyrighted sound recordings. This notice is intended to elicit public comment, views, and information which will assist the Copyright Office in considering alternatives, formulating a report, and making legislative recommendations, if any. Specific areas of inquiry are noted below; related observations are welcome.

DATES: Initial comments should be received on or before May 31, 1977. Reply comments should be received on or before June 15, 1977.

ADDRESS: Interested persons should submit five copies of their written comments to: Harriet L. Oler, Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559.

FOR FURTHER INFORMATION CONTACT: *]

Harriet Oler, Senior Attorney, General Counsel's Office, Copyright Office, Library of Congress, Washington, D.C. 20559, 703-557-8731.

SUPPLEMENTARY INFORMATION: Section 114 of the newly enacted copyright law, Pub. L. 94-553, specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the sound recording and to distribute copies or phonorecords of the sound recording to the public. Paragraph (a) of section 114 states explicitly that the owner's rights "do not include any right of performance under section 106(4)."

Congress had considered the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings but concluded that the issue required further study. Paragraph (d) of section 114 directs the Register of Copyrights to consult with various interests in the broadcasting, recording, motion picture and entertainment industries; arts organizations; and representatives of copyright owners, organized labor and performers, and to report to Congress by January 3, 1978 whether Section 114 should be amended to provide for performers and copyright owners any performance rights in such material. The report is to describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

To assist the Copyright Office in formulating the report and recommendation, public comment is invited on the subject of performance rights in sound recordings. Comment is specifically requested on the following questions:

(1) What are the constitutional and legal constraints and problems arising from a performance royalty in sound recordings?

(2) What are the arguments for and against performance royalty in sound recordings? What projected economic effect would it have on performers, record companies, broadcasters, cable systems, owners of copyright in musical compositions, background music services, jukebox operators, record consumers and other interested parties?

(3) In the event that a performance right is enacted, who should enjoy it? If both record producers and performers enjoy it, what royalty split would be advisable?

(4) If a performance royalty is enacted, what mechanism should be established to implement it? Are voluntary negotiations possible and/or preferable? Would a compulsory licensing system work? If so, who should determine the rates, who should distribute the proceeds and how should the beneficiaries be identified? What role, if any, should the Copyright Office play?

Copies of all comments received will be available for public inspection and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, in the Public Information Office, Room No. 101, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, Virginia.

(Title 17 of the United States Code as amended by Pub. L. 94-553: Sec. 114.)

Dated: April 21, 1977.

BARBARA RINGER,
Register of Copyrights.

Approved:

DANIEL J. BOORSTIN,
Librarian of Congress.

[FR Doc.77-12057 Filed 4-26-77;8:45 am]

* Omitted in Federal Register edition.

ML-151
April 1977-10,000

COMMENT LETTER NO. 2

CHARLES E. BOUTON, ATTORNEY AT LAW,
Chicago, Ill., May 11, 1977.

Re Chicago Bar Association Patents, Trademarks & Trade Practices Committee comments on performance rights in sound recordings

MS. HARRIET OLER,
Senior Attorney, General Counsel's Office, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: In response to the invitation for public comment appearing at 42 Federal Register 21527, our Copyright Subcommittee prepared the attached resolution. This matter was reviewed by the full committee on May 10, 1977 and the committee voted approval of the resolution and instructed me to forward it to you.

We would be interested in following this matter further. While we wish to keep our comments general at the present time and are not in a position to recommend specific legislation, we would like the opportunity to review and comment on any specific legislative proposals that the Registrar of Copyrights may feel are worthwhile. Should you have anything of this nature, please forward it to Mr. Charles Rowe, 20 North Wacker Drive, Suite 2200, Chicago, Illinois 60606.

Very truly yours,

CHARLES E. BOUTON,
Chairman, Patents, Trademarks & Trade Practices Committee.

Enclosure.

To: Committee on Patents, Trademarks and Copyrights, Chicago Bar Association.
From: Subcommittee on Copyrights.
Re Recognition of public performance rights in sound recordings.

At its meeting on May 3, 1977, the Subcommittee on Copyrights agreed to recommend to the Committee on Patents, Trademarks and Copyrights that the following resolution be adopted by the full Committee and communicated to the Copyright Office:

RESOLUTION OF THE COMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE CHICAGO BAR ASSOCIATION

Preamble

The Copyright Revision Act enacted October 19, 1976, Public Law 94–553, 90 Stat. 2541, provides that the owner of a copyright in a sound recording does not have any rights concerning the public performance of the sound recording. Public Law 94–553 § 114(a). Under section 114 (d) of the Revision Act, the Register of Copyrights is mandated to submit to Congress a report by January 3, 1978, setting forth recommendations as to whether or not Congress should amend the Copyright Act to provide for a right of public performance in the owners of copyrights in sound recordings. Pursuant to this mandate, the Register of Copyrights has caused a Notice of Inquiry to be issued soliciting comments from interested parties on this issue to be submitted by May 31, 1977. 42 Fed. Reg. 21527 (April 27, 1977). It should also be noted that Representative Danielson of California has introduced a bill for the recognition of performance rights in sound recordings which is now pending. H.R. 6063, 95th Cong., 1st Sess. Also, the earlier drafts of the Copyright Revision Act contained a provision for a public performance right in the owner of a sound recording together with a compulsory license for the use thereof by the broadcast industry. S. 1361, 93d Congress, First Session § 114, draft introduced March 26, 1973, hereinafter cited as S. 1361.

It is hereby resolved, That the Committee on Patents, Trademarks and Copyrights of the Chicago Bar Association hereby endorses and supports the principle that the right of public performance of a sound recording should be recognized by and incorporated into the federal copyright laws and that such right should be one of the rights accruing to the copyright proprietor of the sound recording.

The Committee further endorses and supports the principle that if such a performance right is enacted, it should be subject to a compulsory license so that public access to performances of sound recordings shall not be impaired.

The Committee further endorses and supports the principle that if such a performance right is enacted, the royalties or other proceeds from the licensing or other disposition of these rights should accrue to the copyright proprietor and should be shared in by the performers or others only if the parties have so contracted of their own volition.

The Committee further endorses and supports the principle that if such a performance right is enacted, it should be extended to performances of sound recordings owned by foreign nationals only if their country reciprocally recognizes such rights for performances of sound recordings owned by citizens of the United States.

BERWYN, PA., *May 11, 1977.*

HARRIET OLER, ESQ.
General Counsel's Office,
Library of Congress, Washington, D.C.

DEAR MS. OLER: I should like to cast a vote opposing extension of copyright to performance rights. Any grant of a monopoly necessarily entails a higher cost to the consumer. With the example of the Tudor monopolies before it, the U.S. was careful to restrict the granting of monopolies to those situations in which the incentive of the monopoly was needed to encourage the creation of new intellectual property to benefit the overall public. This purpose was set forth in the Constitution as follows:

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

A performer by definition is neither an author nor inventor and produces neither a writing nor a discovery. Further, as a class they are richly rewarded—far more so than inventors as a class. The recent extension of the copyright laws insures that the possessors of such rights are the most richly rewarded, in terms of the statutory grant, of any monopolist in history. To accord similar protection to performers, a group not within the Constitutional mandate and already highly paid, is ridiculous. As a consumer and one who would have to pay, I am opposed.

Sincerely,

GEORGE W. F. SIMMONS.

COMMENT LETTER NO. 4

F.E.L. PUBLICATIONS, LTD.,
Los Angeles, Calif., May 19, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is to emphatically express our concern over the fact that the new Copyright Law, Pub. L. 94–553, Section 114, does not provide for the copyright owner to receive performance fees under Section 106(4). We are a small independent closely held religious music publisher who presently provides both printed hymnals and songbooks plus recordings of our owned copyrighted songs for sale to churches ond other groups for Liturgical worship purposes. We also offer an Annual Copy License for a fee to churches or other institutions who wish to "do their own thing" by putting together their own selection of songs in a book or sheet for use at worship or other folk, guitar or youth group functions.

We have several very popular songs such as "They'll Know We Are Christians By Our Love", "Allelu", "Sons of God" and many more, that are often sung at some type of performance such as during an Oral Roberts program, a Billy Graham Crusade or by any number of well known singers either on records, TV, radio or in person at concerts or large gatherings.

We strongly feel that other publishers, record companies or artists who record our copyrighted songs on their records must be legally forced to pay us performance fees under a compulsory license or we will not be able to work out any kind

of voluntary license for performance with them. Thus, to deprive a small struggling company of any part of this performance income which would also penalize the poor composers of their rightful royalties thereon, results in working a financial hardship which I am sure was not intended by Congress when they passed the new copyright law.

Since we are members of ASCAP and most composers and copyright owners are either a member of ASCAP and most composers and copyright owners are either a member of ASCAP or B.M.I. we can see to reason for live, TV or radio performance fees not to continue to clear through those organizations.

The 2¾-cent mechanical license fees to go into effect January 1, 1978 should just be paid direct as at present by the user to the copyright owner and any compulsory performance royalty enacted should be handled in the same way. Thus there would seem to be no reason to involve the copyright office in collection or distribution of proceeds.

I expect to be in Washington the latter part of June 1977, and would be willing to meet with you or any members of the Congressional Committee to discuss this matter further if desired. Please advise.

Sincerely,

JAMES D. BOYD,
Vice President and Treasurer.

COMMENT LETTER No. 5

HERRICK, ALLEN, DAVIS, BAILEY & SNYDER,
ATTORNEYS AT LAW,
Washington, D.C., May 25, 1977.

Re performance rights in sound recordings, S 77–6.

MS. HARRIETT L. OLER,
Senior Attorney, Office of the General Counsel, The Copyright Office, Washington, D.C.

DEAR MS. OLER: In response to the Notice of Inquiry on the above subject we wish to submit the following comments in behalf of the Amusement and Music Operators Association (AMOA), the national association of jukebox operators.

AMOA opposes the creation of a new royalty for manufacturers and performers of musical recordings for the reasons set forth below.

In sumary, AMOA's reasons are as follows:

1. The unfairness of imposing additional royalty burdens upon this industry of small businessmen.
2. The lack of any need for a new royalty by manufacturers and performers who already secure royalties by contract.
3. Objection as a matter of principle to applying a second royalty to a single performance of recorded music, and
4. Objection on Constitutional grounds to the creation of such a royalty.

UNFAIRNESS OF THE PROPOSED ROYALTY TO JUKEBOX OPERATORS

The Copyright Act of 1976 imposes upon jukebox operators a new royalty of $8 per jukebox per year (Section 116 of the Act), and increases the mechanical fee on records they buy to 2¾ cents per recording, or 5½ cents for both sides of a 2-song record (Section 115 of the Act).

According to data before the Congressional Committees when the new Copyright Act was under consideration, there were approximately 450,000 jukeboxes on location and about 70,000,000 new phono-records purchased by jukebox operators each year. The resulting royalties under the new Act will amount to $7,450,000 a year commencing January 1, 1978—$3,600,000 ($8 × 450,000 machines) and $3,850,000 (5.5¢ × 70,000,000 records). As the jukebox operators' representatives demonstrated to the Congressional Committees many times, this is an industry of small businessmen, it is a marginal industry, those who are engaged in it have found they cannot afford to operate jukeboxes unless they also operate amusement and vending machines. The business has declined so much that Wurlitzer, one of the four American manufacturers of jukeboxes, stopped producing jukeboxes in 1974.

Although operators' costs are increasing drastically, they are not able to make changes in prices-per-play to keep pace with these increases in costs. In some businesses, prices can be increased merely by changing the price tag, and the changes may not be noticed. In the jukebox industry, it is a matter of reducing the number of songs a customer can play for a quarter, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent obtained, for he may object that a raise in the cost to play music will be detrimental to his business. Prices of two plays per quarter have been established by operators in some areas, but this is by no means generally accepted. In many areas, rates are still at 10 cents per play or three plays for a quarter, and there are even some areas where the rate remains at 5 cents per play.

These conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations.

We wish to emphasize, therefore, the apprehension with which jukebox operators view any proposal that would create a new royalty and thereby increase their royalty burden under the Copyright Act. We believe the depressed condition of this industry demonstrates the unfairness of imposing any such added burden upon it.

RECORD MANUFACTURERS AND PERFORMERS HAVE NO NEED FOR A PERFORMANCE ROYALTY

Record manufacturers and performers, traditionally, have secured compensation for their recordings through contractually negotiated royalties. They do not need added Congressional assistance to demand and receive adequate compensation for their recordings. On July 26, 1975, for example, Billboard magazine reported a $9,900,000 distribution to musicians throughout the United States from the Phonographic Record Manufacturers Fund, a fund which provides annual distributions to musicians, and was created by private contractual negotiations without the intervention of Congress. We urge the Register of Copyrights, therefore, to require record manufacturers and performers to demonstrate that any such Congressional assistance is needed before any such statutory benefits are conferred upon them.

We also point out that jukebox operators serve as promoters of records, and contend, therefore, that they provide a service to performers and record companies which is of sufficient benefit to obviate any claim for the payment of royalties for play of records on jukeboxes.

DUAL ROYALTIES FOR A SINGLE PERFORMANCE ARE NOT JUSTIFIED

AMOA opposes any new royalty for the recording arts as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kinds of musical copyrights they should be shared in a single royalty among all those who claim to have contributed to the finished product.

A RECORDING ARTS PERFORMANCE ROYALTY IS NOT CONSTITUTIONALLY SUPPORTABLE

Finally AMOA opposes a statutory royalty for record manufacturers and performers because we believe Congress lacks the power to confer such benefits upon them. In our view, record manufacturers, particularly, are not "authors" within the meaning of the Copyright Clause of the Constitution. If equal benefits are given to record manufacturers, along with performers, we believe such a royalty would be fatally defective.

Respectfully submitted.

NICHOLAS E. ALLEN,
Counsel for Amusement and
Music Operators Association.

COMMENT LETTER NO. 6

THARRINGTON, SMITH & HARGROVE,
ATTORNEY AT LAW,
Raleigh, N.C., May 27, 1977.

Re Notice of inquiry concerning performance royalty for sound recordings.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is submitted on behalf of the North Carolina Association of Broadcasters in response to the Copyright Office's Notice of Inquiry concerning the creation of a performance royalty for sound recordings. See, 42 Fed. Reg. pp. 21527–21528, April 27, 1977.

The North Carolina Association of Broadcasters ("NCAB" or the "Association") is comprised of some 300 radio and television broadcast stations in North Carolina.

Despite an effort spanning several decades, the legal case for creating a performance royalty for sound recordings has yet to be made. The Constitution does not empower Congress to establish a copyright for performers. Performers are not "authors" or "inventors" within the meaning of Article I, Section 8, Paragraph 8 of the Constitution. Accordingly, any legislation which purported to create such a royalty would be unconstitutional.

Aside from legal infirmities, a performance royalty would impose an intolerable economic burden on many radio and television stations. Broadcast stations pay substantial royalties to composers for the right to broadcast recordings. These royalties have constituted as much as 25 percent of the radio industry's annual pre-tax profits.

During 1976 when the Senate was considering the performance royalty contained in Section 114 of S. 1361, NCAB submitted to former Senator Sam Ervin the attached table which demonstrates the economic impact which that section would have had on North Carolina radio stations. That analysis is still valid as an illustration of the extent to which a performance royalty would be harmful to the broadcast industry. The table was prepared from the then most recent broadcast financial information available from the Federal Communications Commission. The Commission publishes financial information only for those communities which have at least three broadcast stations.

The table reflects that in 1972, Section 114 would have cost the 90 radio stations located in North Carolina's medium to large cities an additional annual royalty payment of $470,744. That represents, on the average, 15 percent of these stations' 1972 pre-tax profit. Needless to say, few, if any, industries could absorb a 15 percent annual reduction in profits without a compromise in their existing level of service.

The table further reveals that, as a rule, the smaller the community, the more severe the impact. For example, the Section 114 royalty would have represented 103 percent of the 1972 pre-tax profits of the three Goldsboro, North Carolina, stations and forced an operating loss for the year of $331. It would have represented 236 percent of the pre-tax profits of the seven Asheville, North Carolina, stations, and produced an operating loss of $16,361. The percentage of royalty to profits would have ranged from 24 percent in Wilmington, 19 percent in Hickory, and 31 percent in Wilson. The Section 114 royalty would have increased the 28,943 net loss of the three Greenville stations to $36,397.

Given the impact on these stations, it would be impossible for the hundreds of smaller North Carolina radio stations in communities such as Morganton, Lincolnton, Asheboro, Smithfield, Reidsville, Clinton, Wallace, Tarboro, Waynesville, Canton, Farmville, Roxboro, Hendersonville, Selma, Valdese, Fuquay-Varina, etc. could financially survive. The table confirms, in hard figures, what North Carolina broadcasters have been saying for years about a performance royalty—while the economic burden which the new royalty would impose on large market stations would be severe, its impact on small town radio stations would be devastating.

There is no reason to supect that North Carolina stations are less profitable than those in other states. If anything, the converse is true. The 1972 gross profit margin of the stations listed on the enclosed table is 13 percent compared with a national average for all stations in 1972 of 9 percent.

The most recently available broadcast financial information from the FCC does not suggest that the radio industry's ability to pay a performance royalty

has improved since 1972. The seven national radio networks (CBS, Mutual Broadcasting, NBC and ABC's three AM and one FM network) reported a net loss of $2.5 million from their operations in 1975. Some 39 percent of all AM and FM stations and 57 percent of all independent FM stations operated at a loss in 1975. (See, Broadcasting, Nov. 8, 1975 p. 60.)

While record performers have repeatedly argued that the cost of a performance royalty could be easily passed on to advertisers by the broadcasting industry, an independent study undertaken in 1974 concluded otherwise. Professors Bard and Kurlantzick, in the most exhaustive study undertaken to date of the legal and economic issues of a performance royalty, stated in an article entitled "A Public Performance Right In Recordings", 43 Geo. Wash. Law Review 152, 236 as follows: "Almost certainly, broadcasters will absorb the increased costs . . ."

Record artists and recording companies can make no compelling case for increasing their income at the expense of the nation's broadcast industry. Record performers whose works gain public acceptance already tend to earn considerably more than broadcasters. In return for a few weeks of "star" status, many performers earn enough to live out the remainder of their lives in regal splendor.

The claim which is frequently made by artists and recording companies that their arrangement with broadcast stations is non-compensatory is illusory. First of all, when a station buys a record to broadcast on the air, both the performer and the recording company are compensated as a result of the purchase. An additional payment in the form of a performance royalty would be tantamount to compelling one who purchased a book to pay an additional fee for reciting passages from it.

Moreover, no one would argue with the fact that the promotion which records receive from broadcast exposure boosts record sales and attendance at performers' concerts. This promotion is more than adequate compensation for the broadcast performance. The undeniable truth is that many recording companies and artists would be forced out of business overnight if broadcasters stopped playing their records over the air.

Public policy considerations militate against increasing the private coffers of the recording industry at the expense of the nation's broadcasters and, in turn, the public which broadcasters serve. Unlike broadcasters, recording artists and recording companies are not required to render a "public" service. Broadcast stations are compelled by federal regulation to provide news, agricultural, public affairs, religious, weather, educational, minority oriented and other public service programs which usually produce little revenue. To the extent a performance royalty would divert a portion of broadcasting's revenues to performers and private record companies, broadcasters would be left with fewer dollars for these kinds of public service programs.

Perhaps the most telling rebuttal against any claim by record companies and performers that they do not receive adequate consideration for the broadcast of their records is the fact that broadcasters have to constantly monitor disc jockeys to make sure record companies and performers are not paying them to broadcast their records. Such payment constitutes "payola" and is, of course, illegal. Broadcast managers in many stations are engaged in a continuous review and check of their employees to prevent record companies and performers from passing money "under the table" for record plays.

The creation of a performance royalty would only serve to intensify the payola problem. (See the remarks of former Senator Pastore during the floor debate on § 114 of S. 1361 at page 516148 of the Sept. 9, 1974 Cong. Record.)

Bard and Kurlantzick, in their study supra at 198 reached a similar conclusion:

"If payola is an almost inevitable consequence of the pressure of economic forces operative in the broadcast industry, it seems unwise, all things being equal, to increase such pressure by adding direct financial returns to record companies from license fees for public performance in addition to the inherent and unavoidable indirect benefits to record sales from radio play."

In conclusion, given the Constitutional impediments and public policy considerations, NCAB respectfully urges the Copyright Office to recommend to Congress that a performance royalty for sound recordings not be established.

Very truly yours,

WADE H. HARGROVE,
Counsel for the North Carolina
Association of Broadcasters.

TABLE ILLUSTRATING THE ECONOMIC IMPACT SEC. 114 WOULD HAVE HAD ON BROADCAST STATIONS IN NORTH CAROLINA'S MEDIUM TO LARGE CITIES DURING 1972

Market	Stations	Total revenue	Total expense	Net income	Amount of sec. 114 royalty	Percent of sec. 114 royalty to net income
Goldsboro	3	$648,637	$635,995	$12,642	$12,973	103
Asheville	7	1,415,442	1,403,494	11,948	28,309	236
Wilson	3	444,993	416,115	28,878	8,900	31
Burlington	3	736,916	641,190	95,726	14,738	15
Charlotte	16	5,507,524	4,876,993	630,531	110,150	17
Fayetteville	5	1,463,982	1,252,030	211,952	29,279	14
Winston-Salem, Greensboro, High Point	20	5,300,929	4,319,883	981,046	106,019	11
Raleigh-Durham	13	4,426,753	3,560,856	865,897	88,535	10
Wilmington	5	780,001	714,180	65,821	15,600	24
Greenville	3	372,686	401,629	(28,943)	7,454	
Hickory	3	710,415	633,710	76,705	14,208	19
Jacksonville	3	578,633	500,791	77,842	11,573	15
Kinston	3	696,032	621,057	74,975	13,921	19
Rocky Mount	3	454,253	396,562	57,691	9,085	16
Total	90	23,537,196	20,374,485	3,162,711	470,744	15

COMMENT LETTER NO. 7

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., May 31, 1977.

Before the Copyright Office, Library of Congress

IN THE MATTER OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

S 77–6

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB), by its attorneys, hereby submits its comments in response to the Notice of Inquiry[1] in the above-captioned proceeding. NAB is a non-profit incorporated association of broadcast stations and networks. Among NAB members as of May 25, 1977, were 2448 AM radio stations, 1757 FM radio stations, 544 television stations and all nationwide, commercial broadcast networks. The object of NAB according to its by-laws: ". . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

On October 19, 1976, the Copyright Revision Act of 1976 was enacted.[2] Section 114(a) of that Act requires the Register of Copyrights to report to Congress on January 3, 1978, concerning the inclusion of a performance right in sound recordings.[3] The Act recognizes a copyright in sound recordings but accords the owner of the copyright no exclusive right to perform his work. NAB consistently has opposed the establishment of a performance right in sound recordings as unconstitutional, inequitable, contrary to law and detrimental to the public interest. In response to the present inquiry, NAB submits the following arguments against establishment of a performance right in sound recordings.[4]

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[1] 42 Fed. Reg. 21527 (April 27, 1977).
[2] Public Law 94–553, 90 Stat. 2541.
[3] Id., 90 Stat. at 2560.
[4] Following each section heading, NAB has indicated the question in the Notice to which the section is relevant.

I. Establishment of a performance right in sound recordings would be constitutionally impermissible [1]

The Constitution does not empower Congress to create a performance right in sound recordings. The power to create a copyright royalty is contained in Article I, Section 8, Clause 8 of the United States Constitution:

"The Congress shall have power to promote the Progress of Science and Useful Arts by securing for limited times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries;"

Thus, the power of Congress to create a copyright is limited. Establishment of a performance royalty in sound recordings would exceed that limited power. First, performers are not "authors" or "inventors" in the Constitutional sense. The performer of another author's work hardly can be considered an author who has created an original work. The concepts of creation and authorship are distinct from the concept of performance. The former connotes originality, something entirely new and unique. The latter is simply a rendition of something already created by someone else.

Second, a performance right in sound recordings is not necessary to "promote the progress of science and the useful arts." Copyright traditionally has been justified because it encourages authors and inventors to create by assuring them that they will reap the profits of their labors. The copyright law provides necessary protection for authors against those who may seek to "share" in the author's profits by duplicating or otherwise using the author's work for their own gain. Such protection is not necessary in the case of those who perform music and produce sound recordings. They already are assured ample rewards. Record production is a highly profitable undertaking and performers are entitled by contractual relationship with the producer, to a share of the profits. No further encouragement is necessary to stimulate recording of performances and sale of the resultant sound recordings.

The lack of need for a performance right in sound recordings is highlighted when contrasted with the demonstrable need for the limited copyright in sound recordings which initially was established in 1972,[5] and retained in the 1976 Revision. The unauthorized duplication of sound recordings, i.e. record piracy, posed a grave threat to the recording industry, the performers and the authors and composers. There, record piracy led to a loss of revenue to the record company, fees to the performers and royalties to the composers and authors. Thus, the limited copyright recognized prevented losses to the copyright owners. A performance royalty, on the other hand, would provide an unnecessary windfall.

In view of the above, establishment of a performance right in sound records would exceed the power of Congress rooted in Article I, Section 8, Clause 8 of the Constitution of the United States.

II. Establishment of a performance right in sound recordings is inconsistent with the copyright revision act [1]

The Copyright Revision Act establishes copyright protection for "original works of authorship."[6] Performance and recording of musical works do not constitute original works of authorship. Therefore, establishment of a performance right in sound recordings would fly in the face of a most fundamental element of the new law.

The performance and recording of musical works, on balance, are productions or renditions of other basic creations rather than creations per se. The resulting music is merely a production or rendition of a pre-existing copyrighted basic work, whereby the copyright owner grants a license to the producer and performers for the use of his work.[7] But for the basic copyrighted musical work, there could be no performance and no recording. The application of the "but for" test serves to illustrate why a performance and recording never could be considered an original work per se.

The basic copyrighted musical work may change in form by reason of different productions and renditions, but it does not change in substance. Even where the changed form of the copyrighted work seems drastic, e.g., a jazz improvisation,

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[5] Anti-Piracy Amendments, Public Law 92–140, 85 Stat. 391.

[6] § 101 of the new copyright law, Public Law 94–553 (Oct. 19, 1976), 90 Stat. 2541.

[7] § 101 and § 103(b) of the new copyright law, Public Law 94–553 (Oct. 19, 1976), 90 Stat. 2541, recognize the possibility of a copyrightable "derivative work". But, in order to qualify, the work must, "as a whole represent an original work of authorship". A musical production could not be an original work, but rather a performance of an original work.

there still exists the basic text or work that is recognizable, from which the production is made or upon which it is based. Even an extreme jazz improvisation of one musical work would differ from a copyrighted "derivative work" because the latter requires that the work, taken as a whole, be the result of original authorship; an improvisation, in contrast, is still an identifiable rendition of an existing musical work that would not satisfy the originality requirement.

In short, the new copyright law cannot accommodate a performance right in sound recordings without a fundamental enlargement of the scope of protected works. Inasmuch as originality always has been the sine qua non of copyright protection, NAB submits that establishment of a performance right in sound recordings cannot be squared with the basic requirement that a protected work by an original work of authorship.

Indeed, a performance is more akin to the type of work explicitly denied protection by the new law. The new Act states in section 102(b): "In no case does copyright protection for an original work or authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form in which it is described, explained, illustrated or embodied in such a work.*" (Emphasis added.)

This codifies the traditional distinction made in copyright law between protectable "expressions" or "writings" and unprotectable "ideas." A similar distinction exists between the actual performance of an artist and the fruits of his performance. The act of creating music by playing an instrument or singing can be described as a "procedure" or "process" or "method of operation," and by any of these definitions it falls well outside of the realm of works that can be afforded copyright protection under the law.

III. Establishment of a performance right in sound recordings would jeopardize the economic viability of a substantial number of broadcast stations [2]

If a performance right in sound recordings is established, broadcast stations will have to pay additional royalties for use of sound recordings on their stations.[8] The amount of royalties payable by broadcast stations would be substantial and in many cases debilitating. The fee schedule in the latest legislative proposal, for example, would extract substantial fees.

The total payments required of the radio industry under the fee schedule in H.R. 6063 can be estimated from FCC financial data. Table 10A in the FCC AM and FM Broadcast Financial Data, 1975, shows the distribution of revenues for AM and AM/FM stations. According to that table, 860 stations had revenues between $25,000 and $100,000; these stations would pay $250 each, or a total of $215,000. Similarly 1440 stations had revenues between $100,000 and $200,000; these stations would pay a total of $1,080,500.

Payments for stations with revenues over $200,000 can be estimated as follows. Total revenues for stations with revenues less than $200,000 are estimated by first multiplying the number of stations in each revenue category by the midpoint of the revenue category, and then summing across the categories for revenues of less than $200,000 (e.g., the 802×$125,000=$100,250,000). Subtracting these revenues from total broadcast revenues for all AM and AM/FM stations produces an estimate of $1.306 billion in revenues for stations with revenues for stations with revenues over $200,000; assuming that the ratio between total broadcast revenues and advertising revenues is approximately the same for these stations as for all stations, these stations have estimated advertising revenues of $1.284 billion. The total royalty payments for these stations would therefore be approximately $12.8 million, and total payments by all AM and AM/FM stations would be about $14.1 million.

A similar analysis of FM stations indicates that these stations would pay an estimated $1,144,000, so total payments for the entire radio industry would be about $15.2 million.

Payments of this magnitude would have a substantial impact on the radio industry. Total pre-tax industry profits were $90.7 million in 1975, so the royalty payments under the proposed bill would have represented about one-sixth (16.8 percent) of industry profits.

For many individual stations, the proposed payments would be particularly burdensome. In 1975, 39.7 percent of the AM and AM/FM stations lost money and 60 percent of the independent FM stations lost money. Unfortunately, un-

[8] Broadcast stations already pay approximately 3.5 percent of their revenues to authors and composers for use of their musical works.

profitable operations were not confined to the smaller stations (those with revenues less than $200,000) that would pay a flat fee under H.R. 6063; even among stations with revenues greater than $200,000, only 70 percent reported profitable operations in 1975.

Thus, payment of royalty fees for use of sound recordings would threaten the ability of many stations to continue to provide responsive service to their communities.

IV. Establishment of a performance right in sound recordings would produce only an illusory benefit for most performers and would not solve the real problem [2]

The plight of alleged undercompensated background singers and musicians often has been raised as an argument for a performance royalty. A performance royalty apparently would provide additional income to such performers. This argument ignores reality in several respects. First, royalties generated by a performance right very likely would tend to go where they are needed least. The most popular songs from the most popular performers are played more often. Thus, those who are successful will reap additional rewards for their success. Those who fail to achieve popularity will receive little. The rich get richer; the poor stay poor, if very slightly less so. Windfall for the popular; continued shortfall for the also-rans. A new copyright cannot remedy the difference in economic rewards between those who are highly successful and those who are not. Second, if, as alleged, these supporting performers are poorly compensated for their contributions to the final production, then relief should be forthcoming from those parties that directly benefit from these services, the recording companies, and recording artists. This is an intramural industry problem, not a broader problem that compels government intervention.

V. Payment of royalties for use of sound recordings by broadcast stations would be grossly inequitable and unwise [2, 4]

Establishment of a performance right in sound recordings could require broadcast stations to pay royalties for use of sound recordings in their programming. Any such payment of royalties by broadcast stations would be inequitable. Broadcast stations simply should not have to pay for the right to promote sound recordings in a manner no other medium can match for effectiveness. They should not have to compensate a prosperous and growing record industry that already benefits from the marketing boost that radio stations provide.

The vast majority of radio stations rely heavily on recorded music as a programming source. Unquestionably, the constant airplay of sound recordings by broadcast radio stations is highly beneficial to the record producer and performers. Primarily, it promotes sales of records, thereby creating more revenue and higher profits for record companies. Regular airplay of sound recordings also increases the popular appeal of recording artists and performers. Consequently, they will attract larger crowds at local concerts and nightclub appearances. Some may even end up with their own television shows (e.g. Dean Martin, Sonny and Cher, etc.). The benefits of airplay perhaps are illuminated by the usual practice of providing stations with ample free copies of sound recordings.[9] Without the extensive airplay of sound recordings, record producers and distributors would suffer loss of sales and other related revenues and be forced to pay for advertising of their product. The benefit of airplay are, thus, substantial, and to require broadcasters to pay for the right to perform sound recordings would be inequitable.

Furthermore, despite the efforts of the FCC and responsible broadcasters, the spectre of payola has not completely receded. The establishment of a performance royalty would give another segment of the music industry an interest in the selection of sound recordings for airplay on broadcast stations. Consequently, the soil would be more fertile for the growth of payola—an occurrence cleary contrary to the public interest.

VI. Conclusion

NAB urges the Copyright Office to fully consider the numerous constitutional and legal hurdles to establishment of a performance royalty. NAB submits that those hurdles cannot be cleared. Furthermore, establishment of a performance

[9] If broadcast stations were required to pay performance royalty, they would find themselves in a situation right out of Catch 22. "Here are our records. They are free, but, if you wish to use they, you must pay."

right in sound recordings would be inequitable and harmful to broadcast stations, while not providing a real remedy to the alleged plight of performers. Therefore, NAB urges the Copyright Office to recommend against inclusion of a performance right in sound recordings in the copyright law of the United States.

Respectfully submitted.

ERWIN G. KRASNOW,
JAMES J. POPHAM,
Counsel.

COMMENT LETTER NO. 8

MCKENNA, WILKINSON & KITTNER,
Washington, D.C., May 31, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.
(Attention of Harriet L. Oler).

DEAR MS. RINGER: On behalf of the American Broadcasting Companies, Inc., I submit herewith an original and four copies of its comments in response to the Notice of Inquiry released on April 21, 1977, concerning performance rights in sound recordings.

Respectfully submitted.

NORMAN P. LEVENTHAL.

Enclosures.
To: Register of Copyrights

Before The Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

S. 77–6

Comments of American Broadcasting Companies, Inc.

American Broadcasting Companies, Inc. (hereinafter "ABC"), by its attorneys, hereby submits its comments on the Notice of Inquiry issued by the Register of Copyrights on April 21, 1977, in the above-captioned matter.[1]

PRELIMINARY STATEMENT

1. ABC is the owner, operator and Federal Communications Commission licensee of six AM, six FM and five TV broadcast stations. It also operates radio and television networks which distribute news, public affairs, sports and entertainment programming to affiliated stations (including its own) in all parts of the country. In its capacity as radio and television broadcast station owner and in the provision of network programs and services, ABC makes substantial use of musical compositions and the sound recordings embodying them. This use occurs in entertainment, documentary and other programming and in commercial advertising.[2]

2. In 1975, broadcast industry payments for music license fees were made as follows:[3]

AM, AM/FM stations	$34,883,000
FM stations	5,896,000
Radio networks	150,000
TV stations	47,782,000
TV networks	8,445,000

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[1] Hereinafter cited as "Notice". The Notice appeared at 42 Fed. Reg. 21527 (Apr. 27, 1977).

[2] ABC is also the owner of a record production company, ABC Records. Notwithstanding its direct interest in the record industry, ABC does not believe that the proposed performance royalty will best serve the public interest.

[3] FCC Public Notice, November 8, 1976, Mimeo 73357, Tables 5, 6 and 15; FCC Public Notice, August 2, 1976, Mimeo 68100, Tables 5 and 6.

3. The Copyright Office has issued a Notice of Inquiry to elicit public comment on whether these payments—exceeding some $97 million annually on an industry-wide basis—should be substantially increased by the granting of a second use royaty in such copyrighted sound recordings, this time for the benefit of recording artists, arrangers, musicians and record companies.[4] At present, both the composer of the musical composition and the music publisher receive a compulsory license payment for use of each musical composition, whether embodied in a sound recording or not. The proposed performance royalty would create a new privilege of copyright in every separate performance (e.g., by different recording artists, of such musical composition, over and above the copyright already received by the composer (and/or lyricist) for his authorship efforts.

4. In ABC's view there is no justification for enlarging the copyright entitlements in sound recordings beyond the substantial benefits already accorded the composers and publishers of musical compositions. Indeed, there is considerable question whether Congress has the Constitutional power necessary to establish copyright entitlements to individuals or entities other than "authors"—such as is now being proposed for artists, arrangers, musicians and record companies. Certainly, creation of a second use, or performance, royalty would carve out a new area of protection that should not be undertaken without the most thorough legal and economic study and analyses.

5. In this connection, neither the performing artist nor the record company (producer) provides a sufficiently unique contribution to the musical composition that is not already adequately compensated by existing contractual arrangements. The record business is generally healthy and the available evidence indicates that it is in no need of additional royalty payments either to maintain record production or distribution at current levels or to stimulate new duction.

6. Notwithstanding the constitutional infirmities of the performance royalty proposal and the lack of need for its establishment from the public's standpoint, a second use payment would principally serve only to impose yet another substantial cost on the broadcaster for the right to provide musical entertainment to its listening public. In view of the fact that it is the broadcast industry which is singularly responsible for the financial success of composers, artists, record publishers and producers, alike, it is an unfair and burdensome tax that should be kept where the Congres left it.

Creation of a performance royalty would establish a new area of copyright protection that is not contemplated by the Constitution and, contrary to the Constitution's intent, would likely produce disadvantages to the public welfare.

7. Article I, § 8, clause 8 of the Constitution of the United States provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited times to *Authors and Inventors* the exclusive Right to their respective *Writings and Discoveries*. . . ." (emphasis added.)

The performing artist (singer, arranger or musician) does not fall within the category of "authors" and "inventors" to which Congress has been constitutionally authorized to afford copyright protection.[5] A recording artist—in his capacity as a performer—is not an author, nor obviously is a record company in its capacity as a producer and distribution of sound recordings. Moreover, neither provides or produces a "writing" of the kind that would be Constitutionally recognized.[6] As Senator Ervin concluded in presenting argument on this matter

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[4] In its recent revision ot the Copyright Act (Pub. L. 94–553, 90 Stat. 2541) Congress, although having considered the arguments relating to the establishment of a second use right (in the form of a compulsory license) for copyrighted performances in sound recordings, rejected the proposal concluding that the issue required further study. Congress provided the vehicle for such further study in Section 114(d) of the Copyright Act. The Register of Copyrights was directed, after consultation with the various industries affected, to report to Congress by January 3, 1978, on whether that section of the Act should be amended to provide for performance rights in copyrighted sound recordings. In furtherance of this statutory directive, the instant Notice was issued.

[5] Manifestly, as Senator Ervin of North Carolina has pointed out: "there is no contention that a performing artist is a discoverer [i.e., inventor] . . . or that a sound recording is a discovery." Congressional Record—Senate, September 6, 1974, S16073.

[6] It is particularly noteworthy in this respect that performance of neither dramatic nor literary works are accorded protected status under the copyright laws beyond that extended to the author.

in the 93rd Congress, a performance royalty in sound recordings would be "constitutionally unsound." [7]

8. Under English common law no copyright protection existed at all for published works. *Mazer* v. *Stein*, 347 U.S. 201, 214–15 (1954). Thus, copyright protection as we know it is a statutorily created right to which no individual or entity is automatically entitled as a matter of law or policy. The courts have consistently held that in enacting copyright legislation pursuant to the grant of Constitutional authority, Congress must give paramount consideration to the advancement of the public welfare; remuneration to the owner—or, in this case, the performer—is only of secondary importance.[8] The principal philosophy was recently sumarized by the United States Supreme Court:

"The immediate effect of our copyright law, is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary objective in conferring the monopoly', this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'" *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975), quoting *Fox Film Corp.* v. *Doyal*, 286 123, 127 (1932).

9. Assuming arguendo that there is no Constitutional limitation to Congress' ability to establish performance royalties in sound recordings—an assumption which we have shown to be faulty—the principal question to be addressed is whether the establishment of a performance copyright in sound recordings would serve "the general public good." We believe the available evidence indicates that it would not. Indeed, generally recognized experts in this field have concluded that the institution of a performance royalty is likely to result in significant disadvantage to the general public welfare.[9]

10. In their policy and economic analysis concerning performance royalties in sound recordings, Professors Bard and Kurlantzick conclude that because of the "uncertainty of the result, the tenuousness of the individual claims of potential beneficiaries . . . and the inevitable increase in transaction costs [10] attendant upon the establishment of a new public performance right . . . caution is warranted before granting record producers further benefits at the expense of broadcasters, and possibly composers and radio listeners." [11] The authors also conclude that the "establishment of the public performance right inevitably will increase the strong pressures inducing record producers to offer improper inducements to employees of the broadcast industry to get their records played on the air." [12] In other words, according to the studies undertaken by these academicians, a performance royalty will increase the incentive for, and the likelihood of, payola.[13] This is hardly the advancement in public welfare which the framers of the Constitution intended be achieved by the enactment of copyright laws.[14]

11. In view of the Constitutionally imposed limitations on copyright protection, the principal objectives of copyright law, and the public disadvantages likely to accrue from the creation of a new copyright privilege in sound record-

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[7] Congressional Record—Senate, September 6, 1974, S16073. Senator Irvin went on to state: "Even though their contributions in producing a sound recording are significant, such contributions do not constitute original intellectual creations which would justify protection under the copyright law. To create performance royalties for the benefit of record manufacturers and performers under copyright law would stretch the Constitution's meaning beyond reason and justification." Id. at 16074.

[8] *Mazer* v. *Stein*, *supra*, at 219. See also *Kendall* v. *Winsor*, 21 How 322, 327–28 (1859).

[9] One such disadvantage is a principal component of the British scheme which recognizes a performance right in recordings. It is, widely accepted that the English performance royalty is not so much concerned with the payment of fees as with the control of record broadcasts, and the employment of this control to limit the amount of air time for radio record play and to promote the employment of live musicians. See Bard & Kurlantzick, infra, at 173 and n. 75.

[10] Generally, these are the costs imposed upon all parties to implement and administer a new copyright royalty scheme.

[11] "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It", Robert L. Bard and Lewis S. Kurlantzick, The George Washington Law Review, Vol. 43, No. 1, pages 152–238, November, 1974, at pages 237–38; hereinafter cited as "Bard & Kurlantzick".

[12] Id. at 238.

[13] Id. at 196–199. Extensive Congressional hearings conducted on the payola scandals in the 1950s resulted in specific legislation directed to this problem. (See 47 U.S.C. §§ 317, 508.) The Federal Communications Commission has now reopened its long-standing investigation into the payola problem (FCC Docket No. 16648).

[14] As we discuss below (infra, pages 12–13), it is unlikely that a performance royalty will spur creative efforts beyond that which exists under the present system.

ings, the establishment of a performance royalty would be the very antithesis of sound legislative policy.

The performer does not provide a unique contribution, cognizable under the copyright law, that is not already adequately compensated.

12. To the extent that performers and others similarly situated make a significant contribution to a musical work, as we have noted above, such contributions are not constitutionally protected "writings." Moreover, any creative contribution that is made is adequately compensated under existing industry practices and arrangements.

13. The performance royalty generally considered during the last session of Congress apparently would have extended the privilege of copyright not only to the recording artist (singer), but to the arranger, musician and record producer as well—notwithstanding the varying creative contribution of each. In the latter two instances, however, there is considerable question whether any unique contribution is made that would receive even general recognition under the copyright laws. It has been suggested, for example, that the record producer's "unique" contribution is its merchandising and marketing capability in promoting and selling the sound recording. This, we submit, is hardly the kind of "writing" which the Founding Fathers sought to protect in the copyright clause of the Constitution. Similarly, in the majority of cases the musician provides necessary background music. Even in those cases (such as solo instrumentals) where a unique creative contribution has been made, it would not be sufficient to be cognizable under traditional copyright principles.

14. As a general matter, if a sound recording is to be set apart for its particular style or musical approach—and thus arguably contribute to some improvement in the public welfare—it is usually the result of the efforts of the music arranger or the recording artist (singer). In both of these cases, however, to the extent these contributions may be considered of sufficient creativity and originality, more than adequate compensation is already received for such efforts. The music arranger, for example, is generally compensated by the recording artist who employs him (or her) or by the record company. If his contribution and/or improvement to the sound recordings of the artist are meritorious over time, he will be able to increase his compensation. Indeed, the arranger is compensated by the recording artist principally for the uniqueness of his musical contributions and creative ability; there is no need to reward him further for doing the job he is employed to do.

15. In this sense, the recording artist is even less deserving of the additional compensation that would accrue to him as a result of a second use royalty in sound recordings. To the extent the artist makes a creative and original contribution to the musical composition—over and above that inherent in the music and lyrics—he, too, is compensated more than handsomely by the recording company. If the uniqueness of his contributions to sound recordings continue over time, the recording artist will be able to greatly increase his compensation from the record producer as well as obtain additional sources of income (e.g., concert performances, etc.). There is little question that the recording star is well able to protect his or her financial interests by suitable contractual arrangements,[15] as are those "performers whose records do not sell particularly well, but which are publicly performed over a long period". (Bard & Kurlantzick, 206.) This is due principally to the evaluation of the artist's potential by the composer and the record company and the setting of a compensation level suitable to such potential.[16] In this same way, like the artist, record companies already benefit from public performances of their product. The revenues a composer may earn through his public performance right will often serve to reduce the composers' price to the recording company for licensing their mechanical reproduction rights in the first instance. (Bard & Kurlantzick, 195.)

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[15] Bard & Kurlantzick, 195. As an example, the following article appeared in Parade magazine, May 22, 1977, page 4: "The Rolling Stones have negotiated one of the richest recording contracts in history. It's a complicated deal worked out in Toronto and London with Atlantic and EMI, but generally it guarantees them $20 million, based on a $2 million guarantee for each of their next six albums."

[16] As explained by Bard & Kurlantzick (at 206), in choosing a company and the price they will charge that company to record their songs, composers evaluate the capacity of the artists under contract to the company to make records which will yield maximum revenues through both public performances and record sales. Negotiations between the composer and the record company will take this factor into account as will negotiations between the record company and the artist. The artist with such capabilities can compel record companies to compensate him accordingly.

16. The suggestion inherent in the performance royalty that further remuneration is necessary in order to stimulate the production of new recordings—and thus presumably contribute to the constitutional objective of improving the public welfare—misconceives the very nature, of the recording industry. Competitive incentives among artists and record companies alone will be sufficient to insure the continuation of a flood of new recordings. This has certainly been the case to date in the absence of a "use" royalty for performers. Neither recording artists nor the record companies producing their sound recordings need further compensation to provide the necessary incentive "to stimulate artistic creativity for the general public good." [17] As found by Bard & Kurlantzick, "popular record producers and performers do not seem to require a public performance right to provide adequate incentives for maintaining popular record production and dissemination at existing levels." [18] The record business is "prospering without a public performance right" [19] as are recording artists.

A performance royalty would amount to an unfair and burdensome tax on the broadcast industry.

17. As noted above, the radio and television broadcast industries already pay more than $97 million annually for the right to use musical compositions in the offering of entertainment and other programming to the public. They pay this even though these industries represent the principal promotional device leading to the success and well-being of recording artists and companies. In our view, there is no justification for the imposition of a further tax on broadcasters [20] solely for the benefit of a select group which is already more than adequately compensated for its efforts.[21] The existing relationship between record companies and broadcasters makes a compulsory performance royalty particularly unjust.

18. For more than fifty years broadcasting stations have substantially benefited recording companies and artists (not to mention the composers who are already entitled to performance royalties under existing copyright) by providing essentially free and valuable exposure for new recordings. To now require broadcast stations (and networks) to pay substantial fees to record companies and recording artists who benefit most directly under current commercial arrangements from broadcast use of sound recordings would, in our view, constitute a most unfair and harmful proposition:

"Broadcasters would seem to be doubly injured. They must pay fees for playing records which they previously played without charge [i.e., for performer's rights], and they are deprived of the opportunity of using negotiations over public performance fees as a means of recouping the value of the free advertising they provide the record industry." (Bard & Kurlantzick, 204).

19. It has frequently been argued in the past, with substantial documentation we would note, that the addition of a performance royalty would impose an "intolerable economic burden" on radio broadcast stations.[22] This is confirmed by continually declining profit margins in the radio broadcast industry [23] as

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[17] *Twentieth Century Music Corp., supra,* 422 U.S. at 156. We note, in this connection, that it will be the successful recording artist that will benefit most directly from a performance royalty; the struggling new artist will receive little if anything.

[18] Bard & Kurlantzick. 177. The Economic Council of Canada, in its 1971 Report on Intellectual and Industrial Property, at 158–59, reached a similar conclusion. As a result of this and other studies, Canada has now abolished public performance rights in sound recordings. An Act to Amend the Copyright Act. 19 & 20 Eliz. II, c. 60 (Dec. 23, 1971).

[19] Id. at 177, 237. Total record company sales more than doubled in the decade from 1963 to 1973. (Id. 177–78.) Moreover, in the four year period from 1967–1970, the dollar volume of pre-recorded tape sales quadrupled from $120 million to $480 million. (Id. 178.). The recording industry is now a two billion dollar a year business.

[20] Under the compulsory license provisions envisioned in the last performance royalty legislation, Bard & Kurlantzick estimate that additional payments—prior to including administrative costs—would exceed $11 million annually (at 179 and n. 88). In terms of current dollars, this amount will be significantly higher.

[21] In fact, the recording industry is larger, in terms of total revenues, than the radio industry. In 1972, record and tape sales exceeded $1.9 billion, whereas radio revenues approached only $1.4 billion. Significantly, while radio revenues have increased by 107 percent in the ten-year period from 1964–1974, recording industry revenues increased by some *164%*. Congressional Record-Senate. September 6, 1974. S16074.

[22] See, e.g., Letter from Wade H. Hargove, Counsel to North Carolina Association of Broadcasters, to Senator Sam J. Ervin, Jr., dated June 3, 1974, showing that the then proposed performance royalty would amount to 15 percent of the annual pre-tax income of radio stations located in North Carolina's medium to large cities.

[23] In 1968 radio profits were 11.09 percent of revenue; in 1972, they were 9.55 percent and in 1975 they were 5.3 percent. FCC Public Notice, November 8, 1976, Mimeo 73357, Table 2.

well as by recent Federal Communications Commission (FCC) statistics showing network radio losses in excess of $2 million in 1975, and a steady decline in the number of radio stations reporting profitable operations.[24] In this vein, Bard & Kurlantzick also conclude that establishing a record public performance right might "have a profound impact upon classical music broadcasters."[25] In their view, since few classical stations are profitable, with many being only marginally operational, any additional royalty payments for performances "would threaten their financial integrity."[26] We agree. Indeed, we believe the effect will be far more extensive, adversely impacting broadcast operations—and their ability to serve their listening public—without regard to program format.

CONCLUSION

In view of the foregoing considerations:

The Constitutional limitations on establishing copyright entitlements for performance of sound recordings;

The disadvantages to the public, such as an increased incentive on the part of record companies for inducement to broadcast air play, that would likely result therefrom;

The more than adequate compensation already being received by both record companies and recording artists for their efforts in producing sound recordings;

The fact that a performance royalty is not necessary to insure an adequate level of record production and musical composition; and

The manifest unfairness of imposing a further substantial tax on the broadcast industry, particularly in view of the direct and monetarily significant benefit provided to the record industry by broadcast stations and the inability of many stations to absorb any increase in copyright payments.

ABC firmly believes that the establishment of a record public performance right is inappropriate as a matter of law and unsound as a matter of public policy. In the words of Bard & Kurlantzick (at 236), "[n]one of the likely outcomes would justify the establishment of a second public performance right with respect to records."

In these circumstances, ABC urges the Register of Copyrights to recommend to Congress that Section 114 of the Copyright Act (17 U.S.C. § 114) be retained indefinitely in its present form and that a new performance royalty in sound recordings not be established.

Respectfully submitted.

AMERICAN BROADCASTING COMPANIES, INC.,
By EVERETT H. ERLICK,
ROBERT J. KAUFMAN,
MARK D. ROTH,
JAMES A. MCKENNA, Jr.,
ROBERT W. COLL,
NORMAN P. LEVENTHAL,
Its Attorneys.

MAY 31, 1977.

COMMENT LETTER NO. 9

MCKENNA, WILKINSON & KITTNER,
Washington, D.C., May 31, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

(Attention of Harriet L. Oler).

DEAR MS. RINGER: On behalf of various radio and television broadcast station licensees (as set forth in Appendix A to the attached document), I submit

[24] FCC Public Notice, November 8, 1976, Mimeo 73357. According to the FCC, in 1973, 69 percent of AM and AM/FM stations reported a profit; in 1974 this percentage dropped to 65 percent; and, in 1975, the percentage dropped further to 61 percent. Only 40 percent of independent FM stations reported earning a profit in 1975. (Id.) While ABC stations have been profitable, the financial picture for the radio industry as a whole has not been as bright.

[25] Bard & Kurlantzick, 189.

[26] Id. at 189, n. 112.

herewith an original and four copies of their comments in response to the Notice of Inquiry released on April 21, 1977, concerning performance rights in sound recordings.

Respectfully submitted,

NORMAN P. LEVENTHAL.

Enclosures.

To: Register of Copyrights.

Before The Copyright Office, Library of Congress, Washington, D.C. 20559

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS
(S. 77-6)

Comments of Radio and Television Broadcast Station Licensees

The radio and television broadcast station licensees identified in Appendix A hereto (hereinafter "Licensees"), by their attorneys, hereby submit their comments on the Notice of Inquiry issued by the Register of Copyrights on April 21, 1977, in the above-captioned matter.[1]

1. Licensees are the owners, operators and Federal Communications Commission licensees of radio (AM and FM) and television broadcast stations located in all parts of the United States. In their capacity as radio and television broadcast station owners, Licensees make substantial use of musical compositions and the sound recordings embodying them. This use occurs in entertainment, documentary and other programming and in commercial advertising.

2. In 1975, for the right to use musical compositions and sound recordings, broadcast industry payments for music license fees were made as follows:[2]

AM, AM/FM stations	$34, 883, 000
FM stations	5, 896, 000
Radio networks	150, 000
TV stations	47, 782, 000
TV networks	8, 445, 000

3. The Copyright Office has issued a Notice of Inquiry to elicit public comment on whether these payments—exceeding some $97 million annually on an industry-wide basis—should be substantially increased by the granting of a second use royalty in such copyrighted sound recordings, this time for the benefit of recording artists, arrangers, musicians and record companies.[3] At present, both the composer of the musical composition and the music publisher receive a compulsory license payment for use of each musical composition, whether embodied in a sound recording or not. The proposed performance royalty would create a new privilege of copyright in every separate performance (e.g., by different recording artists) of such musical composition, over and above the copyright already received by the composer (and/or lyricist) for his authorship efforts.

4. In our view there is no justification for enlarging the copyright entitlements in sound recordings beyond the substantial benefits already accorded the composers and publishers of musical compositions. Indeed, there is considerable

[1] Hereinafter cited as "Notice". The Notice appeared at 42 Fed. Reg. 21527 (Apr. 27, 1977).

[2] FCC Public Notice, November 8, 1976, Mimeo 73357, Tables 5, 6 and 15; FCC Public Notice, August 2, 1976, Mimeo 68100, Tables 5 and 6.

[3] In its recent revision to the Copyright Act (Pub. L. 94-553, 90 Stat. 2541) Congress, although having considered the arguments relating to the establishment of a second use right (in the form of a compulsory license) for copyrighted performances in sound recordings, rejected the proposal concluding that the issue required further study. Congress provided the vehicle for such further study in Section 114(d) of the Copyright Act. The Register of Copyrights was directed, after consultation with the various industries affected, to report to Congress by January 3, 1978, on whether that section of the Act should be amended to provide for performance rights in copyrighted sound recordings. In furtherance of this statutory directive, the instance Notice was issued.

question whether Congress has the Constitutional power necessary to establish copyright entitlements to individuals or entities other than "authors"—such as is now being proposed for artists, arrangers, musicians and record companies.[4] Certainly, creation of a second use, or performance, royalty would carve out a new area of protection that should not be undertaken without the most thorough legal and economic study and analyses.

5. In this connection, neither the performing artist nor the record company (producer) provides a sufficiently unique contribution to the musical composition that is not already adequately compensated by existing contractual arrangements. The record business is generally healthy[5] and the available evidence indicates that it is in no need of additional royalty payments either to maintain record production or distribution at current levels or to stimulate new production.[6]

6. Notwithstanding the constitutional infirmities of the performance royalty proposal and the lack of need for its establishment from the public's standpoint, a second use payment would principally serve only to impose yet another substantial cost on the broadcaster for the right to provide musical entertainment to its listening public. As noted above, the radio and television broadcast industries already pay more than $97 million annually for the right to use musical compositions in the offering of entertainment and other programming to the public. They pay this even though these industries represent the principal promotional device leading to the success and well-being of recording artists and companies. In our view, there is no justification for the imposition of a further tax on broadcasters solely for the benefit of a select group which is already more than adequately compensated for its efforts. The existing relationship between record companies and broadcasters makes a compulsory performance royalty particularly unjust.

7. For more than fifty years broadcasting stations have substantially benefited recording companies and artists (not to mention the composers who are already enitled to performance royalties under existing copyright) by providing essentially free and valuable exposure for new recordings. To now require broadcast stations to pay substantial fees to record companies and recording artists who benefit most directly under current commercial arrangements from broadcast use of sound recordings would, in our view, constitute a most unfair and harmful proposition.

CONCLUSION

In view of the foregoing considerations, Licensees firmly believe that the establishment of a record public performance right is inappropriate as a matter of law and unsound as a matter of public policy. In these circumstances, Licensees urge the Register of Copyrights to recommend to Congress that Section 114 of

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[4] Article I, § 8, clause 8 of the Constitution of the United States provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited times to *Authors and Inventors* the exclusive Right to their respective *Writings and Discoveries* . . ." (emphasis added.)

The performing artist (singer, arranger or musician) does not fall within the category of "authors" and "inventors" to which Congress has been constitutionally authorized to afford copyright protection. A recording artist—in his capacity as a performer—is not an author, nor obviously is a record company in its capacity as a producer and distributor of sound recordings. Moreover, neither provides or produces a "writing" of the kind that would be Constitutionally recognized.

[5] Total record company sales more than doubled in the decade from 1963 to 1973. Moreover, in the four year period from 1967–1970, the dollar volume of pre-recorded tape sales quadrupled from $120 million to $480 million. The recording industry is now a two billion dollar a year business.

[6] The suggestion inherent in the performance royalty that further remuneration is necessary in order to stimulate the production of new recordings—and thus presumably contribute to the constitutional objective of improving the public welfare—misconceives the very nature of the recording industry. Competitive incentives among artists and record companies alone will be sufficient to insure the continuation of a flood of new recordings. This has certainly been the case to date in the absence of a "use" royalty for performers. Neither recording artists nor the record companies producing their sound recordings need further compensation to provide the necessary incentive to stimulate additional production.

the Copyright Act (17 U.S.C. § 114) be retained indefinitely in its present form and that a new performance royalty in sound recordings not be established.

Respectfully submitted.

JAMES A. MCKENNA, Jr.,
ROBERT W. COLL,
NORMAN P. LEVENTHAL,
Attorneys for Radio and Television Broadcast Station Licensees.

MAY 31, 1977.

APPENDIX A

KAGM, Klamath Falls, Oreg.
KAGO, Klamath Falls, Oreg.
KAKC, Tulsa, Okla.
KALE, Richland, Wash.
KASE, Auston, Tex.
KASH, Eugene, Oreg.
KAYO, Seattle, Wash.
KAZY, Denver, Colo.
KBAR–AM–FM, Burley, Idaho.
KBOX, Dallas, Tex.
KCAU–TV, Sioux City, Iowa.
KCEY, Turlock, Calif.
KCOG, Centerville, Iowa.
KCRC, Enid, Okla.
KDEN, Denver, Colo.
KDLG, Dillingham, Alaska.
KDMA, Motevideo, Minn.
KDTV, San Francisco, Calif.
KEDO, Longview, Wash.
KENE, Toppenish, Wash.
KENR, Houston, Tex.
KERI, Bellingham, Wash.
KEUT, Seattle, Wash.
KEWI, Topeka, Kans.
KEWT, Sacramento, Calif.
KFAB, Omaha, Nebr.
KFAX, San Francisco, Calif.
KFSM–TV, Fort Smith, Ark.
KFTV, Hanford, Calif.
KFUN, Las Vegas, N. Mex.
KGHO–AM–FM, Hoquiam, Wash.
KGMS, Sacramento, Calif.
KGOR, Omaha, Nebr.
KGOT, Anchorage, Alaska.
KGUN–TV, Tucson, Ariz.
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KIVI–TV, Nampa, Idaho.
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KJAN–AM–FM, Atlantic, Iowa.
KJEO–TV, Fresno, Calif.
KKIT, Taos, N. Mex.
KKOS, Carlsbad, Calif.
KKUA, Honolulu, Hawaii.
KLCO–AM–FM, Poteau, Okla.
KLTV, Tyler, Tex.
KLUE, Longview, Tex.
KLVX–TV, Las Vegas, Nev.
KLYK–FM, Longview, Wash.
KLZ, Denver, Colo.
KMA, Shendandoah, Iowa.
KMEX–TV, Los Angeles, Calif.
KMEZ, Dallas, Tex.
KMGO, Centerville, Iowa.
KMHL–AM–FM, Marshall, Minn.
KMHT, Marshall, Tex.
KMMJ, Grand Island, Nebr.
KMPS, Seattle, Wash.
KMTV, Omaha, Nebr.
KMXT, Kodiak, Alaska.
KNID, Enid, Okla.
KNIR, New Iberia, La.
KOBE, Las Cruces, N. Mex.
KOGO, San Diego, Calif.
KOME, San Jose, Calif.
KOMW, Omak, Wash.
KOPE, Las Cruces, N. Mex.
KORO–TV, Corpus Christi, Tex.
KOSA–TV, Odessa, Tex.
KOTZ, Kotzebue, Alaska.
KPLU, Tacoma, Wash.
KPVI, Pocatello, Idaho.
KPVI, Pocatello, Idaho.
KQHU, Yankton, S. Dak.
KQIC, Willmar, Minn.
KQRS–AM–FM, Minneapolis, Minn.
KRAK, Sacramento, Calif.
KRBE, Houston, Tex.
KRIB, Mason City, Iowa.
KRLT, South Lake Tahoe, Calif.
KRUS, Ruston, La.
KSEM, Moses Lake, Wash.
KSFM, Woodland, Calif.
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WAHR, Huntsville, Ala.
WAJF, Decatur, Ala.
WAKR–AM–TV, Akron, Ohio
WAQT, Carrollton, Ala.

WAWA–AM–FM, West Allis & Milwaukee, Wis.
WBIP–AM–FM, Booneville, Miss.
WBKB–TV, Alpena, Mich.
WBMB, West Branch, Mich.
WBMJ, San Juan, Puerto Rico
WBOP–AM–FM, Pensacola, Fla.
WBRK–AM–FM, Pittsfield, Mass.
WCCW–AM–FM, Traverse City, Mich.
WCFT–TV, Tuscaloosa, Ala.
WCIU–TV, Chicago, Ill.
WCMA, Corinth, Miss.
WCMB, Harrisburg, Penn.
WCMI, Ashland, Ky.
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WDXN, Clarksville, Tenn.
WEKR, Fayetteville, Tenn.
WENO, Madison, Tenn.
WFDF, Flint, Mich.
WFHR, Wisconsin Rapids, Wis.
WFIC, Collinsville, Va.
WFIX, Huntsville, Ala.
WFYN–FM, Key West, Fla.
WGCM, Gulfport, Miss.
WGUS, Augusta, Ga.
WHBO, Tampa, Fla.
WHIE, Griffin, Ga.
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WJOR–AM–FM, South Haven, Mich.
WKAU–AM–FM, Kaukauna, Wis.
WKEM, Immokalee, Fla.
WKIZ, Key West, Fla.
WKKE, Asheville, N.C.
WKNE, Keene, N.H.
WKNX, Saginaw, Mich.
WKPT–AM–FM, Kingsport, Tenn.
WKRG–AM–FM–TV, Mobile, Ala.
WLEQ, Bonita Springs, Fla.
WLMD, Laurel, Md.
WLNR, Lansing, Ill.
WLOI, La Porte, Ind.
WLTV, Miami, Fla.
WMAD–FM, Middleton, Wis.
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WNBX–FM, Keene, N.H.
WOKJ, Jackson, Miss.
WONE, Dayton, Ohio
WONS, Tallahassee, Fla.
WPIK, Alexandria, Va.
WPXC, Prattville, Ala.
WQIN, Lykens, Pa.
WQST, Forest, Miss.
WRAB, Arab, Ala.
WRAG, Carrollton, Ala.
WRAN, Dover, N.J.
WRAU–TV, Peoria, Ill.
WRKI, Brookfield, Conn.
WRKR–AM–FM, Racine, Wis.
WRUS, Russellville, Ky.
WSAU–AM–TV, Wausau, Wis.
WSEL–AM–FM, Pontotoc, Miss.
WSFM, Harrisburg, Pa.
WSHF, Sheffield, Ala.
WSHO, New Orleans, La.
WSIL–TV, Harrisburg, Ill.
WSLG, Gonzales, La.
WTAM, Gulfport, Miss.
WTMT, Louisville, Ky.
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WTUE, Dayton, Ohio.
WTUG, Tuscaloosa, Ala.
WTUP, Tupelo, Miss.
WTVO, Rockford, Ill.
WVOJ, Jacksonville, Fla.
WVOV, Huntsville, Ala.
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WWKE, Ocala, Fla.
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WXLI–AM–FM, Dublin, Ga.
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KOAQ, Denver, Colo.
WGFM, Schenectady, N.Y.
WGY, Schenectady, N.Y.
WJIB–FM, Boston, Mass.
WNGE (TV), Nashville, Tenn.
WRGB (TV), Schenectady, N.Y.
WSIX–AM–FM, Nashville, Tenn.
KEZX, Seattle, Wash.
KFMX, Eden Prairie, Minn.
KJIB, Portland, Oreg.
KRSI, Eden Prairie, Minn.
KWJJ, Portland, Oreg.
WBMG–TV, Birmingham, Ala.
WDEF–AM–FM–TV, Chattanooga, Tenn.
WHEN, Syracuse, N.Y.
WJHL–TV, Johnson City, Tenn.
WNAX, Yankton, S. Dak.
WNCT–AM–FM–TV, Greenville, N.C.
WSLS–TV, Roanoke, Va.
WTVR–AM–TV, Richmond, Va.
WUTR–TV, Utica, N.Y.

McKenna, Wilkinson & Kittner,
Washington, D.C., June 6, 1977.

Re appendix A in comment letter No. 9.

Ms. Barbara Ringer,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.
(Attention of Harriet L. Oler).

Dear Ms. Ringer: On May 31, 1977 the undersigned counsel transmitted the Comments of Radio and Television Broadcast Station Licensees concerning Performance Rights in Copyrighted Sound Recordings (S77–6). Appendix A to that filing contained the list of those broadcast station licensees which joined in this submission. Through an inadvertence, that Appendix A contained several errors. Enclosed is a corrected Appendix A.

Respectfully submitted.

Norman P. Leventhal.

Enclosures.

Appendix A

KAGM, Klamath Falls, Oreg.
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KOME, San Jose, Calif.
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WPIK, Alexandria, Va.
WQIN, Lykens, Pa.
WQST, Forest, Miss.
WRAB, Arab, Ala.
WRAG, Carrollton, Ala.
WRAN, Dover, N.J.
WRAU–TV, Peoria, Ill.
WRKI, Brookfield, Conn.
WRKR–AM–FM, Racine, Wis.
WRUS, Russellville, Ky.
WSAU–AM–TV, Wausau, Wis.
WSEL–AM–FM, Pontotoc, Miss.
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WSHO, New Orleans, La.
WSIL–TV, Harrisburg, Ill.
WSLG, Gonzales, La.
WTAM, Gulfport, Miss.
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WTOK–TV, Merdian, Miss.
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KEZX, Seattle, Wash.
KFMX, Eden Prairie, Minn.
KJIB, Portland, Oreg.
KRSI, Eden Prairie, Minn.
KWJJ, Portland, Oreg.
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WHEN, Syracuse, N.Y.

WJHL–TV, Johnson City, Tenn.
WNAX, Yankton, S. Dak.
WNCT–AM–FM–TV, Greenville, N.C.
WSLS–AM–TV, Roanoke, Va.
WTVR–AM–TV, Richmond, Va.
WUTR–TV, Utica, N.Y.

COMMENT LETTER NO. 10

BROADCAST MUSIC, INC.,
New York, N.Y., May 27, 1977.

Re performance rights in sound recordings.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel,
Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: In connection with the Notice of Inquiry relating to performance rights in copyrighted sound recordings, BMI submits the following comments:

BMI firmly believes that anyone contributing to the creative process should be properly compensated. The primary reason for our existence is, in fact, to ensure that the basic creators of music receive a fair and just return for their artistic efforts.

It is important to differentiate between performing rights and proposed legislation which would create performance rights. All of BMI's nearly 50,000 affiliated writers and publishers have entrusted their public performing rights to us and it is our responsibility to protect them. Some of these affiliates are also performers, but we do not represent their interests as performers or their performance rights.

BMI believes that performers should be fairly rewarded for their efforts. Our concern, however, is that there be no erosion of funds already set aside for distribution to those whom we represent. Thus, while prepared to support legislation that will properly compensate the performer. we can do so only if we are assured that the position of BMI writers and publishers will not be adversely affected.

In this same spirit, BMI is also firmly opposed to the concept of compulsory licensing. In our opinion, the unwieldy mechanics inherent in any compulsory licensing concept can only result in a significant reduction of funds actually available for distribution. Any extension of this concept—even as a means to provide new rights—would only serve to compound the problem.

The above is a general statement and we, of course, would like to reserve our right to reply to comments by other interested parties and to any proposed regulations.

Respectfully submitted.

EDWARD M. CRAMER,
President.

COMMENT LETTER NO. 11

RECORD AND TAPE ASSOCIATION OF AMERICA,
E. Windsor, N.J., May 23, 1977.

MS. HARRIET OLER,
Senior Attorney, General Counsel's Office, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I recently received a notice of inquiry regarding Copyright Office Requests Comments Regarding Performance Rights in Copyrighted Sound Recordings.

I would like to go on record as stating that I am in favor of compulsory licensing and think I can document a reasonably good case in this letter.

I am enclosing a copy of a letter written to Mr. George Gaberlavage, Assistant to Rep. Frank Thompson. That letter contains charts that I prepared for Mr. Gaberlavage that I failed to make Xerox copies thereof. If you will kindly contact him and get a copy of the charts it can only support our position.

I believe that the current Copyright law (according to Rep. Pattison) is to revise the 1909 Copyright Act in terms of modern technology, yet keep the spirit and the flavor of the 1909 Copyright Act.

I would like to digress a minute and briefly touch on a concept called monopoly which is ordinarily repugnant to our capitalistic system. However, Government

sometimes grants monopoly on a quid pro quo basis, that is to say a utility is given a monopoly but agrees to limit its profit to a certain percent of sales.

It was already documented that the average life on the hit charts is somewhere in the neighborhood of 12 weeks. After that, the major labels pull it out of the public domain and won't allow anybody else to make or re-record that recording.

I believe that the public has certain rights to enjoy the music it is granted Copyright protection for and that the public should be protected and not abused. As a matter of fact, I refer you to Paragraph No. 3, thought No. 7, in my letter to George Gaberlavage where Ms. Ringer recommended compulsory licensing because "a major problem exists with the large and growing catalogs of recordings that record companies that will neither release or license." (Mr. Gaberlavage has a Xerox of that Billboard article.)

The announcement indicates that it is intended to elicit public comment, views and information which will assist the Copyright Office in considering alternatives. Part of the information it requests is Constitutional which I have covered above briefly. Item No. 2 and No. 3 deals with economics.

The major labels claim that the pirates hurt them. That is a complete fallacy.

To begin with the major labels have already admitted that the average life in the hit charts is about 12 weeks (let's keep that in mind for further reference). The major labels claim that they were hurt by the pirates. However, if you take a look at thought No. 2, Item No. 5, you will notice that from 1921 through 1972 (including a depression and two wars where parts and supplies were unavailable) the major labels were able to enjoy a compounded growth of 9 percent per year. However, from 1972 through June 5, 1976 they were only able to enjoy a compounded growth rate of 5 percent; might I add that the law (anti-piracy) was passed February 15, 1972.

Delving further into the economics of the situation, let us consider the concept of productive years.

It is acknowledged that an athlete has a productive life which averages only four years, what about song writers and singers? Should they not be able to maximize their total dollars, in their short artistic lifespan?

Let us consider the 1909 Copyright Act which said that only the songwriter received a 2-cent mechanical royalty fee and that was it (under compulsory licensing). However, just suppose that a compulsory licensing amendment was passed that allowed for compulsory licensing of songs of albums that was one year old and older and suppose that not only the songwriter but the singer and the musicians were able to get royalties as well as the songwriter then what would happen. (1) The record companies would not lose any sales because they only do new music and not the old stuff (2) The public would then enjoy music that it is entitled to hear (3) The artists (songwriters, singers and musicians) would be able to enjoy an income that is additional income that might benefit them in their non-productive years (when is the last time you heard of the Cowsills who last year declared bankruptcy).

In essence, I think all of the arguments are there for compulsory licensing. It is unfortunate that I received this notice eight days prior to the deadline and that this report could not be prepared in greater depth. However, should you require additional information please feel free to contact me at 609–443–5794.

Respectfully yours,

ALAN I. WALLY,
President.

Enclosure.

P.S.—Most important the duplicators would hire people and a whole industry would arise that could employ 50,000 people. See statistics in attached letter.

A. I. W.

RECORD AND TAPE ASSOCIATION OF AMERICA,
E. Windsor, N.J., May 23, 1977.

MR. GEORGE GABERLAVAGE,
Assistant to Representative Frank Thompson, House of Representatives, Washington, D.C.

DEAR MR. GABERLAVAGE: Thank you very much for taking time out to speak with us on Friday, July 4, 1976.

We had the pleasure of having dinner with Rep. Thompson on Tuesday, July 6, 1976.

He indicated to us that he would speak with Rep. Kastenmeier to find out why Rep. Kastenmeier has granted compulsory licensing in every area except pre-recorded music (especially when we have such a logical argument for it).

Rep. Thompson indicated that he felt that the bill will never pass in 1976 and estimates that it will pass in April, 1977. However, Rep. Kastenmeier acknowledged certain difficulties to Billboard Magazine and indicated that although he is in a race against the clock he feels confident that the bill will, indeed, pass this session of Congress. Therefore, we ask you to remind him of the urgency of our request. Additionally, Rep. Thompson indicated to us that he would share the result of his conference with Rep. Kastenmeier with us through you.

We showed Rep. Thompson some supportive documents to strengthen our arguments. He asked that we send you copies of these documents with appropriate commentary. I will do that and put my comments on a separate page and writing a separate page for each idea with the appropriate document attached to that particular page.

Should you desire any additional information please feel free to call me at 609-443-5794. If you wish to review all of the documents with me I will be only too happy to come down to Washington and do so. Again, it is our position that we would like Rep. Thompson's help not because he is our Congressman but because there is an issue and because of the fact that we are right (as you have already determined).

Once again, thank you very much.

Respectfully yours,

ALAN I. WALLY.
President.

P.S.—Mr. Thompson indicated to us that he would present our findings to his friend and colleague, Mr. Kastenmeier; he also indicated that he would present any reasonable suggestions that we had.

I therefore, have the following two recommendations to make based upon the documents already in your possession. They are as follows:

1. Under the 1909 Copyright Act only the songwriter got a 2-cent mechanical royalty fee and compulsory licensing was granted immediately. The major labels have testified that the average life on the hit charts is 12 weeks. We recommend compulsory licensing after 12 to 15 months with not only the songwriter but the singer and musician as well to get the same royalties as last paid by the major labels.

2. You will see that Mr. Kastenmeier promised the House Judiciary Committee (see item No. 1) that an economic impact survey would be done by the Justice Department during the 1975 session of Congress. This was done to ease the conscience of Rep. Conyers, Seiberling and Drinan who did not want to pass the interim anti-privacy bill without adequate knowledge and information. To date Mr. Kastenmeier's committee has not requested this economic impact survey.

I believe you will find in my original presentation to Congress I demonstrated collusion, conspiracy, restraint of trade, violations of the Sherman and Clayton anti-trust acts and violation of the Wright-Pattman act.

I do believe that the additional information contained in the enclosed documentation will only add fuel to my findings. I feel that as a good American I have to ask Mr. Thompson to recommend to Mr. Kastenmeier that he demand from the Justice Department a full economic impact survey with all of the information contained in my findings given to them so that they know exactly what to look for and where to look for it.

I don't know if what I recommended is political reality or if I am stepping out of line by making that recommendation. Therefore, I humbly request that you use whatever judgment you think appropriate in discussing this particular area with Mr. Thompson.

Thought No. 1

Item No. 1 is an article out of Billboard Magazine (10/5/74 issue) where Rep. Kastenmeier promised the Full Judiciary Committee that an economic impact survey by the Justice Dept. would be done during the 1975 session of Congress for the full hearings on H.R. 2223. Had this survey been done he

would have been able to discover all the facts that we have presented to you and are presenting to you now.

To date the economic impact survey has never been done and, quite frankly, if it were done he wouldn't care anyway because the record industry lobby is so strong. To wit he completely ignored the suggestions of Ms. Barbara Ringer, Copyright Register of the U.S. (see items Nos. 2, 2A through D)—(I believe you already have a copy of this).

We have suggested that in addition to the songwriter getting royalties that the musician and singer get the same royalties as last paid by the major labels.

Item No. 3—Mr. Kastenmeier is under the impression that there is no distinction between a duplicator and a pirate. He feels that pirates and duplicators are one and the same and do not make copies out of press or non-hit recordings, or of fine works that do not become hits. (This quote comes out of Item No. 1.) I am attaching a catalog belonging to Mr. George Tucker of U.S. Tape. (Mr. Thompson saw it and asked us to forward it to you as well.) In it you will find classical music; and as far as the popular stuff goes we invite you to walk into any department store and are willing to bet that at least 90 percent of this catalog is unavailable there.

I have just detailed the difference between a legal duplicator and a pirate. Mr. Tucker's organization (which was a group of manufacturers—I represent a group of retailers—) had a letter drafted to the Secretary of Labor in the State of New Jersey citing figures from the R.I.A.A. (Recording Industry Association of America—the trade organization of the recording industry) indicating that there were at least 40 major duplicators in the State of New Jersey and that 2,500 people were employed in the sales (distribution) of duplicated products. Mr. Peloquin, who drafted this letter has since expired. I have been unable to get any cooperation from the R.I.A.A. to document the above figures. However, I can refer you to Items nos. 13 and 14.

The letter I am referring to spoke about distribution at the manufacturing level and ignored the retail level. Items Nos. 13 and 14 indicate that ABC alone has over 13,000 retail out lets in America that it distributes record and tapes through. Do you know how many additional thousands of retailers they don't distribute through. So altogether, the unemployment rate is much higher than just from the manufacturing level alone. And when you add up all of the business receipt taxes and other business taxes and sales taxes I will bet the figure comes to somewhere in the neighborhood of a $4–5 million loss. When you add the unemployment insurance collected you can see that the drain on the State treasury is a lot higher.

Thought No. 2

The major labels say that they lose money to duplicators and pirates. I might have agreed with them about the fact that they could lose money to pirates. However, how do they lose money to a duplicator on something they no longer make and they no longer sell?

Item No. 4 is a sales graph of record and tape sales from 1921 through 1972. (There are two parts to the graph—records and tapes.) Despite the pirates just in records alone for the years 1955 through 1972 they had an average growth rate of 9 percent a year (again I stress tapes are not included) for a total sales volume of $2 billion in 1972.

Item No. 5 which is out of the June 5, 1976 issue of Billboard Magazine indicates that in 1975 record and tape sales were $2.36 billion (which represented a 7.3 percent increase over 1974 which was $2.2 billion).

This means that in 1972 and 1973 they had an average growth rate of 5 percent per year and here is where the big laugh comes in. The anti-piracy bill took effect February 17, 1972. 5 percent versus 9 plus percent when pirates and duplicators were active.

Item No. 6—there are only five major labels in the U.S. They own hundreds of minor labels. This item is out of another publication indicating the number of titles owned by E.M.I.

Item No. 7 is a graph from Billboard Magazine showing the percentage of music controlled by these major labels and Item No. 8 can give you some idea about the inter-relationship between two major labels and their affiliations with other organizations.

The particular point that we are trying to raise here is that one of the reasons the major labels fear the duplicators is that everytime a duplicator gains national distribution he is bought out by the major labels. Why should they spend the money buying out duplicators when they can get a law passed wiping out the duplicators.

Thought 2–A

If you took a look at Exhibit 2 in my presentation to Congress you saw excerpts from a lawsuit brought by some songwriters. It seems the major labels have a master contract where they pay the songwriters only 1⅓ cent per song (which we will discuss later) and the duplicators, under the Copyright Revision Bill pay 2 cents per song. It won't take long for a smart songwriter to figure out he can make more money with a duplicator who gains national distribution then he can with a major label. How do you keep a songwriter from going to a duplicator, easily accomplished with an act of Congress.

Thought No. 3

One of the reasons the major labels give as the need for an anti-piracy bill is to protect the retailer. That happens to be an absolute crock of nonsense. I am sure you have seen lots of ads for RCA's or CBS' record clubs. They offer something like 8 eight-track tapes for $1.00 (plus postage and handling) provided you buy at least eight more at the regular price during the next two years. The regular price, of course, is the full retail price of $7.98 as against the $6.98 that it can be bought for, discounted in a department store.

Ordinarily if the major labels sold the retailer 8 eight-track tapes in the store they would get approximately $32.00. It costs the major labels less than 50 cents to make the 8-track tape. So, on the 8 eight-track tapes they sell you the consumer, through their record clubs they get $64.00 versus $32.00 selling it to the retailer less the $4.00 it cost them for the 8 eight-track tapes sold at $1.00 (but they've gotten $1.00 back). In other words they make an extra $29.00 profit on that kind of deal.

If you read exhibit 1 of the major paper I presented to Congress (excerpts from the Simon & Garfunkel contract) you will find that the major labels pay songwriters and singers between ½ and 0 percent of the regular royalty rate for record club and promotional sales that they would ordinarily get on retail sales. That is to say, if an artist gets 5 percent royalty based upon the regular retail price then they would get about $3.00 in royalties from the major labels (a strong artist like Elvis Presley gets ½—a new artist gets nothing). So, immediately, we can see that instead of $29.00 out of $32.00 extra profit they save $1.00 or $2.00 on royalties that they would have to pay out to the artist which pays for the first group of eight-track tapes given out for $1.00.

The only fallacy is, actually that is a bad word to use, is that the public gets letters advising them of the selection of the month with a card allowing the consumer to defer and not accept that selection of the month. Very often cards are not received on time, not sent back on time; and as a result the consumer ends up getting a lot of extra tapes he didn't want and the major labels make an extra $4.00 for each tape.

You and I both know what a nation of sheep America is. How very few of the consumers actually return the unwanted tapes versus how many actually keep them?

But, what about selections other than the selection of the month. Under normal retailing (there are three very important points I would like to raise in this section). Under normal retailing the major labels make a tape for an artist, send it out to the store and hope it sells. They have gone to Congress telling Congress about the risks that they have to take, that only one out of ten titles is a hit and the other nine are dogs. The usual disclaimer is allow four to six weeks for delivery. That gives them plenty of time to press the tapes (or records) and completely avoid their risk. To add to it, especially in the state of New Jersey, no sales taxes are collected. Now add to the number of people in New Jersey that worked for a retailer selling records who had to fire these people because they were losing sales to record clubs. One has to laugh at the stupidity of Mr. Kastenmeier's committee who was given a complete snow job. All of this could have been found in an economic impact survey.

Thought No. 3A

To clarify the mathematics: Say Mr. RCA sells me, an independent retailer eight 8 Track Tapes at $4.00 each. His gross is:

Gross sales	$32.00
Royalty to singer, song writer, and musician	(4.50)
	27.50
Less handling charges	(1.00)
Less manufacture charges	(4.00)
Gross profit	22.50

On a record club eight 8 Tracks at $1 and eight at regular price yields:

Gross sales of 8 at $8 each	$64.00
Gross sales of 8 at $1	1.00
Total	65.00
Cost for 1st 8 loss leader tapes	(4.00)
Net sales	61.00
Less for handling and postage (customer pays)	0
Cost of next 8 tapes	4.00
Gross profit if no royalties	57.00
If one-half royalties	54.25

Record club profits between 32.25 and 34.50 extra over normal wholesale.

Thought No. 4

The major labels claim that they are losing sales to pirates. I have to laugh because the major labels owing to their own technology and their own greed are getting ripped off but not by pirates; their getting ripped off by the American public.

American technology, especially RCA, led to the development of the home tape recorder. Any record or tape or song on a radio can be taped on a home tape recording unit. (As a matter of fact you can tape a tape from a tape with an auxiliary hook up.)

If you will take a look at item No. 9 from the April 10, 1976 issue of Billboard Magazine that retailers in the United Kingdom claim they are losing 20 percent of their business to amateur recorders. I will bet you the same thing holds true for America; I should know because I sell a lot of blank tape.

Would you believe that Columbia (which happens to be one of the world's largest tape and record manufacturers) is one of the world's largest blank recording tape distributors.

If the major labels can come up with any graph showing a loss of sales and claim it is to the pirates; and I happen to be around at the time, please forgive me while I exit the room to put on my jacket so I can laugh up my sleeve at their absolute stupidity.

Thought No. 5

We have already seen that there is no way the major labels can lose money to a duplicator who makes out dated music. In other words, it is impossible to lose money on something you are not making and not selling.

There is another reason the major labels want to eliminate the duplicators, it is called the field of custom duplicated tapes.

I'd like to present the following excerpt from item No. 10. "Ecclesiastes, the preacher, sighed that there was no end to the making of books—at a time when the printing press hadn't even been invented yet. What would he have said about the making of phonograph records and tapes—especially recordings that talk? The world of the recorded word is a multi-dimensional one. The same equipment that can turn a home into a concert hall, a night club or a rock festival can also

transform it into a lecture hall, a theater, a classroom, a library, an adventure in time through the annals of history . . . There are literally thousands of records and tapes covering every category of human knowledge and interest. There are even environmental records to surround the listener with birdsong or the sound of oceans surf. . . . ."

The point is that the duplicators are capable of doing custom duplicated tapes. The duplicators are also capable of doing custom duplicated tapes for private label programs such as Sears or Woolworth's etc.

But, who is going to give an out of business duplicator a job or a contract. A customer for custom duplicated tapes wants to deal only with a person who is in business who has a proven track record.

The duplicators were, by law, precluded from doing any post 1972 songs. Third Federal District Court (they are trying to appeal it but Supreme Court has refused to hear it) ruled in January, 1975 that pre-1972 was a misdemeanor under 1909 Copyright Act. By October we read in Billboard that 30% of RCA's sales attributed to custom labels (item No. 11).

I must say the major labels have a fantastic game plan going for them but I didn't realize how fantastic it was until this week (item No. 12) when I read an ad in the July 17, issue of Billboard Magazine about films on cassettes and then I was thunder struck.

As you know, home TV recording and playback units are on the way in and I do believe TV programs and movies will be sold on a pre-recorded basis and I further believe that the technology for making a pre-recorded tape is virtually the same as for making a pre-recorded video cassette. I must say the major labels have some long range thinkers.

Thought No. 6

The major labels claims anti-piracy is needed to protect the retailer and yet how are they protecting the retailer. We have already seen that the major labels are hurting the retailer and the state sales tax revenue structure with their record clubs.

Before I proceed further I must explain a term to you called rack jobbing. When ABC Records sells a tape to Al Wally, the independent retailer they charge me $4.00 and I sell it for $8.00. When ABC Records & Tapes, the rack jobber, puts tapes in my competitor's stores on a consignment basis he gets more than $4.00 for the same record and tape (usually about $5.00 and change).

I have not Xeroxed the article about CBS owning its own stores.

What I am trying to say here is that there are certain department stores and records shops that specialize in the top 100 only. There are certain independents such as myself who specialize in back dated music, hard to get music, finer works of art and who sell the top 100 as well. By eliminating the independent music retailers (and there are thousands of them) and by narrowing the retail channels or outlets that the public can buy music in and narrowing it to the stores that the major labels either own outright or rack job in the independents profits are wiped out and the major labels profits are increased assuming that the same amount of records and tapes are sold.

Let us raise the point very quickly that as long as 1 million records and/or tapes of let's say Elvis Presley, are sold, Elvis Presley will still get his royalties. But, if ABC Records & Tapes can sell a million records and tapes of its particular artist through its own rack job stores their profits are substantially increased.

In other words, an independent like myself doesn't make much of a profit percentage wise in the top 100. But, I have to be eliminated completely so I stop selling the top 100. By eliminating my source of supplies of duplicated music my reason for existence has stopped.

The major labels have gone before Congress and yelled about the need for anti-piracy to protect the artist and the retailer from the pirate and the duplicator.

One of the basic textbooks in the field of logic is, J. G. Brennan's "A handbook of Logic" where he discusses fallacies in argument and discusses something about the "fallacy of the argument of the patrioteer." In other words, the major labels under the guise of motherhood and apple pie have thrown up a tremendous smokescreen to block their true goals. This is something I've made Kastenmeier well aware of and he has chosen to completely ignore.

Item Nos. 14 and 13 show how many stores ABC Records & Tapes rack job. I believe you will find the answer to be somewhere between 8,000 and 13,000

stores. Item No. 15 is a very poor copy about Columbia Record Clubs and stores that had a tie in on charge accounts. This was done to prove the above arguments and I did not want to belabor the issue with any articles about CBS, RCA, etc.

Thought No. 7

I believe the idea about the copyright law is to protect the artist and promote the arts.

It has already been acknowledged that copyright is a monopoly; and that monopoly is not an accepted form of business practice in our capitalistic society except in certain circumstances. I further believe that whenever a monopoly is granted it is granted on a quid pro quo basis. In other words, a utility gets a monopoly but agrees to limit its profits.

The major labels have been granted a monopoly via copyright but since Copyright is to promote the arts the major labels have an obligation to keep certain music within the public domain. This is why Ms. Barbara Ringer, Copyright Register of the U.S., (see item No. 2) recommended compulsory licensing "because a major problem exists with the large and growing catalogs of recordings that record companies are sitting on and will neither release or license."

We already know that the average life on the hit charts is 12 to 16 weeks and we already know that the artists make money only based on royalties on goods that are made and sold. Now, the average productive life of an artist is less than five years (see Item No. 16 about the Cowsills being bankrupt), and that a songwriters mean income in the U.S. is $2,200.00 per year (see Item No. 17). We also know that the major labels by not allowing the artist to make money and by refusing to keep music before the public (see Item No. 18) are violating the very intent of the Copyright Act of protecting and promoting the arts.

As you know, Mr. Kastenmeier has granted compulsory licensing in 12 sections of the General Copyright Revision Bill. The only area he has not granted compulsory licensing to is the field of recorded music.

We already know that sales taxes are down.

My suggestion about compulsory licensing with the songwriter, singer and musician getting the same royalties as last paid by the major labels (with compulsory coming after one year to 15 months) would allow the artist additional income, would protect the artist, would promote the arts and since people have got to make duplicated records and tapes and sell them and distribute them and make and distribute the component parts (packaging, etc.) and provide about 5,000 additional jobs across the board in the State of New Jersey.

To add to it, let us not forget the public which is the beneficiary of Copyright law and which has the right to expect a just return to society for granting a monopoly (Copyright).

Comment Letter No. 12

Statement of Recording Industry Association of America

These comments are submitted by the Recording Industry Association of America (RIAA) in response to the invitation of the Copyright Office published in the Federal Register on April 27, 1977. The RIAA is a trade association of 55 companies whose members help create and market about 90 percent of the sound recordings sold in the United States.[1]

We urge the creation of a performance right for the public performance of sound recordings.

There are two fundamental reasons why sound recordings do not now have a performance right.

First, when the copyright law was enacted in 1909, the popularity of sound recordings was hardly even a dream. Hence, the sound recording was not listed as a copyrightable work and granted a performance right—as was the case with books, articles, musical compositions and other creative works. Now, as a result of revision, copyright law has largely caught up with technology, and the sound recording has received copyright protection—albeit, without a performance right.

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[1] Supplementing these comments is a comprehensive report to the Congress, submitted by the RIAA in 1975, in connection with S. 1111 and H.R. 5345.

Second, the broadcasting industry, the principal user of sound recordings for commercial purposes, is adamantly opposed to paying for its use of sound recordings. Absent this opposition by the broadcasters, we believe Congress would by now have granted a performance right to the sound recording.

A PERFORMANCE RIGHT IS JUSTIFIED

Equity, constitutional principle, judicial interpretation, precedent, international practice and economics all lead to the inescapable conclusion that vocalists, musicians and recording companies should be compensated by those who use copyrighted sound recordings for commercial purposes.

Equal treatment demands that sound recordings be granted a performance right. The sound recording is the only copyrighted work which can be performed that has not been granted a performance right.

Constitutional principle and judicial interpretation make it clear that all of the creators of copyrighted sound recordings are entitled to a performance right. As it stands, the author and composer are the only members of the creative team who now have such a right.

Precedent justifies a right, as well. Only last year, Congress revised the copyright law, in response to technological change, and granted broadcasters a performance right from cable television operators who use copyrighted broadcast materials for profit. Similarly, the Congress granted a performance right to authors and composers from the jukebox operators who profit from copyrighted music, as communicated by sound recordings.

International practice supports a performance right for sound recordings. Most western nations grant such rights. The absence of such a right in the U.S. deprives our record companies and performers of legitimate reciprocal income from foreign royalties in some countries.

Economic equities strongly support a performance royalty. Broadcasters make heavy programming use of recordings. They pay for virtually every other type of programming; they do not pay any royalty for the use of sound recordings.

TWO BASIC ISSUES

The issues involved in this proceeding are not complex. There are two basic questions:

First, is a sound recording the "Writing" of an "Author" in the constitutional sense?

Clearly, the courts have answered that question with a resounding "yes."

Second, should those who use a copyrighted sound recording for commercial purposes pay for the privilege?

An affirmative answer to this question seems just as clear. Users pay for all other copyrightable works which can be performed. Why should sound recordings be the lone exception?

COPYRIGHT OFFICE QUESTIONS AND ANSWERS

We elaborate on each of these points within the context of the specific questions posed by the Copyright Office.

Question 1. What are the constitutional and legal constraints and problems arising from a performance royalty in sound recordings?

Answer. There are none. The constitutionality of a copyright for sound recordings has been upheld by the courts,[2] and recognized by the Congress,[3] and the Copyright Office.[4]

Even the broadcasters have not advanced genuine constitutional or legal arguments. President Wasilewski of the National Association of Broadcasters (NAB) argues simply that a performance right in sound recordings is "unnecessary and unfair." He observes that "[t]he Constitution does not mandate copyright—it

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[2] *Goldstein* v. *California*, 412 U.S. 546, 562 (1973); *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F.2d 656, 657 (2d Cir. 1955); *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

[3] S. Rep. No. 983, 93d Cong., 2d Sess. 139–40 (1974); S. Rep. No. 72, 92d Cong., 1st Sess. 4–5 (1971).

[4] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).

confers power upon the Congress to provide it." He says performers and recording companies "are compensated already, albeit indirectly." [5]

Broadcaster opposition is based on the notion that, because playing recordings on the air may increase the sale of those particular recordings, broadcasters are thereby entitled to play any recording on the air, any number of times.

However, this is not a constitutional or legal argument. Moreover, it is blatantly self-serving, as is apparent from the following comments by John B. Summers, General Counsel of the NAB:

"The cable television industry agreed that it ought to pay some royalty for its use, for profit, of copyrighted material. If any element of the consensus can be termed basic, it is the acceptance, by the parties, of the principle that copyright royalties are legitimately owed to the proprietors of copyrighted material. Creative endeavors, whether the product of motion picture producers or of local and national broadcasters, should not go unrewarded due to the failure to provide for their protection in a copyright law fashioned before the advent of broadcasting and cable television." [6]

The NAB's General Counsel went on to say that copyright revision should "insure that those who profit without paying compensation, of any sort, do so in violation of the intent of the Constitution's framers. To the extent that the copyright law nourishes that evasion, it violates the spirit of the Constitution. It is a violation of that spirit which must be corrected." [7]

Yet, given a remarkably similar set of circumstances, the NAB's President argued that a performance right for recordings "flies directly in the face of . . . the Constitution of the United States." He said that "the performance rights amendment [in H.R. 2223] fails to meet the rigid test necessary to confer full copyright status upon any class of creative endeavor." That is, he said, a performance right for recordings is not "necessary to foster and protect creativity." [8] That argument is false, as will be shown shortly. And certainly the Constitution does not contemplate two classes of copyright protection.

We suggest that the broadcasters' "constitutional" arguments are based on a double standard. When it suits their economic purpose, they interpret the Constitution to support their case, and vice versa. The effort to dress up their economic preferences in the guise of a legal argument, however, is unavailing. The constitutional issue has already been definitively addressed and resolved by the courts and the Congress.

A three-judge federal court has specifically affirmed the constitutionality of a copyright for sound recordings, stating: "Sound recording firms provide the equipment and organize the diverse talents of arrangers, performers and technicians. These activities satisfy the requirements of authorship found in the copyright clause. . . ." [9]

The U.S. Supreme Court has recognized that the copyright clause of the Constitution can extend to "recordings of artistic performances." The Court said that the copyright clause "may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." [10]

The Register of Copyrights probably put it best:

"Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributors of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute." [11]

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[5] Statement by Vincent T. Wasilewski, President of the National Association of Broadcasters. Hearings on H.R. 2223. Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 36, pt. 2, at 1367–68 (1975).

[6] Statement by John B. Summers, General Counsel, National Association of Broadcasters, Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 36, pt. 2, at 775 (1975).

[7] Ibid. at 776.

[8] See note 5.

[9] *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

[10] *Goldstein* v. *California*, 412 U.S. 546, 562 (1973).

[11] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).

There is no valid constitutional or legal reason to continue to exclude the sound recording from the status enjoyed by all other copyrighted works which are capable of being performed.

Question 2. What are the arguments for and aganist performance royalty in sound recordings? What projected economic effect would it have . . . ?

Answer: *Arguments against.* The most potent argument against a performance right for sound recordings is no longer valid, if it ever was.

The argument was made, over the years, that if a performance right for recordings were included in the copyright revision bill, it would "kill" copyright revision—because of powerful opposition by the broadcasters.

Copyright revision is now largely accomplished. A performance right can stand on its own. Copyright revision can be completed, by granting a performance right to all creators of sound recordings.

A second argument against a performance right, previously noted, involves the airplay of sound recordings.

There is no question that airplay helps sell some sound recordings. It should be just as apparent that sound recordings provide valuable radio programming material, which sells advertising, builds station audiences and increases station equity.

These economic facts, however, while of interest, are not relevant to the grant of a performance right. The principle underlying the performance right in copyright law is that the creator is entitled to compensation for the commercial use of his creative product. That principle is not conditioned on who benefits from what. While economic factors can be fairly considered in setting the royalty rate for sound recordings, they should have no bearing on the right itself.

Cable TV operators also claimed they should not have to pay performance royalties to the broadcasters on the ground that they expand the broadcasters' audience and profits when they use copyrighted broadcast programs. The broadcasters rejected that claim. So did Congress.

In any event, the broadcasters' airplay argument is specious. What makes its fallacy apparent is the fact that composers and publishers, who clearly benefit from the airplay of sound recordings, have long received performance royalties from broadcasters. No one, including the broadcasters, contends that the owner of music copyrights should not receive performance royalties because of airplay.

As Chairman Kastenmeier stated, in commenting on the House testimony of broadcasting witnesses:

"I would observe a point made that radio sells records. I don't think it is challenged, but it doesn't necessarily go to the point of whether these so-called performances ought to have copyright protection, because many enterprises help sell what may be copyrighted material for which there are royalties due, but that has not much to do with whether or not the royalty should be paid." [12]

Moreover, the airplay argument used by the broadcasters is, in fact, quite misleading. They make it sound as though the radio stations were doing recording companies a favor.

In fact, radio stations use recordings because that is the best way, in their judgment, to build audiences—which attracts advertisers, generates profits, and also increases station equity value.

In fact, sound recordings are the mainstay of most radio programming. More than 75 percent of commercially available radio program time is devoted to recordings, according to the Senate Judiciary Committee.

In fact, most recordings never get airplay at all. A Top-40 radio station—the chief radio user of current hits—usually adds only five or six new songs a week to its play list—out of more than 900 new recorded tunes released weekly.[13]

In fact, more than 75 percent of all recordings released fail to recover their costs. Only about 6 percent make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Ninety-five per-

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[12] Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. ser. 36, pt. 2, at 1373–74 (1975).

[13] Statement of Recording Industry Association of America, Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 36, pt. 2 at 1320–21 (1975). See also, pp. 27–28 of accompanying submission.

cent of classical releases lose money, but they are played on the radio with no compensation to the vocalists, the musicians, or the recording companies.[14]

In fact, our analysis indicates that 56 percent of recordings played on the radio are those whose meaningful sales life is over.[15] Over the last few years, we've seen a resurgence of older recordings. Airplay of older recordings cuts exposure opportunities for new records, and does little or nothing to generate more record sales, though it helps radio's own goals.

In fact, most stations wait until a record or an artist shows signs of becoming a hit before they provide airplay.

In fact, although recording companies want their new product on the air, they certainly are not out for a "free ride." Recording companies are among the major purchasers of commercial advertising over radio and TV. Our most recent data indicate that in 1972, recording companies paid out to radio stations over $32,000,000 for commercial advertising. And in 1974, the record industry spent nearly $65,000,000 for television advertising. Thus, recording companies spend around $100,000,000 a year for paid air time. Recording companies are both program resources and paying customers.[16]

In fact, broadcasters pay for virtually every other form of programming they employ, except for sound recordings. That includes news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, commentators, financial and business services. Yet, they pay nothing for the recordings which furnish 75 percent of their programming.

We suggest that airplay of sound recordings does more to attract advertising profits to radio stations than it does to sell sound recordings. Only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters—old recordings, new recordings, popular ones, and classics. They all build audiences for the broadcasters and enable them to sell time to advertisers.

It is a basic copyright principle that one should be compensated for the commercial exploitation of his creative product. The creation of a performance right for broadcasters last year, in connection with cable, confirmed this principle. Vocalists, musicians and recording companies are entitled to a performance right, too.

Consider the question in another context. Should Alex Haley, author of "Roots," be deprived of a performance royalty for the televising of "Roots" because the television spectacular enhanced the sales of his book?

Arguments for

The arguments for a performance right and royalty in sound recordings are compelling.

Fairness requires that vocalists, musicians and recording companies receive it.

All copyrighted works which are capable of being performed have been granted performance rights, except for sound recordings.

Why are they excluded? Initially, because recording technology had not been developed in 1909.[17] Today, it is because of the vaunted political power of the broadcasting industry.

These are not valid reasons for continuing this type of illogical discrimination.

Precedent supports creation of a performance right for sound recordings. Congress only recently revised the copyright law to reflect changing technology. Last year, the copyright revision law created a performance right in at least three new instances:

1. Broadcasters now receive performance royalties for use of their copyrighted programs on cable television.

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[14] While most classical music is in the public domain, the composers, performers and producers of classical recordings provide the most vivid examples of creators whose creativity needs the encouragement of compensation for the performance of their copyright works.

See Statement of John D. Glover, Director of the Cambridge Research Institute, Hearings on H.R. 2223 Before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 36, pt. 3, at 1421–22 (1975). See also pp. 20–21 of accompanying submission.

[15] See note 13, supra, at 1321; *see also*, p. 29 of accompanying submission.

[16] See note 13, supra, at 1321–22; see also, p. 30 of accompanying submission.

[17] *Goldstein* v. *California*, 412 U.S. 546, 566 (1973).

2. Educational broadcasters and other nonprofit broadcasters are now required to pay for the music, movies and other copyrighted materials they use.

3. Jukebox operators are now required to pay royalties to authors and composers for commercial use of the musical composition underlying the sound recording.

Granting this new performance right last year to music copyright owners further illustrates the inequity in denying a performance right to those who create sound recordings. The musical composition is, of course, an important ingredient in the sound recording. However, the interpretation provided to that composition by the vocalist, musicians and recording company is crucial to the success of the recording. Often, it is of more significance than the composition itself. "White Christmas" is an example. It was recorded many times. It was the Bing Crosby rendition that made it a hit.

Just as copyright law decrees a performance right and royalty for the musical composition underlying the sound recording, it should provide the same treatment for the vocalists, musicians and recording companies who created the recording. Just as the broadcasters and jukebox operators are required to pay royalties for the underlying musical composition, they should pay for the sound recording itself. Absent the recording, the musical composition is silent. It is the recording that makes it playable in the jukebox, on the air, in the nightclub or discotheque.

Economic equities also support the case.

Since radio and television broadcasters, jukebox operators, discotheques, nightclubs and background music operators profit from sound recordings, they should pay a royalty for the privilege.

Significantly, the value of radio stations—AM and FM—continues to rise, substantially attributable, we believe, to the audience attraction of programming based on sound recordings.[18]

Financially, the broadcast industry is enjoying good times. And the outlook for future financial growth of the industry is most encouraging indeed. A recent report, "Radio in 1985", prepared for the National Association of Broadcasters, says:

"The radio industry will be more profitable than ever in 1985.

"Radio revenues are projected to increase sharply, advancing by 85.9 percent over present levels and reaching $3.2 billion within the coming decade. Increases are projected in every measuring category: revenues per station, revenues per household, revenues per person.

"The operating profit margin of radio stations is expected to jump from 13.0 percent to 16.2 percent. Every analysis shows not only continued good health, but improving health within the industry. This is true across the board, in every section of the country, in every size market." [19]

The report to NAB also says that the increase in profit margin "is a return to historic profit margin levels established over a long period (but affected for a brief time during the mid-seventies by extraordinary inflation). Put simply, radio will make a good recovery after a period during which expenses grew faster than revenues." [20]

Strikingly, this far-reaching report commissioned by the NAB predicts "no major technological advances." [21]

It does predict, however, that "[t]he move to quadraphonics in FM, stereo in AM broadcasting is seen as the most dramatic development technologically in terms of audience/revenue impact." Quadraphonic sound and stereo were developments pioneered for the communication of music on sound recordings.[22] Their value to radio broadcasters, too, would seem to lie primarily in the communication of music—from sound recordings. It appears, therefore, that the sound recording will be even more important for radio broadcasting in the years ahead than it is today, when recordings account for about 75 percent of programming time.

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[18] See note 13, supra, at 1324–26; see also, pp. 37–38 of accompanying submission.

[19] Frazier, Gross & Clay Inc., "Radio in 1985" (Washington, D.C.: National Association of Broadcasters, 1977), p. 26.

[20] Ibid, p. 19.

[21] Ibid, p. 27.

[22] Record industry observers would question the report's accuracy concerning the importance of quadraphonic sound.

Similarly, the sound recording is increasingly important for television broadcasters, jukebox and cable operators, discotheques, nightclubs and background music services.

Accordingly, commercial users should be required to pay a royalty for the use of sound recordings.

Some users of sound recordings may say they cannot afford to pay, or should not have to do so. However, it seems clear that neither ability to pay nor desire to pay should be a major consideration. Economic arguments are irrelevant to the issue of whether such a right should be granted. To weigh economic matters in considering the granting of the right, as opposed to the royalty rate, would make a shambles of copyright law and the principles on which it is based. Copyright law is not a social welfare program.

Moreover, the broadcasters themselves were singularly unresponsive to cable operators' pleas in inability and lack of desire to pay.

As for the owners of the music copyright, granting a performance right to sound recordings need have no effect on them. It could, in fact, reduce collection costs to the composer/publisher, if their collection system is utilized to collect royalties for sound recordings.

Granting a performance right and royalty to sound recordings will encourage and reward creativity.

In days past, networks, major radio stations, and nightclubs employed their own bands and orchestras, thereby providing employment for musicians and performers.

Today, through sound recordings, operators of these enterprises can provide any type of music without employing musicians and performers.

For the recording company, there is substantial risk, as noted previously. More than 75 percent of all recordings fail to recover their costs; only 6 percent make real profits and, in effect, subsidize the other 94 percent. Most classical recordings lose money.[23]

Since broadcasters and other commercial users of sound recordings use all types of recordings, the payment of a performance royalty would help support the creation of all types of recordings.[24] It would help recording companies offset the continuing round of cost increases that have forced record prices up.

Clearly, this would be beneficial to the consumer, who now finances all record production, even while broadcasters and other commercial users are getting a "free ride."

For the performer and musician, a performance royalty will also provide encouragement and reward. Few performers and musicians achieve fame and success. The recording careers of even the successful artists tend to be very short. They are entitled to royalty fees from public performances of their work to prolong their short span of earnings.

Often, one will hear performers and musicians, whose days of recording success are past, lament the fact that they still hear their works played on the air, even while they are struggling to earn a livelihood. This is not fair.

And, a performance royalty could contribute to an economic climate in which new and untried performers, musicians and composers might find it easier to record their works.

International practice

A review of practices in other countries strongly suggests that U.S. copyright law is behind the times because it provides no performance right for sound recordings.

Most western nations grant such rights. In some countries, where the law does not specifically recognize performance rights in recordings, broadcasting organizations nevertheless pay fees to record producers.[25]

If this country followed the precedent of other nations in paying such royalties, more money would flow into this country than would flow out, because the U.S. is the world leader in sound recordings.

Moreover, the absence of a performance right is harmful to U.S. companies, musicians and performers. U.S. record producers are often denied performance

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[23] See note 14, supra.

[24] Statement of Alan Livingston, Hearings on S. 597 Before Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, at 504 (1967).

[25] See note 13, supra, at 1322–23; see also, pp. 31–34 of accompanying submission.

rights from abroad because foreign record companies do not enjoy reciprocal rights in this country.

To continue to deny a performance right and royalty to the vocalist, musician and recording company—while granting it to other creators—is illogical, inconsistent and unfair.

Question 3. In the event that a performance right is enacted, who should enjoy it? If both record producers and performers enjoy it, what royalty split would be advisable?

Answer:

Recipients.—The right should be enjoyed by the recording company, vocalists and musicians whose work helped create the recording. This is the most equitable arrangement, with ample international precedent.

Royalty split.—These beneficiaries have long agreed that the split should be 50 percent to the copyright owner(s), and 50 percent shared by the vocalist(s) and musician(s) whose work is recorded. This arrangement is supported by the RIAA, the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA). Moreover, this sharing formula is consistent with similar arrangements in many countries. Naturally, the question of sharing among vocalists and musicians is more appropriately addressed by their spokesmen.

Question 4. If a performance royalty is enacted, what mechanism should be established to implement it? Are voluntary negotiations possible and/or preferable? Would a compulsory licensing system work? If so, who should determine the rates, who should distribute the proceeds and how should the beneficiaries be identified? What role, if any, should the Copyright Office play?

Answer:

Implementation and distribution; identification of beneficiaries.—There are two alternatives for the successful administraton. collection and distribution of performance royalties for sound recordings. One is to use existing mechanisms. The other is to create a new entity.

ASCAP, BMI and SESAC now administer, collect and distribute royalties for music copyright owners under equitable systems. They use statistically valid sampling techniques to monitor airplay. They might be willing to take on all or part of these administrative functions for sound recordings.

This could be advantageous to all parties, because the sharing of administrative costs should result in greater net income to the holders of the music copyright, as well as to those who would receive royalties from sound recordings.

If those organizations decline such involvement, an independent agency could be set up by the various participants.

It would be appropriate for the Copyright Office to establish or approve implementing regulations. These should include procedures for appeals and settlement of grievances, which presumably would be adjudicated by the Royalty Tribunal.

Compulsory licensing.—We favor a compulsory licensing system. It would assure broad availability of sound recordings for all who wish to use them, and it would simplify procedures.

Rate setting.—Under a compulsory licensing system, rates could be set as the result of negotiation between the parties, in a proceeding before the Copyright Tribunal, or by Congressional action. On balance, we believe the preferable approach is for the Tribunal to consider and adjudicate the complex technical and economic factors involved. Congress created the Tribunal for just this type of function.

We would, of course, be willing to attempt negotiations to set the rate. The RIAA has previously suggested to the National Association of Broadcasters that the matter be negotiated. These efforts were unsuccessful. Voluntary negotiations might pose problems for some groups of users (e.g., discotheques, nightclubs), since they may not have organized representation. Obviously, if there are such negotiations, there must be a mechanism established in case there is no agreement. The Royalty Tribunal is the logical entity to make a final determination, if necessary.

Congress has already enacted legislation implementing precisely such a scheme—voluntary negotiations under a compulsory licensing system, with referral to the Copyright Royalty Tribunal if necessary—in connection with noncommercial broadcasting under Section 118 of the Copyright Revision Act.

SUMMARY AND CONCLUSIONS

We urge the Copyright Office to recommend strongly that Congress create a performance right for the sound recording.

The sound recording is a copyrightable, creative work, as Congress has recognized and the courts have affirmed.

Those who use recordings for their profit should pay for the privilege, as they do for the performance of all other copyrighted works.

There is no valid or logical reason for not granting a performance right to the creators of sound recordings.

As a broadcasting industry spokesman testified in 1975: "It is unreasonable and unfair to let [the cable] industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America." [26]

The broadcasters expect payment when their programs are used for another's profit. So do we. We believe it is unfair to let the broadcasting industry, and other commercial users, "ride on the backs" of those who create the sound recording.

We believe the time has come to correct the inequity which deprives vocalists, musicians and recording companies of compensation for their creative work.

As a supplement to this statement, we are attaching a more comprehensive report, which was submitted to Congress in 1975 by the RIAA, during consideration of S. 1111 and H.R. 5345. This report includes a wealth of economic and other data, developed through an independent analysis by the Cambridge Research Institute, and is cited as a reference in several instances for this statement to the Copyright Office. We are currrently developing supplementary data; it was impossible to complete this task prior to the May 31, 1977 deadline set by the Copyright Office. We, therefore, respectfully request that the Copyright Office keep the record open after the July hearings until mid-September to receive this significant supplemental information.

STATEMENT OF RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This statement has been prepared by the Recording Industry Association of America. Much of the technical information contained in the statement, identified by footnotes, has been drawn from an objective analysis prepared by the Cambridge Research Institute, an independent management consulting and business research firm.

SUMMARY

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work. The exclusive right of a copyright owner to authorize the public performance of his creative work is known as a "performance right." As the general copyright revision bill now stands, sound recordings are the only copyrighted works which can be performed that have not been granted a performance right.

The performance rights bills now pending in the Congress—S. 1111 and H.R. 5345—would remedy this inequity by establishing rights and royalties for the public performance of copyrighted sound recordings. Those bills require broadcasters and others who use sound recordings for their profit to compensate the vocalists, musicians and record companies for the commercial exploitation of their creative efforts. Half of the royalties would go to the performing artists, and the other half would go to the recording companies.

I. Equitable and economic factors overwhelming support a performance right for sound recordings

1. *Sound recordings account for three-fourths of radio programming.*—The basic staple of radio programming is recorded music. The Senate Judiciary Committee has noted that 75 percent of commercially available time is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of stations' advertising revenues—or about $900 million annually. Yet broadcasters—who must pay for all their other types of programming—pay no copyright royalties to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

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[26] Hearings on H.R. 2223 Before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 36, pt. 2, at 769 (1975).

2. *Recordings have replaced "live" performances.*—Broadcasters used to pay for "live" performers, but these artists have actually been replaced by their own recordings. It is inequitable for these recorded performances to be broadcast for profit without any payment being made to the performers.

3. *Composers and publishers receive performance royalties.*—Under the existing Copyright Law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance, and whose creative contribution is at least equal to, if not greater than, that of the composer, are paid nothing.

4. *No "Free Ride" for record companies.*—The record companies do not get a "free ride" from broadcasters. Radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences, which attracts advertisers, which leads to profits, and also increases station equity value. Further, about 56% of the records played are "oldies" that enjoy few current sales if any. Record companies and performers derive little benefit from such air-play, but these recorded performances draw massive listening audiences for broadcasters and, in turn, advertising revenues for the stations. Finally, record companies purchase over $32 million of advertising time from radio stations annually—about three times the total projected performance royalties under the proposed legislation.

5. *Broadcasting industry very profitable.*—The broadcasting industry is exceedingly healthy. Between 1967 and 1973 (the last year for which data are available), the pre-tax profits of radio stations rose 39 percent, and advertising revenues rose 61 percent.

6. *Royalty fees are very modest.*—The proposed performance royalty fee is not burdensom. About one-third of the nation's radio stations would pay 68 cents per day. Another third would say $2.05 per day. The remaining third of the stations—large stations with more than $200,000 in annual advertising revenues—would make a modest payment of one percent of net advertising revenues. Thus, even a station earning revenues of $1 million annually would pay only $27.40 daily, or $1.14 per hour to compensate the vocalists, musicians and record companies for the exploitation of their creative efforts. Clearly, the performance royalties are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces.[1]

The rate schedule is as follows:

Revenues and annual fee

More than $200,000—1 percent of net advertising revenues.
$100,000 to $200,000—$750.
$25,000 to $100,000—$250.
$25,000 and under—None.

Further, all-news stations or others which do not rely heavily on recorded music would pay only a pro rata share of the performance royalty percentage.

7. *Performance royalty consistent with Cable TV royalties.*—The principle underlying the performance rights bills is identical to that supported by the broadcasters in the general revision bill. Broadcasters assert that cable systems should be required to pay the broadcaster and copyright owners when cable TV picks up the broadcasters' over-the-air signal. In testimony before the House Copy-right Subcommittee, they said "it is unreasonable and unfair to let (the cable TV) industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime." But broadcasters, too, are "taking somebody else's product and . . .

[1] A chart detailing, by state, the number of radio stations in each of the royalty rate categories is set forth after page 9, infra.

selling it for profit." In directly parallel fashion, therefore, they should be required to pay the creators of sound recordings when they use that programming material for their profit.

8. *Performance royalty recognized abroad.*—The principle of the bill is not at all radical. Almost all other Western nations require the payment of performance royalties to performers and recording companies. Some of these foreign payments are currently denied to U.S. artists and companies because our country offers no reciprocal right. The primary reason that the principle has not been established here is that the last revision of the copyright laws took place in 1909, long before sound recordings became a significant source of programming materials for commercial exploitation by broadcasters and others.

II. There can be no "constitutional doubt" that the production of a sound recording is a creative activity deserving of copyright protection

1. *Copyright protection covers wide variety of creative or intellectual efforts.*—Copyright protection has never been limited to the "Writings" of "Authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "Writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

2. *Constitutionality of copyright for sound recordings upheld.*—Both Congress and the Courts have recognized that sound recordings may be granted copyright protection under the Constitution. In the Anti-piracy Act of 1971, where Congress conferred limited copyright protection upon sound recordings, the Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution." [2] The Committee rejected the constitutional objection once again only last year.[3]

The Courts have expressly upheld the constitutionality of legislation according copyright protection to sound recordings. In *Capitol Records, Inc.* v. *Mercury Records Corp.*,[4] the Court said that "there can be no doubt that, under the Constitution, Congress could give to one who performs a . . . musical composition the exclusive right to make and vend phonograph records of that rendition."

A three-judge federal Court has likewise concluded that the activities of sound recording firms "satisfy the requirements of authorship found in the copyright clause. . . ." [5] The United States Supreme Court, too, has indicated that the copyright clause can extend to "recordings of artistic performances." [6]

Finally, the Copyright Office has advised that it is within Congress' constitutional power to grant copyright protection to sound recordings.[7]

3. *Creativity in production of sound recording.*—Performers and record companies engage in creative activity when they use their artistic skills, talents, instruments and engineering to produce and record a unique arrangement and performance of a musical composition. The Senate Judiciary Committee has found creative copyrightable elements in the "performer whose performance is captured and . . . the record producer responsible for setting up the recording session and electronically processing the sound and compiling and editing them to make the final sound recording." [8]

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[2] S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5.
[3] S. Rep. No. 93–983, 93d Cong., 2d Sess., pp. 139–40.
[4] 221 F.2d 656, 657 (2d Cir. 1955).
[5] *Shaab* v. *Kliendienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).
[6] *Goldstein* v. *California*, 412 U.S. 546, 562 (1973).
[7] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).
[8] S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5.

S. 1111 AND H.R. 5345—NUMBER OF RADIO STATIONS, BY STATE, IN EACH ROYALTY RATE CATEGORY

[Categories are annual revenues of reporting stations, in thousands of dollars]

State	Stations located in SMSA				Stations located in nonmetropolitan area				SMSA/nonmet total				Total stations reporting
	0 to $25	$25 to $100	$100 to $200	$200 plus	0 to $25	$25 to $100	$100 to $200	$200 plus	0 to $25	$25 to $100	$100 to $200	$200 plus	
Alabama	0	14	27	24	0	45	28	3	0	59	55	27	141
Alaska	0	2	0	5	2	7	2	2	2	9	2	7	20
Arizona	1	5	8	21	1	14	9	3	2	19	17	24	62
Arkansas	1	15	14	8	0	28	24	5	1	43	38	13	95
California	13	54	71	118	5	23	23	11	18	77	94	129	318
Colorado	2	7	11	20	1	10	18	6	3	17	29	26	75
Connecticut	0	4	12	25	0	0	3	2	0	4	15	27	46
Delaware	0	0	1	5	0	2	1	3	0	2	2	8	12
Florida	5	37	39	80	5	29	16	11	10	66	55	91	222
Georgia	2	10	23	31	3	47	52	14	5	57	75	45	182
Hawaii	0	3	5	9	0	3	2	3	0	6	7	12	25
Idaho	1	2	0	3	4	17	16	3	5	19	16	6	46
Illinois	6	16	20	56	1	20	36	18	7	36	56	74	173
Indiana	4	19	14	34	2	20	20	14	6	39	34	48	127
Iowa	1	7	6	18	1	8	28	19	2	15	34	37	88
Kansas	0	4	1	13	1	14	18	15	1	18	19	28	66
Kentucky	2	7	8	15	5	47	33	11	7	54	41	26	128
Louisiana	1	20	11	28	2	24	15	5	3	44	26	33	106
Maine	0	3	2	5	0	13	9	7	0	16	11	12	39
Maryland	1	5	8	25	2	5	14	6	3	10	22	31	66
Massachusetts	3	3	16	43	1	2	9	6	4	5	25	49	83
Michigan	1	16	25	59	3	15	23	16	4	31	48	75	158
Minnesota	1	8	13	20	1	10	27	18	2	18	40	38	98
Mississippi	1	2	4	8	1	51	36	6	2	53	40	14	109
Missouri	0	13	8	31	8	38	29	8	8	51	37	39	135

Montana	1	0	4	5	2	13	10	9	3	13	14	14	44
Nebraska	0	3	1	5	0	14	15	10	1	17	16	15	48
New Hampshire	0	0	1	5	1	10	9	5	1	10	10	10	31
New Jersey	2	3	11	23	0	3	4	2	2	6	15	25	48
New Mexico	1	5	2	4	1	18	21	5	2	23	23	9	57
New York	5	26	28	84	1	20	25	17	6	46	53	101	206
Nevada	2	5	5	12	1	3	2	0	3	8	7	12	30
North Carolina	1	15	27	38	0	53	69	14	1	68	96	52	217
North Dakota	0	0	0	3	2	8	9	7	2	8	9	10	29
Ohio	4	12	29	73	0	11	16	19	4	23	45	92	164
Oklahoma	2	15	7	15	4	22	18	3	6	37	25	18	86
Oregon	3	11	6	16	0	22	27	7	3	33	33	23	92
Pennsylvania	6	19	39	75	0	22	31	17	6	41	70	92	209
Rhode Island	0	1	5	9	0	0	2	0	0	1	7	9	17
South Carolina	2	9	16	15	2	20	37	7	4	29	53	22	108
South Dakota	0	1	2	3	3	7	14	4	3	8	16	7	34
Tennessee	1	18	15	39	1	60	29	9	2	78	44	48	172
Texas	7	39	50	99	10	74	46	6	17	113	96	105	331
Utah	2	9	2	10	0	6	5	0	2	15	7	10	34
Vermont	0	0	0	0	0	2	10	7	0	2	10	7	19
Virginia	2	11	23	30	1	26	34	12	3	37	57	42	139
Washington	2	16	18	19	1	28	9	8	3	44	27	27	101
West Virginia	0	4	8	11	1	19	13	10	1	23	21	21	66
Wisconsin	0	11	13	24	1	21	28	22	1	32	41	46	120
Wyoming	0	0	0	0	2	12	14	2	2	12	14	2	30
Total	89	509	659	1,321	83	986	988	417	172	1,495	1,647	1,738	5,052

Note: Under the royalty rate proposed in S. 1111 and H.R. 5345, stations with annual revenues under $25,000 are exempt; stations with revenues between $25,000 and $100,000 pay a flat fee of $250; stations with revenues between $100,000 and $200,000 pay a flat fee of $750; stations with more than $200,000 in revenues pay a 1-percent royalty on net advertising receipts.

Source: FCC filings by individual stations for 1972.

I. RECORDING COMPANIES AND PERFORMING ARTISTS MERIT A PERFORMANCE ROYALTY

The performer's interpretation of a tune is crucial to its success, and is no less a contribution to the recorded product than is the composer's original lyrics and score.

Many vocalists and musicians are not sustained by royalties from record sales, and their opportunities for live perfromances have been sharply curtailed by the use of pre-recorded music by broadcasters. A performance royalty would alleviate this situation.

The recording company's creative contribution to a song is very significant; it constitutes original creative activities to which copyright protection can be granted under the Constitution.

The recording company must underwrite severe financial risks in the production of a record; over three-fourths of all records fail to break even financially and the proportion of failures is rising. Yet broadcasting companies profit from the airplay of all records, whether successful or not.

Congress and the Register of Copyrights have noted the merits of a performance royalty for sound recordings. In addition, the constitutionality of vesting a copyright in a sound recording has been upheld by the courts.

The performer's interpretation of a tune is crucial to its success

Performer's interpretations of tunes and their participation in the actual creation of audible music contributes creatively to the recorded product no less than the actual tunes composers contribute to recordings. A record is a composite of the artistic creativity not only of the composer, but also of the performer and the recording company.[1]

As William Cannon stated: "There are many factors in the total popularity of a record, and the song itself is many times of minor importance. The most important factors vary in predominance from record to record and any one of them may be of prime importance on a particular recording. These are the artist (singer, instrumentalist, or group) . . .; the song or tune, but never in its original state; the arranger who embellishes the composition or orchestrates the work and decides how the total musical sound will be arrived at . . .; the engineers who control acoustics and make electronic alterations in the sounds . . .; and the very important area of exposure and promotion to the public."[2]

The performer can make an important creative contribution to every type of recording. The highly talented jazz musician's original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As the Director of the Boston Symphony Orchestra stated:

"Improvisation is one of the earmarks of the performer in music. . . . You're engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?"[3]

The role of the artist can be even greater with popular music. Here it is often the artist's performance as much as—or more than—the composer's tune that makes the recording attractive to both record buyers and radio audiences. The artist as much as the tune have made hits of Barbra Streisand's "People", Frank Sinatra's "My Way", and the like. There must be a hundred versions of "White Christmas", but it is Bing Crosby's special rendition which is continuously popular at Christmas each year. Listeners are eager to hear albums by Andy Williams or the Boston Pops Orchestra, but may be less concerned with any particular song or its composer. In some cases a song which enjoyed

[1] The statement of John Desmond Glover before the Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. House of Representatives, 1965, in Part II, Exhibit 4, gives an illustration of the significant creative contribution of the artist and the record manufacturer to the simple melody copyrighted by the composer and publisher in order to transform this simple melody into a commercial product.

[2] Statement of William Cannon, owner of the Cannon Coin Machine Co., Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives on H.R. 4347, 1965, pp. 565–566.

[3] Statement of Erich Leinsdorf, then Music Director of the Boston Symphony Orchestra, in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, April 1967, p. 821.

little success in one recording becomes a hit when a new recording is made with a different artist or arrangement.[4] Yet, ironcially, the performer who makes a composer's tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself. The composer is deservedly paid performance fees for his contribution to a recording used by broadcasters, but the performer, too, is entitled to compensation.

Royalties from record sales do not sustain all performers

Performance fees would provide needed income to those performers who fail to earn substantial royalties from record sales—classifical artists, jazz artists, and many popular artists as well. Such performers "never burst into stardom because their appeal is only felt by a narrow segment of the public. They may never have a hit record, although they may have many, many records which are performed time and again for commercial profit."[5] One performer reports, "he is 'very big in supermarkets and elevators,' and everywhere he goes he hears his music played. Yet he does not receive one dime for these commercial performances."[6]

Performance royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Many famous artists, such as Ernie Ford, Mitch Miller, and Pat Boone, sell fewer records today, but airplay of their old records remains heavy. Some radio stations still offer the recorded music of Nat King Cole, and ". . . everyone benefits but Nat Cole's widow and children. The sponsor attracts an audience with one of the top vocalists of our generation, and the radio stations sells time to the sponsor, the writers and publishers of the songs are paid performance fees for the broadcast of these songs, but Nat Cole's widow and children receive absolutely nothing, nor does the record company that spent 20 years building him as a top recording artist, and owns the masters which are used for these delayed performances."[7]

Such performers (and their heirs) should be compensated for the continued commercial exploitation of their endeavors by others.

Performance fees would, of course, also increase the income of those few artists who are presently collecting sizeable artists' royalties from the sales of their recordings. However, the recording careers of even successful performers tend to be distressingly short, and atists, like baseball players, must often maximize income within short periods. "It is not unusual for a performer to find himself in a high tax bracket for a year or so, to be followed by a lifetime of oblivion. The rise of a star is sometimes meteoric, but his popularity often burns out just as quickly."[8] Furthermore, the percentage of performers who are successful for even a brief period is far smaller than is apparent to the general public, which has been fed tales of the fortunes earned by the recording world's fleeting stars. Many artists dream of riches, but few actually attain them. One recording company reported in 1967, that of the performers that they list, only 14 percent had earned enough royalties on sales to defray the expenses normally charged to artists' royalty accounts. Only 188 or so of its 1,300 performers had a profit in their royalty account.[9] Performance fees from broadcasting would supplement the income of at least some of these artists who are receiving meager royalties from sales.

The Minority Report of the Senate Judiciary Committee (in July 1974) expressed concern that, if broadcasters had to pay performance royalties to performers and record makers, "it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale."[10] Performers certainly would have no objection to such a turn of events, but

[4] See "Publishers, Labels Find Success With 'Underexposed' Copyrights", Record World, January 25, 1975, p. 4.
[5] Statement of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, April 1967, pp. 542 and 543.
[6] Ibid.
[7] Statement of Alan Livingston in Ibid., p. 500.
[8] Statement of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, April 1967, p. 821.
[9] Statement of Michael DiSalle in Ibid., p. 832.
[10] U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision (Report No. 93–983), July 3, 1974, p. 226.

unfortunately, broadcasters are unlikely to abandon the use of recordings simply because of a new performance royalty which increased their expenses by less than 1 percent.[11]

In conclusion, performers are entitled to compensation for the commercial use of recordings created by their artistic endeavors, just as composers certainly merit the performance fees paid to them for the privilege of using their work in broadcasting for profit.

The recording company's creative contribution to the artistic rendition is very substantial

A recording company makes a two-fold contribution to a recording: the technical manner in which it records a piece of music, and the financial risk it undertakes in producing the recording.

The quality of a recording and its appeal to listeners is very much affected by the way the recording was made: the type of recording equipment and studio facilities used, the electronic effects and recording techniques employed, and the character of the song arrangement and background music selected. As recording techniques have become more sophisticated and as experimentation with electronic effects has grown, the creative contribution of recording companies to their products has increased dramatically, beyond simply the fidelity of a recording.

An article in the Wall Street Journal describes "How Record Producers Use Electronic Gear to Create Big Sellers".[12]

"Each instrument has its own microphone leading to its own track on the big console's recording tape . . . . (The producers) will cut, slice and dub tracks from the best of the musicians' performances to eliminate flubs by one or two of them, and they'll pick tapes from (the singer's performances for her best lead vocal. For her harmony parts, they can manipulate the tapes to make her sound like a duo, a trio, a quartet—or even, if necessary, a 16-voice choir. They also will add violin flourishes, called 'sweeteners'. Finally they will blend and distill all this into two stereo record tracks."

The creative contribution of recording companies was recognized by the Senate Committee on the Judiciary when it stated, in its Juy 1974 Report on Copyright Law Revision, "The Committee . . . finds that record manufacturers may be regarded as 'authors' since their artistic contribution to the making of a record constitutes original intellectual creation."[13]

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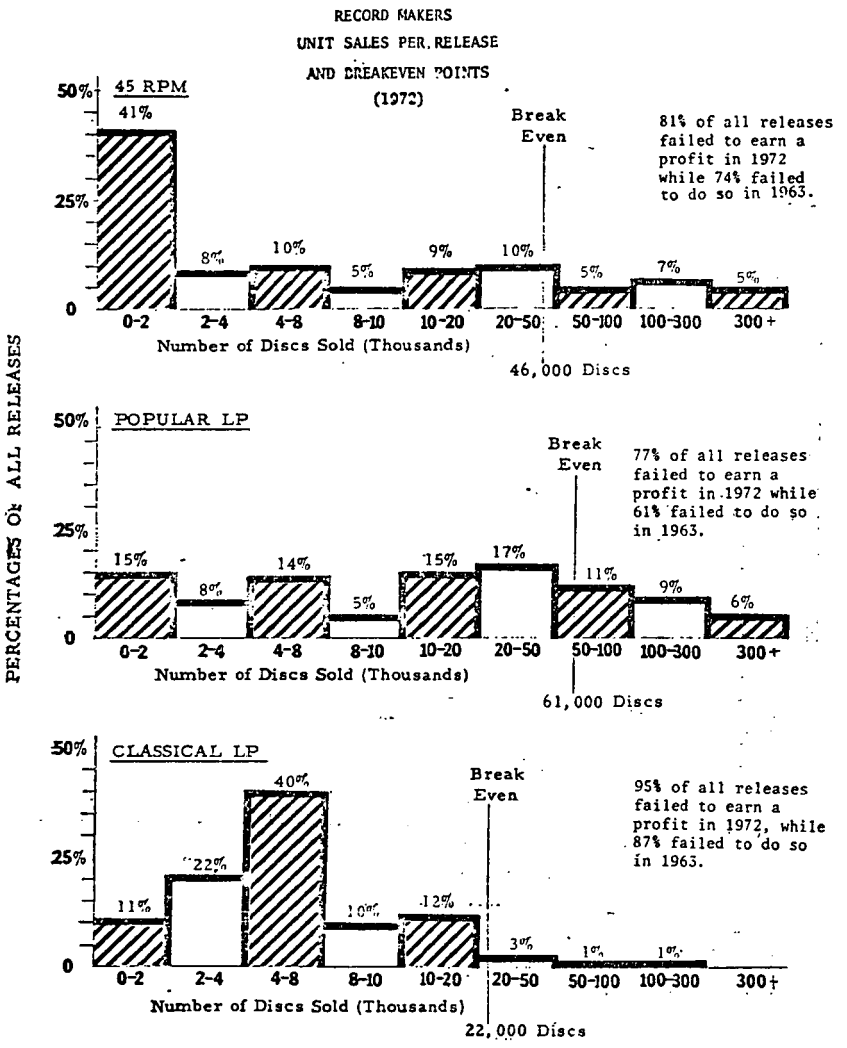
[11] See pages 41–42, infra.

[12] Wall Street Journal, February 12, 1974, p. 1.

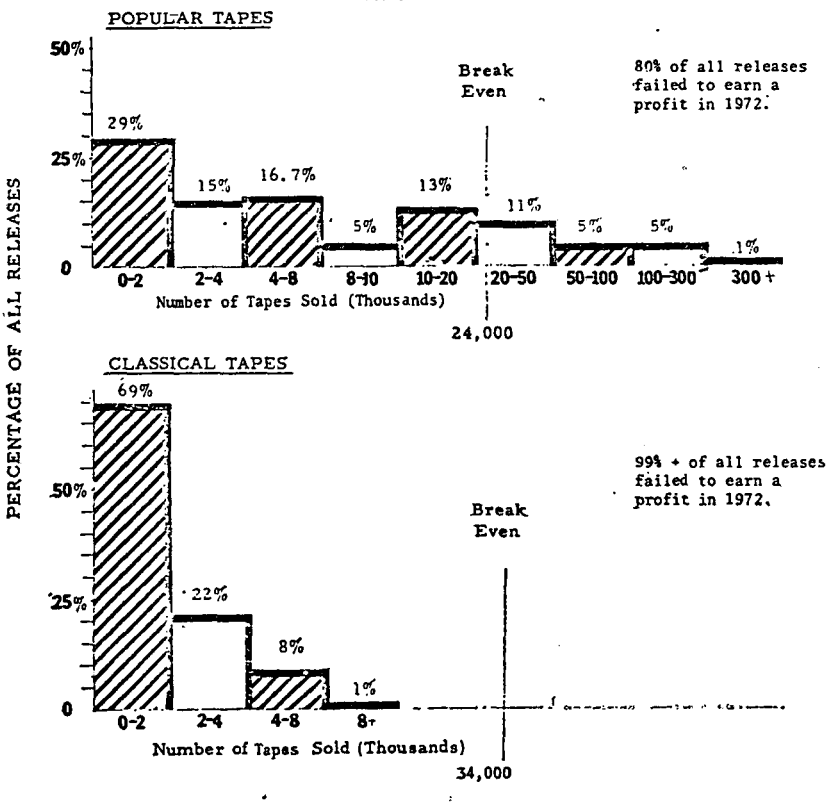
[13] U.S. Senate, Committee on the Judiciary, "Report on Copyright Law Revision" (Report No. 93–983), July 3, 1974, p. 140.

EXHIBIT 1


RECORD MAKERS
UNIT SALES PER RELEASE
AND BREAKEVEN POINTS
(1972)
PERCENTAGES OF ALL RELEASES
45 RPM
50%
25%
0
41%
8%
10%
5%
9%
10%
5%
7%
5%
Break Even
81% of all releases failed to earn a profit in 1972 while 74% failed to do so in 1963.
0-2
2-4
4-8
8-10
10-20
20-50
50-100
100-300
300+
Number of Discs Sold (Thousands)
46,000 Discs
POPULAR LP
15%
8%
14%
5%
15%
17%
11%
9%
6%
Break Even
77% of all releases failed to earn a profit in 1972 while 61% failed to do so in 1963.
61,000 Discs
CLASSICAL LP
11%
22%
40%
10%
12%
3%
1%
1%
Break Even
95% of all releases failed to earn a profit in 1972, while 87% failed to do so in 1963.
22,000 Discs

Record Companies Unit Sales

Per Release and Breakeven Points (1972)



Source: These figures are based on an analysis done by Cambridge Research Institute of a sample of the releases of eight record companies which had 51% of the industry's sales in 1972.

The manner in which a piece of music is recorded contributes not only to the music quality but also to the audience lure and, therefore, the commercial value of any recording used by broadcasters. Recording companies also make a contribution by creating a product that can be used by radio and TV stations without hiring performers. Radio's use of recordings builds audiences, sells commercial time, and creates radio profits. Television's use of recordings adds an important dimension to TV programs. For these contributions, recording companies are entitled to compensation by broadcasters.

The recording company must underwrite serious financial risks

In addition, recording companies undertake a substantial financial risk in producing recordings, for the large majority of recordings do not even recover their costs, let alone make a profit, and the proportion of unprofitable recordings is rising. Over 80 percent of the 45 RPM records and over 75 percent of the "popular" LP records released do not have sufficient sales to break even. (See Exhibit 1 on the next page.) An even higher proportion, 95 percent, of classical records are produced and marketed at a loss. It is only reasonable to expect that all who benefit from this risk-taking by the recording companies should compensate them for any commercial value derived from the use of their recordings.

With performance fees, the record producing companies might be encouraged to make more classical and experimental recordings, for which the sales outlook is uncertain. As one recording company president has pointed out:

"If performance fees were to go to the record company and the performer, there would be an end to the record industry's frantic concentration on teenage rock-and-roll in search for fast and large sales and quick return. Presently, the only road to profit for the performer and the record company is the sale of records: therefore, most music must be designed for the specialized record-buying market. . . . The generation that listens to the 'good music' stations are unfortunately, not record buyers. . . . Let the record companies be compensated for the use of their records on the air, and they will be financially able to record for the benefit of the large listening audience which wants to hear good recorded music, but which does not necessarily buy records." [14]

The commercial risks involved in producing a recording used by broadcasters fall on record companies much more than on publishing companies. If a recording is not a commercial success, the record maker loses. The publishing company and the composer are still paid mechanical fees by the record company whether or not the recording is profitable, and they also get whatever performance royalties accrue from the recording with no additional outlays on their part. To produce a recording cost considerably more than to print sheet music, and recording companies generally expend much more money (and ingenuity) promoting the music than does the publisher. As the President of the American Guild of Authors and Composers has pointed out, the role of the publisher is declining in importance: "Years ago a publisher bought a song, plugged it and got it performed, in eventual hopes of getting a record. Now a song is nothing without a record at the start." [15]

At least in part because of this diminishing relative contribution of the publisher to a tune's success, composers more and more often act as their own publishers for promotional purposes and hire a commercial publishing company solely to print and distribute the sheet music. Although we do not question that the publishing corporations are still entitled to the performance fees they currently receive from broadcasters, it is surely true that record makers and performing artists also merit performance fees for their creative contribution and their commercial risk in producing the recordings used so extensively by broadcasters.

The legal merits for a performance right

In addition to these observations, it is very important to recognize that the authorities agree unanimously that Congress has the power under the Constitution to require that artists and recording companies be paid performance royalties for the commercial use of their recordings. For example:

The Register of Copyrights wrote in July 1974; "Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of

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[14] Testimony of Alan Livingston in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Part 2 (March 1967), p. 504.

[15] New York Times, Aug. 8, 1966.

authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute." [16]

The Supreme Court stated in 1973 that the copyright clause of the Constitution can extend to "recordings of artistic performance." [17]

The Senate Judiciary Committee concluded in 1974 that recordings are entitled to full copyright protection:

"Records are 'writings' and performers can be regarded as 'authors' since their contributions amount to original intellectual creations. The committee, likewise, finds that record manufacturers may be regarded as 'authors' since their contribution to the making of a record constitutes original intellectual creations. The committee endorses the conclusion of the Copyright Office that sound recordings 'are just as entitled to protection as motion pictures and photographs'." [18]

In conclusion, because of the creative activity involved in recorded performances that is recognized unanimously by the relevant authorities, there is no legal reason why sound recordings should remain the only copyrighted product without performance rights. The contributions of both the performers and the recording companies merit such rights in full.

II. IT IS COMPLETELY EQUITABLE FOR PERFORMING ARTISTS AND RECORDING COMPANIES TO OBTAIN A PERFORMANCE RIGHT

Performers and recording companies are entitled to a performance royalty from broadcasting companies by the very same logic that entitles broadcasters to royalties for the programs retransmitted by CATV operators—i.e., unfair exploitation of another's property for profit.

Broadcasters currently pay less than 3 percent of their expense dollar for the programming which generates 75 percent of their revenues. All of this goes to music publishers and composers. None goes to musicians, vocalists and recording companies. This is totally inequitable.

The fact that radio airplay helps the sales of some new records is fundamentally irrelevant to the fairness of granting a performance right.

Most other Western nations now recognize a performance right, and the United States has much to gain by following suit.

The parallel with CATV

There is no stronger argument in support of a performance right for sound recordings than the very same argument which broadcasters are using to urge that cable television companies should pay royalties on the programs they propagate through secondary transmission. The broadcasting companies have sought compensation from CATV for the commercial exploitation of their product without their consent. Performers and recording companies, in requesting performance fees from radio and television broadcasting companies, are seeking precisely the same right. If CATV should pay for the use of programming created by others, so broadcasting should pay for the use of recordings created by others. If CATV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

Jack Valenti, on behalf of the Motion Picture Association of America, stated on August 1, 1973 at the hearings before the Senate Copyright Subcommittee: ". . . I agree with Senator Burdick that the crux of this is that the free market place ought to be the determinant as to what a man pays for the product he chooses from a supplier. And, indeed, that is the way cable (television) operates on everything that goes into its system. It buys at a bargain price or price that is set by its suppliers for everything that they use, except one, their copyrighted materials, which is the grist of their business." [19]

If the word "cable" were changed to "broadcasting companies", this quotation could serve just as well to describe the condition that exists with respect to broadcaster's use of copyrighted recordings. On the basis of such reasoning, the Senate

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[16] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).

[17] *Goldstein* v. *California*, 412 U.S. 546, 562.

[18] U.S. Senate. Committee on Judiciary, "Report on Copyright Law Revision," (Report No. 93–983), July 3, 1974, p. 140.

(Congress granted copyright protection for public performances of dramas in 1856, of musical compositions in 1897, and of motion pictures in 1912.)

[19] Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, March 1967, p. 251.

Judiciary Committee in 1974 stated its belief that "just as cable systems will now be required to pay for the use of copyrighted program material, so should broadcasters be required to make copyright payments under the performance royalty." [20]

Broadcasters should pay for all of their program materials

The performance royalties currently paid to composers and publishing companies reflect the principle of fair compensation for the use of another's creation. But their creations are only tunes. Without arrangement, performance and all the rest, the tune remains silent, only printed notes on a page. It is creative arrangement, performance, and recording that makes a tune into music, and it is another's music that the broadcasting companies are exploiting without fair compensation.

Fully 75 percent of radio airtime is devoted to the playing of recordings.[21] The payments to composers/publishers for the use of the tunes on these recordings equal only 2.8 percent of radio station expenses, and no payments are made for the use on the air of the recordings themselves. (See Exhibit 2 on the next page.) Thus broadcasting corporations pay virtually nothing for the bulk of the program material which attracts advertisers.

Such was not always the case. As Red Foley pointed out in hearings before the Senate Subcommittee eight years ago.

"At one time the recording artist could look to 'live' radio as an important source of income and employment. But in the 1950's local radio stations discovered greater profits were available by playing recorded music. Therefore, the 'live' shows virtually died and local stations switched from network programming of 'live' shows to the playing of recorded music. . . . Today, instead of 'live' performance opportunities, the artist is in the ironic position of having been displaced by his own recordings, which the radio stations use for profit, without the performer receiving any of the benefit from the profits that his creative performance produces." [22]

As a result, radio stations can no doubt charge advertising rates that are relatively cheaper than those of other media with which they compete, and which must pay for all their programming material.

We maintain that this situation is inequitable.

EXHIBIT 2

Breakdown of Expenses of All Radio Stations [1]

	In thousands of dollars				Percent of total expenses for all stations			
	1970	1971	1972	1973	1970	1971	1972	1973
PROGRAM COSTS								
Payroll for program employees	208,224	222,078	240,841	260,275	20.9	20.1	19.7	19.3
All other program expenses not itemized below	34,522	40,543	42,468	48,837	3.5	3.7	3.5	3.6
Music license fees paid to composers and publishers	29,937	32,274	35,616	37,310	3.0	3.0	2.9	2.8
Other performance programing rights	11,903	12,950	13,245	14,410	1.2	1.2	1.1	1.1
Cost of outside news services	19,933	20,908	23,355	24,930	2.0	1.9	1.9	1.8
Payments to talent not on payroll	8,203	8,443	9,080	9,355	.8	.8	.7	.7
Records and transcriptions	5,123	5,678	6,063	6,763	.5	.5	.5	.5
Total program costs	317,845	342,876	370,669	401,881	31.8	31.0	30.2	29.8
NONPROGRAM COSTS								
Total technical expenses	102,171	107,984	115,638	120,045	10.3	9.8	9.4	8.9
Selling, general, and administrative (includes depreciation)	578,017	655,890	739,046	826,994	57.9	59.2	60.4	61.3
Total nonprogram costs	680,188	763,874	854,684	947,039	68.2	69.0	69.8	70.2
Total broadcast expenses	998,034	1,106,750	1,225,354	1,348,920	100.0	100.0	100.0	100.0

[1] These figures are for all AM, AM–FM, and FM stations with revenues of more than $25,000. They do not include networks, whose figures are broken down somewhat differently. The figures are compiled from those reported in the FCC's annual reports on broadcasting financial data. Last digits may not add to totals, due to rounding.

[20] U.S. Senate. Committee on the Judiciary, "Report on Copyright Law Revision," (Report No. 93–983), July 3, 1974. p. 141.

[21] See study reported by RIAA in the hearings cited above, pp. 487–491.

[22] Statement of Red Foley. Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, April 1967, p. 814.

Record sales are fundamentally irrelevant to the fairness of a performance royalty

As underscored by the risk analysis in the previous section, the fact that recording companies profit from the sales of recordings should not be used, as some would maintain, as a pretext for preventing them from earning additional legitimate income from the use of these recordings by others to sell broadcasting time, aspirin or automobiles. Composers receive royalties both from the sale of records and from the playing of records over the air. Radio and TV broadcasters record, syndicate and sell for re-use some programs which have already created ad sales for them. Motion pictures are secondarily paid for TV showings. There is no just reason why record producing companies should not also earn income from multiple sources in exactly the same way.

In addition, it has often been argued that radio airplay boosts the sales of sound recordings. It is certainly true that airplay can help the sales of some new releases. However, it is important to keep two points in mind: first, the stations which play exclusively the so-called Top 40 songs usually start playing them after the songs have become significant sellers in their own right. Not only that, a typical Top-40 radio station rarely adds more than five or six new songs each week to its airplay, but about 135 single records and 75 new albums representing almost 900 tunes are released each week.[23] Clearly, many of these receive no airplay at all.

Second, most airplay does not produce significant record sales because it is devoted to "oldies" (*i.e.*, records that have been out on the market for a number of years and are long past their period of significant sales), and the vast majority of record sales occur on albums which have been on the market for less than 90 days.

This conclusion is based on the following facts. In 1967, 70 percent of Capitol Records' total sales were accounted for by records which had been on the market for less than 90 days.[24] A 1975 analysis on one company's record catalogue listing all recordings released in the last two years showed that 75 percent of all sales of records on the list were sales of recordings released in the previous 90 days. A further survey of five record companies indicated that, on the average, 70 percent of their 1974 sales were of recordings released that year. Clearly, a newly-released record is a rapidly wasting asset.

At the same time, as can be seen in Exhibit 3 on the next page, an analysis of the advertising revenues earned by radio stations in six major markets showed that, of the revenues earned by the playing of music, 55.8 percent were earned by the playing of "oldies". Even though these are minor sales items for recording companies, old recordings as well as new ones lure radio audiences and enable stations to make sales to advertisers. And yet, no compensation is ever paid for the artistry, know-how, enterprise and investment that went into creating that vast repertory which has unequalled commercial value for radio and television companies.

In addition, frequent airplay of some popular songs can actually decrease sales due to overexposure. In the industry such a song is called a "turntable hit". "This means the tune was a hit in terms of the number of times it was played on the air, but the performer does not receive royalties for broadcast plays, and the substantial sales he counted upon never materialized."[25] Another way airplay can hurt a recording's sales is by making it possible for listeners to make a copy on tape without buying the recording.[26]

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[23] A tune may be released on both a single and an album, so the statistics on record releases give a slightly overstated picture of the number of tunes released.

[24] Testimony of Alan Livingston in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, April 1967, p. 497.

[25] See testimony of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, March 1967, p. 540.

[26] Testimony of Michael DiSalle in ibid., p. 832.

ANALYSIS OF MUSIC PROGRAMING IN STATIONS IN 6 MAJOR MARK

Market and number of music stations in market (news and foreign language stations omitted)	Estimated daily music revenue assuming 5 advertising minutes per hour [1]	Revenue due to "oldies" programing, as reported by each station in early 1975, aggregated by market
Baltimore, Md. (22 stations)	$48,683	$28,018
Houston, Tex. (23 stations)	65,138	30,791
Los Angeles, Calif. (48 stations)	176,407	102,197
New York, N.Y. (25 stations)	156,983	91,682
Salt Lake City, Utah (20 stations)	31,293	15,955
Washington, D.C. (29 stations)	95,029	51,227
Total	573,533	319,870

[1] Minute rate times 5 times airplay hours per day times 0.75. (The assumption of 5 advertising minutes per hour is not crucial to the result. Multiplying by 0.75 takes into account the fact that ¾ of programing is recorded music.)

Note: Composite share of all revenues due to oldies equals $319,870 divided by $573,533 equals 55.8 percent.

Source: Survey conducted by Cambridge Research Institute.

Finally, if radio airplay did contribute significantly to record sales, there would be no need for the recording companies to spend the vast sums they do on record advertising. Billboard magazine reported in May 1975 that record advertising on television soared to $65 million in 1974, including cooperative ads by retailers. The data on radio advertising expenditures developed from a survey by the Cambridge Research Institute indicates that in 1972 the comparable total was on the order of $32 million.[27] One reason for this is again that few tunes receive any airplay at all.

All of these observations notwithstanding, whether recording companies or performers benefit in any way from the broadcasting of their products is a subordinate argument. As Senator Tunney pointed out in 1974:

"The real issue is whether or not a person who uses creative talents should receive compensation from someone else who takes them and profits form them. More than 75 percent of the airtime during which advertising is sold is spent playing music. I believe if the artist's creative efforts are used in this way he is entitled to some compensation." [28]

A performance royalty should be paid in the United States as it is in most other western nations

An "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations" was adopted in 1961. This convention, known as the Rome convention, stated in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

So far the convention has been ratified by fifteen countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden.

Although the details of the laws vary, Japan and most countries in Europe also have domestic laws specifying that performance fees should be paid to recording companies and/or performers for the use of recordings in broadcasts, and arrangements are made on either a legal or a voluntary basis for the two groups to share the performance fees collected. (See Exhibit 4 on the next page.) In Japan, the four Scandinavian countries, Austria, and Czechoslovakia, the law grants performing rights to both record producers and performers. In the United Kingdom, Ireland, Spain, and Italy, the law grants performing rights to record producers alone, but the record producers have sharing arrangements on a voluntary basis with performers. In West Germany, on the other hand, a law gives performing rights to performers, with a share to be paid producers. In France, Belgium, and The Netherlands, the law does not specifically recognize performance rights in

[27] The survey conducted for RIAA by the Cambridge Research Institute is based on reporting by seven companies representing 42.3 percent of industry sales, with respect to purchases of non-co-op radio time; as to co-op radio time, six companies representing 40.7 percent of industry sales reported. The total recording industry figure of $32 million was grossed up to 100 percent of the industry from the foregoing bases. See also, Billboard May 10, 1975 and May 15, 1975, p. 1. Billboard has estimated that radio advertising including co-op in 1974 was $3.5 million, a figure that obviously is inaccurate.

[28] U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision, (Report No. 92-983), July 3, 1974, p. 222.

records, but broadcasting organizations nevertheless pay fees to the record producers.

EXHIBIT 4

COUNTRIES IN WHICH THE LAW GRANTS PERFORMANCE RIGHTS TO PERFORMERS AND/OR RECORD MAKERS

Australia	East Germany	Paraguay
Austria	West Germany	Philippines
Barbados	Iceland	Poland
Brazil	India	Roumania
Chile	Ireland	Sierra Leone
Costa Rica	Israel	Singapore
Cyprus	Italy	Spain
Czechoslovakia	Jamaica	Sri Lanka
Denmark	Japan	Sweden
Dominican Republic	Mexico	Trinidad and Tobago
Ecuador	New Zealand	United Kingdom
Fiji	Norway	
Finland	Pakistan	

NOTE.—In some countries, such as France, Belgium, and the Netherlands, the law does not specifically recognize performance rights in records, but broadcasting organizations nevertheless pay fees to record producers.

Source: International Producers of Phonograms and Videograms, "General Survey on the Legal Protection of Sound Recordings As At December 31, 1974."

Canada, moving in a contrary direction to the rest of the world, recently abandoned performance fees for performers and record companies. However, this action was taken primarily because most payments were remitted to United States recording artists and United States record makers, with no reciprocity for Canadian artists in the United States. This explanation was documented by the statement of The Honorable Ron Basford, the Minister responsible for the introduction and passage of the Government Bill, at the commencement of the hearings before the Standing Senate Committee on Banking, Trade and Commerce in the Canadian Parliament in December, 1971:

"May I be permitted, Mr. Chairman, to draw your attention and that of honourable senators to what I view as certain important considerations. I shall be very brief and will then subject myself to whatever questioning that honourable senators have. As has been made clear in evidence before you, 95 percent of the record manufacturers, through this performing right society known as Sound Recording Licenses (SRL) Limited, are subsidiaries of, or associated with, foreign firms, in very large measure American firms. The American principals of the SRL group do not have the right in the United States that their Canadian subsidiaries are now demanding and trying to exercise in Canada through the tariff that was accorded to them in the recent decision of the Copyright Appeal Board.

"What is not available to the record manufacturers in the United States is apparently regarded as necessary in Canada. What is not available to the foreign parents is claimed in Canada. Surely this is an anomalous position for us in Canada to find ourselves in, and surely it is an inequitable one from the point of view of Canadian users of records."

In addition, United States record producers are often denied performance royalties from abroad because foreign record companies do not enjoy reciprocal rights in this country. [29]

"For example, in Denmark, payment is made only for the performance of recordings originating in Denmark itself or in a country which grants reciprocal rights to recordings of Danish origin. As a result, no payment is made for the use of U.S. recordings there." [29]

If this country followed the precedent of others in paying performance fees to record producers and performers, more performance fees would flow into this country than would flow out. In 1974, for example, ASCAP received from abroad $12.3 million in performance fees, but it paid out to foreign performing rights societies only $5.9 million. Were the performance right enacted, the performance

[29] Statement by Sidney Diamond in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Part 2, March 1967, p. 508.

fees paid to U.S. artists and recording companies would contribute positively to the balance of international payments.

III. THE IMPACT OF A PERFORMANCE ROYALTY UPON BROADCASTERS, ADVERTISERS, AND CONSUMERS WOULD BE SLIGHT

Economic analysis indicates an ability on the part of broadcasting companies to pay the proposed performance royalty. A growing amount of airtime which radio has been able to sell to advertisers has combined with an expanding audience for radio programs to produce sharply rising radio revenues and profits. Even if the proposed performance fee were not covered by either higher ad sales or higher ad prices, the fee would increase total radio expenses by less than 1 percent, and amount to 8 to 10 percent of radio's pretax profits (for radio stations with revenues of $25,000 or more).

If instead, radio stations elected to pass forward the expense of a performance royalty to their advertising sponsors, the increase would be minimal compared with advertising rate increases posted in recent years. In addition, radio's advertising advantages are such that a 1 percent (maximum) increase in advertising rates is very unlikely to scare away advertisers.

The proposed performance royalty for television stations would amount to a mere 0.07 percent of 1973 pre-tax television profits. Television's return on sales would not be affected.

If advertisers also passed forward the costs of a performance royalty for recording companies and performing artists, the impact on wholesalers and consumers would be scarcely perceptible.

Broadcasters have the ability to pay a performance royalty

Radio industry trends indicate the industry can cope easily with the added expense of a performance royalty paid to performers and recording companies. Radio is a growing and prosperous industry, as reflected by the following trends based on 1973 data, the last year for which FCC statistics are available.

Radio is a larger industry than the recording industry: in 1973, net radio revenues were $1.5 billion while net sales by the recording companies were about $1 billion.[30] The profitability of the two industries has been about the same in recent years even though recording industry profits are notably volatile: radio pre-tax profits were 7.4 percent of net revenues in 1973, and recording company pre-tax profits were 7.8 percent of net sales.

Radio advertising revenues have grown even more rapidly than total advertising revenues for all media. While total advertising revenues grew 49 percent between 1967 and 1973, radio advertising revenues grew over 61 percent during those years.[31] (See Exhibit 5 on the next page.) The Commerce Department projects that radio revenues will grow to $2.7 billion by 1980, an increase of 60 percent over the 1973 figure.[32]

Total radio pre-tax profits rose 39 percent between 1967 and 1973, the last year for which data is available, to a level of $112.4 million.[33] (See Exhibit 5.)

The number of radio stations grew 20 percent between 1967 and 1973.[34] So many new radio stations would not be opening up if the financial future of the radio industry were not considered to be attractive.

The prices at which existing radio stations are sold have shot up. For example, "Back in 1970 . . . the price in Cleveland for a 'raw FM license' (meaning any given facility regardless of its particular *pro* and *con* attributes) was $70,000. Now, reports a Midwest broker, it would go for $1.2 million. Four years ago a raw facility in Miami would sell for about $500,000. Today you couldn't pick it up for less than $1 million.[35]

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[30] Retail sales of recordings at list prices are reported in Billboard International Buyers Guide, September 14, 1974, as about $2 billion. Since most recordings are sold at a discount, actual retail sales are about 80 percent of the Billboard figure. The prices at which recording companies sell records and tapes to distributors average about 50 percent of list prices.

[31] According to Advertising Age's Research Department, total advertising revenues rose from $16.9 billion in 1967 to $25.1 billion in 1973, while radio advertising revenues rose from $1.05 billion in 1967 to $1.7 billion in 1973.

[32] "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," Broadcasting, Nov. 11, 1974, p. 48.

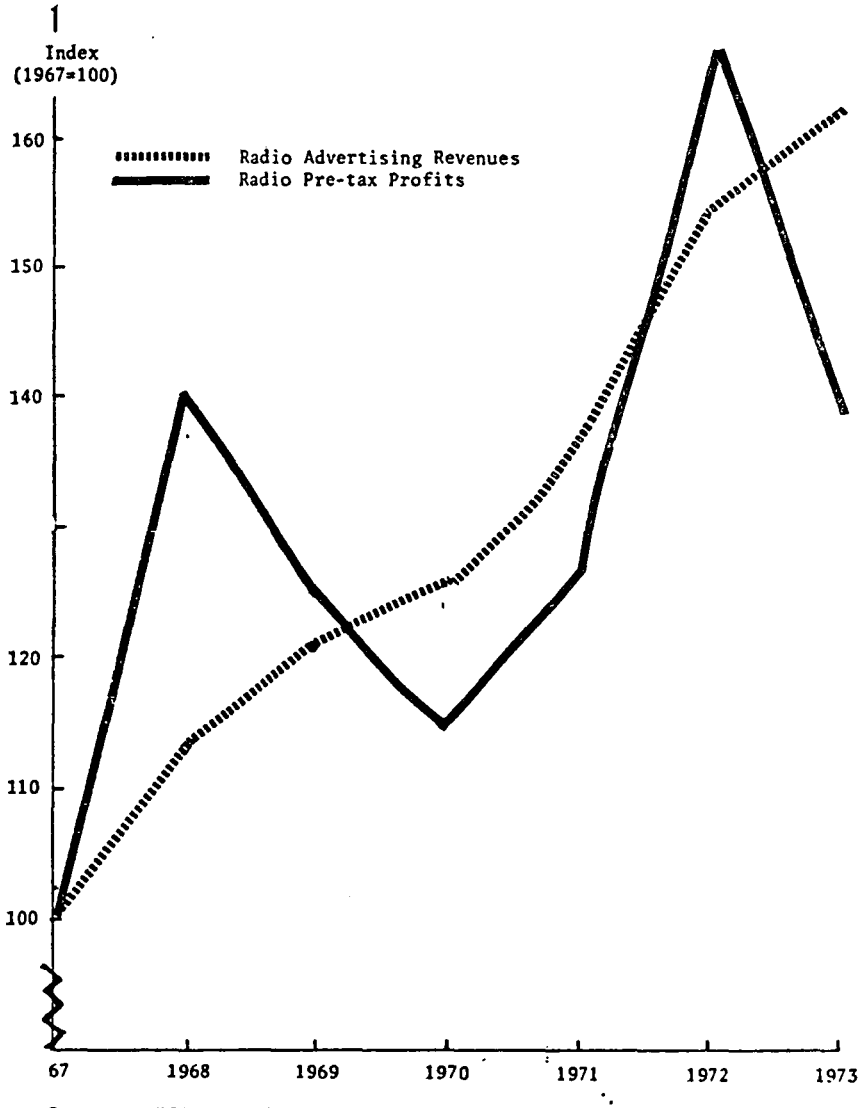
[33] FCC annual reports on AM–FM Broadcast Financial Data indicate that radio's pre-tax profits rose from $80.9 million in 1967 to $112.4 million in 1973.

[34] According to the FCC's annual reports on AM–FM Broadcast Financial Data, the number of radio stations rose from 4,481 in 1967 to 5,358 in 1973.

[35] "One Sure Indicator of FM Growth: High Price Tags on Stations," Broadcasting, Oct. 7, 1974, p. 50.

EXHIBIT 5

RADIO REVENUES AND PRE-TAX PROFITS 1967-1973



Sources: FCC annnual reports on AM-FM Broadcast Financial Data
Research Department of Advertising Age

Prices for AM stations are rising, too. The average transaction price per trade of all radio stations rose from $54,674 in 1954 to $188,829 in 1967 to $464,820 in 1971.[36] Thus, between 1967 and 1971 the average transaction price rose 146 percent while the Consumer Price Index rose 21 percent during those years, and radio station revenues advanced 38 percent. Apparently investors consider that radio has good future prospects, for just as they might accord a high price/earnings ratio to a desirable common stock, they are valuing radio stations far in advance of their actual revenue and earnings growth.

Radio has been able to sell increasing amounts of time to advertisers despite the rise in its advertising prices. This is reflected in the fact that radio advertising revenues have been rising more rapidly than the prices radio charges advertisers. For example, while radio spot ad prices rose 19 percent between 1967 and 1973, radio spot ad revenues rose over 21 percent during that period.[37] (Radio spot advertising is national advertising which permits the advertiser to select the radio markets to which his message will be beamed, Spot advertising is distinguished from network advertising, which is also national advertising but which restricts the advertiser to network-affiliated stations.)

Radio has been able to increase its audience considerably. Between 1968 and 1973, the audience for radio spot ads grew 32 percent.[38] Because of the substanstantial growth in radio audiences, the cost of radio spot ads/1,000 listeners grew only 7 percent between 1966 and 1973, even though an advertiser's cost/minute of radio spot ads went up 19 percent.[39]

The audience for radio encompasses almost the entire population of the United States. Of all adults, 96 percent are reached by radio at some time during the week. Each adult on the average listened to radio 3 hours and 22 minutes per day in 1974—a dramatic increase from the 2 hours and 31 minutes the average adult devoted to radio in 1969. The average time adults listened to radio in 1974 is only slightly less than the comparable television figure: 3 hours and 48 minutes, and television had only a three minute increase between 1969 and 1974. Of all U.S. homes, 98.6 percent had at least one radio in working order, and 95 percent of all cars are equipped with radios. Cars with radios have the radio on 62.5 percent of driving time.[40]

It is interesting to compare this prosperity of the radio industry with the proposed fees spelled out in S. 1111–H.R. 5345, the text of which is similar to that of Section 114 of the Copyright Bill passed by the Senate Judiciary Committee in July 1974. The provisions require broadcasting corporations to pay performance fees to recording artists and recording companies. These bills favor smaller radio stations by exempting them from the proposed performance royalty. Stations with annual revenues of less than $25,000 (2.6 percent of stations in 1973) would be completely exempt from the performance royalty. Stations with revenues between $25,000 and $100,000 (26.5 percent of all stations in 1973) would pay only a token performance royalty of $250 a year. Stations with revenues between $100,000 and $200,000 (33 percent of all stations in 1973) would pay a performance royalty of just $750 a year. Only the remaining 38 percent of stations, which have revenues above $200,000 a year, would pay the full performance fee equal to 1 percent of their net receipts from advertisers, and this fee would be reduced for those stations using less than the usual amount of recordings. Thus, 62 percent of all radio stations would be exempt or pay only a token performance right to performers and recording companies, and only the large stations would pay the full performance right of 1 percent.

On the basis of this fee schedule, the Senate Judiciary Committee one year ago concluded that, "The committee's analysis of the economics . . . of the

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[36] Using statistics in the 1973 Broadcasting Yearbook, the average transaction price for radio stations only (not combined radio-TV stations) was derived from the total dollar value of FCC-approved transactions, divided by the number of radio stations changing hands, including both majority and minority transactions.

[37] Radio spot ad revenues rose from $313.5 million in 1967 to $380 million in 1973, according to Advertising Age's Research Department. Radio spot ad prices rose 19 percent according to "1974–75 Cost Trends," Media Decisions. August 1974, p. 45.

[38] "Broadcasting in 1975: Shipshape in a Shaky Economy," Broadcasting, January 13, 1975, p. 35.

[39] "1974–75 Cost Trends," Media Decisions, August 1974, p 45.

[40] Radio Advertising Bureau, Radio Facts: Pocket Piece, 1975 and 1970 editions.

broadcasting industry, indicates an ability to pay the royalty fees specified in Section 114." [41]

Indeed, as can be seen in Exhibit 6 on the next page, an estimate can be made (based on 1973 radio revenues) that the total performance fees paid by radio to performers and recording companies under S. 1111–H.R. 5345 would have been between $10 and $12 million. Referring once again to Exhibit 2, (the exhibit in Section II on program costs) two things should be noted: first of all, a performance fee expense of, say, $11 million would have added a scant 2.7 percent to total program costs in 1973. Secondly, the proportion of all expense dollars going into program costs has been declining, while that of administrative salaries, general overhead, and selling expenses has been rising. If the proposed performance fees were required, thereby adding about $11 million to program costs, the proportion of all broadcast expenses going toward programming would still be only 30.3 percent, less than it was in 1970. Hence, there would be no significant change in broadcasters' cost structures. All in all, the proposed performance fees represent less than a 1 percent increase in radio station expenses.

The same performance fee would represent about 8 to 10 percent of the radio industry's pre-tax profits (for all those stations with revenues above $25,000).[42] On balance, the proposed performance fee for performers and record makers is not likely to seriously impair the profitability of the growing and generally prosperous radio industry.

EXHIBIT 6

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER S. 1111 [1]

[In thousands]

Revenue category	AM, AM/FM stations in this revenue category in 1973	AM, AM/FM estimated performance royalty (based on 1973 revenues) [2]	Estimated FM stations in this revenue category in 1973 [3]	Estimated FM stations of all types in this revenue category in 1973	All stations estimated performance royalty (based on 1973 revenues) [2]
Less than $25,000	36	0	98	134	0
$25,000 to $100,000	996	$202– $239	367	1,363	$276– $327
$100,000 to $200,000	1,420	863– 1,022	255	1,675	1,018– 1,206
Over $200,000	1,761	8,209– 9,729	204	1,965	8,769–10,393
Total	4,213		924	5,137	
Total for stations with revenues of $25,000 or more	4,177	9,274–10,990	826	5,003	10,063–11,926

[1] These figures are based on 1973 FCC statistics for those radio stations operating a full year.

[2] Formula for the performance royalty in both S. 1111 and in sec. 114 of copyright bill passed by Senate Judiciary Committee in July 1974: Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250; Stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750—but the fees would average only about 81 to 96 percent of this because of fee reductions granted stations using less than the usual amount of recorded music. (See exhibit II–2 on the percentage of stations which are music stations.) Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their net sponsor receipts. If allowance is made for stations devoting less than average air play to recorded music, the performance royalty would average perhaps 0.81 percent to 0.96 percent of net sponsor receipts. AM, AM/FM stations in this revenue category had 77 percent of all AM. AM/FM stations expenses in 1973 and thus, we estimate, earned 77 percent of the $1,316,117,000 collected in net sponsor receipts by all AM, AM/FM stations in 1973. No data are available on total net revenues earned by FM stations with revenues above $200,000. We estimate that 24.7 percent of the FM stations with revenues above $25,000 fall in this category, while 42 percent of AM, AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over $200,000 earn 77 percent of total AM, AM/FM revenues. We, therefore, estimate that FM stations with revenues over $200,000 earned 45 percent of all FM revenues (24.7 percent divided by 42 percent times 77 percent) or $69,127,000 in 1973.

[3] 1973 FCC data indicate the distribution among various revenue categories of independent FM stations but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations with revenues under $25,000 was reported to be 98 in 1973. Therefore, in this revenue category the number of stations is correct and is not an estimate.

Source: Analysis made by Cambridge Research Institute based on the FCC's "AM–FM Broadcasting Financial Data,' 1973. (The latest available statistics.)

[41] U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision (Report No. 93–983), July 3, 1974, p. 140.

[42] According to the FCC's AM–FM Broadcast Financial Data—1973, radio stations with revenues over $25,000 had total profits before taxes of $118,261,000 in 1973.

Ability of broadcasting companies to pass forward the costs of a performance royalty

Although the preceding analysis demonstrates clearly that broadcasting companies can easily absorb the costs of a performance royalty, the stations could, if they so elected, pass this new expense forward just as other programming costs and profit increases have been successfully passed on in higher advertising rates. Indeed, it is equitable for the stations to pass along the costs of a performance royalty, because advertisers benefit directly from the audiences that sound recordings attract.

Furthermore, radio has raised its advertising rates repeatedly over the years. For example, from mid-year 1973 to mid-year 1974 alone, radio spot advertising rates rose 9 percent, and in the three years between mid-1971 and mid-1974 the rise in radio spot ad rates was 24 percent.[43] All these increases were far greater than the 1 percent increase that would be required if radio were to pass forward fully the proposed new performance royalty.

Although radio advertising rates have been raised periodically, the increase in these rates has been considerably lower than for prices generally. Although the Consumer Price Index rose 47 percent between 1967 and June, 1974, the rates for network radio ads rose 7 percent and those for spot radio ads rose 30 percent.[44] Thus the prices radio advertisers paid for their advertising rose much more slowly than the prices at which the advertisers sold their own products.

Even with these price increases, however, advertising costs per thousand of audience—which is a much more meaningful measure of cost than the rate per minute of time—are far lower for radio advertisers than for advertisers in print media.[45] For example, in 1974 the J. Walter Thompson Agency estimated that the cost per thousand readers for daily newspapers (1,000 lines black and white, all daily papers) was $7.85, and the cost per thousand for consumer magazines (one 4-color page in top 50 magazines) was $6.39. In contrast, the cost per thousand viewers for prime-time network TV (one 30-second announcement) was $2.54, and the cost per thousand listeners for daytime spot radio (25 adult Gross Rating Points[46]) was $1.91.[47]

It is important to recognize that radio has distinct advertising advantages. A vice-president of Goodyear Tire is quoted as saying, "Radio and television may constitute the most satisfactory media buys during this period of inflation."[48] He reasoned that the price of paper has zoomed, the wages of printers has escalated, and the price of postage is climbing. He pointed out that radio and television have "considerable latitude" in their cost structure, in contrast to the built-in costs of direct mail and other print media that work against adjustable rates. In addition, radio provides important advantages to advertisers wishing to reach specific local markets such as teen-agers, ethnic groups, and commuters. Radio also reaches important segments of local markets that are not inclined to read newspapers. Radio's appeal to advertisers is enhanced by the medium's focus on local rather than national advertising: In 1973, local sales provided 73 percent of radio advertising.[49] This focus enables radio to profit from the overall trend among advertisers to emphasize local more than

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[43] "1974–75 Cost Trends," Media Decisions, August 1974, p. 45. As indicated earlier, both network and spot radio advertising are national, but with network ads, the advertiser is restricted to network-affiliated stations, while with spot ads the advertiser can select the markets to which he wants his message beamed.

[44] *Ibid.*

[45] In comparing the costs per thousand of these media, it is recognized (as we will show), that each offers different advantages and reaches different markets. However, what the comparison and the following discussion indicates is that for those advertisers whose needs are already best met by the broadcasting media, a 1 percent increase in the cost per thousand for those media is not only negligible in an absolute sense, but would surely not provoke a substitution effect toward print media which carry a cost per thousand that is 300 percent higher.

[46] A Gross Rating Point is the percent of the population in a market listening to a station during a time period times the number of announcements.

[47] "Television Advertising Stakes Out New Turf for Future Growth," Broadcasting, Nov. 18, 1974, p. 22.

[48] Statement by Edward H. Sonnecken, Vice President, Corporate Planning, Goodyear Tire and Rubber Company, Akron, Ohio, summarized in "The dollars side of advertising gets going-over in Phoenix," Broadcasting, May 13, 1974, p. 4.

[49] According to Advertising Age's Research Department, total expenditures on radio advertising in 1973 were $1.7 billion, while local radio advertising expenditures were $1.2 billion.

national advertising. Local advertising expenditures in all media grew 70 percent between 1967 and 1973, while national advertising expenditures grew 35 percent.[50]

Many factors beside price affect an advertiser's choice of media. Among other things, the advertiser wants a medium that is appropriate for his particular product and his current advertising and marketing strategy. The effectiveness of a given medium in reaching the advertiser's target audience is a primary consideration. The advertiser is also concerned with the availability of openings in the various media, each medium's flexibility in placing and changing advertisements, and the risk associated with the various media. Radio advertising, for example, has the great advantage that ads can be prepared on short notice and with a minimum expenditure of time and money. This makes radio a particularly appealing medium to advertisers during a recessionary period when there is uncertainty about markets, the size of companies' advertising budgets, etc. If, on the basis of all such considerations, an advertiser feels that a given medium is the most desirable for him, he will normally stick with that medium even if the medium's advertising rates rise.

For all these reasons, a small—1 percent maximum—increase in radio advertising rates to cover a performance fee paid performers and recording companies is not likely to have an appreciable effect on advertising sales in these media and is equally unlikely to promote substitution of other media. Broadcasters, if they elected to pass on the performance fee, could become simply a conduit for placing the cost upon the advertisers. In effect, the broadcasters could collect the fee from their advertisers and then transmit it to performers and recording companies. The fee would simply pass through the broadcasters' hands without affecting their financial situation. The cost of the fee would, in effect, be paid by advertisers who are currently benefiting at no cost to themselves from the talent and money invested in recordings by performers and recording companies. Furthermore, as we shall next show, such a fee even with a nominal markup by broadcasters would represent no great burden for advertisers.

The proposed performance royalty would have a negligible impact on consumer product costs

We have shown that it is equitable for radio stations who benefit directly from the playing of recordings, to pay for the commercial value they derive from the use of other people's property and creativity. It is equally equitable for advertisers to do so. Advertisers benefit from the fact that radio reaches a vast audience. This audience "pays", in a sense, for the free music on radio by listening to commercials. Advertisers should pay for the use of recordings that attract this audience for their commercials. Artists and recording companies deserve compensation for the indispensable contribution they make to the selling of cars, cosmetics, and the host of other products advertised on radio.

If broadcasting companies raised their advertising rates to cover a performance fee paid to artists and recording companies, the impact on advertisers' budgets, and, ultimately, on product costs would be negligible. For example, the Ford Motor Company, one of the top ten radio advertisers in the country, spent $13.9 million on network and spot radio ads in 1973.[51] Suppose, as an illustration, Ford even spent an equal, additional amount on local radio ads. Then its total expenditures for radio advertising in 1973 would have been around $28 million. If the advertising budget had to be increased by 1 percent ($280,000) to cover the pass-through of the performance fee from radio broadcasters, and if Ford passed these costs on to the consumer, the impact on one of the roughly 2 million vehicles Ford produces every year would be miniscule. Indeed, the impact of any markup on this total taken by broadcasters would also be minimal. It is far more likely for the sum to simply be absorbed within Ford's operating budget.

Similarly, the Coca-Cola Company, another major radio advertiser, spent

[50] Based on advertising expenditure figures supplied by Advertising Age's Research Department.

[51] According to "Advertising. Marketing Reports on the 100 Top National Advertisers." Advertising Age, Aug. 26, 1974. pp. 27ff. Ford spent $13.9 million on network and spot radio ads in 1973 and had sales of $23 billion.

$8.3 million on national network and national spot radio ads in 1973.[52] If Coke spent even an equal, additional amount on local radio ads, its total radio advertising expenses might approximate $16.6 million. A 1 percent increase in these costs would equal $166,000. Again, it is most likely that this sum would be lost in the costs of Coke's doing several billion dollars worth of business each year. However, if this increase due to a performance royalty were passed forward to the consumer in a general price increase, the performance right's share would represent a minute 0.0079 percent increase in prices ($166,000 divided by Coca-Cola's 1973 sales of $2.1 billion). This sum, spread out over billions of bottles of Coke, would be imperceptible to consumers and wholesalers alike.

In short, the impact on consumer product costs of the proposed performance fee for performers and recording companies would scarcely be perceptible either to advertisers or to consumers, even if the new fee were passed forward fully. No appreciable effect would be felt on consumer prices.

Television stations should also pay for their use of sound recordings

Television stations also make use of recorded music, particularly as theme songs and background music for their programs. Although audiences may be less conscious of the music on television than on radio, television's performance royalty payments to composers and publishers actually exceeded those of radio in 1973, the last year for which data are available. Total music license fees paid by television exceed $41.5 million in that year. It is no doubt true that a higher proportion of this total amount was for live performances than was true for radio; nevertheless, use of recorded music is substantial.

Just as composers and publishing corporations are entitled to compensation for the use of their music on television, so artists and record makers are entitled to compensation for the use of their copyrighted recordings. The performance royalty prescribed in this bill would require television stations to pay only token sums to recording companies and artists. Television stations with annual revenues of $1 to $4 million would pay only $750 a year, and station with revenues over $4 million would pay $1,500 a year. Total television payments, which would be divided between artists and recording companies, would equal $429,000—less than one-tenth of one percent of television station profits in 1973. (See Exhibit 7.)

EXHIBIT 7

PERFORMANCE ROYALTY TV STATIONS WOULD PAY RECORDING COMPANIES AND ARTISTS UNDER S. 1111-H.R. 5345

	Stations	Annual performance royalty per station	Total performance royalty paid per year
Television stations with revenues of $1,000,000 to $4,000,000	304	$750	$228,000
Television stations with revenues over $4,000,000	134	1,500	201,000
Total	438		429,000
Total 1973 pretax profits of television stations with annual revenues above $25,000 (excluding networks)[1]	622		468,800,000
Performance royalty as percent of pretax profits			0.09

[1] TV stations with revenues over $1,000,000 have 93 percent of all TV station expenses and probably an even higher percentage of TV station profits since 81 percent of the stations in this revenue category are profitable, while profits are enjoyed by only 48 percent of the stations with revenues under $1,000,000.

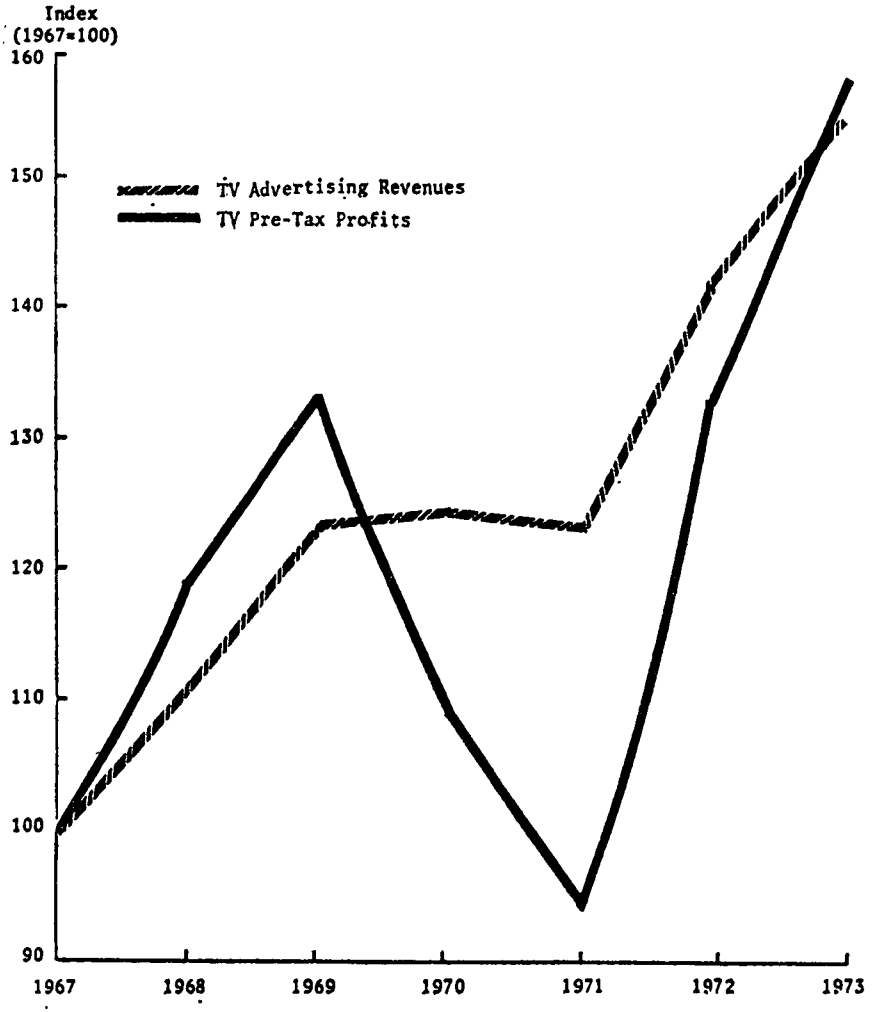
Source: FCC, "TV Broadcast Financial Data—1973."

Television is a highly profitable industry and would scarcely feel the pinprick of such small performance royalties paid artists and record makers.

[52] According to Advertising Age, Aug. 26, 1974, p. 27ff. Coca-Cola spent $8.3 million on network and spot radio ads in 1973 and had sales of $2.1 billion.

EXHIBIT 8

TELEVISION REVENUES AND PRE-TAX PROFITS
1967-1973



Sources: FCC's annual reports on TV Broadcast Financial Data
Research Department of Advertising Age

Total television pretax profits rose 58 percent between 1967 and 1973.[53] (See Exhibit 8.)

Television enjoys an unusually high profit level. In 1973, television's pre-tax profits were 18.8 percent of its revenues.[54]

Advertising dollars spent on television rose 54 percent between 1967 and 1973.[55] The Commerce Department predicts that television revenues will grow about 9 percent a year between now and 1980.[56]

Unlike radio, television's growing revenues appear to be the result of increases in its advertising prices rather than increases in the amount of time it sells, largely because available time is frequently sold out. Network television advertising revenues rose 35 percent between 1967 and 1973, a period during which the cost per minute of advertising on nighttime network TV rose 47 percent and on daytime network TV, rose 33 percent.[57]

Television's audience has been growing. Between 1968 and 1973 the audience for nighttime network TV grew 8 percent while the audience for daytime network TV grew 26 percent.[58] Because of the growth in television audiences, television ad costs per thousand viewers grew more slowly than did ad costs per minute: cost/1,000 viewers rose 12 percent for daytime network TV and 20 percent for nighttime network TV.[59]

Television profits are so high that the industry could absorb the entire performance royalty proposed in this bill, and its income statement would remain virtually unchanged. If television paid the royalty entirely out of its profits, television stations with revenues above $25,000 would continue to enjoy a 22.7 percent pre-tax return on sales. (The rate would merely ease from 22.76 percent to 22.74 percent.) [60]

If television stations should elect to pass the new royalty on to advertisers in higher rates, the increase in rates would be so slight that it would be unlikely to affect television ad sales or to have any appreciable effect on advertisers' budgets or on consumer prices.

The proposed royalty will not affect composers and publishing companies

No suggestion is currently being made that the performance fees radio and TV broadcasting stations now pay to composers and publishing companies should be reduced if the stations should be required to begin paying performance fees to performers and record makers. The new performance fee would simply increase the total payments that stations already make for the use of recordings.

The performance fees paid composers and publishing companies have been growing rapidly. Between 1963 and 1973, the performance fees collected by U.S. composers and publishing companies nearly tripled, rising from $40.5 million to $114.4 million. (See Exhibit 9 on the next page.) These performance royalties are almost 4 percent of broadcasters' revenues, and, as broadcasters' revenues have grown, the royalties have escalated. The U.S. Commerce Department predicts that both radio and television revenues will grow by about 9 percent a year between now and 1980.[61] Because the performance royalties earned by composers and publishing companies are tied to revenues, these interested parties may be expected to enjoy an expanding royalty base in the years to come.

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[53] According to the FCC's annual TV Broadcast Financial Data, television pre-tax profits rose from $414.6 million in 1967 to $653.1 million in 1973.

[54] FCC's annual reports on Broadcast Financial Data for TV.

[55] According to the Research Department of Advertising Age, television advertising revenues rose from $2.9 billion in 1967 to $4.5 billion in 1973.

[56] FCC's annual reports on Broadcast Financial Data for TV.

[57] According to the Research Department of Advertising Age, network television revenues were $1.455 million in 1967 and $1,968 million in 1973. Network ad price indices are from "1974–75 Cost Trends," Media Decisions, August 1974, p. 45.

[58] "Broadcasting in 1975: Shipshape in a Shaky Economy," Broadcasting, Jan. 13, 1975, p. 35.

[59] "1974–75 Cost Trends," Media Decisions, August 1974, p. 45.

[60] Television stations with annual revenues of $25,000 or more, had net revenues of $2,059,847,000 and pre-tax profits of $468,803,000 in 1973, according to the FCC's "TV Broadcast Financial Data—1973" (August, 1974).

[61] U.S. Department of Commerce figures cited in "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," Broadcasting, Nov. 11, 1974, p. 48.

EXHIBIT 9

INCOME TO COMPOSERS AND PUBLISHERS FROM RECORDINGS, 1973 VERSUS 1963

[Dollar amounts in millions]

	1963	1973	Percent increase, 1963–73
Estimated total performance fees paid U.S. composers and publishers	$40.5	$114.4	+182
Estimated total copyright fees	44.5	117.1	+163
Estimated copyright fees paid by U.S. record companies	37.6	82.1	+118
Estimated copyright fees received by U.S. composers and publishers from foreign record companies	6.9	35.0	+413
Estimated total income received by U.S. publishers and composers from both copyright and performance fees	85.0	231.5	172

Sources: 1963 figures are from the 1965 Glover report before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives, 89th Cong., 1st sess. The 1973 figure for mechanical fees paid by U.S. record companies was calculated from statistics supplied to RIAA by 34 record companies representing about 98 percent of the industry's sales. The actual 1973 mechanical fee payments reported by these companies was $80,400,000, but the figure for the entire industry is estimated to be $82,100,000 (80.4 divided by 96 percent). The 1973 figure on foreign mechanical fees was estimated from "Billboard" reports about sales abroad of recordings of U.S. music. 1973 performance fees were calculated as follows: $37,500,000 in music license fees paid by radio stations and networks (FCC figures); $47,800,000 in music license fees paid by TV stations and networks (FCC figures); $19,400,000 in ASCAP receipts from: general and background music; symphonic and concert music; and royalties from foreign societies (ASCAP figures); $9,700,000 estimated BMI and SESAC receipts from these 3 sources (estimated to be roughly half ASCAP receipts).

CONCLUSIONS: PERFORMANCE RIGHTS SHOULD BE GRANTED TO RECORD MAKERS AND PERFORMERS

The general Copyright Revision Bill grants performance rights to every performable copyrighted work except sound recordings.

Both record makers and performers make a major creative contribution to recordings and their creative contribution merits full copyright protection.

Almost every other Western nation pays performance royalties to performers and record companies.

Broadcasters should pay performers and record makers for the commercial value they extract from sound recordings.

The broadcasting industry enjoys high profits, in part because of its use of recordings at little cost, and the industry could pay the small performance royalty proposed without seriously impairing its profitability.

Because they do not now make such payment, advertisers, in turn, are indirectly benefiting from music programming on radio and television at rates which do not reflect the true costs of the talent and money invested in recordings by performers and record companies.

The profit position of the broadcasting corporations could be preserved by passing forward the costs of the proposed new performance royalty to their advertisers who are the ultimate beneficiaries, without decreasing the attractiveness of the media.

If advertisers in turn passed on the costs of a performance royalty to the consumer, the impact would be imperceptible.

COMMENT LETTER No. 13

TWENTIETH CENTURY-FOX FILM CORP.,
May 24, 1977.

COPYRIGHT OFFICE,
Library of Congress,
Arlington, Va.

DEAR SIRS: This is in response to your request for comments from interested parties concerning your study of the record performance royalty situation as required by the Copyright Law, Title 17 of the United States Code, as enacted by the Congress in 1976.

Unfortunately, the Copyright Law was passed, despite amendments proposed by the record industry, without giving copyrighted recordings the right to collect

royalties when played by broadcasters and other commercial users; a right given under the new Copyright Law only to the owners of the copyrighted music on the recording.

Records are the prime source of music and programming for radio, juke boxes, wired music services, discotheques and other suppliers of entertainment. These are commercial enterprises that sell time or service for a fee. Nevertheless, neither the performers nor the record manufacturer is paid for the use of his product. This situation is inherently wrong on its very surface.

Records, therefore, are necessarily produced and manufactured specifically for sale for home use. Since the primary market is teen-agers, this has created an over-abundance of time and attention devoted to rock music. The result is a huge industry (approaching retail sales of three billion dollars per year) which has sponsored a rock cult of unusual proportions, with all of the implications which need not be gone into here. Classical music, "good" singers like Andy Williams, Tony Bennett, Steve Lawrence, Edie Gorme and many, many others do not sell phonograph records in significant proportions. Therefore, they are ignored by the industry in spite of the fact that there is a market for them. The rack jobbers who dominate distribution are not interested—why take up space with an album that will sell fifty thousand units when the same space can be used for one that will move three to four million copies?

1. Performances and product are being used for profit without compensation to those who have created and produced it.

2. Good music is not being actively created and made available to those who would like to buy it, since radio and other commercial use provides no income.

The answer is quite simple. A performance should be copyrightable so that the owners can license its use for fair compensation. The result will be the availability of a far wider range of music, and less emphasis, by virtue of less dependence, on teen-age rock artists.

I urge you to consider the advisability of a performance royalty in the interest of fairness to the creators and performers of the industry, and for the furtherance of musical values for all consumers.

Respectfully submitted.

ALAN W. LIVINGSTON.

COMMENT LETTER NO. 14

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF COPYRIGHT OFFICE REQUEST FOR COMMENTS REGARDING PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

COMMENTS OF THE COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYEES

In response to the Office's Notice of Inquiry requesting comments on performance rights in copyrighted sound recordings, I submit the following observations in behalf of the Council of AFL-CIO Unions for Professional Employees which comprises eighteen national and international unions serving more than one million employed professional people.

1. The Council perceives no constitutional or legal restraints inherent in legislative recognition of a performance right in sound recordings. We believe that Congressional action and court decisions in recent years have established that sound recordings are, indeed, appropriate subjects for copyright protection. Furthermore, we believe all sides to this question are in agreement that the performers and record producers make a sufficiently creative contribution to the sound recording to justify protection as "authors" of such "writings". These positions were fully discussed in Congressional hearings that took place in 1975 and in opinions provided that year to both House and Senate subcommittees by the Register of Copyrights.

Indeed, since a performance right currently attaches to every copyrighted item except sound recordings, the establishment of such a right would end an unjustified form of discrimination against the creators of sound recordings, enhance the symmetry of U.S. copyright law and thus tend to resolve inconsistencies rather than create problems in the law.

2. Those who authored our constitution saw a danger in permitting the exploitation of creative efforts by those who deny compensation to the creators.

They knew from experience that if a new nation was to depend upon the creative wealth of its inventors, authors and artists, they must be assured of just rewards for their creativeness. "Thou shalt not muzzle the ox that treadeth out the corn". (1. Timothy, 5, 18)

Perhaps these thoughts were in the mind of one broadcast industry representative when he testified before a House subcommittee in 1975 and charged that the cable industry took the work of the broadcasters without making recompense. "It is unreasonable and unfair", he said, "to let (the cable) industry ride on our backs, as it were, to take our product, resell it and not pay us a dime. That offends my sense of the way things ought to work in America".

The broadcast, juke box and background music industries use the talents of America's performing artists—ride on their backs, as it were—as assuredly as if they directly employed them but they do not pay them a dime. Just as the printing press enabled others to make use of the talents of writers without actually employing them, so does the sound recording make possible the exploitation of the work of the performer. The early legislators of our country saw and understood the potential danger to the creator posed by the printing press. Similarly, in our own era, government must cope with the injustice perpetrated upon the performer by the unrestricted use of sound recordings by commercial interests which contribute nothing (not even a dime) to those who make possible recorded performances that they exploit.

The users of sound recordings argue that they do compensate the originators by popularizing their works. This same sophistry could have been used by the earliest printers with regard to the works of writers and artists. It could be used by these selfsame exploiters of sound recordings to deny performance royalties to composers, arrangers and publishers. After all, isn't their fame being furthered and sheet music sales, as well as sales of their recorded compositions enhanced? In similar fashion, the cable TV industry could argue that by strengthening and improving the broadcasters' over-the-air signals they are providing the TV broadcaster with a larger audience for his programs and the justification for charging advertisers a larger fee.

If all of these practices by the users of copyrighted material truly benefitted the creators, would they (the authors, composers and the broadcasters themselves) have pressed so hard for protection and remuneration? Would the recording industry and the recording artists today, bite a hand that feeds them?

Despite allegations by those who profit by postponing the development of performance rights for sound recordings, the performers have not, on balance, benefitted to the extent claimed.

The use of sound recordings by broadcast licensees served to displace thousands of performing artists from employment in the broadcast media. Whereas the broadcast industry at one time employed and compensated on a regular basis such fine artists as those who comprised the famed NBC Symphony and other ensembles, today it provides employment for but a handful of musicians and regularly sells to advertisers the recorded programs of the old NBC Symphony and others without making any payment whatsoever to the artists.

The use of sound recordings displaced many more thousands of musicians and vocalists formerly employed in restaurants, clubs, etc. Today their work is used in its recorded form to attract customers and help make a profit for the proprietors, juke box operators and background music concerns.

According to testimony given to Congressional committees, many promising artists far from seeing their careers enhanced by exposure of their recordings on the air saw them limited because of overexposure. Testimony was also received from artists and artists' representatives indicating that the commercial use of their recordings had little or no effect on their careers because they were not identified (most broadcasters only announce the composition, composer and lead artists and rarely inform listeners of the majority of artists who made the recording possible) and/or the record itself is not identified (background music firms never publicize the recording or the artist).

The advent of inexpensive and easy to operate taping equipment by individuals undermines whatever validity there may be to the broadcasters' argument of increasing record sales. The day is rapidly approaching when present individual purchasers of records will be able to tape record music and other performances from stereo or monaural broadcasts thus obviating the need for purchasing records.

In place of the insubstantial and undefined benefits now claimed by broadcasters and other users, a performance royalty in sound recordings would enable

the creators of a sound recording to realize a real benefit from the use of their efforts. This would end a long standing inequity that denies the creators of sound recordings the rights enjoyed by other authors of copyrighted works.

Furthermore, it is our belief that the individual consumer who purchases recordings for personal enjoyment would also benefit. At present, the cost of bringing together performers, arrangers, composers and technicians, providing appropriate equipment for making sound recordings and then manufacturing and distributing them is borne almost entirely by the men and women who buy records for their own pleasure and non commercial use. Relative to the profit they realize on the use of these same records, the broadcast industry and other commercial users return very little to the creative source. If, through payment of royalties for performance, these beneficiaries were to share the costs of production in a manner commensurate with the benefit they realize, the burden on the individual record buyer should be lightened.

3. Testimony by both recording company representatives and performing artists before Congressional committees indicate a recognition by both parties that the technology of making sound recordings requires creative effort by both the producer and the artists. Given this condition an equal split of royalties for a performance right is fair.

4. ASCAP, BMI and SESAC provide excellent models of mechanisms for monitoring the use of sound recordings, obtaining payment for such use and ensuring an equitable distribution of appropriate royalty payments. In addition, pursuant to various collective bargaining agreements the recording industry and unions representing musicians and vocalists have, for many years, developed and refined procedures for ascertaining the producers of given recordings as well as the artists who participated. With these mechanisms already functioning, we believe the Register, working with the recording companies and artists representatives could readily devise an effective system for implementing the payment of performance royalties. Insofar as the setting of rates is concerned, we suggest that voluntary negotiations between the parties should be encouraged with the Royalty Tribunal being called upon to resolve impasses.

This Council is deeply concerned because in this as in other areas there is evidence that our society is preoccupied with the mechanisms for distribution to the point of ignoring the needs of the creative core. The broadcaster, the juke box operator and background music suppliers have made it possible for more Americans to hear and enjoy the work of performing artists but they do not create these works and, because of a flaw in our copyright laws, they are not required to assume any obligation whatever for assisting or supporting the creative process. As new technological developments make it possible for sound recordings to be more easily transmitted and duplicated the harm inflicted upon the creative core because of the parasitic position enjoyed by those who profit from its efforts will become even more severe.

A remedy, however, is at hand. We urge the Register to recommend to the Congress that performers and the holders of copyright in sound recordings like other authors of copyrightable material be allowed to enjoy the benefits of a performance right in their works.

Respectfully submitted.

COUNCIL OF AFL–CIO UNIONS FOR
PROFESSIONAL EMPLOYEES,
By JACK GOLDNER, *Executive Secretary.*

Dated May 31, 1977.

AFFILIATES OF THE COUNCIL OF AFL–CIO UNIONS FOR PROFESSIONAL EMPLOYEES

Actors Equity Association
American Federation of Musicians
American Federation of Teachers
American Federation of Television and Radio Artists
American Guild of Musical Artists
Communications Workers of America
Insurance Workers International Union
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators
International Brotherhood of Electrical Workers
International Federation of Professional and Technical Engineers
International Union of Electrical, Radio and Machine Workers
International Union of Operating Engineers

National Association of Broadcast Employees and Technicians
Office and Professional Employees International Union
Retail Clerks International Association
Seafarers International Union
Service Employees International Union
Screen Actors Guild

COMMENT LETTER NO. 15

HARRIET OLER,
Senior Attorney, General Counsel's Office, Copyright Office, Library of Congress.
Washington, D.C.

DEAR MS. OLER: I am writing this letter in response to the notice in the Federal Register of April 27 soliciting comments on whether the Copyright Law should be amended to grant a copyright in the performance of a sound recording to record companies and performers.

I am, and have been for many years, wholeheartedly in favor of such legislation.

Having recently celebrated my 40th anniversary as a musician, band leader and recording artist, I can personally attest to the manifest unfairness of recordings being played publicly for profit and accruing to the enrichment of everyone except those whose talent and creativity are being exploited.

I am proud that despite the great changes that have taken place in the forms of musical expression over the last two decades, audiences today—composed in large measure of high school and college students—still find me to be a contemporary performer. The demand for personal appearances by me and my band thankfully keep me occupied for the entire year. People pay to attend our concerts, income which supports me and those in my musical organization.

Yet, when one of my recordings—whether it is one I recently recorded or may have made 10, 20, or 30 or more years ago—is played on radio, neither the company that produced the recording, the members of my band nor I derive any income from that air play. And we know that the station has sold time to its advertisers, that the advertisers have found audiences for their commercials, listeners who are attracted by the performances by me and other recording artists. Were the stations to hire us to perform live, they would have to pay us; why shouldn't they have to pay when they exploit our recorded performances?

The very same people—broadcasters, who had been most resistant to the principle of a performance copyright in a sound recording are the ones who argued loudest and were granted in a new copyright law a royalty when Cable TV operators picked up their broadcasts. The principle is the same. If the creativity of the broadcasters in producing programs should be protected, and if they should be recompensed when others use their programs for profit, so should record companies and performers when our creative performances are used for profit.

Hearing my recordings played on the air and knowing that I will derive no compensation from their use, give me the same wrathful feeling that I get in finding that some of my recordings are being pirated and sold illegally.

In short, if anyone uses a recording commercially in which I performed, I feel it is only just and equitable that the company that made the recording and the musicians who performed on it be compensated for its use.

WOODY HERMAN.

COMMENT LETTER NO. 16

PONDEROSA BROADCAST HOUSE INC.,
Hot Springs, S. Dak., May 26, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel.
Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIET OLER: I am a broadcaster. I am the owner and manager of a small market station in a community that numbers less than 5,000. My average work week is something in excess of 60 hours. I even type my own letters since station revenue will not support a fulltime secretary. I mention this not for sympathy but to make an important point.

Before I became a broadcaster I spent 20 years in show business. For most of that time I was with a recording group. We recorded for the Epic label and had 5 albums issued as well as a number of singles. I have logged many hours in recording studios so I think I know what I am talking about.

The point I am trying to make is that performers on records are being paid very well without putting an additional burden on the broadcaster. Most recording sessions are extremely well organized with a large premium put on efficiency. Consequently, only the best musicians and singers are hired for the job. These proven performers get the largest percentage of the available jobs. Their numbers are very small and, believe me, their incomes are very large. It is impossible for me to see where there is a need for a performers royalty. It would only benefit the recording companies and make it possible for them to operate in an inefficient manner. They would be able to try anything if they didn't have to pay for the operating costs.

I mentioned the hours I put in. People in the recording industry seldom see a 60 hour week, since most sessions are 3 hour sessions, and leisure is part of their reward. As a broadcaster I have no concept of what leisure time is.

I have had the opportunity to observe both scenes. That perspective leads me to conclude that broadcasters need performers and performers need broadcasters. An efficient system mutually beneficial has been worked out. To change now would only serve the interest of a very few greedy performers. There is no way it could serve the interests of the public in general.

Incidentally, for the record, the recording group that I was part of for so long was called "Something Smith and the Redheads".

Sincerely,

MAJOR SHORT.

COMMENT LETTER NO. 17

WBAQ STEREO,
Greenville, Miss., May 28, 1977.

MRS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MRS. OLER: We at Radio Station WBAQ, as well as all broadcasters, are gravely concerned regarding additional royalty fees now being contemplated to be imposed on radio stations. These proposed payments would be required to be paid to recording artists, arrangers and musicians.

As you know, broadcasters are already burdened by heavy royalty fees to composers through ASCAP, BMI and SESAC. But beyond that fact, I do feel that recording artists are more than compensated by broadcasters by merely playing their records on the air. Without this air exposure, I feel these artists would sell far fewer records to the public.

WBAQ features a Beautiful Music format, and if it were not for the "handful" of such formatted stations around the country, these artists would have no air exposure at all. Consequently, I believe these artists appreciate radio stations playing their records and would expect nothing in return in the way of royalty fees.

In view of these facts, we urge your committee to please report unfavorably to Congress on the enactment of a performance royalty fee.

Sincerely,

PAUL ARTMAN,
General Manager.

COMMENT LETTER NO. 18

KRPL INC.,
Moscow, Idaho, May 27, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is in reference to the pending legislation concerning another ASCAP fee on music. A small radio station, like KRPL, finds it hard to meet all monthly expenses as is. Our ASCAP and BMI fees are higher than we can afford now. To compound the expense with yet another fee would be hard to tolerate indeed.

Also, it appears to us that since radio is responsible for exposing virtually all of the newer records, and giving a wide range of artists the chance for public acceptance, stations should be compensated—rather than charged. If it weren't for radio stations playing music there would be many less records purchased, causing an immense decline in profits for artists, composers and publishers.

The music industry in America today takes in over 2.3 billion dollars, which is more than all professional sports, and the motion picture industry. Radio stations receive none of this money, but in fact contribute to this giant amount with fees and record purchases. Many smaller stations around the nation are trying hard to keep meeting ever-increasing expenses. I sincerely hope you will look at the unfortunate problems this fee would create, and do what you can to keep a fee increase from becoming law.

Sincerely,

GARY CUMMINGS,
Program Director.

COMMENT LETTER NO. 19

KDXU RADIO STATION,
St. George, Utah, May 26, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR SIR: It would be highly appreciated if you could include our voice along with those others of the broadcasting profession who desire to go on record as being very much opposed to any recommendation that a Performance Royalty Fee be adopted by Congress. Our reason is simply that broadcasters are already paying a substantial royalty for performance rights, to A.S.C.A.P., Broadcast Music, Inc., and to Sesac, and to add to this burden would be fundamentally unfair, not to mention a real burden to many of the smaller broadcasting stations and certain a "gouging" tactic to the larger ones who might be able to "afford" it. But even the rich should not be robbed and in many respects this proposed performance royalty fee would be just that.

The broadcasting industry has made possible the highly lucrative and successful art of recording. Let us not destroy a successful system by promoting greediness on the part of the performers. We in the industry are not fighting the avoidance of legitimate royalties, fairly assessed, such as are now being paid thru the present licensing groups. But let it rest there. Further meddling could cause chaos and financial havoc upon broadcasters. Nevertheless if that be the aim and purpose of government, by all means, recommend this Performance Royalty fee. It would make an interesting horror story in seeing how much fees would be collected and equitably distributed.

Respectfully,

L. JOHN MINER,
General Manager.

COMMENT LETTER NO. 20

WBCH RADIO,
Hastings, Mich., May 27, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MISS OLER: As a small market broadcaster I am distressed to learn that your office is giving some thought to recommending legislation that would provide a performance royalty fee for recording artists, arrangers and musicians.

Sitting in Washington, perhaps you are thinking in terms of the large stations with which you are probably most familiar with. Please, please give some thought to the many small market stations in the nation where it is a daily struggle for advertising revenue from our merchants up and down main street.

We simply cannot afford to absorb any more expenditures. Enactment of another new "tax" would simply have to be passed on to our merchants. This becomes

difficult for us competitively because our local newspapers and shopping guides are out pitching for the same advertising dollars as we are. They don't have things like music licensing fees to pay for, as we already do, so we must constantly be aware that passing on a new performance royalty fee could indeed price small market broadcasters out of the market.

Recording artists, arrangers and musicians already benefit greatly from the recordings radio stations play every hour of the day. Without the free exposure we give their music, I am sure record sales would not be generated. In essence, what they are asking for now is really biting the hand that already feeds them.

Sincerely,

KENNETH RADANT,
President.

COMMENT LETTER No. 21

KAOK RADIO 140,
Lake Charles, La., May 26, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

Please do not institute another copyright act such as the Performance Royalty fee upon broadcasting stations.

Most stations, including our own, are paying through the nose already to such societies as B.M.I., A.S.C.A., S.E.A.S.A.C., etc. The penalties and fees, etc., are already imposed on broadcast stations to the point of bankruptcy.

If we have ever needed your help, we need it now.

Thank you for every effort in our behalf.

Sincerely,

TOM FLETCHER,
General Manager.

COMMENT LETTER No. 22

KPSI 145,
Palm Springs, Calif., May 27, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

LADIES AND GENTLEMEN: I am stating again a voice against a performance royalty fee. Such legislation would add to the already heavy burden faced by small radio stations toiling in the public interest, convenience and necessity.

Please count this opinion among those against the performance royalty fee.

With regards, I am,

Sincerely,

ELLIOT FIELD,
Vice President/General Manager.

COMMENT LETTER No. 23

BLUESTEM BROADCASTING CO., INC.,
Emporia, Kans., May 26, 1977.

DEAR MS. OLER, I understand that you are seeking comments to assist in your recommendations to the Congress on the Copyright Legislation. The issue being—"Should Broadcasters be Required to Pay a Fee for Playing Recorded Music." We believe that the performing artists and record companies receive great awards from the broadcasters through the playing of their music. We do not believe that there is justification in assessing fees against the American broadcasters.

There is no question that broadcasters make major contributions to the performing artists as well as the record companies under whose label they perform. An unknown artist can vault to fame through such free broadcast exposure; present day stars made their reputations and maintain them through this broadcast exposure. With reputations established in this manner these performers have fame and fortune through their personal appearances and royalties from their record sales.

Neither the record companies or the performers are a depressed industry or group. It is common knowledge that performers receive magnificent sums for their personal appearances and reap rich benefits from their record sales. If fees were to be considered, and we certainly do not believe they should, these should go to the radio stations which have practically, single-handedly built the fame and fortunes of these performers and their recording companies. But broadcasters do not ask for these fees. We are already paying ASCAP, BMI and SESAC; but certainly do not believe that another fee via Copyright should be assessed against us.

I ask you to place yourself in the position of a performer/record company. I would ask you this question. Would you think it fair to ask fees from the identical people who have helped form your musical reputation, built fame and great monetary rewards? I am certain your answer would be in the negative. The broadcasters position is simply this. We solicit your assistance in this matter.

Cordially,

E. J. McKERNAN, Jr.,
General Manager.

COMMENT LETTER NO. 24

[Telegram]

SYDNEY, AUSTRALIA,
May 30, 1977.

HARRIET OLER,
Copyright Office, Library of Congress,
Washington, D.C.

Reference inquiry regarding sound recordings performance rights. Respectfully submit following initial comments. Granting of performance rights to performers presents no insuperable problems. Said rights should be granted to performers on basic principle that justice should give to each his due. Economic effect of grant minimal on public and users but vital for performers. Said rights should belong to performers. Royalty rates should be determined by statutory tribunal and principles of already established systems enabling performance royalties to be distributed accurately and economically to all individuals.

Participating performers should be adopted. Detailed comments following regards.

J. A. L. STERLING WARDELL CHAMBERS.

COMMENT LETTER NO. 25

EATON COUNTY BROADCASTING,
Charlotte, Mich., May 31, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

Why are you considering another direct tax on this industry? It is already hard enough to do business with the Federal Government as a silent partner.

RALPH S. GREGORY,
President.

COMMENT LETTER NO. 26

PITTSBORO, N. C.,
May 28, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: When an interpretive singer records a song written by another, and it is played by a broadcasting station publicly, what is being publicly performed? Is it the song itself, the singer's rendition of the song, or both? The Rolling Stones, who got their start imitating black rhythm and blues artists,

would possibly argue that it was "The Singer, Not The Song". In fact, they have a copyright in a song by that name.

I am a third year law student at the University of North Carolina School of Law, who has been fortunate enough to simultaneously attend Duke Law School for various courses in Copyright law and the Entertainment industry taught by David Lange. I am also a musician, currently non-professional, and I plan to submit a paper regarding performers and performers' rights to the Nathan Burkan Memorial Competition later this summer.

Let me congratulate your office for your persistant efforts at providing an equitable compensation to performers for commercial use of their performance embodied in a sound recording. I would be gratified to assist you in any way regarding research, survey, formulation and recommendation of legislation in this area. Although there will be numerous questions to consider, I wish to subjectively comment on only a few.

The performer's right to control against the commercial exploitation and use of his performance embodied in a sound recording requires a strong definition of the performance right in sound recordings. The individual performer's style, method, or technique of delivery is but an uncopyrightable idea, but the performance itself becomes the expression of that idea; when fixed in the form of a sound recording, legal rights should attach to protect the performing artist from commercial use of that recording. The copyright pertains to the artistic form in which the author expressed his intellectual concept, and a "performance" is an individual's artistic form of expression. Constitutionally, I see no problem in finding a performance embodied in a sound recording to be a "writing" within the meaning of the copyright clause. Section 102 specifically includes sound recordings, pantomimes, and choreographic works of authorship, within the subject matter of copyright. In essence, originality means some type of independent creation, without copying from others. "Writings", although originally limited to script or printed material, has been expanded within the constitutional definitional standard; and may be interpreted to include any "physical rendering of the fruits of creative intellectual or aesthetic labor." Thus, if recordings of artistic performances are within the reach of the copyright clause, then the performance embodied in the recording, resulting from the "fruits of creative intellectual or aesthetic labor" and the efforts and talents of the performer, should be added to the Section 114 scope of exclusive rights in sound recordings. The artistic form constitutes an expression of intellectual creation, and the performance is a particular selection and arrangement of ideas, as well as given specificity in the form of their expression. Certainly, such a recorded performance is within the Section 102 definition of subject matter as an "original work of authorship fixed in any tangible medium of expression".

A careful analysis of the overlapping patterns that emerge from a distinction between an "imitation", set forth in Section 114(b), and the composer's limited exclusive right under Section 106 to make "an arrangement or other derivitive work", suggests the need for a detailed and precise definition of these terms. We should encourage imitative performance, for all amateurs seek to emulate the best of the professionals—it is what stimulates achievement. It is fundamental to our system of music education that one must first learn to imitate before one can create. Indeed, most professionals are flattered in knowing there are numerous students imitating his or her "style" or "school" of playing. Any definition of "imitation" should also be broad enough to encourage and promote parody, burlesque, and comedy, an essential means of communication which is, as Oscar Wilde put it, "the tribute that mediocrity pays to genius".

The impact on the quality of recorded material distributed to the consumer should be a considerable factor. A guaranteed performance royalty would give the record producer and the performer an additional consideration: rather than try mediocre original material, the performer might sell one million units of other popular standard material. The performance right would also guarantee income to the performer of a sound recording even if there were no sales of his recording. This is especially important to those performers and musicians whose market is limited, such as. but not limited to, recordings of classical performers, orchestras, dance bands, marching bands, jazz performers, and the traditional folk and blues artists.

The "new" artists has very limited contractual bargaining ability, particularly if his compositions or interpretive renditions are not within a saleable category.

If his or her style of performance is "off-the-wall" or too avantgarde or progessive, even though innovatively it may be twenty years ahead of its time, the artist will usually be forced to settle for less, or not record at all. Some of our greatest vocal performers only perform material written by other composers. In the early years of jazz and blues, it was a rare exception to write and sing or perform your own songs. Today, it is an economic necessity. Record companies, who understandably take risks on new talent, would prefer a singer-performer who writes his or her own material, over a mere singer or performer. The long-range effect of this preferred method is a dilution of the quality of recorded material. Eighty percent of the material released is long forgotten by the end of the year. Voluntary negotiations of the arrangement rights between authors and truly interpretive performers, coupled with a performance right in the sound recording, would perhaps decrease the number of repetitive and mundane "original" recordings that are released today, particularly in the "top-forty", country, rock, and soul markets. Where has the incentive gone? The incentive to write fresh and imaginative new works has struck a lazy tone in the hearts of our young composers, and the sounds of the cash register often seems to be the major source of inspiration. Performers with musically inferior works, when performing publicly, attempt to entertain live audiences with a touch of vaudeville by incorporating dramatic or choreographic routines, outrageous costumes, sets and lighting (not to mention highly sophisticated electronic, audio, and visual equipment) to embellish and augment an otherwise lacking creative effort.

Is the recorded performance a "creative" entity in itself? If pantomimes, choreographic routines, and photographs are deemed worthy of exclusive rights, certainly a recorded performance as creative as John Coltrane's "My Favorite Things", or the electrifying perfection reached in the interpretation of the classics by Jascha Heifetz should be worthy also. For example, performers, and even writers, of traditional blues have for too long been confined to back-alley bars and clubs, and denied the exposure and renumeration that their "imitators" receive. From its beginnings in the rural south, through its nurtured adolescence in the streets of New Orleans, throughout its domestic and international growth during the past five decades, this most precious national musical resource, traditional blues, is the "granddaddy" and the very cornerstone of the great musical-industrial complex as we know it today. The echoes of Charlie Christian, Django Reinhardt, Charlie Parker, Robert Johnson, Bessie Smith, Billie Holiday—every interpretative blues performer of the past denied protection as a mere performer, rings loud in our ears. Does this truly "promote the progress of the art"? Or does it result, as the Register of Copyrights suggests, in the "loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings"? The effect of this "deafness" of the Copyright laws to the status of performers is simple: it works as a disincentive; we are losing our great interpretive performers. Virtuoso soloists and brilliant instrumentalists whose utterly flawless interpretive techniques are recorded, should be entitled to performance royalties. Record performers who have regional FM airplay, but otherwise limited sales, should be entitled to renumeration for their efforts used commercially by broadcasters, juke box operators, discos, and background music services.

What would be the effect on other markets and mediums of expression in establishing a performance right, in the form of a compulsory license, in sound recordings? Musically, new markets could open up for the pure instrumentalists, particularly jazz and classical, creating perhaps an increased demand for solo and instrumental recordings, and orchestral concert recordings, that is, music without words. There is also a potential increased market in narrative recordings. Perhaps broadcasters could benefit from a performance right if their use of such a right in sound recordings creates a vast new listening market. For example: if the vocal performer of a dramatic detective mystery or science fiction story embodied in a sound recording, were to receive performance royalties, perhaps we might see a renaissance of dramatic radio plays. If radio broadcasters had exceptional oral dramatic material, they could possibly compete in some ways with their television counterparts. How far will we extend this performance right in the future? Will dramatic actors and performers in motion pictures and other audiovisual works feel that they deserve a renumeration for commercial use of their performance? Would an exceptional athletic performance be worthy of royalties when commercially broadcast? Such other considerations, though, should not hold back our efforts concerning performance rights in sound recordings.

A most difficult problem exists with respect to whom performance royalties should accrue, that is, which performers should share in the royalties. Are the record companies themselves part of this creative effort? If so, the record producer should share. It would be difficult to attempt to provide some type of formula based on percentage share of performance contribution; perhaps we should leave this decision to the record company producer, who will ultimately decide which musicians, performing artists, and vocalists will be used. This would require an extensive reporting of all performers used on each selection appearing on the sound recording with some type of pro rata distribution for lead vocalists, supporting band members, studio musicians, and back-up vocalists. In the case of a large group contribution, such as orchestras or large bands, all members would share pro rata. As far as the supporting technicians and engineers who contribute to the overall effort of producing the sound recording, their share could come out of the record producers share of the royalties. For example, all musical performers whose creative musical contributions are embodied in the recording, would share three-fourths cent per commercial use of the recording, and the record producer (and supporting technicians and engineers) would share the remaining one-fourth cent per commercial use.

Who shall administrate the collection and distribution of the royalties will be a delicate question. The Copyright Office should play an administrative role in providing a system for filing, recording, and transferring current information regarding performance rights in sound recordings. A guaranteed performance royalty in the form of a compulsory license system would be an incentive towards better accounting of record distribution to broadcasters and other commercial users. If record producers wish to promote the sale of their sound recordings, and broadcasters wish to advertise their sponsor's product with the aid of an audience attracted by the transmission of the sound recording, it would not jeopardize their business relationship to expect record companies to account for performers-used-per-specific-selection, and broadcasters and other commercial users to report the specific-selection-played on a weekly, monthly, or quarterly basis. Some type of independent agency with an accurate system of reporting the particular selections broadcast, would be essential to a compulsory license, and would better serve the needs of all competing values and interests. Should such an agency also keep a record of all performers per selection on a sound recording, and all their current addresses, and actually clear and distribute royalties from the independent agency? Should the agency only record and collect royalties, and simply distribute all to the record company for redistribution, then, to the specific performers? Whatever the method used, it is recorded music that attracts audiences to radio programs, discos, juke box operated clubs, background music services, and other commercial uses. Research into the current and potential markets involved could be done more effectively by an independent team of analysts working as part of an independent agency or royalty commission made up of impartial members, free from competing economic or political interests. A compulsory license system would put the burden where it should exist: on those who commercially exploit and use the creative contributions that our copyright laws are designed to promote.

Ultimate costs of increased royalties of any kind will, directly or indirectly, pass on to the consumer, and whatever alternatives necessary to cushion this outcome should be studied. Record companies will probably offer less selections per long-playing album. Even this year, the standard number of selections per record will probably be reduced to eight on a number of releases. Now that Section 115(c)(2) offers an alternative mechanical royalty of one-half of one cent per minute of playing time, record companies can cut back the number of selections but with longer playing time per selection without a concurring decrease in royalties: two selections of twenty-five minutes each would pay greater royalties than eight selections of three minutes each. If some similar type of structured alternative could be utilized in collecting and distributing performance royalties, then performers and producers of longer selections, like jazz, disco, and classical, would benefit from popular commercial use.

Given the substantial economic success of American music on the international market, foreign performers are eager to move their musical business ventures to the United States, to take advantage of our markets, particularly with respect to live performances and concerts. This foreign musical renaissance, subsidized by the United States music industry, is not limited to just the English and Canadian performers, but now many European, South American, African, Asian,

and Caribbean countries are exporting their most talented performers to the United States. It is indeed ironic that the United States, as a signatory to the 1961 Rome Convention, must apply its protective provisions to foreign performers in international situations even though the United States does not grant the same protection to its domestic performers. We have increased our term of protection to life plus fifty years to be more in line with other countries in the international market, and considering the importance of American music on the world market, we should do likewise with respect to performance rights in sound recordings. I would endorse Senator Scott's proposed amendment requiring broadcasters, juke box operators, background music services, and others who use sound recordings for profit to pay a performance royalty to those whose talents are used to create the recording.

We should listen to the echoes of the creative individuals whose faint cries of commercial exploitation by the gargantuan advances of musical technology have been met by an inconsistency in the application of the law designed for their protection, at least on an equal status with that of foreign musical brethren. Music is the one great common language of universal understanding, known by all those who can hear, felt by all living beings who have hearts capable of feeling the tides of emotion manifested in the presentation of the composer's dream, a bridge between otherwise conflicting idealogies.

Line of least resistance, guide us home.

Respectfully submitted.

H. CRAIG HAYES.

COMMENT LETTER NO. 27

WKBV CENTRAL BROADCASTING, CORP.,
Richmond, Ind., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We are very concerned about the idea of a performance royalty fee being imposed upon broadcasters. This suggestion of a fee for recording artists, arrangers and musicians would represent a substantial direct tax on the broadcasting industry.

As you know we already pay substantial fees to ASCAP, BMI, and SESAC for the use of music on our broadcast stations.

In the past the recording artists or performers have done everything possible to try and get their recordings used on radio stations without any kind of a fee. They have realized that the exposure of a record to the public by being used on the air sells records to the buying public and of course the more records that are sold the more money recording artists or performers will get.

These recording artists are very well paid for the records made and sold to the public. They are certainly not in need of fees from broadcast stations.

In our own case we might seriously consider going to an all talk format in the operation of our stations rather than pay a substantial fee to record performers.

We could broadcast news, sports events, audience participation call-in programs, farm and market information and many other types of programs without using recorded music. This certainly would not help the performers because listeners would not hear their efforts and would not think of buying records.

At the present time we operate radio stations in Marion, Bedford and Richmond, Indiana as well as in Beaumont, Texas. We are seriously concerned about a record payoff to performers in all of our operations.

Best regards,

LESTER G. SPENCER, *President.*

COMMENT LETTER NO. 28

STATEMENT OF HAL C. DAVIS, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS

On behalf of the 330,000 members of the American Federation of Musicians, AFL–CIO, I most strongly urge you to recommend the adoption of a performance right for the sound recording as an amendment to the Copyright Law. Performers

for too long have been denied the modest compensation that justice demands for the uncompensated exploitation of their talents by others for profit.

In 1940, after three years of study, a Congressional committee refused to include the recognition of performer's rights in a revision of the Copyright Law then being proposed. The committee's justification was that "thought has not yet become crystallized on this subject . . . and no way could be found . . . for reconciling the serious conflicts of interest arising in the field." In 1961, 21 years later, the then Register of Copyrights after years of further study informed Congress that the issues "still have not crystallized" so that detailed recommendations could not be made. Five years later, in 1966, the House Judiciary Committee acknowledged that there "was little direct response" to arguments favoring performance rights but that "the concerted opposition" from the broadcasters precluded enactment of legislation. The committee suggested "full consideration of the question by a future Congress."

In 1975, after another nine years had elapsed, the Congress again considered performance rights in the context of a complete revision of the Copyright Law. The National Endowment for the Arts, the AFL–CIO, the Associated Councils of the Arts, the recording industry and many individual artists all supported this important concept. The only real opposition was that of the commercial broadcasters who enjoy public gifts of air wave monopolies and who prosper enormously by exploiting the talents of our members without compensation but once again, the Congress asked for a study of the issue—this time by the Copyright Office.

It is time legislation to protect performers was enacted and we urge the Copyright Office to recommend such legislation to the Congress.

There simply is no justification on any grounds for a commercial entrepreneur to use another person's work without compensation, to fill his own purse and, in the process, to render jobless another person whose living was earned by providing the same service. This is what the broadcasters have done. As Miss Nancy Hank, Chairman of the National Endowment for the Arts, has noted, "undoubtedly it is a performing artist's personal rendition that brings to life the work of music, composers and lyricists . . ."

Radio stations have claimed that they fill their air time with recorded music out of concern for the recording industry, and that by so doing both the industry and the artist derive economic benefits. That argument is specious and untrue. On the contrary, record sales often suffer from overexposure and overplay on the radio. Why should one buy a record when one can hear it for nothing?

Opponents of performance rights have in the past argued that "poor" radio stations should not have to contribute to "millionaire" recording artists. This is grossly misleading. The overwhelming number of performers who record could hardly be regarded as wealthy. The legislation which we beseeched Congress to enact last year and which we would willingly support again would offer each and every musician and/or singer on each record broadcast an equal share of the royalties allocated to performers. Performer unions are in agreement on this principle.

Employment opportunities for professional musicians have diminished at the same time that broadcasting has become one of the most profitable industries in our country. One of the reasons for the anomaly is that the same broadcasters who use 75 percent of their air time playing music do not hire a single musician and do not pay one cent for the musician's work which they exploit.

As you are aware, most other Western nations require the payment of performance royalties for sound recordings. It is inexcusable that the U.S., the world leader in sound recordings, does not have a performance royalty for the sound recording.

When such a performance right is enacted, it should be enjoyed by the performers and the record companies, who created the sound recording. Representatives of the performer unions and the record companies agree that a 50–50 split would be equitable. That is, 50 percent to the recording company holding the copyright and 50 percent to the performers whose creative work is on the recording.

Each musician and/or singer on each record should receive an equal share of the royalties allocated to the performers. If, for example, a recording presented the work of a featured singer, with 15 backup musicians, there should be 16 equal share of the 50 percent allocated to performers.

We believe a compulsory licensing system would work and be relatively simple to implement. We would, of course, be willing to negotiate insofar as rate setting is concerned—providing there are fair procedures established to set the rate,

perhaps by the Royalty Tribunal, should there be no agreement between the parties.

The identification of beneficiaries and distribution of royalties should present no major problems. Airplay of recordings could be checked through a system similar to that used by ASCAP, BMI and SESAC. Perhaps these organizations might assume that function. If not, a similar monitoring system could be established.

The names of performers appearing on individual recordings are already a matter of record, to a great extent, inasmuch as they are collected by the performer unions. The AFM collects such data for its special payments fund. It would be relatively easy to expand this record keeping to cover all copyrighted recordings.

I urge your office to recommend that the creators of the sound recording be given the consideration they deserve and that a performance royalty for sound recordings be recommended to the Congress.

COMMENT LETTER No. 29

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF COPYRIGHT OFFICE REQUEST FOR COMMENTS REGARDING PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

COMMENTS OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS CONCERNING ESTABLISHMENT OF PERFORMANCE ROYALTY

The establishment of a Performance Right for sound recordings in the Copyright Law would, however belatedly, return to the creative artists and to the recording companies some small measure of compensation when their talents and products are used by commercial broadcasters and others for their own profit.

The American Federation of Television and Radio Artists, on behalf of its 34,000 members who perform in the broadcasting and recording industry, most strongly urges that such a performance right be recommended and swiftly enacted. Logic requires it, economic justice demands it, and even the opponents of such a performance right, whose opposition is motivated entirely by greed, have offered no valid argument to deny it.

Our argument is simple: Performing artists, musicians and record producers deserve to be compensated by those who profit from their creativity, as broadcasters and jukebox operators and others profit through their use of sound recordings. Neither the performers whose talents are exploited nor the legitimate record manufacturer who hires the performer has any say or control over the unauthorized use of their recorded works. The broadcasting industry has enjoyed a "free ride" unprecedented in the annals of American business. Approximately 75 percent of all radio air time is devoted to playing recorded music. Broadcasting stations sell time to sponsors based on the popularity of recorded music with the station's listeners. These stations derive enormous advertising revenues from this unconscionable exploitation. Yet they return not one penny of their profits to the people who made them possible.

If the sound recording as we know it today had existed back in 1909, when the Copyright Law first was enacted, the creators of these recordings would now be compensated for their profitable use, just as those who create books and motion pictures are compensated. The royalty fees that have been proposed are minimal. Objections, even on economic grounds, cannot be factually supported.

Radio stations pay for other types of programming. Why should they not also make modest payments to those whose talents are used to fill the bulk of their air time?

Adoption of a performance royalty would also help the companies offset the increasing cost of recording, a high-risk business. As matters now stand, the consumer pays the entire cost of a record. Broadcasters and other commercial users should help share that cost. Creation of such a royalty might even make it easier for the less experienced, experimental or classical artist to get his work recorded.

The royalty should be shared evenly by the performers and recording companies, on a fifty-fifty basis. Among the performers, we believe their (50 percent) share of the royalty should be split equally among those whose talents are

recorded on the individual recording (e.g., a lead performer and five backup musicians would mean six equal shares).

This formula is supported by AFTRA, the American Federation of Musicians and by the Recording Industry Association of America.

A system for monitoring the use of sound recordings could be devised similar to that employed by ASCAP, BMI and SESAC, which now monitor the use of recordings for the benefit of composers and publishers. Perhaps an arrangement could be devised whereby these agencies could agree to do the same for performers and record producers.

Identification of the beneficiaries poses no problems for the two unions representing the performers (AFTRA and the AFM), or for the recording companies. There are existing mechanisms, developed under collective bargaining agreements, which can be utilized for this purpose.

Recordings, today, have, for the most part, replaced live performances on radio stations. Broadcasters used to pay for live performances and still enjoy handsome profits. Today, they pay nothing to the artists and musicians who have been displaced on radio by their own recordings. There is no justification for continuing to deny to the creators of sound recordings the same right that is enjoyed by those who create other copyrighted products.

We respectfully urge that the Register of Copyrights recommend to Congress that the Copyright Act be amended to provide for payment of royalties to performers and recording companies when their recorded works are used by others for profit.

Respectfully submitted.

AMERICAN FEDERATION OF TELEVISION
AND RADIO ARTISTS, AFL–CIO,
By SANFORD WOLF,
Executive Secretary.

COMMENT LETTER NO. 30

KWFC STEREO–FM,
Springfield, Mo., May 31, 1977.

HARRIET OLER,
Senior Attorney, Copyright Office, Library of Congress, Washington, D.C.

In my opinion a performance royalty fee imposed on radio stations would not be in the best interest of either the radio stations or the performers.

In the case of radio stations, particularly this radio station, it would add an additional expense to a business that is already loaded with fees, licenses, etc. At present the station owners receive less income from "profit" (in the years we show a profit) than they would by investing the same amount of money in a savings account.

In the case of the performers, the great source of performers income is from personal appearances and record sales. Without radio play of their records they would have difficulty selling the records or attracting crowds. How famous would the "Beatles" be if their records had not been played? If a tax, or royalty, were imposed most radio stations would find some way to cut down on the playing of records to avoid such a fee.

In the long run the performers benefit more from air play of their records than do the stations. If things were to be done justly, the performers should be paying us to play their records.

W. F. ASKEW, *Manager.*

COMMENT LETTER NO. 31

WPVM,
Cumberland, Md., May 31, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am writing you about a sore point with me. I understand that your office is either to recommend favoring or denial of a performance royalty fee to Congress. I hope that you will recommend denial of such legislation.

Broadcasters are already paying musicians, arrangers, performers and writers for using their music. It should be pointed out that none of these peo-

ple pay broadcasters for all the promotion their work gets. Yet broadcasters are called upon to not only play the music but to promote it too, and then on top of that to pay a licensing fee. This is just one of the areas that the radio industry is discriminated against. Several years ago Congress ruled that the armed services could advertise on T.V., in the papers and magazines and on billboards, but they were prohibited from advertising on radio. Its about time this type of favoritism is done away with.

If you do recommend approval of this measure I hope you realize that it is an out and out tax on our industry. If you still are in favor than be fair-minded enough to include in the recommendation that the recording industry "Pay Broadcasters" for all the promotion they receive.

Let me urge you to report to Congress that this should not be added to the already existing licensing fee that radio must pay.

Sincerely,

GEORGE G. ANDERSON,
General Manager.

COMMENT LETTER NO. 32

WKEY INC.,
Covington, Va., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Reference The Register of Copyrights regarding enactment of a performance royalty fee that would impose upon broadcasters a second ASCAP-like fee to be distributed among recording artists, arrangers, and musicians.

The broadcast industry is already saddled with enormous fees by ASCAP, BMI and SESAC. Royalties and License fees last year totaled over $5,800 for our stations, which are located in a small mountain market. All of these increase each year when the stations are able to do a little more business. For this year the fees are averaging over $500 a month.

I don't need to tell you the cost of operating business today, however, in the broadcast business, the cost of operating has soared with the high costs for equipment replacement, parts and everything in electronics. We must keep the equipment top-notch for good quality, but there are other fixed expenses impossible to control such as heat, lights, water that has continually increased at a tremendous pace. Our News service until recently went from $48 a week and they furnish everything in 1969 to $110.00 a week and we furnish all supplies. This was corrected somewhat just recently.

Now, if the broadcast industry is given what would substantially be a direct tax for AA and M, then there would have to be a cut somewhere, possibly in the purchasing of additional or new recordings, which we do weekly. It seems to me these people need to start reducing the cost to the broadcast industry since they are the ones that make or break a recording. If we don't play 'em, they don't sell.

We are committed to rendering the best possible service to our area and we continually do our best. Continual uncalled for drains such as a proposed direct tax on the broadcast industry will only lead to curtailment of services now furnished. We encourage and ask your office to recommend refusal of the enactment of a performance royalty fee for this direct tax.

Many thanks for your consideration.

Very truly yours,

KEN BRYANT,
Station Manager.

COMMENT LETTER NO. 33

WCKW STEREO 92, WKQT RADIO 1010,
Garyville, La., May 30, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

We are opposed to the enactment of the performance royalty fee for the following reasons:

1. Such a fee would duplicate fees already paid to ASCAP and BMI.

2. Such a fee would actually be a tax on broadcasters.

3. Such a fee would adversely affect small broadcasters who are already burdened with too many fees and who in many cases, have to purchase the records they play. Pay for the record, pay for the music and pay for artists, too? That is UNFAIR! to the broadcaster! When the time the record plays is free!

4. Such a fee would actually hurt unknown performers whose records would be overlooked for the established stars simply because nobody likes to give money to people they don't know.

5. Such a fee would certainly be accompanied by some kind of paperwork system that would add to the burden on small broadcasters and would add to the already overloaded bureaucracy.

6. Such a fee is unecessary. Artists, arrangers and musicians have the opportunity to make as much money as they can using their talent and initiative . . . a tax such as this is unnecessary.

Sincerely,

BOBBY MARTINEZ,
Program Director.

COMMENT LETTER NO. 34

WCKW STEREO 92 WKQT RADIO 1010,
Garyville, La., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington. D.C.

DEAR MS. OLER: I write as an owner of a small broadcast operation serving a small area of the country. The total population of the three Parishes (counties) we serve is less than 100,000.

The effect of our stations on the sale of records or the popularity of an artist is to say the most is the least.

Yet daily, yes daily, our little operation receives either by mail or in person or on the phone "visits" by artists asking us to consider their product (record).

Most of these artist, no one, other than their wife, husband or mother, has ever heard of, or about. All looking for that chance to get a audience to hear them . . . Then may be . . . most of their stuff is bad . . . either they can not sing or play or both . . . but they have that dream . . . however now and then there is a real talent that has what it takes . . .

After we tell them what we think about their record we get to talking about this performers royalty fee from broadcast stations to performers.

Not a one thinks the idea to be a valid one.

To sum up their feelings, its (the performers Royalty fee) attempt by known artists to prevent unknowns from getting their chance. Broadcast operations would be less likely to take a chance on an unknown than a known. Then there is the question of where does the payments stop. What about the engineer that make "the star" sound so good, or the person that makes the record, or the person that built the studio that gives the "star" that selling sound?

In working up the application for these stations I used the talents of Engineers and Attorneys, without their talent this operation could not be. Do they get a "Royalty fee? No they get paid for their services and that is all.

Artists get paid by the companies for whom they make the records and they get paid by the Broadcast stations that play those records. The performers fee is the air time given them to perform. True it's a back scratching type deal. Broadcasters play the records the performer gets the exposure to the public they need, then when they "play" at the local nite spot they can demand and get the very high fees for live performance.

This mutual system has served the public, the performer and the broadcaster well. New talent gets its' chance, old timers get exposed, those with talent continue, those without fade out.

The idea that Broadcasting cuts an artist expected fees is not valid. Those artist with talent and desire to entertain the public will not lose but gain. True they will have to keep on their toes, but who can sit back on a one time event?

Lastly there is the monies expected from Broadcasting. I hate to burst a balloon, but Broadcasting is not a "high profit" item. As the records on file with the F.C.C. will show most broadcast operations just make or loose money. If we would have to pay a performance royalty fee we would simply have to cut

corners somewhere else. The idea that we could just go sell some more ads just does not make it. There is only so much water in the well.

Looking at the long and the short of the whole idea, it appears best to leave things as they are.

Sincerely yours,

SIDNEY J. LEVET III,
Owner, G.M.Ch. Eng.

COMMENT LETTER NO. 35

WVJS, WSTO, WVJS–TV,
OWENSBORO, KY.,
June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The enactment of such a fee would be disastrous to many broadcasters and burdensome to all broadcasters. There are many radio stations in the nation which are losing money, at the present time, or just barely breaking even. This fee would be in addition to the three music fees already being paid by broadcasters: ASCAP, BMI and SESAC.

Inasmuch as the performer could not possibly reach a nationwide audience without the broadcasters help, it seems to me that the performer should pay the broadcaster for publicizing his product . . . but, that would be payola . . . and there's a law against that!

A performance fee could be such a millstone around the neck of the broadcasters that it would very likely result in the recurrence of the Broadcaster-ASCAP activities of the early nineteen forties.

This could be an egregious situation that would benefit nobody and could wreak havoc in the music industry.

Your kind consideration of these thoughts will be greatly appreciated.

Sincerely,

MALCOLM GREEP,
Executive Vice President and General Manager.

COMMENT LETTER NO. 36

WKXY, SARASOTA BROADCASTING CO.,
Sarasota, Fla., May 30, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Broadcasters are already overburdened with royalty fees paid to ASCAP, BMI and SESAC. The financial load these fees impose on the smaller broadcasters is many times the difference between profit or loss. To add additional fees to radio stations in our opinion is to silence a larger number of smaller outlets.

Radio broadcasting has helped the record industry more than any other medium. It has made it possible for otherwise obscure performers, writers, composers and publishers to bathe in the limelight of greatness with attendant financial rewards.

We hope that the Register of Copyrights recommends against an additional direct tax on the broadcasting stations.

Sincerely,

A. G. FERNANDEZ,
President.

COMMENT LETTER NO. 37

RADIO STATION WJZZ,
Streator, Ill., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This is a reply-comment to the proposal for the enactment of a performance royalty fee from the general manager of a small market radio station.

This would impose an additional financial burden on us that would have to come from other services to the community. We would be paying to play records that we make popular by airplay. In effect we are being asked to pay for making a record popular so the artist makes more money.

Now they send promotion people to our stations and send records asking us for airplay. They know how important it is to get us to play their music. If anything, they should pay us for making them popular. In fact, the payola scandals show that they do just that to large metro stations that can make them in a given market. Their industry is already a larger industry than the radio business.

Right now it is a mutual benefit to each other. We need the music and they need us to play it.

Sincerely,

C. J. MCDONALD,
V.P. and General Manager.

COMMENT LETTER NO. 38

WZYQ,
Frederick, Md., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is in reference to the request of the Register of Copyrights to submit an opinion regarding the enactment of a performance royalty fee to be imposed among broadcasters.

It is our feeling that this legislation should not be enacted for we definitely oppose this action. We believe this legislation would be inflationary increasing our costs, which in turn would make our clients' costs go up, and their costs would be passed on to the consumer. This would duplicate fees already levied by performance rights organizations such as BMI and ASCAP.

We urgently request your opposition to this negative, costly proposal.

Thanking you in advance.

Regards,

HOWARD JOHNSON,
Vice President-General Manager.

COMMENT LETTER NO. 39

HEDBERG BROADCASTING GROUP,
Blue Earth, Minn., May 31, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

MS. OLER: I hope that your office will not recommend to Congress the enactment of a performers royalty fee.

Small market radio stations cannot afford such a tax and it is not necessary. Right now this station is paying over $500.00 per month to ASCAP, BMI, and SESAC.

Radio stations are providing quite a service to the performers already. In playing their music, they get public exposure and free publicity that directly help their earnings.

Performers are paid for their talent when they cut the records or tapes. I am definitely against the performers royalty fee.

Yours truly,

HAROLD L. NORMAN, *Manager.*

COMMENT LETTER NO. 40

REAMS BROADCASTING CORP.,
Toledo, Ohio, June 1, 1977.

REGISTRAR OF COPYRIGHTS,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR SIR: On behalf of Reams Broadcasting Corporation, licensee of stations WOWA and WIOT, Toledo, Ohio and WKBZ, Muskegon, Michigan we wish to inform you of our opposition to the proposed Performance Royalty Fee. Enactment of such legislation amounts to an additional tax on broadcasters who are already paying fees for the use of music to ASCAP and similar companies.

This additional cost of operation would work a severe financial hardship on radio stations serving smaller markets and might well be the difference between being able to continue the service they are now providing and discontinuing this because of financial reasons. We hope you will listen to the small broadcaster and recommend against the enactment of a Performance Royalty Fee.

Sincerely yours,

FRAZIER REAMS, Jr.,
President.

COMMENT LETTER NO. 41

WHKP RADIO.
Hendersonville, N.C., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of The General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: First of all—let me say that our two broadcast facilities—WHKP and WKIT–FM are opposed to a performance royalty fee.

We feel that such a fee will further impose upon we as broadcasters, a second ASCAP-like fee which obviously is a further direct tax on the broadcasting industry.

Thank you very much for noting our comments relative to said performance royalty fee.

Sincerely,

ART COOLEY.

COMMENT LETTER NO. 42

WPHM,
Port Huron, Mich., June 3, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: For many years the broadcasters of this country have paid for the right to play music over the air. Most stations have a contractual agreement with ASCAP, BMI and SESAC. This money has been paid to compensate composers and publishers and is a substantial amount of money. WPHM, located in a city of 36,000, paid $13,338.71 last year alone. This could very well be the difference between profit and loss for a marginal station.

Without the exposure offered by radio stations, most music recorded for sale to the public would never be heard and would surely not sell successfully. Broadcasting sells music!

In my opinion, broadcasters should play music without fee and should be complimented for the exposure they give all the people connected with selling music. Now the artists, arrangers and musicians want to be compensated by broadcasters. This is just too much! The artists who are truly talented, earn tremendous amounts of money and the properly managed recording companies also do very well financially.

May I count on your support to be sure this kind of legislation, if proposed, is soundly defeated?

Thanks in advance for your consideration.

Cordially,

EUGENE E. UMLOR,
President and General Manager.

COMMENT LETTER NO. 43

WWCK 105 FM,
Flint, Mich., June 1, 1977.

REGISTRAR OF COPYRIGHTS,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR SIR: Gencom Corporation would like to go on record as being opposed to the enactment of a Performance Royalty Fee. Such a fee would create a severe financial hardship on small broadcasters such as ourselves. It would certainly cause us to consider playing music based on financial reasons rather than providing the service which our listeners desire.

Therefore, please register our comments against the enactment of a Performance Royalty Fee in your report to Congress.

Sincerely,

GENCOM CORPORATION,
JOHN R. LINN,
President.

COMMENT LETTER NO. 44

WAGL,
Lancaster, S.C., June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Please place WAGL on record as opposing the enactment of a Performance royalty fee. The on air performance is necessary to artists and performer in order to get exposure for their records. We of the broadcast industry do them a greater service than they do us in performing the music. If any fee is imposed it should be the broadcaster on the receiving end not the other way around. For a small station such as WAGL to have to pay another operating expense such as this royalty fee would place a further hardship on us and an unjust one at that.

I personally urge you oppose any such legislation of Congress.

Sincerely,

B. LEN PHILLIPS,
Station Manager.

COMMENT LETTER NO. 45

1340 RADIO WIGO,
Atlanta, Ga., June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We strongly urge you not to recommend to Congress enactment of a performance royalty fee. We already pay royalties through ASCAP and BMI, which many of us feel are already too high. In my opinion, the enactment of a performance royalty fee would be like asking people to pay a second income tax under a different name.

While it is true that playing records is an essential part of our business, it is also true that the sales of records in stores are directly related to the exposure we give the records. If Broadcasters are to be required to pay a performance royalty fee, record companies should then be required to pay Broadcasters a fee for the playing of their records. This, of course can not be done because it would violate FCC payola policies.

The imposition of such a fee would be discriminatory against the predominantly music station, and would give an unfair advantage to news and talk stations.

Latest NAB figures demonstrate that it is becoming increasingly difficult to make a reasonable profit in Broadcasting, and still fulfill all our public service commitments.

Both the industry and the public at large would suffer from the imposition of additional unfair fees.

We hope you will not recommend to Congress legislation such as was defeated in 1976.

Respectfully,

JOSEPH R. FIFE,
Vice President and General Manager.

COMMENT LETTER NO. 46

WKXK, FM–STEREO–101.
Pana, Ill., June 1, 1977.

HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

I should like to express my opinion of any additional taxes for music copyrights for radio.

I am sure that if you check, you will find that a large number of radio stations, throughout the country, are struggling to break even, or to make anything. It may seem nebulus that one more expense will break the back . . . but those of us in the small markets can't handle more. We are cutting about every conceivable corner to keep serving our communities, who need us badly.

The artists will soon bite off the hand that feeds them. The million or half million sales are created by the radio stations for the artist to make the money he makes, over and above what we presently pay. We are his or her bread and butter and in no way should we be called upon to be taxed again. They are presently paid on a basis where they collect fees for any and all programs, if they are music, news, sports, or whatever.

Please look at the records in the FCC . . . see the small stations that are barely making it. Please do not tax us anymore.

Sincerely,

ALLEN H. EMBURY,
General Manager.

COMMENT LETTER NO. 47

WDBQ—COMMUNICATIONS PROPERTIES, INC.,
Dubuque, Iowa, June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Legislation for a second royalty fee for performance is not reasonable. It does not fill a need.

It would be reasonable to have performers look to ASCAP, BMI, and SESAC if they felt they were underpaid. Those companies extract millions of dollars from broadcast stations based on revenues not on the amount of music they play. It is hard for a small broadcaster to understand the reasoning when Congress entertains legislation that would add another tax on a heavily taxed industry for the benefit of individuals that are for the most part well into six figure salaries. The proposed legislation will not do much for the performers on the low end of the scale, but will add another layer of wealth to already wealthy performers on the upper end of the scale.

The proposed legislation does not pass the basic requirement of filling a need and for this reason it would be sound advice to recommend that it not be enacted.

Thank you for your consideration of our thoughts.

Sincerely,

PHILIP T. KELLY,
President.

COMMENT LETTER NO. 48

CAPITOL BROADCASTING CORP.,
Charleston, W. Va., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: There seems to us to be a strange paradox with any proposed royalty fee for recording artists, arrangers, and/or musicians.

It is, and will continue to be, the radio stations who make the recording stars by exposure to their recordings. As such, they are immediately rewarded by the sale of their renditions and, as if this weren't enough, as their star rises, their remuneration via concert performances skyrockets! Royalty Fees? Those who warrant stardom will have already been grandly rewarded!

Under such a system, God forbid, we guess we would also have to pay, carte blanche, even those whose recordings never received public acclaim.

If such a totally unfair, inconsiderate fee were enacted, we can readily see a proliferation of "artists", etc., talented or otherwise, "bellying up to the trough".

Please, right is right—*Wrong* is *Wrong.*

Sincerely,

PAUL MILES,
Vice President.

COMMENT LETTER NO. 49

KSDR 1480,
Watertown, S. Dak., June 1, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I have just been notified that the Register of Copyright has requested comments on whether his office should favorably recommend to Congress enactment of a second ASCAP royalty fee.

I am appalled that such proceedings are even to be considered. My small station here in Watertown, South Dakota is having enough problems meeting the present fee by ASCAP, BMI, and SESAC!

They now have a license to steal from radio as it is. I will not stand still to be subjected to such action.

Sincerely,

VERN MCKEE,
President.

COMMENT LETTER NO. 50

KMYR FM 99.5 STERIO,
Albuquerque, N. Mex., June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Council, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: KMYR feels no legislation is required to add a Performance Royalty fee or ASCAP type fee concerning radio broadcasting of recorded transcripts.

Sincerely,

DAVID L. ARNOLD,
President/General Manager.

COMMENT LETTER NO. 51

WLDY—FLAMBEAU BROADCASTING CO.,
Ladysmith, Wis., June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We feel that by paying monthly license fees to American Society of Composers, Authors and Publishers, as well as Broadcast Music, Inc., in addition to SESAC, Inc. we are indeed giving performers their due. Any additional performance royalty fee enacted by Congress would be totally unwarranted.

Sincerely,

RUTH B. NELSON,
President.

COMMENT LETTER NO. 52

WILK,
Wilkes-Barre, Pa., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am responding to your request for comments and reply comments as to whether the Copyright Office should recommend to Congress enactment of a Performance Royalty Fee. I would like to point out to you some of the reasons this should not be done.

First of all, broadcasters currently pay royalty fees to recording artists, arrangers, and musicians through ASCAP, BMI, SESAC and the Musicians Recording Trust Fund. We are already paying substantially for whatever music we might be using. In our own case, we are already paying approximately $12,000 per year in performance fees.

However, I think this matter should be looked at from another point of view, as well. There is no doubt but that the broadcasting of music creates business for the recording artists, arrangers, composers, and musicians in general. All statistics clearly show that a song hit is made because it gets played on broadcasting stations.

The radio broadcasting industry has basically made successful careers for all of the big name artists in the business. It would be impossible to find either a solo artist or a recording group whose careers were not substantially advanced by the broadcasting industry.

Many of these performers have gone into the millionaire class. However, it would be very difficult to find a small market broadcaster whom you could class as a millionaire. Most radio stations particularly are rather small business operations that seek to serve their community interests in the best possible way.

Whenever a broadcast station is forced to pay additional costs in its operation, that means it becomes more difficult for that station to offer the type of community service that the operator would desire to produce.

It must be pointed out that many of our services are not profit-making at any time—and that includes the news services that we seek to provide.

I appreciate the opportunity to make these comments. I trust they will be helpful to you in arriving at a final decision.

Peace be with you,

ROY E. MORGAN,
Executive Vice President.

COMMENT LETTER NO. 53

WJTN,
Jametown, N.Y., June 3, 1977.

MS. HARRIETT OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The performance royalty fee is one of the greatest ripoffs of broadcasters ever attempted.

Since the Copyright Office has been directed to report on whether legislation should be enacted to provide a performance royalty fee and, if so, how the rate should be established and distribution of the fees made, we would like to give you our comments and rationale on why legislation should not be enacted.

We have copies of correspondence dating back to 1969 which we have enclosed to give you the logic that makes sense. It is inconceivable to us how anyone can suggest paying record companies and performers on the one hand and then having the same categories of record companies and performers violate the FCC rules by engaging in payola.

Performers and record companies need our exposure. They should be paying broadcasters—not getting paid. We are sure that intense appraisal of the facts will outweigh the glamour and the glitter of the Frank Sinatras, John Denvers, Bread, etc. You are not talking about the little fellow—you are talking about the big boys and girls who already have millions.

Once you get all the facts, there is just no earthly way that anyone can suggest that broadcasters pay these performers and record companies anything. We know you will digest this material and the other material you receive and come to the basic recommendation to let the record companies and performers make their millions in the manner in which they now are.

Sincerely,

SIMON GOLDMAN, *President.*

EDITORIALS

Ducking the issue

The FCC's order for a hearing on the proposed transfer of the *Washington Star* and its associated broadcast properties was, to put the best face on it, an act of temporizing. The commission put off the difficult decision of whether to waive its crossownership rules, perhaps long enough to make the decision unnecessary. In the application that was filed eight months ago, with a request for expeditious action, the transfer was described as essential to save the failing newspaper.

The FCC's handling of the *Star* waiver request has been of a piece with its issuance of the crossownership rules themselves, about two months after the *Star* transfer application had been tendered. In the rules, the FCC outlawed monopoly ownerships of co-located newspaper and broadcast stations, of which it found 16 in small towns, and prohibited future acquisitions or creations of co-located crossownerships anywhere. Those were concessions to pressures from professional antitrust types in the Department of Justice and liberal legislators on the Hill and were made in the utter absence of any showing of social or economic harm from co-located common ownerships in the 16 communities designated for divestiture or elsewhere. The *Star* is seeking a waiver of the rule prohibiting existing crossownerships from being sold intact.

In all of this there has been more a bending to prevailing political winds than a search or even regard for reasoned policy. All of the crossownerships that the FCC has decreed to be broken up by divestiture or attrition were originally created with the approval of the FCC. And the agency has made that 180-degree turn in government policy only on the vague argument that crossownerships are somehow bad. It has ignored a mound of expensive and professional research showing that in many ways crossownerships have added to the vigor and multiplicity of mass communications.

The ultimate irony—which would probably be lost on the *Star's* stockholders—would come if, in the prolonging of the *Star's* agony, Washington became a one-newspaper town. Now *that* would be a testimonial to FCC policy in action.

Welfare at the top

The recording artists and labels that have been lobbying for a broadcast performance royalty are making more progress than broadcasters are making at this stage of legislative development. As reported here a week ago, hearings before Senate and House copyright subcommittees turned up far more testimony in favor of the new recording right than against it.

Not the least disquieting testimony came from Nancy Hanks, chairman of the National Endowment for the Arts, who claimed to speak for the Ford administration in supporting the legislation. Unless higher officials disclaim it, Miss Hanks' statement would suggest that Senator Hugh Scott (R–Pa.), the Senate's minority leader and indefatigable advocate of the new performing right, has cashed in one of his many chits at the White House.

Miss Hanks, as a patron of the less popular arts, put in a plea for a distribution of the proposed royalties to the performers and producers of works that are

failures in the market, the "symphonic, folk, operatic or other musicians involved in the creation of artistic works which . . . do not have, at this time at least, the ability to generate mass sales."

Miss Hanks was merely putting a cultural twist on the advocates' pitch that the recording royalties are needed to augment the pay of ordinary performers who work for union scale. That pitch is, of course, wholly fallacious.

As broadcasters have pointed out, the Scott bill and its House counterpart would only make the rich performers richer. Royalties would be paid on the basis of performances and would therefore go in largest amounts to the most popular artists whose records got the most airplay. Those, as even Senator Scott must understand, are already among the highest paid performers in any medium. Not only that, many artists own their own record labels and would thus get double pay under the legislation's comtemplated division of royalties 50–50 between performers and recording companies.

The new recording royalty may very well be reported out of the subcommittees and perhaps the parent committees in both Senate and House. That means the broadcasters fight must be eventually won on the floor. They have no time to lose in making their positions known to their representatives.

Case by case

Richard Nixon's apparent willingness to be interviewed for pay has brought back into debate the question of whether he should be, and with that question comes the larger one of checkbook journalism in general.

Let us say first that there are areas in which it would be foolhardiness of the highest order for any news organization to make payments. Hard news is obviously in that category. There may also be areas where payment would unquestionably be in order, although offhand we can think of none. Having ruled hard news off limits, we suspect most of the remaining cases will fall into the cloudy area where decisions must be made one by one and can go—and be defended—either way.

The current Nixon question, it seems to us, is such a case. Dick Salant of CBS News has concluded he was wrong in approving payments for the H. R. Halderman and G. Gordon Liddy interviews that were broadcast some months ago and says he won't make that mistake again. Dick Wald of NBC News is willing to pay Mr. Nixon—if everything else can be worked out—on the theory that these interviews would be "memoirs," for which authors are traditionally paid.

It might be noted that the memoirs rationale figured prominently in Mr. Salant's original decision in the Haldeman case—a fact we recall not to defend or find fault with the argument, but to underline the essential difficulty of the question and the absence, except in blatant cases, of easy answers to it. Like much else in journalism, it has to be a matter for individual judgment.

August 21, 1969.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senate,
Committee on Labor and Public Welfare,
Washington, D.C.

DEAR SENATOR: I have been appalled at the legislation proposed to protect the performer and I am only sorry that I didn't have an opportunity to testify at your hearing.

I recognize your sincerity and your desire to be fair. However, I fear that the recording artists put their best foot forward and convinced you that they deserve a "peace of the action".

First of all, the premise on which you base this legislation is erroneous. The fact is that the words and music of a composer has through ASCAP, particularly, and somewhat through B.M.I., gouged the broadcasting industry way beyond the value of the work. The entire philosophy is insidious. When you worry about the poor performer who sings or plays that music and you want him to get a piece of the action, you forget the poor broadcaster who is striving to do the job and get a fair return for his investment, his energy and his effort.

I can show you a file of letters to ASCAP which embodies exactly how I feel and in fact, I am going to send you copies of some of my letters to ASCAP which tells you and tells them just how the working broadcaster feels. As I explained. I am talking from the radio broadcasters viewpoint and I think you will agree that two wrongs do not make a right! The fact that we have been led down the

Primrose Path by ASCAP is no reason for you or Congress to decide that the poor performer get as much as the author and composer.

First of all, there is a tremendous difference between the composers and the performers.

Before I go any further, let me state my qualifications. I have been in Radio Broadcasting for 33 years. I operate six radio stations, most of them in small markets. One of them is in a city of 8,000 in Salamanca, New York, and I will have more to say about that a little later.

Incidentally, I hope you will bear with me because this will be a lengthy document but it is the only way to express myself thoroughly and completely.

Now, getting back to the poor performer. Our stations happen to emphasize what is known as Middle of the Road, so I am not as familiar with rock 'n roll. But, do you think for a minute that the composer of the hit song can demand the kind of money that Frank Sinatra demands for a personal appearance?

Let's go the other route. I understand the Supremes are getting as high as $60,000 for a concert. The poor, poor performer! The kids in those rock groups are not even grown up yet and they are making more money than you and I will ever make together. They are being misled in the value of money and some of them are corrupting themselves because of the lavish money they demand and get.

Now, let's talk about why they are able to demand this money. Is it that they are so great? No! It is the exposure they get through broadcasting.

If the radio stations didn't play their records, how popular would they be? I don't care how good they are or how bad they are, or how good the music is or how bad it is—the publicity and the exposure is the only thing that makes it work for them. Otherwise, why was there payola?

Record companies were even paying to try to get popular disc jockeys to play the records they were pushing. Fortunately, this was stopped but why is it, that we get hundreds of single records every single week from every artist and every record company. The individual artists are pleading with us to play their records. Some of them come in in person, even to little stations like ours. You say they need the money? The exposure is what they need, not the money from broadcasting.

All you will be doing is making the rich richer because if we have to pay additional fees to play records, you can well be assured that we are going to play as few as possible and only play the positive hit! It isn't worth taking a chance with an unknown! Not only that but if this legislation goes through, I am going to do everything in my power to persuade the National Association of Broadcasters and I am sending them a copy of this, to get radio stations to charge record companies or performers for everytime we play a record. We will get back every dime we pay and more, or not play the records!

You say, well how can you exist without the records? This is what ASCAP thought when Radio Stations banded together and refused to be gouged any further. This is when B.M.I. was formed and it is a good thing because the BMI was more important to the philosophy of democratic America than ASCAP which is operating under a consent decree now. BMI has given many, many unknown authors, finally, a chance and through that chance, hundreds of performers were able to get recording contracts and become famous.

If you listen to the beautiful female vocalist and I am reminded of that comment of the late Senator Kennedy, which points up how these people use their best efforts and send people who would make the biggest impression, to plead their case. Believe me, if you want to get the real record picture and what the performer really wants, get the little fellow, not the Frank Sinatra's, the Julie Andrews', the Patty Pages', the Beatles and those people, but somebody who is trying to get ahead on the bottom rung.

Now, let me, without going into too much detail, tell you one more thing that bugs me on this whole idea. We have a radio station in Salamanca, a city of 8,000. It is the best radio station that that little city has ever had and we did it by pouring in money for equipment, services, personnel and bringing to that station and the community, a service they had never had before. Unfortunately, however, this is a depressed area. The whole city is owned by the Seneca Indians and everyone is on a 99-year lease and the leases are almost up. The Seneca Nation indicated that they are going to ask for more money and as a result, the whole town is in limbo.

Last year, we took something like $36,000, losing about $7,500 for the year. This year, for the first six months, we are $6,000 in the red. We have cut every place we can and we are doing the best job we can and we hope to at least, by the end

of the year, break even and show some indication of profit. Candidly, I am trying to sell the station, but I can't even get anybody to look, let alone sell it. That community is entitled to the service of the highest caliber it can get; obviously, we can't perform in the same manner as we can where the revenue enables us to but we are not shunting our public service or community service and we are hopeful to, at least, break even.

We have to pay ASCAP regardless of the loss and now you want us to pay the performers as well? If we are going to make performers part owners in our station, which is what ASCAP and BMI are to a degree, how about them taking some of the loses as well with us or how about them making some investment in our operation, as long as they are getting a piece of the action. They don't have a dime invested in our operation; they don't do any work to make it successful or unsuccessful, they just record a record and we play it and, therefore, they are supposed to get the money. Why?

In addition, the harassment of record keeping is getting beyond the small staff. It is about enough now with ASCAP and BMI reports due monthly and ASCAP auditors coming in every year with all the forms and reports required by the FCC—Now, you want to add one more to this staggering pile?

I pointed this out to ASCAP and I will say it to you. With this exception, every station we bought was in the red except WJTN. We have increased the volume in the years we have owned it substantially and all but one are moderately successful. Our return is modest, compared with some of the returns that are being received by industry and other businesses. We are not complaining about that, but we are complaining about harassment that we get in addition to the money we have to pay for what ASCAP and performers are the guts of a radio station.

If that is true, that music makes a radio station, then how come we take a radio station that used the same records previously with low volume and make it a success? Anybody can play records. It is the easiest thing in the world. A child can get a stack of records and play them on a radio station. This is not a trick! The trick is management, ingenuity and service which is what we give to our business. Not only that, but you have all talk stations, all news stations that are a great success, proving that music is an ingredient that is important and no one is denying this but by the same token, that exposure is the most vital thing that the performer and the composer too, gets. At least the composer, if you want to say that he deserves something for his work, is getting a return now through ASCAP and BMI, although, I don't like the way it is done anymore than I think that we should expect to be paid for ever and ever because of what we have helped create or helped sell. Everytime you go in a factory and turn out a chair that somebody else uses profitably, should the craftsman get paid while that chair is used on display or in big conferences or for successful meetings because without a chair—you can't sit down and you might not be able to negotiate properly, a deal or peace treaty for that matter. Should the man who made that chair get a piece of all the business deals that are made using his chair. I know that is ludicrous, but it is comparable, if you stop and think of it.

And—the most important thing and I'll hammer and hammer on this; the performer gets thousands and thousands of dollars for every personal appearance. The prices these artists are getting today are fantastic. I only wish I could make that kind of money in a year as some of them make in two days or a week. And you say, why do they get it? Because they are great artists, Yes! But, more important, they have been exposed on radio and television.

Magazines and Newspapers give healthy publicity but they won't sell one record until it is heard. That is the key! I say, if you want to have legislation to give the performers a piece of the action, then we will charge the performer for the publicity he gets from being heard. We can play the records without announcing the artist or the name of it or anything else, if we are paying for it that way. As far as I am concerned, I would do everything in my power to keep these performers from getting any exposure and I would run unknowns, if I had to. You think it can't be done, profitably, but it can!

I have rambled quite a bit, but if you think about it, the two important points are, (1) the author of the words and the author of the music cannot demand money for personal appearances. The recording artist and the artist can. (2) The exposure by broadcasting is absolutely essential and important and as a matter of fact, television uses practically no records except in very few instances, so you are talking about radio. You are discriminating against radio,

practically completely, and they are the people that recording companies and the artists are begging to play their recordings.

I would like to suggest that you have further hearings, if that is possible, or at least a private hearing among a few people, specifically the record company, publicity men, some modest recording artists who haven't hit it big like the Sinatra's and the Supremes, Petula Clark, etc., and then bring in a few of us little fellows who are in the grass roots and who live with these things day to day and struggle to sell more advertising so we can do a better job and every-time we do that, we pay, now, the composers more, and now you want us to pay the artists as well.

In my opinion and I think I speak for the entire broadcasting industry, we feel that the whole idea is absolutely ridiculous; there is no merit anywhere along the line that I can see and as far as the extra ingredient the performer adds to a song, he does it because he is an artist. If he doesn't, he is a lousy artist.

I don't like performers or employees who don't do their best. I am sure you don't either. There are plenty of records that are poorly performed and they don't become hits. That is because the broadcasters screen records and don't play them. The records that become hits are the ones that broadcasters play. I don't think you need to give performers any more money to make them produce successful records, so how come all these years the recording industry has prospered and gotten bigger and bigger and bigger—and how come more records are sold then ever before—how come the performers are making more than they have ever made in any other time in the history of show business and you say, pity the poor performer? I say, pity the poor broadcaster!

Sincerely,

SIMON GOLDMAN,
President.

WJTN, WDOE, WGGO, WWYN, WVMT, WTOO,
March 20, 1970.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senate,
Committee on Labor and Public Welfare,
Washington, D.C.

DEAR SENATOR: I received your reply to my recent letter in regard to your copyright amendment in behalf of record companies and performers. It left me in a state of shock and disbelief.

Either one of your staff members wrote that or you never read my letter. You never once touched on any of the points that I made in that letter and your letter blandly and blithely goes on to discuss your amendment as though I were in favor of it and that the Judiciary Committee agrees with your illogical and unnecessary attempt to get millions for millionaires.

I know you are a busy man; I know that you must have been sold as I told you in the very first letter, which you never answered or acknowledged so, perhaps this letter will be read and I will try it one more time.

Incidentally, this is my last letter on this subject to you.

As the late Senator Bobby Kennedy said to Julie London when she was lobbying in behalf of the very amendment you put in, "I don't know what you're selling, but I'll buy it". I am afraid this is true of more than Senator Kennedy and it may be what convinced you.

My last plea to you is not to be one of those people that the cliche' fits, "Don't confuse me with facts, my mind is made up". Obviously, your mind is made up so, there is nothing anyone can do. Hopefully, the Judiciary Committee will look into this at least enough to get the facts.

The facts are obvious. The performers, as I pointed out in more than one letter which you have either not read or ignored, need Broadcasting more than Broadcasting needs them.

On top of everything else, the FCC is now suggesting fees and percentages and if you are going to start worrying about the poor performers like Frank Sinatra and Bing Crosby and Columbia Records then, you certainly have forgotten the forgotten man, the struggling, small businessman. Broadcasting is composed of more small businessmen, than big.

Cordially,

SIMON GOLDMAN, *President.*

APRIL 13, 1970.

Senator HUGH SCOTT,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR: I was appalled to learn that you were endorsing the Williams amendment on the proposed new copyright law.

Inasmuch as I am a property owner in the State of Pennsylvania, and the operator of a very vital business in the City of Erie, I have been very interested in, and have long admired, many of the fine things you have done in behalf of your country and your state.

However, I am very disturbed by the feeling that this amendment would rectify a long standing inadequacy in the law and would provide for equitable and just treatment for these members of the creative community.

Without going into chapter and verse, I am enclosing a copy of a letter which I sent to Senator Williams with a followup letter. I believe it pretty conclusively proves that the creative community has not only been justly rewarded for its efforts but an adoption of this amendment would create a most inequitable situation for the broadcasting industry.

What you are proposing is to provide a very unrealistic, uneconomical drain of the income of the broadcasting industry in order to give the performers and the record companies these dollars. Since when, does Bing Crosby and Frank Sinatra, etc., etc., need these dollars and since when does Columbia Records and Capitol Records, etc., need these dollars? What they need is exposure and hit records. Then, they make out beautifully! Not only do they get paid for their performance but they are then in great demand and all I would recommend to you, Senator, is that you try to hire one of these performers that have had a hit record and see what their fees are. They are astronomical. Believe me, I know and I think you people have really been misled on this amendment. It is inconceivable to me that the Senators, like you and Senator Williams, could have bought this philosophy when the logic of the situation is exactly the opposite.

Now, what I would like to have somebody answer is, why do these big record companies give us records to play at no cost, provide us with an album service at just the cost of mailing in order to get exposure. If the money is so important to the performer, why don't they charge us full price for the records? The answer is obvious, they need exposure. They need exposure more than they need the money because the exposure gives them many, many times over what they can get with the 2 percent deal.

I don't blame the performers and the record people for playing the game. If you people will buy it and put it into law and get them a percentage, they will take everything they can get, besides, psychologically, it's beautiful!

As I pointed out to Senator Williams, less than ten years ago, Congress was holding hearings on Payola and Plugola and raising the very dickens with the industry for allowing these same performers, through their agents and publicity people and the record companies, from buying our disc jockeys to play and plug their records. I just don't understand on the one hand how you can point out the inadequacy of publicity for which these performers and record companies were paying out thousands and wining and dining disc jockeys. I agree, it was wrong and we all agreed and stopped it as an industry. Now, you are going to make that same thing legal. Why, oh why?

I don't know how many radio stations are in a loss situation but there are many, many. In fact, it wouldn't surprise me if 25 percent of all the radio stations on the air are either just breaking even or in a loss situation. Yet, you want to harass these stations by making them pay an additional amount, pay for the records, and do it on a percentage, because of the poor creative community who is not getting enough return for their effort.

Even though I don't agree with the ASCAP philosophy, I will say that the composer at least has no other opportunity at getting a return. But, a performer—man, these guys have it made if they have a hit record or have the exposure by radio or television!

Find out what Elvis Presley is getting, the Supremes, Frank Sinatra, Dinah Shore or any of the others, for a personal appearance, on a one night stand. You'd be amazed! Some of them are getting as much for one night as you are getting for a year.

How about helping the poor, creative broadcaster and how about providing equitable and just treatment for those members of a community that is not only

creating, but serving the public and serving the community and serving the nation.

I could go on for many, many pages and I would like the opportunity, Senator, to debate with record people and performers for justification of this fee.

In conclusion, let me say that I, for one, feel so strongly that if this amendment goes through, I will do everything within my power to see that record companies are charged for every play of one of their records. As far as I am concerned, they are getting much more out of it than we are.

And, if the record people tell you that it is their creative efforts that made us a success, I have news for them and for you! Every radio station that I have purchased that was a loser, the volume of each one of these stations has been increased. It's a strange thing, but the same records were available before we bought those stations, as after. Yet, we increased the volume—not by playing different records or more records, but by an ingredient known as creative management plus blood, sweat, tears and money. We have increased the volume not because of music but because of ideas, salesmanship and all kinds of other things that go into the successful operation of a radio station. If all it took was a bunch of records to be successful, anybody could be successful in this business. It takes an entirely different approach and ingredients of which records are merely a small part. As a matter of fact, I am enclosing a brochure that we put out several years ago in which we point out that 60% of the time of our station was devoted to talk and only 40% to music, and we were successful. If this philosophy were to permeate our economy, then the reporters who write the news, United Press and Associated Press, who supply the bulk of the average newspapers content, should not just get salaries, they should get a piece of the action too! After all, without the news in the newspaper, you wouldn't have a newspaper. What about those creative people? This could go on and on and on and it's ridiculous!

It's vital that you take the time to check the situation more thoroughly because I feel confident that if you do, you will come to the inevitable conclusion that this amendment should be deleted in its entirety. Also, if this letter is being read by a staff member, that staff member is astute enough and knowledgeable enough to call your attention to what's in this and send me a reply that makes sense. I am reluctant to tell you that the last letter that I sent to Senator Williams was answered with another which caused me to send him a reply, a copy of which I have enclosed. I realize that with the amount of mail that each of you Senators receive, it is an impossibility to answer each one separately. However, I would hope that your staff is on the ball and will call your attention to the important letters on important matters and that you would direct them to give your constituents an intelligent reply and also call your personal attention to the contents.

I am enclosing all my correspondence with Senator Williams along with a reply that triggered off my last reply to him. Senator Williams' staff blew it and I am sure that your staff is more astute and alert and so are you.

I realize that this is lengthy and I hope that you or someone on your staff takes the trouble to check the facts, the theories and come to the conclusion that the Williams Amendment was ill conceived and is not rectifying any inadequacy and will not provide equitable and just treatments for the creative community who is well taken care of much better than Senators and Broadcasters. I only wish I had a voice and could make my living singing. I'd gladly trade my income for that of the creative community and yet, I feel I am creative in some areas where I don't have God-given talents that make me rich, but rather that I have to strive, struggle, work, think and produce.

Thanks for your consideration and I hope I have helped clarify this situation in your mind. I will approciate a reply.

Sincerely,

SIMON GOLDMAN, *President.*

MAY 13, 1974.

Senator JAMES BUCKLEY,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BUCKLEY: I am appalled that there is serious consideration being given the record royalties to performers. When this first reared its ugly head, I wrote to Senator Williams and everything I said then holds true now, but

even more so. I have enclosed a copy of those letters and hope that you will take the time to read them since they explain logically and realistically the ridiculousness of the proposal.

In addition to the points I made at that time, there are a few other pertinent points to add to the long list of realistic reasons that this provision should be eliminated from any copyright bill or any other legislation. In this letter I have covered the paradoxical situation and the inconsistency of the performers, their agents and the record companies who are so anxious to get exposure by broadcasters that payola reared its ugly head a few years ago. Obviously it doesn't make sense that if the performance of a record means so much to the artist and the record company that they are willing to pay for it, that now they should get paid. I won't dwell on that any further because it is obvious and I have covered it thoroughly in the enclosed letters.

A couple of new points are also obvious, and are more pertinent now then when I wrote the original letters. As you know, broadcasting is limited by the FCC in the number of commercial minutes per hour. Therefore, it is important for the well-being of broadcasting, and, I am speaking more about radio because I am more familiar with that aspect, that the partners we are getting should not become too numerous. We already have partners in ASCAP and BMI. The FCC was a partner in the fee schedule which has been aborted—now the performers and the record companies want to be our partners.

There are many radio stations that are marginal or are losers. Yet Congress is willing to consider increasing the costs of broadcasters for something which is absolutely illogical, unfair and totally unnecessary at any point.

If people want to be partners, why aren't they willing to share in the losses as well as the profits? If they want to get paid for something on a percentage deal, then they ought to be willing to share in the losses and pay to the stations which lose money to help those stations absorb their losses. But, no, they want in on a percentage of gross, just like ASCAP and BMI. At least in the case of the authors and publishers there is merit seeing that they get something for the performance—not in the case of the performers. The two are not the same whatsoever.

Second, the increase of cost of operation means that the broadcasters have to push that much harder to get more advertising. They won't have as much money to do the public service job that they would like to do and that the FCC and Congress would like them to do.

And, now, the piece de resistance—and I don't understand how Congress is ignoring this: if we pay a percentage of our income—it comes right off the top—it is an expense. You realize, do you not, that 50% of that (if you are in the 50% bracket) is paid for by Uncle Sam? In other words, in the case of the broadcasters who show a profit, this comes right off that profit and is 50% paid for by the government. So, why doesn't Congress pay the poor performers, such as Frank Sinatra, the Jackson Five, or whoever, because they don't have very much coming in at all? They need this royalty. If you stop and think of it, this will cost the Government almost half of the total monies that would go into the coffers of these performers, most of whom are very wealthy already—and the record companies are doing very well, I am sure. If Congress feels strongly that these poor performers need additional dollars, then why not pass some kind of a giant record aid bill and pay it from all the taxpayers, rather than just the broadcasters and the government?

I know we can count on you to study this bill and eliminate this expensive and unnecessary provision.

I will be interested in your reaction and comments after you have digested all this.

Sincerely,

SIMON GOLDMAN, *President.*

WJTN, WDOE, WWYN, WVMT, WSYB,
March 12, 1975.

Senator HUGH SCOTT,
Senate Office Building,
Washington, D.C.

DEAR SENATOR SCOTT: I read recently that you still were gung-ho on attempting to give record companies and performers a piece of the action from broadcasters. I've written to you previously and, fortunately, the majority of our

legislators recognize the unfairness and absurdity of paying out money to record companies and performers when broadcasters are responsible for their success.

Time and time again the record companies have publicly pointed out that the record business relies on air play, particularly radio. Here are some quotations from a speech by Sam Cronyn, Senior Vice President of Warner Brothers Records, when he spoke at the National Association of Recording Merchandisers meeting in Los Angeles last week. Mr. Cronyn asked, "what would happen to our business if radio died?" and, he answered himself, "half of us would have to give up our Mercedes leases. In the last 5 years," he said, "their record company has sold mostly what has been played on radio. Reliance on radio has reached such a point," he said, "that Warner Brothers won't put an album out unless it can get air play."

These comments really echo what broadcasters know. Record success is based on the ability of broadcasters to get exposure for those records and those artists. From our efforts and our ability to attract audiences comes great financial rewards to successful record companies and their performers.

Gouging additional millions from broadcasters will create additional hardships for us and make it that much more difficult for us to continue to do the thing that we do best—serve our communities.

I couldn't resist letting you know, once more, that your devotion to this segment is hard to understand and I'm sure that if you study it carefully you will come to the inevitable conclusion that there should be no performance fees from broadcasters. Candidly, this is the only area that I can't understand, from your point of view, because normally your astuteness and leadership has been excellent.

I hope you come to the same conclusion that the others have come to, and that is that this section of the copyright law should be eliminated.

Sincerely,

SIMON GOLDMAN, *President.*

AUGUST 21, 1975.

Senator HUGH SCOTT,
Senate Office Building, Washington, D.C.

DEAR SENATOR SCOTT: You know how strongly we feel about the attempted rape of broadcasting by the proposed royalties to performers and producers of music.

Unfortunately, the logic of the situation is so horrible that apparently we've just sat back with the feeling that justice will triumph, instead of which, the proponents are in there trying to steal dollars, and I do mean steal, in order to make the rich performer richer and the recording companies richer.

We helped make them what they are and we are expected to add thousands and millions to people like Sinatra, The Rolling Stones, etc.

I've enclosed a copy of the editorial in "Broadcasting", in case you missed it, for your perusal.

It's paradoxical that in the same issue of "Broadcasting" is a story on payola which is running rampant. The recording companies and recording artists are trying to buy their way into broadcasting on the one hand, and you are trying to buy their way in. So, in other words, with payola being illegal, what you are doing is giving money to people who may use it to be more illegal. I just don't understand the logic.

As you must realize from all my correspondence, this matter is of the utmost concern to me, and I had to pass on these additional thoughts.

Sincerely yours,

SIMON GOLDMAN, *President.*

COMMENT LETTER NO. 54

NATIONAL ENDOWMENT FOR THE ARTS,
Washington, D.C., June 6, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This is in response to the Copyright Office's notice of inquiry regarding performance rights in copyrighted sound recordings published in the Federal Register of April 27, 1977 (42 Fed. Reg. 21527–8 (1977)).

I. ARGUMENTS FOR A PERFORMANCE ROYALTY IN SOUND RECORDINGS

As you know, under present copyright law radio and television broadcasters, jukebox owners, and background music companies may utilize sound recordings to their commercial benefit without paying royalties to the artists and recording companies who created the recordings. While the Act for General Revision of the Copyright Law (Public Law 94–553) grants a sound recording copyright owner the exclusive right to reproduce the recording, prepare derivative works, and distribute the recording to the public, section 114 of the Act specifically excludes any right of performance in such works.

The National Endowment for the Arts strongly supports the establishment of a performance right in sound recordings. In our view, establishment of such a right would go a long way in correcting the present inequitable situation with respect to the commercial exploitation of the creative efforts of performing artists and record companies. We are, of course, referring to the situation where broadcasters pay composers, song writers, and publishers for the use of their music, but pay nothing to the musical artists and record companies whose creative contribution in connection with sound recordings is, in our view, at least equal to that of the composer and publisher. Undoubtedly, it is a performing artist's personal rendition that brings to "life" the work of music composers and lyricists: also, it is a record producer's ability electronically to create, process, and edit sounds that enables broadcasters to utilize recording artists' unique performances again and again to fill their commercially available time.

Consequently, the National Endowment for the Arts strongly favors amending section 114 of the new copyright law to provide for a performance royalty in sound recordings. In our view, establishing such a right would be an important step toward achieving one of the Endowment's major goals: to encourage and sustain development of creative American talent by helping to insure that American artists will receive a just financial return for their creative work.

II. ECONOMIC EFFECT OF PERFORMANCE ROYALTY

It would not appear that paying a performance royalty to recording artists, musicians, and record companies would impose a financial burden on the broadcast industry since the relatively small additional costs of performance royalties would be passed on to advertisers, the ultimate economic beneficiaries of the commercial use of sound recordings. Broadcasters pay for all other forms of programming, including news, sports, and features. It would seem logical and equitable that they should also pay for the privilege of using sound recordings which constitute, we understand, approximately seventy-five percent of all radio broadcast time sold to advertisers.

III. IMPLEMENTATION OF DISTRIBUTION SYSTEM

In our opinion, royalty fees should be divided equally between the performers and copyright owners (record companies) of the sound recording. We agree with the view that all performers on a given recording (whether soloist or supporting musician) should share equally in the distribution of royalties.

Further, the Endowment would favor an implementation approach which would ensure substantial benefits to performing artists involved in the creation of artistic works falling outside the commercially successful category, i.e., the category of popular "hits." In other words, the National Endowment for the Arts would favor a distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involved in the creation of artistic works which are worthy in themselves, but which by their nature do not have, at this time at least, the ability to generate mass sales.

Finally, it is our understanding that members of the recording industry would be willing to allocate a certain percentage of the royalties they receive to the Arts Endowment to be used for purposes consistent with the Endowment's enabling legislation. These funds could be used to support classical, folk, narrative, and other non-commercial recording projects, or to provide advance training opportunities for musicians to further their careers.

In conclusion, the National Endowment for the Arts strongly believes that musicians and record companies who contribute their creative efforts to the

production of copyrighted sound recordings should share in the income enjoyed by radio and television stations and other commercial organizations who use the recordings for profit. We would therefore support future legislation which would amend the copyright laws to accomplish this important goal.

Attached for your information is a copy of Nancy Hanks' statement before the Senate Subcommittee on Patents, Trademarks and Copyrights regarding S. 1111, the performance royalty bill introduced during the first session of the 94th Congress.

Thank you for the opportunity to present these views to you.

Sincerely,

ROBERT WADE,
General Counsel.

COMMENT LETTER NO. 55

WISP,
Kinston, N.C., June 1, 1977.

MS. HARRIET OLER,
Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We are opposed to the performance royalty fee. It will put a heavy burden on small town radio stations, many of which are struggling to survive.

We pay a percentage of our receipts to three organizations in the music field now . . . ASCAP, BMI and Sesac. This money pays the composers.

The recording artists are well compensated through sale of records. Radio stations playing their records create sales, money and fame. They are not entitled to additional money from radio stations.

Very truly yours,

RICHARD V. SURLES,
President.

COMMENT LETTER NO. 56

KSGT—SNOW KING BROADCASTING CORP.,
Jackson Hole, Wyo., June 1, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It has been brought to my attention that there is a performance royalty fee under consideration that would be distributed among recording artists, arrangers and musicians. It is my understanding that this is in addition to those royalties already being paid by broadcasters. I would like to voice strong opposition to the consideration of this aditional royalty. The small market broadcaster is already paying a substantial sum in royalties to ASCAP, BMI and SESAC. The recording artists, arrangers and musicians make an important contribution for which they should receive compensation, but the broadcaster makes an equally important contribution by playing their works. The present royalties seem to fill the need regarding broadcaster's monetary contributions.

Thank you.

Sincerely,

ROBERT W. CAMPBELL.
President.

COMMENT LETTER NO. 57

WQDW 97 STEREO FM,
Kinston, N.C., June 1, 1977.

MS. HARRIET OLER,
Office of the General Counsel.
Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. OLER: My heart is bleeding over Elvis, old "Blue Eyes" Sinatra and The Beatles financial condition. They are filthy rich as a result of radio stations playing their records free, thereby creating sales for their records along with fame and fortune.

Now they want more money through the ridiculous proposal called "performance royalty fee". We are already paying a percentage of our small income to ASCAP, BMI, and Sesac to the composers.

Many small town radio stations are barely existing now. The Federal Government taxes us 60 minutes per hour, but the Federal Communications Commission says we can only make money 18 minutes each hour.

If this proposal goes through, I will be sorely tempted to chop down my tower and apply for food stamps and welfare. You can keep on working and pay the bills.

Very truly yours,

M. L. STREET.

COMMENT LETTER NO. 58

KSAL–1150,
Salina, Kans., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We are not in favor of a second ASCAP-Like fee to be distributed among recording artists, arrangers, and musicians. It would represent a substantial direct tax on us.

Such a fee was defeated in 1976, and we would like to see this one defeated for the same reasons.

We need less taxation—not more—so please let it be known that we oppose enactment of a performance royalty fee.

Cordially,

KEN JENNISON,
Vice-President/General Manager.

COMMENT LETTER NO. 59

WNYR—MALRITE OF NEW YORK, INC.,
Rochester, N.Y., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It has come to my attention that consideration may again be given to enactment of performance royalty fee legislation. As a broadcaster, I would like to express my unalterable opposition to such legislation.

In looking at this proposal, one must recognize that recording artists, arrangers, and musicians are well compensated today for their efforts. Frequent audits of sales figures and play by radio stations insures most the residual compensation that is earned.

Performer's royalties are insured under the contractual arrangements with the recording companies. Broadcasters and others take care of composers, authors, and publishers; adding performers to this list would create an undue inflationary hardship. It would serve no useful purpose other than to further compensate the group which is already very well remunerated.

I strongly urge your office to recommend to the Congress that this matter not be brought up for consideration.

Thank you for your interest.

Very truly yours,

MURRAY J. GREEN,
General Manager.

COMMENT LETTER NO. 60

WVOB,
Bel Air, Md., June 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: A matter of grave importance is being considered by your office at this time. It concerns a recommendation to the Congress on the enactment of a performance royalty fee.

As a small-market broadcaster, if the performance royalty fee is approved, it will crush us.

The reasons are many and varied, but most importantly, we are at the point of marginal survival due to natural inflation, and a second ASCAP-like fee would be the straw that will break some small broadcasters' backs, including mine.

I urge you, in all sincerity, to recommend against such a redundant tax on the broadcast industry.

Yours truly,

JAMES V. MCMAHON, Jr.,
General Manager.

COMMENT LETTER No. 61

KIRX, KRXL—COMMUNITY BROADCASTERS, INC.,
Kirksville, Mo., May 31, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It is my understanding that your office is required to make a recommendation to Congress on the enactment of a performance royalty fee under the Copyright Act.

In my estimation such a fee would be counter productive to the performing artists themselves. We in the radio broadcasting business would be selective in that only those artists known to be popular would be played, thus stifling the opportunity of new entertainers.

The artists are compensated now from the sale of records made popular by being broadcast. If the broadcasters don't play them then the record is not going to be sold in any large quantity. Since the composers are now compensated through license fees paid by radio stations, any reduction in the amount of music played would be a loss in income for the composers as well as the artists.

For the artist it will be killing the goose that lays the golden egg, although the artists apparently do not know this because they are continuing to try to get this rip-off.

Nobody has ever explained to me just how the station would account for each record play without a prohibitive cost especially in smaller communities.

I strongly recommend that for all concerned you do not recommend favorably to Congress for the enactment of a performance royalty fee.

Sincerely,

SAM A. BURK.

COMMENT LETTER No. 62

RADIO STATION KATL,
Miles City, Mont., May 31, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am enclosing a comment on the subject of instituting a performance royalty fee on broadcasters.

It is my understanding that your office is inviting comments regarding the proposal and would like to be considered in the area as being opposed to such.

Thank you for your consideration.

Sincerely,

FRED B. HUNNES.

COMMENT IN REFERENCE TO THE ESTABLISHMENT OF PERFORMANCE ROYALTY FEES

The enactment of a performance royalty fee on the broadcast industry would be an additional and probably substantial direct tax on the industry. It would be a tax that would be extremely difficult to apportion to artists, arrangers, and musicians in an equitable manner. It would be a tax, the purpose of which, could better be handled in the open market without governmental intervention.

Ours is a small radio station; we do a good job of serving our community and area but we do that job without extra personnel beyond those necessary to do that job. If our income were larger, we could employ more people to do a more sophisticated job in our area, but:

I think of the philosophy of this proposal and I compare it with what might be a projection if such an act becomes law.

We use electricity to power our transmitters. Since the beneficial use of that electricity is to perform broadcasting, then the utility company may say, "because you're using those kilowatts for broadcasting, we want a tax placed on our electricity that you're using because you're using it for making a profit." And, if our lawmakers saw fit, could levy a special tax on broadcasters for the use of electricity to apportion among the linemen or meter readers.

Or the company that supplies our paper needs could feel the same way . . . and we'd be taxed for the paper we used as opposed to paper used to write the letters to family and friends.

If the artists, arrangers, musicians and others that are proposing and attempting to further such legislation would take their idea to the market place they could, if their particular recording was a good one, command a larger percentage of the retail sales price as their portion or they could increase the price of said recording to be remunerated as they may seem fit.

There would seem to be little question that the popular and well-received recordings sell far greater numbers than the trash which comes forth with tremendous volume, too. The marketplace provides the ideal barometer of the value of any given recording.

We buy our records for use in programming; the good ones, the ones the listeners like are given more play than those of lesser appeal. Automatically, we become an agent by exposing good music to the public, to stimulate purchase of those recordings.

The marketplace will provide the remuneration to the good artists and the good arrangements. It will do it automatically without the need of a great amount of paperwork and regulation and it will act as the stimulus to produce great songs and arrangements. That's what has served to make our country great!

There is no question that the broadcast industry does use the recordings in the carrying on of their business. But, there is little difference in the use of recordings or in the use on innumerable other products in the furtherance of business.

Thank you for your consideration of my comment.

U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., June 1, 1977.

COPYRIGHT OFFICE,
Library of Congress,
Arlington, Va.:

The attached letter is submitted for your consideration during your study of performance rights and sound recordings.

No reply expected.

Very respectfully,

RICHARD BOLLING,
Member of Congress.

COMMENT LETTER NO. 63

KCMO RADIO,
Kansas City, Mo., May 24, 1977.

HON. RICHARD BOLLING,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN BOLLING: It has been brought to our attention that the Library of Congress, Copyright office, has issued a notice of inquiry seeking comments on the subject of performance rights and sound recordings. Under the new Copyright law, to go in effect on January 1, 1978, the Copyright office must pre-

pare and submit to Congress a report and recommendations on possible legislation in this area.

The new law (Section 114) provides for rights of the owner of copyright in a sound recording, but such rights are limited to the rights to reproduce the sound recording, to prepare derivative works, and to distribute copies to the public. Thus, copyright protection does not extend to a "performance" of a sound recording.

Paragraph (d) of Section 114 directs the Register of Copyrights to consult with various interests in the broadcasting, recording, motion picture and entertainment industries; etc., and to report to Congress by January 3, 1978 whether Section 114 should be amended to provide for performers and copyright owners any performance rights in such material.

While I am sure you are aware that radio and television stations now pay royalties for "performance" of musical compositions alone via ASCAP and BMI, organizations formed to protect the rights of composers, authors, and publishers; we feel, however, to pay performance rights to recording artists and their record companies is in effect taxing one free enterprise business in favor of some individuals and other free enterprise businesses. Aside from the precedent being extremely dangerous and totally uncalled for, the point is very ably made when it is known for a fact that both performers and recording companies encourage, sometimes with illegal payola, radio stations and radio stations' personnel to play the records performers and record companies have produced. Without such performance on radio *and* television, records apparently do not sell in sufficient quantities to make the business viable and recording artists no longer can demand exorbitant fees for one night stands.

As one who is deeply and directly associated with the radio broadcasting business, please know that I am diametrically opposed as are all broadcasters to this totally unwarranted potential confiscation of funds by the government in favor of performers and record companies. How on earth have these same performers and record companies in the past survived? And on the other side of the coin, with inflation and governmental controls and regulations burying the small broadcaster; how can indeed the average broadcaster, usually the small broadcaster, survive this additional financial negative onslaught.

Please, please dig into what the Library of Congress, Copyright office is required to do under Section 114 and join with us in opposing this further governmental intrusion in our business.

And too, the record performers and/or record companies who come around begging, tell them two can play the game. We, too, can charge them for favorably and repeatedly exposing on our air records they want to sell.

Thank you for your personal attention to this inquiry. Deadline for comments to the Copyright office is May 31, 1977, which we recognize is not much advance notice, but we didn't receive much ourselves. Replies are to be filed by June 15, 1977.

Cordially,

STEVE SHANNON.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 1, 1977.

MS. HARRIET OLER,
General Counsel of the Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. OLER: I am enclosing a copy of a letter from one of my constituents which concerns the Copyright Office's inquiry on performance rights and sound recordings.

I believe that Mr. Shannon's letter is self-explanatory and I would appreciate your taking his views into consideration.

Thank you for your assistance.

Most sincerely,

LARRY WINN, JR.,
Member of Congress.

PRAIRIE VILLAGE, KANS.,
May 24, 1977.

Hon. LARRY WINN,
House of Representatives,
Washington, D.C.

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Cordially,

STEVE SHANNON.

COMMENT LETTER NO. 64

KJ RADIO 910,
Phoenix, Ariz., May 26, 1977

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

I wish to go on record on behalf of Dairyland Managers, Inc., licensee of Radio Station KJJJ, Phoenix, Arizona, as being opposed to any legislation for a copy-

right fee intended for writers and performers of musical works aired by broadcast stations.

Writers and performers receive a substantial sum from royalties derived from record sales. If it were not for the broadcast stations airing these musical selections, the record sales would be practically zero. Therefore, the two-way street is obvious. The broadcasters need the musical selections, and in turn, the writers and performers are already receiving tremendous benefits from the broadcasters.

As a member of the Phoenix Metropolitan Broadcasters Association and past president of the Arizona State Broadcasters Association, I am already on record with the Arizona Congressional delegation as being totally against such legislation. Also, the Phoenix Metropolitan Broadcasters Association and the Arizona State Broadcasters Association are unanimously opposed to said legislation.

Sincerely,

RAY ODOM, *General Manager.*

COMMENT LETTER NO. 65

KDWA,
Hastings, Minn., May 27, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

On the performance royalty fee.

KDWA is, I am sure, in the company of several thousand radio stations who are strained to the limit in trying to find enough money to fulfill our public service requirements.

The energy situation has caused rate increases to our radio station, along with 20 to 30 percent hikes in already huge telephone bills.

ASCAP and BMI payments have increased nearly 10 percent for our station this year.

I am paying my announcers at a poverty level and they wonder why.

Please take this information into consideration. Although this is a general letter, it is based on cold, hard facts. I will produce the necessary supporting data on request.

Sincerely,

DAVID L. BAUDOIN,
President.

COMMENT LETTER NO. 66

CARTHAGE BROADCASTING CO.,
Carthage, Mo., May 27, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MRS. OLER: A performance royalty fee would impose upon Broadcasters an unfair "tax" for playing the very records and music that becomes popular for public purchase through the "plays" on Radio itself.

I am against any Performance Royalty and hope to never see Broadcasters pay more taxes to play the music the industry helps make popular which is a service to the record industry.

I believe that if anything Broadcasters should be paid for "advertising" the record industries product and talents instead of the other way around. Other advertisers pay us for same . . . why not the Record Industry? To take my point one step further . . . the Broadcaster has to spend *his* time and HIS money to "screen" the records for foul lyrics and suggestive terms. It just does not make it even does it?

Sincerely,

RON PETERSEN,
General Manager.

COMMENT LETTER NO. 67

RADIO STATION KFBR,
Nogales, Ariz., June 3, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It is our understanding The Register of Copyrights has requested comments on whether his office should favorably recommend to Congress enactment of a performance royalty fee.

A performance royalty fee would impose upon broadcasters a second ASCAP, BMI and Sesac like fee to be distributed among recording artists, arrangers and musicians.

It would represent a substantial direct tax on the broadcasting industry and we would like to recommend that this matter not be recommended to Congress.

Thank you for your consideration of this matter.

Yours truly,

BERNARD WILSON.

COMMENT LETTER NO. 68

TWENTIETH CENTURY-FOX FILM CORP.,
May 24, 1977.

COPYRIGHT OFFICE,
Library of Congress,
Arlington, Va.

DEAR SIRS: This is in response to your request for comments from interested parties concerning your study of the record performance royalty situation as required by the Copyright Law, Title 17 of the United States Code, as enacted by the Congress in 1976.

Unfortunately, the Copyright Law was passed, despite amendments proposed by the record industry, without giving copyrighted recordings the right to collect royalties when played by broadcasters and other commercial users: a right given under the new Copyright Law only to the owners of the copyrighted music on the recording.

Records are the prime source of music and programming for radio, juke boxes, wired music services, discotheques and other suppliers of entertainment. These are commercial enterprises that sell time or service for a fee. Nevertheless, neither the performers nor the record manufacturer is paid for the use of his product. This situation is inherently wrong on its very surface.

Records, therefore, are necessarily produced and manufactured specifically for sale for home use. Since the primary market is teen-agers, this has created an over-abundance of time and attention devoted to rock music. The result is a huge industry (approaching retail sales of three billion dollars per year) which has sponsored a rock cult of unusual proportions, with all of the implications which need not be gone into here. Classical music, "good" singers like Andy Williams, Tony Bennett, Steve Lawrence, Edie Gorme and many, many others do not sell phonograph records in significant proportions. Therefore, they are ignored by the industry in spite of the fact that there is a market for them. The rack jobbers who dominate distribution are not interested—why take up space with an album that will sell fifty thousand units when the same space can be used for one that will move three to four million copies?

I make two points:

1. Performances and product are being used for profit without compensation to those who have created and produced it.

2. Good music is not being actively created and made available to those who would like to buy it, since radio and other commercial use provides no income.

The answer is quite simple. A performance should be copyrighted so that the owners can license its use for fair compensation. The result will be the availability of a far wider range of music, and less emphasis, by virtue of less dependence, on teen-age rock artists.

I urge you to consider the advisability of a performance royalty in the interest of fairness to the creators and performers of the industry, and for the furtherance of musical values for all consumers.

Respectfully submitted.

ALAN W. LIVINGSTON.

COMMENT LETTER NO. 69

KLBM,
La Grande, Oreg., May 28, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am greatly concerned about the proposed Performance Royalty Fee.

I feel this would be a real burden on many, if not all broadcasting facilities. Certainly I find this true in my case.

Royalty fees for ASCAP, BMI and SESAC are burdensome now. The extra Performance fee for writers, etc. would mean another necessary increase in our advertising rates, and/or curtailment in purchasing needed equipment or even the possibility of hiring less employees.

I feel the people involved in receiving the royalty, if enacted, are where they are today only because of the exposure they get from radio broadcasting.

I oppose the Performance Royalty Fee. I trust you will agree with me.

Respectfully,

KENNETH L. LILLARD, *President.*

COMMENT LETTER NO. 70

WWJC RADIO,
Duluth, Minn., June 3, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: In response to the Register of Copyright's request for comments on whether or not to recommend to Congress enactment of a performance royalty fee:

As a broadcaster, I am categorically opposed to the implementation of the proposed fee. These fees will constitute unjust enrichment of the already prospering recording artists and recording companies, but, even more importantly is the fact that these works are merely productions or renditions of other creations and hence, not copyrightable.

The unjust nature of the proposal is further emphasized in that it is a form of penalty imposed upon the media that is most responsible for record sales through the promotional impact of air-play. It would make more sense if the broadcasters were to share in the royalties rather than being required to be the source.

Respectfully submitted.

ROGER ELM, Sr.,
Executive Director.

COMMENT LETTER NO. 71

WORM—SAVANNAH BROADCASTING SERVICE, INC.,
Savannah, Tenn., June 6, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: As General Manager of Radio Station WORM AM/FM located in a rural area, Savannah, Tennessee, I am very concerned about proposed legislation of a performance royalty fee. I feel this would add substantially to the taxes of this nature already being paid by the broadcasting industry.

Over the past few years, Music Copyright fees have increased at an alarming rate. I feel this does put an extra burden on the broadcasting industry, especially small operations in rural areas.

At this time I am strongly opposed to passage of the proposed performance royalty fee and hope it will be defeated in 1978.

Sincerely,

EDITH A. STRICKLIN,
General Manager.

COMMENT LETTER No. 72

REPLY COMMENT ON PERFORMANCE ROYALTY FEE

(Submitted by David A. Donlin, CRMC, General Manager, WABX Radio, Wilkes-Barre, Pa.)

As a radio broadcaster I am at a complete loss in attempting to understand why additional performance royalty fees should be considered by anyone.

I manage a radio station in a Northeastern Pennsylvania market that is designated as a Standard Metropolitan Statistical Area by the United States Department of Commerce. 630,000 people reside in the Northeastern Pennsylvania SMSA, a great number of them elderly living on fixed incomes. Our average household income is at least $4,000 under the national average. I compete with 21 other radio stations that have the same regulatory problem that I do. Thanks to the Federal Communication Commission and their frequency allocation foresight, the competition here is keener per person than it is in New York City.

The average radio station in Northeastern Pennsylvania has an income of $220,000, another governmental statistic. To employ a staff of 19, including 17 full time staff members, and maintain quality service to remain competitive, while also serving the community good is a major daily accomplishment based on the regulations directed by government agencies, and the fees sought by performers groups.

Right now we pay performance fees to ASCAP, BMI, and SESAC. Those fees cost about as much as another full time staff member would.

In return for the fees I play music that entertains our listening audience, and has a great deal to do with their being exposed to music that they consider purchasing if they like the music. For exposing the music talent to my audience I am charged a fee, while the artist, his entourage, and some record company wait in the wings for the collective payoff of millions of exposures on thousands of radio stations.

Now on top of an already grave injustice, the Register of Copyrights wants to have Congress consider the third level of injustice, another performance fee for music talent.

Consider the total profitability of the music industry versus the profitability of the radio industry. Does the radio industry have excess money available to engage in questionable promotional activities like the record companies sometimes do? After you get by a few giants of the radio industry, you are dealing with small businesses. How many small businesses must conduct business where fees are imposed for conducting the business, while opportunities for securing income are limited by the federal government.

The radio industry is far from perfect, and can stand a great deal of improvement, but isn't that a simple reflection of America.

The Register of Copyrights should recommend to the Congress of the United States that another performer's royalty fee is unwarranted and unjustified. As another recommendation the Register of Copyrights should award to the Congress of the United States of America a continuing copyright which apparently they have acquired over the last few years to continually create new programs and regulations which are frivolous, while ignoring the most important issues of the day.

COMMENT LETTER No. 73

WAGQ,
Athens, Ga., June 1, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel,
Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We are responding to proposed legislation in Congress, which would recommend enactment of another performance royalty fee to be imposed upon the broadcast industry. If this legislation would be enacted, it would represent a substantial tax on broadcasters in this country.

We are strongly opposed to such legislation. Broadcast operations are already paying the substantial amounts of performance royalty fees to musicians, artists, and arranges. Quality broadcasting in large and small markets across the coun-

try would create difficulty to an immense degree, in all phases, from job availabilities to local merchant budgeting for competitive advertising.

This legislation is impractical, unnecessary, and inflationary. Another performance royalty fee would cause a serious imbalance in the business and resultant creative product in both the performing and reproduction of the entertainment field.

Sincerely,

JERRY E. GERSON,
Station Manager.

COMMENT LETTER NO. 74

HAYCO BROADCASTING, INC.,
Celina, Ohio, June 1, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. OLER: I am writing in reply to the Register of Copyright's request for comments on the proposed Performance Royalty Fee issue.

I have been in the broadcasting industry for a relatively short period of time (5 years), however, I've been quick to learn the many and various problems in the industry. This particular issue is one of major concern.

Looking at the entertainment end of the business, Radio Stations spend an enormous amount of time and money in trying to interest an audience with a particular format of music. Radio Stations like ours have to pay the various music license companies, (SESAC, ASCAP, BMI), in order to play their records and we then have to purchase many of the records to fill our format charts. If we were required to pay an additional Performance Royalty Fee, our music fee expenses would be unreal.

What happens to the songs that we, the Radio Stations, play again and again each day? They become hits. The various artists and recording companies as well as the music license companies make money on the progress of their record. The Radio Station receives nothing from the popularity of the record.

What would happen if a Radio Station, under a Performance Royalty Fee Program, would refuse to play an artist. . . . the record that he or she had produced would go nowhere.

It seems to me that the Performance Royalty Fee program is backwards—the artists should be paying the various Radio Stations a fee for making them successful.

Sincerely,

JOHN H. COE,
President and General Manager.

COMMENT LETTER NO. 75

WRMF 1060,
Titusville, Fla., June 6, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel,
Copyright Office, Library of Congress,
Washington, D.C.:

I wish to comment on the possibility of the enactment of legislation providing for the collection of a performance royalty fee to be distributed among recording artists, arrangers and musicians.

ASCAP, BMI, et al., were brought into being so that composers, who had virtually no other means, could receive compensation for their creativity. Both authors and composers were removed from poverty by this system for compensation where none had existed before.

This does not seem to me to be the case before us today in that recording artists, arrangers and musicians, individually or as a group, do not seem to be impoverished.

Were this not the case I would morally endorse a plan for the compensation of this group.

Further, it would not be inconceivable to propose payment for the broadcasting of performances by recording artists, arrangers and musicians as compensation for this benefit to their careers and personal incomes.

Sincerely,

DALE MOUDY,
General Manager.

COMMENT LETTER NO. 76

WAXX & WEAU-FM,
Chippewa Falls, Wis., June 6, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am writing in my capacity as Station Manager of a Midwestern AM-FM station to express my feelings on the proposed Performance Royalty Fee.

That such a direct tax is being considered should be of great concern to the public as well as station operators. The public, after all, will eventually be paying the tax, for all increased costs are passed along to the consumer in the form of higher rates, therefore, higher prices for goods to cover ad costs.

That the music industry feels it should get more from the industry that it survives on is ludicrous. Perhaps it should, instead, levy charges on the perpetrators of payola-plugola who feel the need to dole out money and goods to station personnel and put licenses in jeopardy. We can survive nicely without both, thank you.

Sincerely,

BOB HOLTAN,
Station Manager.

COMMENT LETTER NO. 77

MARMET PROFESSIONAL CORP.,
Washington, D.C., June 6, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: On behalf of WWSW Radio, Inc., licensee of standard broadcast station WWSW and frequency modulation broadcast station WPEZ, both Pittsburgh, we write herewith by way of reply comments, pursuant to instructions from our client.

Our client is strongly opposed to the enactment by Congress of a Performance Royalty Fee. This would impose on our client, and all broadcasters everywhere, a second fee, on top of what is already paid. This additional fee would increase the cost of offering and rendering service to the public by way of FM and standard broadcast radio. Increasing the cost to the broadcasting licensee will, in the final analysis, result in an increase in the cost to the advertiser and to the public. We believe that there is no need for this additional taxation by way of an additional fee.

It is respectfully requested that this office and WWSW Radio, Inc., One Allegheny Square, Pittsburgh, Pennsylvania, 15212 be placed on the mailing list that you may establish for consideration of comments and replied comments filed in the proceeding.

Thank you for considering the views of our client.

Very truly yours,

ROBERT A. MARMET.

COMMENT LETTER NO. 78

WIQT-WQIX,
Horseheads, N.Y., June 6, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIET: This letter is to inform you of our company's total opposition to any inactment of a performance royalty fee to be imposed upon the broadcast industry.

As I am sure you are aware, ASCAP, BMI and SESAC all now charge performance fees and broadcast rights charges for musical selections they license. These combined fees are presently very substantial, and are a burden for a company such as ours to pay. Any additional performance royalty fee, as the copyright act directed the register of copyrights to explore, would be a further burden upon us (in an area I feel we are already overcharged). It would duplicate fees now being paid and it would cause stations such as ourselves to either raise rates (which is inflationary) or cut personel (which would not help the employment situation) or both.

Recording artists, arrangers and musicians are now more than adequately reimbursed with fees collected by ASCAP, BMI, and SESAC.

We unanimously and vigorously oppose any further forms of performance royalty fees!

Sincerely,

JAMES B. STEVENSON,
General Manager.

COMMENT LETTER NO. 79

KVOD—DENVER'S FINE ARTS STATION,
Denver, Colo., June 6, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It has come to my attention that comments are requested on whether the Register of Copyrights should recommend that Congress enact a performance royalty fee to apply to broadcasters and others.

I hereby wish to express my strongest opposition to such an additional fee being added to the already burdensome performance and licensing fees we are obliged to pay.

KVOD is an FM only station presenting classical music and cultural programming 24 hours each day. We happen to be the only full time fine arts station between Chicago and the west coast.

At this time we are paying many hundreds of dollars to the three music licensing organizations with whom we are forced to have contracts in order to perform music at all. As you know, these are American Society of Composers, Authors and Publishers, Broadcast Music, Inc. And SESAC. Because we play mostly music which is already in the public domain I feel we are being charged excessively by those three organizations for the relatively few selections we play which are licensed by them.

If an additional performance royalty fee of any amount were to be added KVOD would have to seriously consider dropping its cultural programming, which is a costly format to produce, and revert to the simplistic formats which are making money for broadcasters but have little creative challenge to offer listeners. We do not want to abandon a fine arts format. But additional performance fees could drive us to such action.

We believe the performers are already being generously compensated by the existing license fees. We strongly oppose any additional fees.

Sincerely yours,

E. E. KOEPKE, *President.*

COMMENT LETTER NO. 80

WGBF METRO RADIO CO. INC.,
Evansville, Ind., June 7, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It is my understanding your office is to make a recommendation to the U.S. Congress on whether a performance royalty fee should be enacted.

As a broadcaster, I'm strenuously opposed to such a fee. The vast majority of radio stations now pay substantial fees each year to ASCAP, BMI and SESAC.

For instance, the fees charged this station for 1977 will be well into the five figure category. Coupled with the proposed fees and increases in those now being paid it could create some serious economic repercussions.

Performers are certainly entitled to profit from the talent they possess. However, they should also be prepared to accept the economic consequences when they fall from favor of the public. The public market place is sufficiently able to provide the necessary royalties in monetary and personal gratification terms without resorting to extracting fees from broadcasters and others.

Thank you for your attention to my concerns.

Sincerely,

DONALD J. NEWBERG.

COMMENT LETTER NO. 81

KNIGHT QUALITY STATIONS,
June 6, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel,
Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter, together with five additional copies, is being sent to you in accordance with the request of the Register of Copyrights for comments regarding possible recommendations to Congress on the enactment of a performance royalty fee.

The Knight Quality Stations of New England, comparatively small operations in the broadcasting business, would suffer real harm if such a fee were enacted.

We created BMI to keep the ASCAP monopoly from becoming more and more authoritarian. Today, BMI is just as bad as ASCAP and close to 4% of our gross revenues go to these two organizations.

Most of the artists and musicians, whose music we play, are already in huge tax brackets as a result of the ancillary benefits gained by our air play. Our already modest profits would be further reduced and these people would simply add to our tax problems. Insofar as the thousands of struggling artists are concerned, they would also suffer harm because if we are forced to pay performance royalties, we will probably stick only with the well known "safe" artists.

So if the fees are established, the fat cats will get fatter, the unknown artists will, for the most part, stay unknown, and smaller and middle-size radio stations will have less money available for public service programming.

Your consideration of these viewpoints can only be weighed into the mass of other opinions you are receiving but I will be grateful if you will consider them carefully and let me know of your reaction.

With thanks and good wishes,

NORMAN KNIGHT, *President.*

COMMENT LETTER NO. 82

THE UNIVERSITY OF CONNECTICUT,
SCHOOL OF LAW,
West Hartford, Conn., June 8, 1977.

MS. HARRIET OLER,
Senior Attorney, General Counsel's Office, Copyright Office, Libary of Congress, Washington, D.C.

DEAR MS. OLER: I have received a copy of the notice of inquiry requesting comments regarding performance rights in copyrighted sound recordings. As I previously informed Mr. Baumgarten, a colleague here, Professor Robert Bard, and I co-authored an article on the performance rights question which appeared in the George Washington Law Review. I believe our article is the only comprehensive, objective study of the question. I previously sent copies of the article to Mr. Baumgarten and Barbara Ringer. I have enclosed five additional copies for your use.

Professor Bard and I are in the process of writing a book about the economics of copyright protection which will focus on the record industry and will consider the appropriate scope of protection for recording artists and record companies against unauthorized duplication and performance of their recordings. Research

for the project is being funded by the National Science Foundation. Our research and analysis may lead us to revise our conclusions expressed in the article; and we, of course, are very much interested in reading and analyzing the various comments you receive. I assume it would be an unreasonable burden to ask you to supply us with a copy of the initial and reply comments which you receive. However, I would greatly appreciate it if you could send me a list of the names and addresses of the parties who submit comments so that I can contact them directly in order to secure copies.

Thank you very much for your attention.

Sincerely,

LEWIS KURLANTZICK,
Professor of Law.

COMMENT LETTER NO. 83

WFBR,
Baltimore, Md., June 13, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This is to urge you to recommend against enactment by Congress of performance royalty fee for record artists.

The proponents seem not to recognize the fact that radio stations are already taxed by ASCAP, BMI and SESAC for music performance royalties based on a percentage of revenues.

The proposed performer fee would amount to double taxation and would cause a severe hardship among radio stations, particularly the smaller operators.

Both the radio and recording industries have prospered over the years under the present system. Why is there need for a change?

Sincerely,

HARRY R. SHRIVER,
President and General Manager.

COMMENT LETTER NO. 84

WNOE, INC.,
New Orleans, La., June 6, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: As a broadcasting station, WNOE AM and FM strongly oppose a performance royalty fee. The artist, writer, etc. are more than compensated through the free airplay given their product on radio.

Cordially,

ERIC ANDERSON,
General Manager.

COMMENT LETTER NO. 85

WMOB—BAY BROADCASTING CORP.,
Mobile, Ala., June 2, 1977.

HARRIET OLER,
Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLERS I would like to comment on the proposed performance royalty fee, which I understand is part of the Copyright Act. The Register of Copyrights is requesting comments from industry principals on this proposed legislation.

Such a performance "fee" will amount to another staggering tax on broadcasters. And an unfair one for this primary reason: artists, musicians and other members of the recording industry depend *wholly* on *radio airplay* for the exposure of their product to the consumer. The music industry is getting a free ride off radio stations; the music industry is a multi-billion dollar a year industry,

largely owned by huge conglomerates like CBS and ABC, each of which is already extremely profitable, and yet this industry seeks to penalize radio stations for playing their product.

As you know, ASCAP and BMI already have upped their share of our profits. Before February of this year, both organizations take 1.7 percent of gross profits as royalties. To a small radio station like WMOB, this amounts to a pretty fair chunk of money which we would obviously like to see to increase our service, hire more people and improve our business. I do not know what increase has been negotiated as of this writing, but I do know there was a substantial increase.

In addition, the current royalty contracts are so construed that we must pay a constant percentage of our gross, no matter how much or how little music programming we play. If we played as little as four records per week, we still must pay the same as a station that plays 90 percent music. Of course, BMI and ASCAP have what is ludicrously termed a "per program" agreement. However, it is so involved that a radio station would have to hire one full-time person just to keep up with paperwork. BMI and ASCAP executives will themselves recommend against the per program agreement. We are stuck with a blanket percentage.

My question is this: why should a radio station pay to provide the market for record companies? There is no other way than radio airplay for record companies to expose their product to the public. It is totally unrealistic to expect us to pay an additional fee on top of the percentage of our gross that composers already get from us, whether or not we play their product.

The proposed legislation is simply another underhanded way for the music industry to rake off some money that they did not earn, and call it "royalties". Radio stations are expected to pay for the privilege of playing records, while at the same time providing a free medium to advertise their product. We already pay. We pay through the nose.

The fee was defeated in Congress in 1976. The Congress obviously recognized the legislation for what it was/is: an unfair, unrealistic, illogical tax on radio stations which are already over-burdened with royalty payments regardless of whether broadcasters even play music. The present royalty structure is not based on how much or how little music is played: rather, it is a disproportionate fee—radio stations pay the same percentage of their gross, no matter how little music is programmed. And now, this proposed legislation seeks to increase this contorted "skim" to the behomoth monguls.

It is common for a composer to get one cent per copy of the recording sold. It doesn't take a mathematical genius to determine what kind of "take" the composer is already getting off retail sales for a record, say, that sells a million copies. He also gets his share of my profits, whether or not I play his recording.

I think this is the most fallacious, cleverly-disguised scheme I have ever seen. Record companies already get free exposure off radio, and I don't think it is sane to expect radio stations to pay more. I'm certain that, if this legislation is passed, you will see a good deal of civil disobedience.

Cordially yours,

ALTON BROUSSARD II.
Vice President.

COMMENT LETTER NO. 86

KSOO RADIO INC.,
Sioux Falls, S. Dak., June 7, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Broadcasters have historically paid their fair share of performance royalty fees via contracts/licenses with the recording industries.

Imposition of any further fee raising legislation would only escalate costs and in many instances impose undue financial hardship on marginal operations.

We see no need for further legislation that in fact would only duplicate existing revenue producing fees and create a substantial direct tax on the broadcasting industry.

Sincerely,

SYLVIA R. HENKIN.
President.

COMMENT LETTER NO. 87

WABB RADIO 1480,
Mobile, Ala, June 6, 1977.

MS. HARRIETT OLER,
Senior Attorney, General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MISS OLER: With reference to the performance royalty fee, it is impossible for a medium market station to raise the spot rate commensurate with the huge bookkeeping expenses that a copy-right fee would require.

From a broadcaster in a medium sized market the imposition of a performance royalty tax would cause an undue hardship from an economic standpoint. Markets the size of Mobile or smaller can not possibly sustain additional expenses in the form of copy-right fees or license taxes and still maintain proportionate public service and the art of broadcasting in its best form.

I strongly urge that the performance fee be carefully considered and rejected as an insurmountable burden that would gravely confine and hold back the improvement of broadcasting in the medium and small markets.

Sincerely yours,

BERNARD DITTMAN,
President.

COMMENT LETTER NO. 88

KITN–KITI, CORP.,
Olympia, Wash., June 6, 1977.

HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

Some lawmakers have been wooed by the glittering stars of show-biz who have promoted the idea they should receive (along with the musicians and singers) (who performed a recording for sale on the wide-open record market) special fees from radio stations playing those records for the public.

Some lawmakers have seemed determined to force a giant rip-off on broadcasters (most of whom are small town radio stations—not giant TV enterprises) with this performers royalty bit. It was overwhelmingly defeated in previous sessions. Copyright law is to protect the creator of a property (author, composer, lyricist) who has no other means of compensation when his material is performed or published. We pay ASCAP, BMI music royalties for the creators. No problem. Now the performer gets his compensation by selling his records, his personal appearances. The musicians who back him up are paid for their performance in a recording studio, theater, concert hall, night club. There is no justification for another charge on top of that. Especially when radio is the means of their popularity to start with. Where would a recording artist be if he didn't have the exposure of his records on radio . . . and that's all free to him from radio broadcasters. The fees to performers and recording companies would be nothing but a giant rip-off which would in the long run effect the public's broadcast service by contributing to its decline in quality. These are the same performers and record companies that have been accused over the years of payola to radio personalities to get their records played on the air and promoted so they could make the big money in sales and personal appearances. Copyright is one thing. Performers royalty is a totally foreign concept and should not be confused with copyright royalty. It is totally unjustified to the performer and unfair to the broadcaster and the public we serve. I hope you'll oppose this nonsense.

Cordially,

DONALD F. WHITMAN.

COMMENT LETTER NO. 89

NATURAL BROADCASTING SYSTEM LTD.,
Mesa, Ariz., June 10, 1977.

MS. HARRIET OLER, *Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.*

DEAR MS. OLER: Once again Recording Artists are asking for royalties for the playing of their music on Radio and Television. It is ironic that free air-play of

their material on radio is responsible for the sale of 95 percent of their records (see enclosed article from Variety). As you are undoubtedly aware, most of these recording stars make far more money than you or I, and yet they are asking for an additional burdensome tariff on broadcast facilities.

A perusal of FCC or National Association of Broadcasters revenue figures for 1976 will reveal that contrary to popular belief, the Radio Broadcasting Industry is not that lucrative. In fact, many small and medium market broadcasters (the backbone of independent American broadcasters) are losing lots of money. A performer's royalty will help provide the crushing financial blow to many radio stations.

Please strongly oppose the introduction of a Performers Royalty Bill in the Congress.

Thank you for your time and cooperation.

Sincerely,

ERIC HAUENSTEIN,
President/General Manager.

RADIO BECOMING "BIGGEST CANCER IN THE BIZ," DISK EXECS CHARGE

HOLLYWOOD, May 28—Radio is becoming "the biggest cancer in the business," record industry execs say, with stations cutting back on number of disks played, and in turn slicing into recording company profits.

"Radio is the biggest cancer in the business—including ABC stations," said Jay Lasker, president of ABC Records. "It's impossible to establish new acts."

"Radio station playlists are getting shorter," said Herb Eiseman, prez of 20th Century Music. "They play only 20 records per week. Only an Elton John or Paul McCartney can get played automatically. It's affecting the record business and the publishers.

"We're having to put on more promotional men," Eiseman added.

Lasker said what used to be the Top 40 has become the Top 20 or Top 15, drastically reducing the chances of introducing new talent. He asserted this will eventually affect the earnings of all recording companies.

Payola-plugola investigations are partly the cause. Radio stations, desiring to "play it safe," are hesitant to have their deejays put on an unknown release, not knowing if the motivation may have been some form of payola.

MAJOR INDUSTRY THREAT

Lasker said the situation is "the most serious, single threat" to the industry. Radio is our main area of promotion—spots and tours are important, but radio represents 95 percent of our promotion.

As a result of station policies, "two years ago we had 10 promotion guys—today we have over 50. And we haven't moved ahead in our promotion—that's just staying even.

"Diskjockeys are in a defensive position—managers are questioning them when they play something different. Consequently, it's hard to break a new release," Lasker pointed out.

That, in turn, is causing companies to cut back on new talent signings as well as releases.

And they're also looking for new areas of promotion—i.e., more TV spots (even to the extent of supplementing an act's salary for something like "Midnight Special" to get them to appear on it so their album would get a promo).

COMMENT LETTER NO. 90

KCRC–KNID,
June 6, 1977.

MS. HARRIET OLER.
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: A performance royalty fee is completely out of the question from any standpoint:

1. All elements are provided compensation through the present music licensing organizations.

2. The Constitution specifically excludes performers.

3. Performers, authors, composers and publishers are adequately compensated now by the broadcast industry. Everytime one of their records is played, they get valuable advertising exposure.

4. If radio had to pay a performance fee, this station would establish a policy of playing no new recording unless we were paid to do so. There would be few new records sold in our area.

Sincerely yours,

PAT MURPHY, *Vice President.*

COMMENT LETTER NO. 91

WDIG 1450,
Dothan, Ala., June 8, 1977.

HARRIET OLER,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. OLER: I am writing to reply comment on the proposed performance royalty fee currently being considered by the copyright office.

As owner/general manager of WDIG Radio I feel this fee would not only be unjust, but would also be a completely unnecessary piece of legislation.

If there is a need for such a fee, which I seriously doubt, perhaps it would be more expedient for the music-licensing services to apply for increased rates. While such a move would be an aggravation, I'm sure it would be infinitely more justifiable than would an additional fee from another source.

Sincerely,

LAMAR TRAMMELL,
General Manager.

COMMENT LETTER NO. 92

MCKENNA, WILKINSON & KITTNER,
Washington, D.C., June 15, 1977.

(Attention of Harriet L. Oler, Senior Attorney, Office of the General Counsel.)

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: On behalf of various radio and television broadcast station licensees (as set forth in Appendix A to the attached document), I submit herewith an original and four copies of their reply comments concerning performance rights in sound recordings.

Respectfully submitted.

NORMAN P. LEVENTHAL.

Enclosures.

Before the Copyright Office, Library of Congress, Washington, D.C.

S77-6

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS
REPLY COMMENTS OF RADIO AND TELEVISION BROADCAST STATION LICENSEES

The radio and television broadcast station licensees identified in Appendix A hereto (hereinafter "Licensees"), by their attorneys, hereby submit their reply comments in the above-captioned matter.

1. In their capacity as radio and television broadcast station owners, Licensees make substantial use of musical compositions and the sound recordings embodying them. This use occurs in entertainment, documentary and other programming and in commercial advertising. As Licensees noted in their initial comments herein, in 1975, annual broadcast industry payments for music license fees had already exceeded $97,000,000. Under existing copyright law, the composer of the musical composition and the music publisher receive a compulsory license payment for use of each musical composition, whether embodied in a sound recording or not. The proposed performance royalty which is the subject

of this proceeding would create a new privilege of copyright in every separate performance in a sound recording of such musical composition (e.g., by different recording artists), over and above the copyright already received by the composer (and/or lyricist) for his authorship efforts.

2. We do not believe that Congress possesses the Constitutional power necessary to establish copyright entitlements to individuals or entities other than "authors"—such as is now being proposed for artists, arrangers, musicians and record companies.[1] Furthermore, neither the performing artist nor the record company (producer) provides a sufficiently unique contribution to the musical composition cognizable under the Constitution that is not already adequately compensated by existing contractual arrangements.

3. A performance royalty payment is also objectionable because it imposes another unwarranted and substantial cost on broadcasters for the right to provide musical entertainment and other programming to their listening public. For more than fifty years broadcasting stations have substantially benefited recording companies and artists (not to mention the composers who are already entitled to performance royalties under existing copyright) by providing essentially free and valuable exposure for new recordings.[2] To require broadcast stations to pay substantial fees to record companies and recording artists who benefit most directly under current commercial arrangements from broadcast use of sound recordings would constitute a most unfair and harmful proposition.[3]

4. The filings of other parties herein do not justify a contrary conclusion. The only meaningful substantive attempt to support the proposed performance royalty was made by the Recording Industry Association of America (RIA). However, its showing is seriously lacking in major respects.

5. The principal objective of the Constitutional copyright power—and the legislation enacted thereunder—is to "promote the progress of science and useful arts"; in other words, to increase creativity and productivity for the general public welfare. (It is *not* the basic purpose of the copyright law, as RIA suggests, to merely recompense the creator "for the commercial use of his creative product";[4] this is only of secondary importance. *Mazer* v. *Stein*, *supra*, 201, 219 (1954).)[5] Clearly, in the absence of some public benefit, there is no justification for copyright protection of any kind. In this connection, other than the bald assertion that a performance royalty in sound recordings will encourage creativity,[6] RIA offers no factually documented support for this proposition. Indeed, RIA presents no hard evidence whatsoever to combat the findings of those who have closely studied the issue that a performance royalty—over and above that which already exists—is unnecessary to spur further artistic endeavors and/or record production.[7]

6. The suggestion inherent in the performance royalty that further remuneration is necessary in order to stimulate the production of new recordings—and thus presumably contribute to the principal constitutional objective of improving the public welfare—misconceives the very nature of the recording industry.

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[1] Article I, § 8, clause 8 of the Constitution of the United States provides that Congress shall have the power—

"To promote the Progress of Science and useful Arts, by securing for limited times to *Authors and Inventors* the exclusive Right to their respective *Writings and Discoveries* . . . " (emphasis added).

The performing artist (singer, arranger or musician) does not fall within the category of "authors" and "inventors" to which Congress has been constitutionally authorized to afford copyright protection. A recording artist—in his capacity as a performer—is not an author, nor obviously is a record company in its capacity as a producer and distributor of sound recordings. Moreover, neither provides or produces a "writing" of the kind that would be Constitutionally recognized. (The National Association of Broadcasters (Comments, page 2), Amusement and Music Operators Association (Comments, page 3) and North Carolina Association of Broadcasters (Comments, page 1) are in agreement.)

[2] Such exposure frequently leads to additional substantial remuneration in the form of concert engagements, television appearances and motion picture film contracts.

[3] See Comments of National Association of Broadcasters, page 9; Comments of North Carolina Association of Broadcasters, page 4; and Comments of Amusement and Music Operators Association, page 4. These groups agree generally with the objections raised by Licensees relative to the proposed performance royalty.

[4] RIA Comments, page 11.

[5] See also *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975), quoting *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932).

[6] RIA Comments, page 23.

[7] See, e.g., "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It", Robert L. Bard and Lewis S. Kurlantzick, The George Washington Law Review, Vol. 43, No. 1, pages 152–238, November, 1974, at page 177; hereinafter cited as "Bard & Kurlantzick".

Competitive incentives among artists and record companies alone will be sufficient to insure the continuation of a flood of new recordings. This has certainly been the case to date. Neither recording artists nor the record companies producing their sound recordings need further compensation to provide the necessary incentive "to stimulate artistic creativity for the general public good." [8] Indeed, since it will be the successful recording artists that will benefit most from a performance royalty, there is nothing at all to suggest that such royalty will encourage struggling new artists to increase their creative efforts.[9]

7. The absence of any showing that the general public welfare will be advanced by the proposal relegates the case for a performer's royalty to one of economics and fairness.[10] Essentially, this boils down to whether recording artists and record companies are entitled to additional compensation at the expense of broadcasters (and jukebox operators). The available evidence strongly dictates that they are not.

8. The record business is "prospering without a public performance right",[11] as are recording artists. In fact, the recording industry is larger, in terms of total revenues, than the radio industry. In 1972, record and tape sales exceeded $1.9 billion, whereas radio revenues approached only $1.4 billion. Significantly, while radio revenues increased by 107 percent in the ten-year period from 1964–1974, recording industry revenues increased by some 164 percent.[12] Continually declining profit margins in the radio broadcast industry,[13] as well as recent Federal Communications Commission (FCC) statistics showing network radio losses in excess of $2 million in 1975, and a steady decline in the number of radio stations reporting profitable operations,[14] add further support to the conclusion that there is no basis in economics or equity for the imposition of a further tax on broadcasters [15] solely for the benefit of a select group which is already more than adequately compensated for its efforts.[16]

9. According to RIA, recording artists make creative contributions to a musical composition that are as deserving of copyright entitlements as the creative efforts for which composers and lyricists already receive royalty payments. There are several significant distinctions between the two classes, however, which justify different copyright treatment. Most importantly, as noted above, such contributions as are made by recording artists and record companies are not constitutionally protected "writings" for which copyright protection may be extended by Congress. In addition, any creative contribution that is made by record artists and producers is already adequately compensated under existing industry practices and arrangements.[17] Thus, whereas the composer usually relies solely upon his copyright entitlements for compensation, the recording artist and producer will generally look to a variety of revenue sources—record sales, concert engagements, television appearances, and the like.

10. Throughout the RIA Comments is the statement—made in a variety of contexts—that broadcasters should be required to pay for the use of recorded compositions, just as they do for all other types of program product, and a performance royalty is thus fair. What RIA conveniently, and consistently, ignores is that broadcasters *do pay* for the right to use copyrighted musical works—to the tune of some $97,000,000 annually. Thus, this is not a case of copyright owners not being compensated for their creative efforts or of broadcasters obtaining free program product. Rather, it is a situation where—in exchange for providing free valuable exposure to recording artists and companies—the broadcaster is asked to pay even more in order to provide programming to its listening public.

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[8] *Twentieth Century Music Corp., supra,* 422 U.S. at 156.

[9] See Comments of National Association of Broadcasters, page 8.

[10] While RIA asserts that "economic arguments are irrelevant" to the performance royalty issue (RIA Comments, page 22), it is principally contentions of an economic nature upon which RIA relies in urging enactment of the performance royalty (see, e.g., RIA Comments, pages 13–14, 19–20, 23–24).

[11] Bard & Kurlantzick, at 177, 237.

[12] Congressional Record-Senate, September 6, 1974, S16074. See also Bard & Kurlantzick, at 177–78.

[13] In 1968 radio profits were 11.09 percent of revenue; in 1972, they were 9.55 percent and in 1975 they were 5.3 percent. FCC Public Notice, November 8, 1976, Mimeo 73357, Table 2.

[14] According to the FCC, in 1973, 69 percent of AM and AM/FM stations reported a profit; in 1974 this percentage dropped to 65 percent; and, in 1975, the percentage dropped to 61 percent. Only 40 percent of independent FM stations reported earning a profit in 1975. FCC Public Notice, November 8, 1976, Mimeo 73357.

[15] Contrary to the assertions of RIA, radio broadcasters will not likely be able to pass on the additional royalty payments to advertisers. Bard & Kurlantzick at 211.

[16] See, e.g., RIA Comments, page 18.

[17] See ABC Comments, pages 9–12.

11. The attempt by RIA to liken the instant situation to the question of copyright payments by cable television systems is similarly inapposite.[18] In the latter case, prior to the 1976 Copyright Revision Act, cable systems—although using the copyrighted works of others for commercial purposes—paid nothing to the copyright owner.[19] Broadcasters, on the other hand, are permitted to utilize sound recordings and musical compositions only on condition that they pay a percentage of their station revenues to one of three publishing associations (ASCAP, BMI, SESAC).

CONCLUSION

In view of the foregoing considerations—

the Constitutional limitations on establishing copyright entitlements for performance of sound recordings;

the more than adequate compensation already being received by both record companies and recording artists for their efforts in producing sound recordings;

the fact that a performance royalty is not necessary to insure an adequate level of record production and musical composition;

the manifest unfairness of imposing a further substantial tax on the broadcast industry, particularly in view of the direct and monetarily significant benefit provided to the record industry by broadcast stations and the inabiltiy of many stations to absorb any increase in copyright payments;

the undersigned firmly believe that the establishment of a record public performance right is inappropriate as a matter of law and unsound as a matter of public policy.

Respectfully submitted.

By JAMES A. MCKENNA, Jr.,
ROBERT W. COLT,
NORMAN P. LEVENTHAL,

Attorneys for Radio and Television Broadcast Station Licensees.

APPENDIX A

KAGM, Klamath Falls, Ore.
KAGO, Klamath Falls, Ore.
KAKC, Tulsa, Okla.
KALE, Richland, Wash.
KASE, Austin, Tex.
KASH, Eugene, Ore.
KAYO, Seattle, Wash.
KAZY, Denver, Colo.
KBAR–AM–FM, Burley, Idaho
KBOX, Dallas, Tex.
KCAU–TV, Sioux City, Iowa
KCEY, Turlock, Calif.
KCOG, Centerville, Iowa
KCRC, Enid, Okla.
KDEN, Denver, Colo.
KDLG, Dillingham, Alaska
KDMA, Montevideo, Minn.
KDTV, San Francisco, Calif.
KEDO, Longview, Wash.
KENE, Toppenish, Wash.
KENR, Houston, Tex.
KERI, Bellingham, Wash.
KEUT, Seattle, Wash.
KEWI,, Topeka, Kans.
KEWT, Sacramento, Calif.
KFAB, Omaha, Nebr.
KFAX, San Francisco, Calif.
KFSM–TV, Fort Smith, Ark.
KFTV, Hanford, Calif.
KFUN, Las Vegas, N. Mex.
KGHO–AM–FM, Hoquiam, Wash.
KGMS, Sacramento, Calif.
KGOR, Omaha, Nebr.
KGOT, Anchorage, Alaska
KGUN–TV, Tucson, Ariz.
KIAK, Fairbanks, Alaska
KIVI–TV, Nampa, Idaho
KIXY–AM–FM, San Angelo, Tex.
KJAN–AM–FM, Atlantic, Iowa
KJEO–TV, Fresno, Calif.
KKIT, Taos, New Mex.
KKOS, Carlsbad, Calif.
KKUA, Honolulu, Hawaii
KLCO–AM–FM, Poteau, Okla.
KLTV, Tyler, Tex.
KLUE, Longview, Tex.
KLVX–TV, Las Vegas, Nev.
KLYK–FM, Longview, Wash.

[18] RIA Comments, pages 11, 18.
[19] Contrary to the assertion of RIA, cable systems do not pay broadcasters for the use of their signals. Rather, they now pay a relatively insignificant compulsory license fee to the copyright owner—in the great majority of cases this is the program producer, not the broadcast station.

APPENDIX A—continued

KLZ, Denver, Colo.
KMA, Shenandoah, Iowa
KME–TV, Los Angeles, Calif.
KMEZ, Dallas, Tex.
KMGO, Centerville, Iowa
KMHL–AM–FM, Marshall, Minn.
KMHT, Marshall, Tex.
KMPS, Seattle, Wash.
KMTV, Omaha, Nebr.
KMXT, Kodiak, Alaska
KNID, Enid, Okla.
KNIR, New Iberia, La.
KOBE, Las Cruces, N.Mex.
KOGO, San Diego, Calif.
KOME, San Jose, Calif.
KOMW, Omak, Wash.
KOPE, Las Cruces, N.Mex.
KORO–TV, Corpus Christi, Tex.
KOSA–TV, Odessa, Tex.
KOTZ, Kotzebue, Alaska
KPLU, Tacoma, Wash.
KPVI, Pocatello, Idaho
KQHU, Yankton, S.Dak.
KQIC, Willmar, Minn.
KQRS–AM–FM, Minneapolis, Minn.
KRAK, Sacramento, Calif.
KRBE, Houston, Tex.
KRIB, Mason City, Iowa
KRLT, South Lake Tahoe, Calif.
KRUS, Ruston, La.
KSEM, Moses Lake, Wash.
KSFM, Woodland, Calif.
KSND, Springfield-Eugene, Calif.
KSWT, Topeka, Kans.
KTRE–TV, Lufkin, Tex.
KTSB–TV, Topeka, Kans.
KUAC–TV–FM, Fairbanks, Alaska
KVET, Austin, Tex.
KVGB–AM–FM, Great Bend, Kans.
KVOB–AM–FM, Bastrop, La.
KVRN, Sonora, Tex.
KWAC, Bakersfield, Calif.
KWEX–TV, San Antonio, Tex.
KWLM, Willmar, Minn.
KWNC, Quincy, Wash.
KWSL, Sioux City, Iowa
KXLE–AM–FM, Ellensburg, Wash.
KXKZ, Ruston, La.
KXON–TV, Mitchell, S. Dak.
KXXX–AM–FM, Colby, Kans.
KYAK, Anchorage, Alaska
KYUK–AM–TV, Bethel, Alaska
WAFB–TV–FM, Baton Rouge, La.
WAHR, Huntsville, Ala.
WAJF, Decatur, Ala.
WAKR–AM–TV, Akron, Ohio
WAQT, Carrollton, Ala.
WAWA–AM–FM, West Allis & Milwaukee, Wis.
WBIP–AM–FM, Booneville, Miss.
WBKB–TV, Alpena, Mich.
WBMB, West Branch, Mich.
WBMJ, San Juan, P.R.
WBOP–AM–FM, Pensacola, Fla.
WBRK–AM–FM, Pittsfield, Mass.
WCCW–AM–FM, Travere City, Mich.
WCFT–TV, Tuscaloosa, Ala.
WCIU–TV, Chicago, Ill.
WCMA, Corinth, Miss.
WCMB, Harrisburg, Pa.
WCMI, Ashland, Ky.
WCOE, La Porte, Ind.
WCOR–AM–FM, Lebanon, Tenn.
WCRY, Macon, Ga.
WCSM–AM–FM, Celina, Ohio
WCTV, Thomasville, Ga.
WDAM–TV, Laurel, Miss.
WDBC, Escanaba, Mich.
WDBL–AM–FM, Springfield, Tenn.
WDDO, Macon, Ga.
WDIO–TV, Duluth, Minn.
WDXN, Clarkesville, Tenn.
WEKR, Fayetteville, Tenn.
WENO, Madison, Tenn.
WFDF, Flint, Mich.
WFHR, Wisconsin Rapids, Wis.
WFIC, Collinsville, Va.
WFIX, Huntsville, Ala.
WFYN–FM, Key West, Fla.
WGCM, Gulfport, Miss.
WGUS, Augusta, Ga.
WHBO, Tampa, Fla.
WHIE, Griffin, Ga.
WHNB–TV, New Britain, Conn.
WICD–TV, Champaign, Ill.
WICS–TV, Springfield, Ill.
WIFC, Wausau, Wis.
WINE, Brookfield, Conn.
WJMI–FM, Jackson, Miss.
WJNJ–AM–FM, Atlantic Beach, Fla.
WJOR–AM–FM—South Haven, Mich.
WKAU–AM–FM, Kaukauna, Wis.
WKEM, Immokalee, Fla.
WKIZ, Key West, Fla.
WKKE, Asheville, N.C.
WKNE, Keene, N.H.
WKNX, Saginaw, Mich.
WKPT–AM–FM, Kingsport, Tenn.
WKRG–AM–FM–TV, Mobile, Ala.
WLEQ, Bonita Springs, Fla.
WLMD, Laurel, Md.
WLNR, Lansing, Ill.
WLOI, La Porte, Ind.
WLTV, Miami, Fla.
WMAD–FM, Middleton, Wis.
WMAG, Forest, Miss.
WMDD–AM–FM, Fajardo, P.R.
WMER, Celina, Ohio
WMFQ, Ocala, Fla.
WMKC, Oshkosh, Wis.
WMQM, Memphis, Tenn.
WMTV, Madison, Wis.
WNBX–FM, Keene, N.H.
WOKJ, Jackson, Miss.
WONE, Dayton, Ohio

APPENDIX A—continued

WONS, Tallahassee, Fla.
WPIK, Alexandria, Va.
WQIN, Lykens, Pa.
WQST, Forest, Miss.
WRAB, Arab, Ala.
WRAG, Carrollton, Ala.
WRAN, Dover, N.J.
WRAU–TV, Peoria, Ill.
WRKI, Brookfield, Conn.
WRKR–AM–FM, Racine, Wis.
WRUS, Russellville, Ky.
WSAU–AM–TV, Wausau, Wis.
WSEL–AM–FM, Pontotoc, Miss.
WSFM, Harrisburg, Pa.
WSHF, Sheffield, Ala.
WSHO, New Orleans, La.
WSIL–TV, Harrisburg, Ill.
WSLG, Gonzales, La.
WTAM, Gulfport, Miss.
WTMT, Louisville, Ky.
WTOK–TV, Meridian, Miss.
WTRF–TV–FM, Wheeling, W. Va.
WTUE, Dayton, Ohio
WTUG, Tuscaloosa, Ala.
WTUP, Tupelo, Miss.
WTVO, Rockford, Ill.
WVOJ, Jacksonville, Fla.
WVOV, Huntsville, Ala.
WWCA, Gary, Ind.
WWKE, Ocala, Fla.
WWQM, Madison, Wis.
WWRW, Wisconsin Rapids, Wis.
WXLI–AM–FM, Dublin, Ga.
WXRA, Alexandria, Va.
WXTV, Paterson, N.J.
WZOB, Fort Payne, Ala.
KFOG, San Francisco, Calif.
KOA–AM–TV, Denver, Colo.
KOAQ, Denver, Colo.
WGFM, Schenectady, N.Y.
WGY, Schenectady, N.Y.
WJIB–FM, Boston, Mass.
WNGE(TV), Nashville, Tenn.
WRGB(TV), Schenectady, N.Y.
WSIX–AM–FM, Nashville, Tenn.
KEZX, Seattle, Wash.
KFMX, Eden Prairie, Minn.
KJIB, Portland, Oreg.
KRSI, Eden Prairie, Minn.
KWJJ, Portland, Oreg.
WBMG–TV, Birmingham, Ala.
WDEF–AM–FM–TV, Chattanooga, Tenn.
WHEN, Syracuse, N.Y.
WJHL–TV, Johnson City, Tenn.
WNAX, Yankton, S. Dak.
WNCT–AM–FM–TV, Greenville, N.C.
WSLS–TV, Roanoke, Va.
WTVR–AM–TV, Richmond, Va.
WUTR–TV, Utica, N.Y.

COMMENT LETTER No. 93

KTIL—BEAVER BROADCASTING SYSTEM, INC.,
Tillamook, Oreg., June 9, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter addresses the subject of a proposed performance royalty fee which your office is considering.

Beaver Broadcasting System, Inc., is opposed to such a fee. This corporation is already paying substantial fees to ASCAP, BMI, and SESAC, and a performance royalty fee would amount to a second direct tax on us. We feel such a tax is unfair and not needed. One has only to read daily newspapers or weekly newsmagazines to learn that successful artists, arrangers, and musicians are living in a style far beyond the means of nearly all the rest of us.

We urge that your office strongly oppose the enactment of any law which would impose a performance royalty fee on radio stations.

Sincerely,

RICHARD N. LARSEN,
General Manager.

COMMENT LETTER No. 94

KUHL RADIO,
Santa Maria, Calif., June 10, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I'm writing you a very short note to give some reasons why the Performance Royalties should not be recommended to Congress for action. Congress turned it down last year, and there is no more reason why it should pass this year any more than it did last year. If it was not a legitimate levy against the Broadcasting industry then, it certainly is not legitimate now.

I'm sure that you're aware of the fact that we now pay three different organizations licensing fees at the present time, and if this fee should become a reality,

it's difficult to even guess how many more of these onerous fees will be assessed against the Industry. We play their music for them so they can sell records and albums which, of course, makes them money, and they in turn want us to pay them additionally for the right to make money for them.

I'm sure that this additional fee would work a real hardship on many small market stations, just as the present fees to ASCAP, BMI, and Sesac do at the present time. If you'll check with those organizations, you'll find that many small stations, and I imagine many not so small stations, have a very difficult time paying these fees, and are seriously delinquent in their dues.

Thank you for your courtesy and attention.

Sincerely,

JAMES H. RANGER, *Manager.*

COMMENT LETTER NO. 95

INDIANA BROADCASTERS ASSOCIATION, INC.,
Indianapolis, Ind., June 10, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The Indiana Broadcasters Association opposes the proposed impositon of performers fees on the nation's radio and television stations.

Were it not for the broadcast industry, recording artists would hardly be known. Stations, as you know, now pay annual composer-publisher fees to music licensing organizations, ASCAP, BMI and SESAC. If performers are not adequately compensated for their recording talents, it seems to us that this is a problem to be settled within the recording industry.

We believe the Danielson Bill which would add performers fees to what the broadcast industry now must pay to composers and publishers is unfair.

We recognize that only hypothetical arguments are possible at this point. But, as an example, a radio station which has more than $100,000 gross revenues, but less than $200,000 annually, would be forced to pay a $750 a year performers fee.

WORX–AM–FM, in Madison, Indiana, fits that category. General Manager Richard D. Witty estimates WORX would spend that much to broadcast remotes from ten community events, i.e., city council meetings, school board bond hearings or sessions of the local department of public works.

These special programs are not necessarily attractive to sponsors and are carried as public service. It would not be fair or proper to say, should performance fees be imposed, that WORX would curtail public service remote broadcasts. But. the money must come from some place. To a small market broadcaster, $750 is no small item.

Sincerely,

PAUL L. KING, *President.*

COMMENT LETTER NO. 96

KFMN RADIO,
Abilene, Tex., June 8, 1977.

HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We cannot express our opposition to the proposed performance royalty fee strongly enough. Recording artists, arrangers and musicians are already being subsidized by the broadcast industry at no cost to them.

How many nationally known entertainers would enjoy their present fame if they had to pay for having their performances broadcast, instead of receiving what amounts to free promotional time? Virtually none!

How many prominent performers would be name "draws" without the free publicity they receive when their recorded works are broadcast? Again, virtually none! These artists already receive royalties from record sales; it is the free broadcast promotion (in the form of air play) that makes the majority of these sales possible. If you don't think so, you've already forgotten the infamous disc jockey 'payola' scandals of not too many years ago.

The existing ASCAP, BMI and Sesac fees are inequitable enough, being based as they are on gross revenues. There is no provision to deduct revenue gen-

erated from news, sports and talk shows that utilize no music, and any formula for a performance royalty computation would inevitably be just as unfair.

The ultimate loser, however, is neither the broadcast industry, the listeners, nor the artists—it is the millions of small, independent businessmen who can afford only minimal amounts of advertising. Any increase in fees would ultimately result in higher advertising rates, depriving many small businesses of the advertising they desperately need to survive in today's highly competitive market place.

Yours truly,

RICHARD BRUSSOW.
Station Manager.

COMMENT LETTER No. 97

WHBL,
Sheboygan, Wis., June 8, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: A performance royalty fee would impose upon broadcasters a second ASCAP-like fee to be distributed among recording artists, arrangers, and musicians. It would represent a substantial direct tax on the broadcasting industry, and broadcasters already pay such a fee. We are opposed to the ASCAP, BMI and SESAC fees, because we must pay cash to promote the sale of their records. They should be grateful for the free promotion, or pay us. At any rate we are opposed to a second level of government levied fees.

Best regards,

MICHAEL R. WALTON,
President and General Manager.

COMMENT LETTER No. 98

K–BON/1240 AM RADIO.
San Bernardino, Calif., June 7, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is to express my strong feelings on the possible enactment of a performers royalty fee on broadcasters.

A fee such as this proposed by recording artists, arrangers and musicians would be a direct tax on the broadcasting industry.

These performers could not afford to buy the type of free publicity and exposure they receive when thousands of radio stations in this country air their products.

The majority of these performers are in a high income tax bracket and this unfair tax on broadcasters would indirectly serve to fatten the appetite of bureaucracy and the federal government such as it is.

I strongly urge you not to recommend such a royalty fee.

Thanking you, I remain,

THOMAS M. JONES,
President.

COMMENT LETTER No. 99

MCKENNA, WILKINSON & KITTNER,
Washington, D.C., June 15, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.
(Attention Harriet L. Oler, Senior Attorney, Office of the General Counsel.)

DEAR MS. RINGER: On behalf of the American Broadcasting Companies, Inc., I submit herewith an original and four copies of its reply comments concerning performance rights in sound recordings.

Respectfully submitted.

NORMAN P. LEVENTHAL,

Enclosures.

Before the Copyright Office, Library of Congress, Washington, D.C.

(S 77-6)

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

REPLY COMMENTS OF AMERICAN BROADCASTING COMPANIES, INC.

American Broadcasting Companies, Inc. (hereinafter "ABC"), by its attorneys, hereby submits the following comments in reply to the submissions filed in the above-captioned proceeding on May 31, 1977.

1. Among others, in its capacity as radio and television broadcast station owner and in the provision of network programs and services, ABC makes substantial use of musical compositions and the sound recordings embodying them. As we noted in our initial comments herein,[1] in 1975, annual broadcast industry payments for music license fees had already reached the $97,000,000 level. At present, these payments go to both the composer of the musical composition and the music publisher. Under existing copyright law, these indiivduals and entities receive a compulsory license payment for use of each musical composition, whether embodied in a sound recording or not. The proposed performance royalty which is the subject of this proceeding would create a new privilege of copyright in every separate performance in a sound recording of such musical composition (e.g., by different recording artists), over and above the copyright already received by the composer (and/or lyricist) for his authorship efforts. No justification exists for enlarging the copyright entitlements in sound recordings beyond the substantial benefits already accorded the composers and publishers of musical compositions.

2. In our view, nothing presented by the other parties submitting comments in this proceeding justifies a contrary conclusion.[2] Indeed, the only meaningful substantive attempt to support the proposed performance royalty was made by the Recording Industry Association of America (RIA).[3] However, its showing is seriously lacking in major respects.

3. As we noted in our opening comments, the principal objective of the Constitutional copyright power—and the legislation enacted thereunder—is to "promote the progress of science and useful arts"; in other words, to increase creativity and productivity for the general public welfare.[4] (It is *not* the basic purpose of the copyright law, as RIA suggests, to merely recompense the creator "for the commercial use of his creative product;[5] this is only of secondary importance. *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).) Clearly, in the absence of some public benefit, there is no justification for copyright protection of any kind. In this connection, other than the bald assertion that a performance royalty in sound recordings will encourage creativity,[6] RIA offers no factually documented support for this proposition. Indeed, RIA presents no hard evidence whatsoever to combat the findings of those who have closely studied the issue that a performance royalty—over and above that which already exists—is unnecessary to spur further artistic endeavors and/or record production.[7]

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[1] Comments of American Broadcasting Companies, Inc., S77-6, May 31, 1977, page 2; hereinafter cited as "ABC Comments".

[2] In fact, many of the parties filing comments agree generally with the objections raised by ABC relative to the proposed performance royalty. See Comments of National Association of Broadcasters, page 9; Comments of North Carolina Association of Broadcasters, page 4; and Comments of Amusement and Music Operators Association, page 4.

[3] BMI supports a performance royalty *only* if it does not lead to an erosion of existing payments to publishers and composers. The Recording & Tape Association of America, supporting a compulsory licensing scheme, generally addresses the problems attendant to record duplication.

[4] See ABC Comments, pages 6-7. The principal philosophy was recently summarized by the United States Supreme Court:

"The immediate effect of our copyright law, is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. *'The sole interest* of the United States *and the primary object* on conferring the monopoly', this Court has said, *'lie in the general benefits derived by the public* from the labors of authors.'" (Emphasis added.)

Twentieth Century Music Corp. v. *Aiken*, 422 U.S. 151, 156 (1975), quoting *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932).

[5] RIA Comments, page 11.

[6] RIA Comments, page 23.

[7] See, e.g., "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving it", Robert L. Bard and Lewis S. Kurlantzick, The George Washington Law Review, Vol. 43, No. 1, pages 152-238, November, 1974, at page 177; hereinafter cited as "Bard & Kurlantzick". As found by Bard & Kurlantzick, "popular record products and performers do not seem to require a public performance right to provide adequate incentives for maintaining popular record production and dissemination at existing levels." (*id.*)

4. The absence of any showing that the general public welfare will be advanced by the institution of a performance right in copyrighted sound recordings relegates the case for a performer's royalt yto one of economics and fairness.[8] Essentially, this boils down to whether recording artists and record companies are entitled to additional compensation at the expense of broadcasters (and jukebox operators). The available evidence strongly dictates that they are not.

5. The record business is "prospering without a public performance right," [9] as are recording artists. Continually declining profit margins in the radio broadcast industry,[10] as well as recent Federal Communications Commission (FCC) statistics showing network radio losses in excess of $2 million in 1975, and a steady decline in the number of radio stations reporting profitable operations,[11] add further support to the conclusion that there is no basis in economics or equity for the imposition of a further tax on broadcasters [12] solely for the benefit of a select group which is already more than adequately compensated for its efforts.

6. According to RIA,[13] recording artists make creative contributions to a musical composition that are as deserving of copyright entitlements as the creative efforts for which composers and lyricists already receive royalty payments. There are several significant distinctions between the two classes, however, which justify different copyright treatment. Most importantly, as noted above, such contributions as are made by recording artists and record companies are not constitutionally protected "writings" for which copyright protection may be extended by Congress. In addition, any creative contribution that is made by record artists and producers is already adequately compensated under existing industry practices and arrangements.[14] Thus, whereas the composer usually relies solely upon his copyright entitlements for compensation, the recording artist and producer will generally look to a variety of revenue sources—record sales, concert engagements, television appearances, and the like.

7. Throughout the RIA Comments is the statement—made in a variety of contexts—that broadcasters should be required to pay for the use of recorded compositions, just as they do for all other types of program product, and a performance royalty is thus fair. What RIA conveniently, and consistently, ignores is that broadcasters *do pay* for the right to use copyrighted musical works—to the tune of some $97,000,000 annually. Thus, this is not a case of copyright owners not being compensated for their creative efforts or of broadcasters obtaining free program product. Rather, it is a situation where—in exchange for providing free valuable exposure to recording artists and companies—the broadcaster is asked to pay even more in order to provide programming to its listening public.

8. The attempt by RIA to liken the instant situation to the question of copyright payments by cable television systems is similarly inapposite.[15] In the latter case, prior to the 1976 Copyright Revision Act, cable systems—although using the copyrighted works of others for commercial purposes—paid nothing to the copyright owner.[16] Broadcasters, on the other hand, are permitted to utilize sound recordings and musical compsitions only on condition that they pay a percentage of their station revenues to one of three publishing associations (ASCAP, BMI, SESAC).

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[8] While RIA asserts that "economic arguments are irrelevant" to the performance royalty issue (RIA Comments, page 22), it is principally contentions of an economic nature upon which RIA relies in urging enactment of the performance royalty (see, e.g., RIA Comments, pages 13–14, 19–20, 23–24).

[9] Bard & Kurlantzick, at 177, 237.

[10] In 1968 radio profits were 11.09 percent of revenue; in 1972, they were 9.55 percent and in 1975 they were 5.3 percent. FCC Public Notice, November 8, 1976, Mimeo 73357, Table 2.

[11] According to the FCC, in 1973, 69 percent of AM and AM/FM stations reported a profit; in 1974 this percentage dropped to 65 percent; and, in 1975, the percentage dropped to 61 percent. Only 40 percent of independent FM stations reported earning a profit in 1975. FCC Public Notice, November 8, 1976, Mimeo 73357.

[12] Contrary to the assertions of RIA, radio broadcasters will not likely be able to pass on the additional royalty payments to advertisers. Bard & Kurlantzick at 211.

[13] See, e.g., RIA Comments, page 18.

[14] See ABC Comments, pages 9–12.

[15] RIA Comments, pages 11, 18.

[16] Contrary to the assertion of RIA, cable systems do not pay broadcasters for the use of their signals. Rather, they now pay a relatively insignificant compulsory license fee to the copyright owner—in the great majority of cases this is the program producer, not the broadcast station.

CONCLUSION

In these circumstances, ABC urges the Register of Copyrights to recommend to Congress that Section 114 of the Copyright Act (17 U.S.C. § 114) be retained in its present form and that a new performance royalty in sound recordings not be established.

Respectfully submitted.

AMERICAN BROADCASTING COMPANIES, INC.,
By EVERETT H. ERLICK.
ROBERT J. KAUFMAN.
MARK D. ROTH.
LETTICE TANCHUM.

COMMENT LETTER NO. 100

ARENT, FOX, KINTNER, PLOTKIN & KAHN,
Washington, D.C. June 15, 1977.

HARRIET L. OLER, ESQ.,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: On behalf of the National Radio Broadcasters Association, a non-profit trade association representing approximately 1,000 AM and FM radio broadcast stations located throughout the United States, submitted herewith are an original and four copies of Reply Comments in response to the Notice of Inquiry dated April 21, 1977 concerning performance rights in sound recordings.

Sincerely,

THOMAS SCHATTENFIELD.

Enclosures.

Before the Copyright Office, Library of Congress, Washington, D.C.

(S 77-6)

IN THE MATTER OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

REPLY COMMENTS OF THE NATIONAL RADIO BROADCASTERS ASSOCIATION

1. The National Radio Broadcasters Association ("NRBA"), a non-profit trade association representing approximately 1,000 AM and FM radio broadcast stations throughout the United States, strenously opposes any legislation which would require radio broadcast stations to pay record companies and/or performers for giving airplay to their product. In a free economy, government intrusion should be limited to those instances where, for whatever reason, factors inhibit the free play of market forces to the disadvantage of one or more segments of the economy. Such a situation certainly does not exist with respect to the use by radio broadcast stations of record industry product.

2. Most radio stations feature music on records and tapes throughout their broadcast day. Since stations rely on the product of record companies, without a knowledge of the forces at play in this particular market situation, it is not illogical to consider requiring those stations to pay a reasonable fee for the use of that product. However, an intellectual solution to an intellectualized area of concern may make for an interesting discussion, but that is all. To require radio stations to pay a stipend to the record companies and/or performers for the broadcast of records and tapes is a solution to a problem which does not exist. While broadcast stations do not pay in monies for use of the product, they provide something far more valuable—exposure of that product to the listening and buying public.

3. Over the past twenty to thirty years, with the advent of television and the resultant change in the formats utilized by radio stations as well as the development of many new radio stations, the growth of the record industry has been phenomenal. As noted above, most radio stations rely on records and tapes to entertain the listening audience. The record companies as well as the per-

formers affirmatively recognize that the success is highly dependent upon securing airplay from radio stations by making free records available to stations and hiring promotion and public relations personnel to ingratiate themselves with radio station employees so as to get more airplay, thus providing a showcase to better merchandise their product. For the record companies, airplay results in greater profits through the sale of records. From the performers' standpoint, airplay means better contracts with the record companies as well as lucrative television, nightclub and concert dates. The illegal abuses in the industry known as "payola" and now "drugola" stand as not so mute testimony to the importance to record companies and the performers of securing maximum exposure for their product. In such a marketplace, it would be anomalous to require radio stations to pay a stipend to the record companies and/or performers, when in fact, if it were legal, the record companies and performers would be willing to pay the radio stations for the exposure.

WHEREFORE, the National Radio Broadcasters Association respectfully submits that to require radio stations to pay either record companies and/or performers for performance rights would be injecting a factor in the competitive marketplace which is not needed.

Respectfully submitted.

ARENT, FOX, KINTNER, PLOTKIN
AND KAHN,
THOMAS SCHATTENFIELD,
Counsel for the National Radio Broadcasters Association.

COMMENTER LETTER NO. 101

Before the Copyright Office, Library of Congress

(S 77-6)

IN THE MATTER OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

REPLY COMMENTS

Mid America Media ("Mid America"), by its attorneys, hereby submits its reply to comments filed in response to the Copyright Office's Notice of Inquiry published on April 27, 1977, in Federal Register. See 42 Fed. Reg. 21527.

1. Mid America Media is the flag station name for five radio broadcasting licensees; Mid America Audio-Video, Inc., the licensee of AM broadcast station WKAN, Kankakee, Illinois, and FM broadcast station KRVR, Davenport, Iowa: Mid America Radio, Inc., the licensee of AM broadcast station WIRE and FM broadcast station WXTZ, both of Indianapolis, Indiana; Mid America Media, Inc., the licensee of AM broadcast stations WIRL, Peoria, Illinois, and WTRX, Flint, Michigan; Mid America Broadcasting, Inc., the licensee of AM broadcast station WQUA, Moline, Illinois, AM broadcast station KIOA, and FM broadcast station KMGK, both of Des Moines, Iowa; and Kankakee, TV Cable Co., the licensee of FM broadcast station WSWT, Peoria, Illinois.

2. The question posed under the Notice is what position should the Copyright Office of the Library of Congress take in a report to the Congress by January 3, 1978, on "whether Section 114 [of the newly enacted copyright law, Pub. L. 94-553] should be amended to provide for performers and copyright owners any performance rights in [copyrighted sound recordings] material." 42 Fed. Reg. at 21528.

3. Mid America, as the owner and operator of ten (10) radio broadcast stations, is a person whose interests would be adversely affected by this proceeding. Accordingly, Mid America is eligible to file these Reply Comments.

4. Mid America has reviewed the Comments filed on May 31, 1977, by the National Association of Broadcasters. For the reasons set forth in those Comments, and the reasons herein, Mid America strongly urges that the Copyright Office recommend to Congress that performance rights of any type in sound recordings not be created.

5. Mid America's long term position on this matter is reflected in a portion of a letter dated July 19, 1974, to Senator Charles H. Percy from Mid America's President Burrell L. Small:

* * * * * * *

"We broadcasters are already paying a considerable portion of our revenue in copyright fees to ASCAP, BMI, and SESAC. The premise that the broadcasters owe the performers money for playing their records is as irrational as it would be for the broadcasters to impose a fee on the performers for broadcasting their records. The records from which performers receive their royalties are sold in huge quantities, principally because the broadcasters play their records and make them popular. The performers could not live without the broadcasters. It is also true that the broadcasters could not live without the performers. Therefore, a tax on one of them for copyright is unfair."

* * * * * * *

6. Mid America is in full agrement with the NAB, and so many other broadcasters, that it would be unconstitutional, unlawful, arbitrary, and capricious for the Congress to attempt to create full or limited performance rights in favor of either performers, copyright owners, or both.

7. To summarize Mid America's position, we submit:

(*a*) Article I, Section 8, Clause 8 of the United States Constitution gives the Congress power only to grant exclusive rights to authors and inventors of their respective writings and discoveries. Performers of sound recordings are not "authors" or "inventors" and therefore Congress is without the power to grant performance rights;

(*b*) A performance right would be inconsistent with a fundamental premise of the Copyright Review Act, i.e., protection for "original works of authorship" which performances are not;

(*c*) A performance royalty, on top of ASCAP, BMI, etc. fees and ever increasing regulatory expenses, etc. will adversely affect Mid America's stations to the likely point either that public service programs will have to be sacrificed or the recordings which generate the fees to the performers (and create the costs to the stations) will be reduced or eliminated;

(*d*) The compensation of singers and musicians *per se* is not a cognizable matter and in any event performance royalties provide no reasonable assurance that they would be an effective solution.

(*e*) If performers are due performance royalties, in order to avoid a fundamental inequity, broadcasters would have to be accorded the equivalent of "popularization royalties". For without the free substantial marketplace exposure which broadcast stations give to a copyright owner's work and a performer's rendition, the copyright owner and/or the performer would have to pay for such exposure or risk the certain fate that the copyright owner's work would not through reproduction and sale generate the revenues produced today and would not insure the same level of popularity and acceptance which today earns these performers the revenues generated now.

Based on the foregoing, Mid America Media respectfully urges the Copyright Office of the Library of Congress to review these reply comments and to adopt the position set forth herein in its report to the Congress.

Respectfully submitted.

MID AMERICA MEDIA,
By RICHARD R. ZARAGOZA,
Attorney.

COMMENT LETTER NO. 102

KIRKLAND, ELLIS & ROWE,
Washington, D.C., June 15, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: In response to the notice contained in the Federal Register, April 27, 1977, the following reply comments concerning the inquiry into performance rights in sound recordings are filed on behalf of the manufacturers of coin-operated phonorecord players: Rock-Ola Manufacturing Corp., 800 North Kedzie Avenue, Chicago, Illinois 60603; Seeburg Products Division, 1500 North Dayton Street, Chicago, Illinois 60622; Rowe International, Inc., 1550 Union Avenue, S.E., Grand Rapids, Michigan 49507.

In your consideration of this matter, the manufacturers urge serious consideration be given to constitutional law problems with a performance right copyright, raised in the comments submitted by the National Association of Broadcasters, the American Broadcasting Companies, and the Amusement and Music Operators Association. Such "performance" rights could extend copyright control to a range of parties, such as record companies, technicians, background musicians, and others, who may well have not contributed to the "originality" to the copyrighted work which is the touchstone of protection under the Constitution's copyright clause.

The manufacturers also urge that the Copyright Office carefully assess the possible impact of additional royalty fee requirements upon the operators of jukeboxes. This industry of small businessmen will soon be faced for the first time with an $8.00 per jukebox annual fee, and an increased mechanical royalty payment, which will result in royalty payments by the operators of over $7 million per year. It is clear from the initial comments that the parties with real interest in the performance rights in question here are the record manufacturers and the broadcasters; resolution of their controversy should not result in an unconsidered and inapporpriate burden on an unrelated industry of small businessmen.

Sincerely yours,

STEPHEN A. HERMAN.

COMMENT LETTER NO. 103

WMAR STEREO 106.
Baltimore, Md., June 13, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We want to go on record with you as being in complete opposition to a performance royalty fee. We already pay a substantial amount to ASCAP, BMI and SESAC for performance rights. Since we are a marginal operation from a profit standpoint, additional fees would be very burdensome.

As you are well aware performers would not succeed without exposure on radio. For them to get additional fees is biting the hand that feeds them.

We hope you will recommend against it.

Sincerely,

R. C. EMBRY,
General Manager.

COMMENT LETTER NO. 104

WBOC–TV–AM–FM,
Salisbury, Md., June 14, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR COUNSELOR: Regards the 1976 Copyright Act's provision for a study of performance royalty fees, the process of payment of performance fees already exists and seems to be doing very well without interference.

In the existing business process, performers in films, tapes, recordings negotiate their contracts for rates of pay to cover all uses of the material. Buyers of the materials pay for all uses not expressly excluded by contract.

Plays of the recordings on the air to benefit talent and manufacturer have been accepted as quid pro quo for the use of the recordings by the stations.

In the late 1930's, early 1940's the record companies and/or talent moved to collect for broadcast plays. The stations and music distributors (not commercial recording companies) set up and operated their own recording and licensing organizations to test the realities and economics of the question.

The recording companies came back and asked, begged for the broadcasting of their discs, even paid station personnel to see that their materials be aired.

Isn't it ironic that royalty demands are orchestrated at the same time the pleas and payments are made to broadcast management and talent for play of the material?

Let the market place control! If particular performance be of specific value to the user let the owner and the user establish a price in the give and take of business.

Sincerely,

SAMUEL S. CAREY.

COMMENT LETTER NO. 105

SYDNEY, AUSTRALIA.
May 31, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Further to my cable dated May 30, 1977, I enclose herewith five copies of my comments in reply to the Notice of Inquiry regarding Performance Rights in Copyrighted Sound Recordings.

Yours sincerely,

J. A. L. STERLING.

PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS—COMMENTS IN REPLY TO NOTICE OF INQUIRY, FEDERAL REGISTER, APRIL 27, 1977 (PP. 21527–28)

Further to my cable dated May 30, 1977, the following comments are respectfully submitted:

Enjoyment of Rights

Performers should enjoy the exclusive right to authorize the public performance of their recorded performances. The right should be subject to a minor exception (use of short extracts for news reporting), and in certain cases (of which full details are given in the text of a proposed law establishing the rights of performers, published in ASPAC Journal No. 2, April 1976) the right should be limited, through compulsory licensing, to entitlement to remuneration: these cases include public performance by means of commercially published phonorecords.

Determination of Remuneration Rates in Compulsory Licensing

Remuneration rates should be determined by the Copyright Royalty Tribunal. Payments to performers should be subject to deduction of administrative expenses and of a contribution to a National Fund for the Performing Arts, the amount of the contribution to be fixed by the Tribunal. Allocations to entitled record producers should be made from the Fund contributions, in accordance with Tribunal adjudication, and any balance remaining should be used for promotion of the performing arts, e.g. in the making of new recordings and the training of young performers.

The Tribunal should be empowered to exclude from the ambit of the compulsory licensing provisions any use of a phonorecord in any particular case where the Tribunal is satisfied that such use would prejudice the livelihood of performers.

Implementation

The pattern of section 116 of Public Law 94–553 should provide the basis of a practical mechanism for the administration of the rights.

The beneficiary identification and distribution systems adopted should take account of international recognition of the rights and of future developments so that remuneration shares can be paid to entitled performers throughout the world.

J. A. L. STERLING.

May 31, 1977.

COMMENT LETTER NO. 106

INTERNATIONAL PERFORMING ARTISTS' RECORDINGS LIMITED,

London, May 30, 1977.

HARRIET L. OLER,
Senior Attorney, General Counsel Office, Copyright Office, Library of Congress, Washington, D.C.

WITH COMPLIMENTS OF THE DIRECTORS

Enclosed are comments and information in reply to Notice of Information re Performance Rights in Copyrighted Sound Recordings (Federal Register, April 27, 1977 (pp. 21527–28).

PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS—COMMENTS AND INFORMATION IN REPLY TO NOTICE OF INQUIRY, FEDERAL REGISTER, APRIL 27, 1977 (PP. 21527–28)

Payment of sound recording performance royalties to each performer participating in a recording can be implemented by a distribution mechanism based on the following elements:

1. Computerization based on a numbering system which codes details of each participating performer, each claim of entitlement, each recording and each beneficiary, together with Authorized Duplicate Number (ADN) allocated to each edition of a sound recording.

2. Registration of names and addresses of individual performers and of choirs, groups and orchestras, and issue of embossed cards to each registrant, showing registration number.

3. Recordation at recording sessions of performers' registration numbers and recording details.

4. Authorization for payment of royalty to claimants.

Printing of the ADN on phonorecord labels provides:

(*a*) simple logging reference for users, who need only show ADN and track number used on returns;

(*b*) key to distribution process: and

(*c*) effective means of control of right to reproduce copyrighted sound recordings.

The requisite numbering system has been fully elaborated, can be used internationally, and is available by license through INTERPAR for use in any country.

Respectfully submitted.

HELEN HOLMES,
J. A. L. STERLING, LL.B.,
Directors.

COMMENT LETTER NO. 107

SOUTH DAKOTA BROADCASTERS ASSOCIATION,
Sioux Falls, S. Dak., June 13, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Our Association would like to go on record as opposing that Congress enact a performance royalty fee to be paid by Broadcasters.

Sincerely,

VERL THOMSON.

COMMENT LETTER No. 108

PENNSYLVANIA ASSOCIATION OF BROADCASTERS,
Harrisburg, Pa., June 14, 1977.

DIRECTOR,
Copyright Office, Library of Congress, Washington, D.C.

DEAR SIR: On behalf of the PAB, I am enclosing herewith brief comments to the proposal considering the establishment of performance rights in sound recordings now being considered by your Copyright Office.

This Association, like its counterpart on the National level—the National Association of Broadcasters, represents the interests of radio and television stations licensed to the Commonwealth of Pennsylvania by the Federal Communications Commission. It is assumed that we will be advised of further proceedings in the above matter and its eventual disposition.

Very truly yours,

ROBERT H. MAURER.

Enclosures.

Before the Copyright Office, Library of Congress

S–77–6

IN THE MATTER OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

COMMENTS OF THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS

The Pennsylvania Association of Broadcasters (PAB), by its Counsel, hereby joins in urging that comments recently filed by the National Association of Broadcasters in the above-entitled proceeding be considered for and on behalf of the membership of this Association.

PAB fulfills the same role as the National Association of Broadcasters attempts to portray for its member stations but primarily on a State level. However, since the proposal under consideration by the Copyright Office transcends any Federal issue and directly and substantially affects our industry's economic viability, especially of our medium and smaller stations, it is deemed incumbent upon PAB to speak out on this issue.

PAB finds it most difficult to supplement the comments of the National Association of Broadcasters in any meaningful or additional manner. Consequently, rather than burden the Copyright Office with any similar presentation, PAB requests that the comments of the National Association of Broadcasters be, and they are hereby incorporated in this document by reference, considered as also representing the views of the members of this Association.

PAB, therefore, urges the Copyright Office to fully appreciate the legal, as well as practical, reasoning set forth in opposing the inclusion of a performance right in sound recordings in the present Copyright Law and urges the Copyright Office to conclude it would not be appropriate to recommend such a right be enacted into law by the Congress of the United States.

Respectfully submitted.

ROBERT H. MAURER, *Counsel.*

KDBM RADIO,
Dillon, Mont., June 13, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: It has come to my attention that the office of copyright is considering the inclusion of performers' royalties in the copyright act. I want to go on record as opposing any such action, as the Radio Industry is the one who

gives exposure to the performers, and they are the ones who should be paying us as an industry, giving them the exposure they have received. Where would they be without the exposure they receive, nobody, would know about them, or care for them. They, the performers should be paying a royalty of 2.5 percent to the radio industry to be paid back to the individual stations thru an organization yet to be set up for making payments to Radio Stations. Thank you for reading these comments, and giving me an opportunity to express my views.

BURT OLIPHANT,
Owner-Manager.

COMMENT LETTER NO. 110.

UTAH BROADCASTERS ASSOCIATION,
Provo, Utah, June 14, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The board of directors have gone on record in full opposition of the payment of Performance Royalty Fees by the broadcast stations of the United States, and with good reason.

Radio and television stations in the United States are already over burdened with the payment of more than 3 percent of their total net income as copyright performance rights to ASCAP, BMI and SESAC. In 1976 this amounted to more than 17 million dollars.

Many of the composers who receive these funds for popularizing and playing their music are also the record performers of this music. Here they are urging the broadcasters to play their records which in turn creates thousands of sales and a great financial return to the performers and composers.

It just doesn't make sense to hit the broadcasters again for another payment for benefitting the performers on these records.

Please let us put this matter to rest and concede that the radio and television stations of the United States are already doing more than they should to benefit the composers and performers of recorded music. The broadcast industry just can't withstand another financial assessment taken from their income regardless of the profitability of their operations.

It is also beyond our understanding as to how such proposed performance royalty fees would be collected and equitably distributed.

Respectfully,

EARL J. GLADE, Jr.,
Executive Director.

COMMENT LETTER NO. 111

SOUTH CAROLINA BROADCASTERS ASSOCIATION,
Columbia, S.C., June 13, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Please be advised that on behalf of the South Carolina Broadcasters Association, we oppose the imposition of Performance Royalty Fees for Broadcasters. The reason being that the Performance Royalty Fee would impose an additional fee which we feel is already covered through licenses with various music license organizations such as ASCAP and BMI. As you know, these music license organizations collect and distribute royalties among recording artists, arrangers and musicians. The imposition of a performance royalty fee would represent a substantial direct tax on the broadcasting industry.

Accordingly, and again, we would appreciate your recommending against the enactment of such a fee to Congress.

Respectfully submitted,

JAMES V. DUNBAR, Jr.

COMMENT LETTER NO. 112

THE NUTMEG BROADCASTING CO.,
Willimantic, Conn., June 14, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The Nutmeg Broadcasting Company would like to comment on the study your office is presently making on Performance Royalty Fees. Our company operates four very small market radio stations in the State of Connecticut. The radio broadcasting business at our level is an extremely marginal operation. Many stations our size operate either with very small profit margins or at a loss. Two of our four stations are presently loss operations. The enactment of Performance Royalty Fees would be a grave economic hardship on stations of our size. We could not recover these additional fees by raising rates. Should these fees be enacted, the only way we could afford to pay them would be by reducing service to the public.

This potential hardship is made even more difficult for us to accept in light of the fact that recording artists, arrangers, and musicians are already well compensated for the musical product they produce. They receive this substantial compensation by virtue of the fact that radio stations like ours play their records. We just cannot view this as a hardship or a needy situation.

The Nutmeg Broadcasting Company submits that the enactment of Performance Royalty Fees on small market radio stations would be a grave economic burden on our industry. There is no broad based public sentiment in favor of this issue and we urge the copyrights office not to favor enactment of these fees.

Thank you very much.

Sincerely,

MICHAEL C. RICE,
President.

COMMENT LETTER NO. 113

STEREO ROOK 99,
Springfield, Mo., June 8, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIET: It is my wish to register with you my deepest concern with the proposed performance royalty fee to be levied on the broadcasting industry.

Although our industry has lived with ASCAP and their fees for years, additional monies for similar purposes appears unreasonable. Radio sells the music. Plain and simple. It is radio that builds the popularity of artists and their art. Our station and others like it create the awareness and the enthusiasm needed for record sales. Why should the broadcast industry be penalized by recording artists, arrangers, and musicians . . . the very same people we are benefiting?

Radio's two main objectives are to inform and entertain. Please . . . no more fees for doing our job.

Sincerely,

BRIAN DANZIS,
Sales Executive.

COMMENT LETTER NO. 114

REESE C. ANDERSON & ASSOCIATES,
Salt Lake City, Utah, June 14, 1977.

OFFICE OF THE GENERAL COUNSEL,
Copyright Office, Library of Congress,
Washington, D.C.
(Attention of Harriet Oler, Senior Attorney.)

GENTLEMEN: The situation as it exists is the broadcast or programming by the electronic media. A part of this programming is music. Fees are charged for advertising messages that are integrated into the programming. The recording ar-

tists, arrangers and musicians who prepare this music for broadcast claim that they should have a part of the advertising fee since they have contributed to the programming.

In the past broadcasters received compensation from the advertisers. The performing artists and arrangers have received their fees from the recording industry and certain licensing agents. In the past this has been based on the rates charged by the broadcasters. The musicians have been compensated through the recording companies, the licensing agents and artists for personal appearances. Each has been compensated in keeping with their own abilities to do their own thing. A part of the compensation of artists, etc. is already being paid by broadcasters through licensing agents and recording royalties.

The artistic end, in part, the performers, arrangers and musicians, now feel that they are entitled to a part of the compensation received by the broadcaster. The ordinary channels of compensation through the recording companies and licensing agents are no longer satisfactory.

In the past the means of extracting and distributing compensation has taken on various forms through various acts introduced into Congress. The number one introducer in Congress was Senator Hugh Schott of Pennsylvania, who has now retired. Others have contributed to the various attempts. None have presented an acceptable and adoptable legislation.

Proposed legislation in the past has been objectionable for specific reasons. At present the matter is a matter of study. The reasons for objections and unworkability of the products of the past continue even though they may be introduced after further study and further attempts at a workable solution. This does not make the various means any more appropirate than the attempts in the past.

There has always been a conflict between the two groups on the basis of who makes the music popular. Who does the most for whom.

As the system works at present the broadcast industry receives recordings of comparatively unknown compositions and unheard of performers arranged by unheard of arrangers. Through the broadcast media both the composition, the artist and the arrangement are made popular. From this popularity the recording companies gain from the sale of records. The recording companies then by way of royalty pay the performing artists, the musicians and the arrangers. This payment may be direct to the musicians and arrangers, or through the artists. Additionally, the performing artists use their popularity in establishing their fees for personal appearances. The musicians and arrangers accompany the performing artists on personal appearances. The effect of the system is to reward those who merit reward to the extent that they merit the reward.

That the foregoing is the manner in which the system does work is evidenced by the "payola" scandals. It is further evidenced by the FCC concern with the payola problem. It should be apparent from this alone that the broadcast industry is creating or establishing the basis for the reward of the performing artists, the musicians and the arrangers. The artists, etc. pay individuals in the broadcast industry to play the records.

The attempt to legislate another system of reward to the performers, musicians and arrangers creates a system that is duplication. The duplication is unhealthy and uneconomical. Further, it is usually an attempt to create a system that imposes a tax upon the broadcast industry that in the past has usually taken the form that does not consider the creativeness of the broadcaster.

The ability of the broadcasters to put together programming that builds audiences, attracts advertisers and thereby creates and generates income is probably the most substantial factor in the generation of such income. Two or more stations in the same city can play the same music, performed by the same artists, and performed by the same musicians, arranged by the same arrangers; one will succeed, the other will fail. Or, one may succeed to a degree and the other to a partial degree. There is no way that there can be a fair determination of the contribution of the performing artist, the musician or the arranger that will reward these persons on the basis of their ability other than through the royalties received through the recording industry.

Any attempt to legislate additional reward to the performing artists, musicians or arrangers should be based on the merit of the individuals. Any other attempt would be to legislate income to these persons without consideration of their merit. These attempts are also attempts to legislate income to the artists at the expense of the radio or broadcasting industry without any basis for the claim. These attempts are contrary to the accepted principles of reward in a free society.

The only basis for any claim by the performing artists, musicians or arrangers would be to the extent that they contribute to the popularity of the particular station involved and the income received by that station. The only means of establishing that relationship in actuality is through the popularity of the particular recording involved. There is no direct relationship between the popularity of the station and the music it plays. Consideration would have to be given as to the prime nature of the particular station involved as to whether it was (1) classical, (2) news, (3) talk, or (4) a combination of the foregoing.

A far more direct relationship between income and music can be established between artists, etc. and juke boxes, syndicated music programming, background music, and music or record services. There is no sound reason for selecting broadcasting and discriminating against the broadcaster.

For the foregoing reasons it is strongly recommended that there be no legislative attempt to compensate the performing artists, musicians or arrangers. That existing means of compensation are adequate. That further duplication of means of compensation would be wasteful and an unwarranted burden on broadcasters.

Respectfully submitted.

REESE C. ANDERSON,
Attorney for KWHO Radio and KWHO–FM.

COMMENT LETTER NO. 115

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 14, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This is written in behalf of Mr. Richard Brussow, Station Manager of KFMN, P.O. Box 473, Abilene, Texas.

I am enclosing a copy of his recent letter to me, as well as a copy of the letter forwarded to you on the same date, June 8. He is, as you will note, deeply concerned about the prospect of performance royalty fees as it would create a hardship for his station.

As you are in the process of considering all comments before making a final recommendation to Congress, I will greatly appreciate your consideration of his views in this matter.

With my thanks and good wishes, I remain,

Sincerely yours,

OMAR BURLESON.

Enclosure.

KFMN RADIO,
Abilene, Tex., June 8, 1977.

Congressman OMAR BURLESON,
17th Texas District, House Post Office, Washington, D.C.

DEAR CONGRESSMAN BURLESON: Enclosed is a copy of a letter we have written to the Copyright Office expressing our opposition to a proposed performance royalty fee that may be coming before Congress in the near future.

We oppose this fee, generally, because we feel the broadcast industry is already subsidizing these artists in the form of billions of dollars in free promotion they could not get anywhere else, or any other way.

We are also concerned about the effect such a fee would have on the many small advertisers, who just can't afford larger budgets. This fee would, naturally, be passed along to advertisers in the form of higher spot rates, depriving many small businesses of the advertising they need to stay in business. It's not going to affect the larger business as they can up prices to cover the increased advertising cost—so who ultimately pays this fee? You and I do, as consumers.

Perhaps we should suggest an alternate proposal. Rather than getting a performance royalty fee, how about legislation requiring them to pay commercial rates for having their performances promoted (played).

We hope you will continue your opposition to such unfair legislation.

Yours truly,

RICHARD BRUSSOW,
Station Manager.

KFMN RADIO,
Abilene, Tex., June 8, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We cannot express our opposition to the proposed performance royalty fee strongly enough. Recording artists, arrangers and musicians are already being subsidized by the broadcasting industry at no cost to them.

How many nationally known entertainers would enjoy their present fame if they had to pay for having their performances broadcast, instead of receiving what amounts to free promotional time? Virtually none!

How many prominent performers would be name "draws" without the free publicity they receive when their recorded works are broadcast? Again, virtually none! These artists already receive royalties from record sales; it is the free broadcast promotion (in the form of air play) that makes the majority of these sales possible. If you don't think so, you've already forgotten the infamous disc jockey "payola" scandals of not too many years ago.

The existing ASCAP, BMI and Sesac fees are inequitable enough, being based as they are on gross revenues. There is no provision to deduct revenue generated from news, sports and talk shows that utilize no music, and any formula for a performance royalty computation would inevitably be just as unfair.

The ultimate loser, however, is neither the broadcast industry, the listeners, nor the artists—it is the millions of small, independent businessmen who can afford only minimal amounts of advertising. Any increase in fees would ultimately result in higher advertising rates, depriving many small businesses of the advertising they desperately need to survive in today's highly competitive market place.

Yours truly,

RICHARD BRUSSOW,
Station Manager.

COMMENT LETTER NO. 116

KACY,
Oxnard, Calif., June 13, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: If the Performers Royalty bill is passed Radio and Television Stations would be paying unjust fees to the already prosperous record companies and artists. These works are only productions or renditions of other creations and should not be copyrightable. The Broadcasters of our area feel that this would be a direct tax that is substantial and unrealistic.

Cordially yours,

DON DAVIS,
Vice President and General Manager.

COMMENT LETTER NO. 117

KUPK RADIO STATION,
Garden City, Kans., June 17, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

Dear MS. OLER: I am most distressed to learn of the proposed Performance Royalty Fee, which in essence, will be an additional tax on the broadcasting industry.

Broadcasting royalty fees are already approaching a prohibitive standpoint for many of America's radio stations. An additional tax will cause undue hardship on small market stations, such as KUPK.

It is a broadcaster's purpose to provide a public service, in addition to entertaining. An additional royalty tax can only mean a cutback in personnel to

many of us, in order to meet the ASCAP, BMI and other commitments. This denies every broadcaster the opportunity to perform in the public interest in the way he should.

As a conscientious broadcaster, I vehemently oppose the proposed Performance Royalty Fees. I hope you will add my comments to those you receive from other broadcasters across the nation.

Cordially,

JIM THRONEBERRY, *Manager.*

COMMENT LETTER NO. 118

MOBILE FIDELITY PRODUCTIONS, INC.,
Olympic Valley, Calif., June 14, 1977.

MS. BARBARA RINGER,
Registrar of Copyright, Library of Congress,
Washington, D.C.

(Attention of Ms. Harriet L. Oler, Senior Attorney.)

DEAR MS. RINGER: With reference to your hearing schedule of July 6 through July 8, and July 26 through July 28, I wish to make the following comments regarding the proposed "performance royalty" amendment to the Copyright Law.

1. In my opinion, as a record producer/performer, and part owner of a phonograph record company, there should be provisions for a "performance royalty" in the Federal Copyright Law.

2. Further, the provision should be statutory and compulsory.

3. The origination of ownership of "performance rights" should be vested with the performer, prior to publication.

4. The recording of a performance should constitute "publication" of the performance, and performance royalties would then be shared by performer and publisher (which may be the producer and/or record (releasing) company).

5. I see a mechanical structuring of the law, and a practical application, similar to the customary role of song writer, song publisher, and collection agency (ASCAP, BMI, SESAC) respectively.

It is my opinion, that performers have for too long, provided "free" entertainment to radio and television audiences. It is time to arrive at a fair and equitable remedy to a one sided situation.

Thank you for the opportunity to respond to your inquiry.

Sincerely,

BRAD S. MILLER.

COMMENT LETTER NO. 119

COLUMBIA, S.C., *June 18, 1977.*

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This comment is pursuant to the invitation of the Copyright Office for "related observations" on possible revisions of Section 114 of Title 17 to "provide for performers and copyright owners any performance rights in (phonorecords)".

As an attorney, I have represented my wife (and her mother) in matters relating to works of her father, the late Austrian librettist who collaborated with Kalman, Straus, and Lehar in various operettas; and also wrote a lyric rendered in English as "Just a Gigolo". Her father was Julius Brammer.

I would favor full performance rights for performers (and derivatively, for copyright owners in such works) in all sound recordings of works in the public domain. I would also favor full such rights in copyrighted recordings based on no copyrighted written text. The performer contributes such a significant part to the success of such recordings that this is warranted.

However, I strongly oppose such performance rights for performers of sound recordings made under the compusory license provisions of Section 115. Any musician of prestige is in excellent position to bargain for part or all of such performance rights. This is clearly implied by the last clause of 115(a)(2).

"the arrangement . . . shall not be subject to protection as a derivative work . . . except with the express consent of the copyright owner".

In behalf of my clients, I wish to express appreciation for the protection offered by the United States to such intellectual property. I desire nothing but a reasonable measure of equity for all concerned.

Yours sincerely,

GRIER S. KESTER, Jr.

COMMENT LETTER No. 120

PRICE, HENEVELD, HUIZENGA & COOPER,
Grand Rapids, Mich., June 21, 1977.

REGISTRAR OF COPYRIGHTS,
U.S. Copyright Office, Office of the General Council, Library of Congress, Washington, D.C.
(Attention of Harriet L. Oler, Senior Attorney.)

I have just learned that the Commissioner is requesting comments on whether or not section 114 of the newly enacted copyright law should be amended to provide performance rights in sound recordings. I feel that such an amendment should be made.

As the law now stands, there is a serious loophole as a practical matter. If a person distributes tapes of his work before he distributes sheet music, it can be said that he forfeits his performing rights in the underlying work. In essence, he only obtains a partial copyright in his work and he forfeits all other rights.

As a result, I have been very careful to advise my clients to first publish their work in sheet music form with a proper notice of copyright and then publish the work on tape or in records with the appropriate notice of copyright.

I don't feel that a composer should have to worry about this technical distinction. Accordingly, I feel that the law should be amended as suggested.

Sincerely,

JAMES A. MITCHELL.

COMMENT LETTER No. 121

MAY 27, 1977.

HARRIET S. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: As a solicitor who represents and has represented for some years many recording artists, I would like to make the following comments on the subject of performance rights in copyrighted sound recordings.

You will no doubt be aware that in England the case of Gramophone Co. Ltd. v. Stephen Carwardine in 1933 prompted the setting up in 1934 of Phongraphic Performance Ltd. (PPL) to collect performance royalties in sound recordings. According to a book whose title is "The Composer in the Market Place: An Economic Survey" (by Alan Peacock and Ronald Weir published by Faber Music Ltd.) the then President of the PPL made it clear that the intention of PPL was to divide the money collected between record artists, the Musicians' Union, the publishers and the record companies. The division was then: artists 20 percent; 12½ percent MU; 10 percent publishers; balance record companies. In response to my recent request to PPL for a breakdown of the division now, I was told that they are "unable to provide me with the information" I requested. My understanding is that no money now goes direct to the recording artists, unless they manage to negotiate such payments with the record companies. Many artists are not in a position to negotiate such payments, and indeed I have only ever seen two contracts in which provision was made to share the PPL royalties; in both cases the money was to be shared equally.

I would like to recommend that if a performance right is enacted, which for reasons of simple equity I trust it will be, then the record producers and the performers (in cases where they are royalty-earning artists) should share the benefit equally.

Yours truly,

IAIN ADAM.

COMMENT LETTER No. 122

KILIBRO BROADCASTING CORP.,
Modesto, Calif., June 23, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: As owner of radio stations in California and Oregon, I wish to go on record as being strongly opposed to the enactment of a performance royalty fee.

Sincerely,

F. ROBERT FENTON,
President.

COMMENT LETTER No. 123

WLIR FM 92.7,
Garden City, N.Y., June 22, 1977.

HARRIET OLER, Esq.,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is in protest to the proposed congressional action regarding performance royalty fees.

It was Victor Herbert who first conceived of the idea ASCAP (American Songwriters, Composers, Authors and Publishers). To my way of thinking, this was a just and rightful step in order to protect the composers, authors and publishers in regard to the music that they have written and published. From this idea, ASCAP became the one and only monopolistic music clearance organization in the country. They had complete control and received royalties for all music played on radio, television, clubs, theatres, etc. . . .

In the early 1940's, the radio networks decided to defy ASCAP and would not sign a new proposed contract, to use ASCAP music on the radio networks. At this time, the public was forced to listen to music that was public domain such as selections by Stephen Foster or music that was licensed by other organizations such as SESAC. The broadcasters then decided to develop their own authors, publishers and music clearance organization. They subsidized this idea which ultimately became Broadcast Music Incorporated (BMI). After a very long strike against the use of ASCAP music, they eventually broke their backs. At this time, ASCAP and the broadcasters began negotiations and a contract was signed. Even before the inflationary period of the 1960's and 1970's, ASCAP was successful in increasing their rates on each of their successive contracts. Even to this date, a new contract is being negotiated by the broadcaster. However, the outcome materialized into two national music clearance houses that the boradcasters had to carry, along with SESAC. Most broadcasters pay royalties to all three of these music licensing firms out of fear that, by accident, they may infringe upon a copyright. We as broadcasters, are living with all three.

I would also like to mention that BMI, at this late date, is playing a close second to ASCAP. I previously made mention of the copyright infringement problem because I have experience with the problem.

The possibility of performance royalty fees arises. I interpret this as performers earning a royalty other than their salary or contract fee to perform on radio, television, nightclubs, theatres, etc. I feel that performers are in a different class and that they are well-compensated for their talents or performance on radio, television, theatres, clubs, etc. . . . They have unions and private contracts. The performers are paid by record companies via royalties, residuals, and salary. They are well-compensated when they perform in a contract. Groups who perform at Madison Square Garden are paid from anywhere from $10,000 to $25,000 for just one performance. Some are paid a flat fee plus a percentage of the gate. This practice is very common throughout the entire United States. What more do they want? Contemporary artists such as Frank Sinatra, Steve Lawrence, Eydie Gorme, Diahann Carroll, etc. . . . are doing very well for each of their performances. Performers who appear in clubs, concerts, television programs and make recordings, which are played on radios and juke boxes throughout the country, become popular and in demand. They are making a fee from all

angles. Let's not add another tax to the broadcaster who has aided in the performers popularity. This additional royalty tax on the broadcaster would be greed on the part of the performer. The point is, is that performers are doing well. The composers, authors, and publishers of music are also doing well. The broadcaster is certainly paying his dues. We do not need another tax!

I am against the proposed congressional action regarding royalty fees, and will, lobby against it. My fellow broadcasters, together with our broadcast association, will fight against it.

Thank you for the attention you have given this matter.

Very truly yours,

JOHN R. RIEGER,
President.

COMMENT LETTER NO. 124

A&M RECORDS, INC.
Hollywood, Calif., June 15, 1977.

MS. BARBARA RINGER,
U.S. Register of Copyright,
Copyright Office,
Crystal City, Va.

DEAR MS. RINGER: Herb and I have been following the development of the Performance Rights and Royalties issue with great interest. We feel strongly that record companies should be receiving compensation for the use of our songs for the public performance of recordings. Our reasoning is not based on a purely fiscal motive; as the creators and developers of A & M Records, we have devoted our professional lives to our artists and our music. We are totally involved in all aspects of record conception, production, design, manufacturing, distribution, marketing and promotion.

Herb and I created A & M Records in 1962. "Herb Alpert and The Tijuana Brass" became one of the biggest selling groups of all time. Especially during the group's peak touring years from 1965 through 1969. Our perspective from conception was an artistic one; Herb directed the Tijuana Brass, and as a musician and singer, led them to the unprecedented success which is known throughout the world today. I was involved intricately with the musical development of the group, as well as overseeing the promotion and distribution of the records. From the beginning of our company up through today, Herb and I spent most of our time and energies seeking, recording and developing high quality recordings. Our label built its reputation on the quality of its music, its art, if you will; the marketing of the records was always easy as long as the music was valid. In fact, A & M has always sold its records on its reputation for consistently producing good music. We are never marketing or advertising specialists. We never invested enormous amount of dollars into the merchandising of our material, because we always depended on the quality of our art to grow naturally within the marketplace. Even today, every record which has an A & M label has been carefully studied, on the creative end, by either Herb or myself.

Herb is still a very active and successful artist on the label, as well as discovering and producing many important artists for A & M Records—The Carpenters, Gino Vannelli, and Gato Barbieri, to name a few. I find myself constantly seeking new artists, signing music groups, finding producers for certain artists, changing producers, deciding upon the sequence of tunes, etc. This is our most important work. Once the music is there, then the record will sell itself.

In summary, both Herb and I are as creatively involved in the records we release as are our artists and producers. For this reason, we feel that a record company is entitled to a royalty for the use of our songs by public media sources, along with the writers, performers and producers. You can't make arbitrary distinctions about a creative process. We are all in it together, for better or worse. And speaking for Herb and myself, if we weren't creatively involved in the music making process, we would not be in the record business.

Please consider our thoughts when you are determining the question of Performance Rights and Royalties.

Thank you very much.

JERRY MOSS,
Chairman A & M Records,
Chairman of the Board, RIAA.

NEW YORK, N.Y., *June 14, 1977.*

COMMENT LETTER NO. 125

MS. HARRIET OLER,
Senior Attorney, General Counsel's Office,
Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter is in response to the solicitation of comments in the Federal Register of April 27 on the question of granting a copyright in the performance of a sound recording to record companies and performers.

As a performer, musician and recording artist for well over 40 years, I have been in favor of this principle since the now-celebrated Fred Waring case and have long questioned why those who make money from the public play of recordings are not required to compensate those whose talents are being used.

Recordings that I made during the Swing Era of the 1930's are still being played on the air as indeed they are still being bought by the public. I still give performances today and people pay to hear me, as they do to buy my records. But the one area in which neither I nor any of the other musicians who play with me receive any compensation is from the use of my recordings on the air, in background music services, etc.

Unfortunately, the Congress did not include a performance copyright provision for sound recordings in the new Copyright Law that was enacted last year. Hopefully, this omission can still be corrected in the report which the Register of Copyrights was directed to submit early next year which, I trust, will lead to an amendment to the Law establishing such a right.

Sincerely,

BENNY GOODMAN.

COMMENT LETTER NO. 126

[Mailgram]

HARRISON MUSIC CORP.,
Hollywood, Calif., July 19, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Library of Congress,
Washington, D.C.

With respect to your request for comments on the proposed broadcasting royalty for performing artists we respectfully suggest the importance of maintaining a distinction between the aforesaid performing rights of musical copyright owners under current and future legislation so that the latter not be diminished in any matter. Apart from the above we take no position as to the appropriateness of the issue.

ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS.

COMMENT LETTER NO. 127

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: I am writing you as a concerned performer to voice my support of a performance royalty. I know you will be making a decision on this issue by January 3, 1978, and I wanted to be certain you knew how performers feel.

A performer makes a very important, often vital, contribution to a recording as part of a creative team which stems from the writer and blossoms with the addition of the performer who faithfully and artistically conveys the message of the musical work.

I feel, therefore, that we as performers make a contribution equal to that of the songwriter and publisher and should be entitled to the same royalty benefits.

Thank you for your support of songwriters and performers, and I urge you to decide in favor of a performance royalty for the artist.

Sincerely,

PAULA WATSON.

COMMENT LETTER NO. 128

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: I am writing you as a concerned performer to voice my support of a performance royalty. I know you will be making a decision on this issue by January 3, 1978, and I wanted to be certain you knew how performers feel.

A performer makes a very important, often vital, contribution to a recording as part of a creative team which stems from the writer and blossoms with the addition of the performer who faithfully and artistically conveys the message of the musical work.

I feel, therefore, that we as performers make a contribution equal to that of the songwriter and publisher and should be entitled to the same royalty benefits.

Thank you for your support of songwriters and performers, and I urge you to decide in favor of a performance royalty for the artist.

Sincerely,

CYNTHIA LEBO.

COMMENT LETTER NO. 129

RECORD & TAPE ASSOCIATION OF AMERICA,
East Windsor, N.J., July 11, 1977.

MS. HARRIET OLER,
Senior Attorney, General Counsel's Office, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am writing you in reference to your announcement of Library of Congress, Performance Rights in Sound Recordings Notice of Inquiry. When I wrote my original letter to you I took the position that we are in favor of compulsory licensing.

Upon rereading the announcement I see that this announcement concerns itself strictly with the performance rights of artists in sound recordings, and not compulsory licensing, per se.

It might appear that my letter would not be germane to the topic on hand. However, I would appreciate it if you would review my letter again and possibly make a notation that compulsory licensing would serve as a means unto an end to achieve some of the performance rights for artists.

In Item No. 1, you ask about Constitutional and legal problems. Might I point out that an artist is as entitled, or should be Constitutionally entitled, to make as much money as he possibly can during his productive years to take care of him and his family in his nonproductive years and should not have that right abrogated by the whims of some corporate executive.

By artist I mean the singer, songwriter and musician.

I also believe that the Copyright Law is designed to protect and promote the arts and the artist (and H.R. 2223 simply revises the 1909 law in terms of modern technology) and if the major labels are through with an artist and his recordings then it should fall back into the public domain again via compulsory licensing with royalties to all artists and allow the free market place to decide whether or not these artists are still desirable.

In question No. 2 you ask what are the arguments for and against performance royalties.

The argument for royalties, of course, can be compared to a man's vested interest in his job. In our modern society a man is allowed to retire and not forced to work for the rest of his life. A man has certain guaranteed (Federally funded) insurance programs so that neither he nor his family have to suffer in his non-productive years due to old age infirmity or death.

Might I point out that I think it is generally acknowledged that the productive life of a musical artist (as well as an athlete) is much more limited than the average working man and that, therefore, the artist has as much right to make as much money as he possibly can in his short, productive, time span.

Might I further point out that the Copyright Law is to protect and promote the arts.

I think it behooves the American public to see that its artists are rewarded so that they keep on performing which is a socially beneficial thing. I do not feel that the record companies have the right to abrogate a performer's income by executive fiat and say to an artist, we no longer find you financially rewarding, therefore, we will no longer produce you and no longer let the American public love you. I think the free forces of the market place should come into being at that time and see whether or not the American public will provide for its favorite artists via compulsory licensing.

Item No. 3, I think that instead of the songwriter himself getting money under the old compulsory licensing law, the singer, musician and songwriter all should be allowed to make money under a new compulsory licensing law.

Item No. 4, Voluntary negotiations are impossible with the major labels, they want no potential competition from some one who might be able to set up a distribution network with old and discarded performers. A compulsory licensing law should be enacted, paying the artist the exact same money he currently receives from the major labels and this should take place (or compulsory licensing should be allowed) within 15 minutes after release of recording as the major labels have already conceded an average life of 12 weeks (3 months) on the charts.

As for what role the Copyright Office should play? I think there should be a law passed by Congress that where we have technical agencies such as the Copyright Office their word should be final and absolute because they know what is most socially beneficial versus political expediency.

I trust you will allow these extra comments to be entered and I would like to know how I can apply at the hearings on S77–6.

Respectfully yours,

ALAN I. WALLY.
President.

P.S.—How do I apply for a membership on copyright Tribunal? I read Tom Brennan was nominated.

COMMENT LETTER NO. 130

HAGERSTOWN BROADCASTING CO., INC.
Hagerstown, Md. July 21, 1977.

REGISTER OF COPYRIGHTS,
Copyright Office, Library of Congress
Washington, D.C.

Hagerstown Broadcasting Company, Inc. is the owner, operator and Federal Communications Commission licensee of one AM and one FM broadcast stations. The following is submitted for consideration in above-captioned matter, issued by the Register of Copyrights on May 26, 1977 stating that "The record of the proceedings will be kept open until August 26, 1977 for receipt of supplemental statements." The following is a statement by a small broadcaster and the economic impact that such legislation would have on his operation and others like him.

"Our Corporation was founded in 1932, when our AM station went on the air. Our FM station went on the air in 1946, and has been in continuous operation since then . . . providing a service to our area even when FM was not even recognised as a viable radio medium. Any profits realized have been so small that not one penny has ever been paid to any stockholder as a dividend. Monies earned, along with additional investments by the stockholders, have been used to maintain and up-date the equipment of the stations so that they could continue to provide a good quality of performance.

Since 1932, these stations have introduced many new pieces of music to our listeners. Music, and performing artists, that they would not have had an opportunity of hearing if it had not been for radio . . . and recordings. These stations pay approximately five percent of our monthly Gross income to ASCAP, BMI and SESAC for the priviledge of introducing their licensed music to the world. The music is heard more frequently . . . the performing artists become better known . . . they sell more records . . . they demand more money for their personal appearances . . . they make more money . . . because their records are heard on radio. They are well paid for their efforts.

To require broadcasters to pay them additional monies for their recorded performances would be an additional burden to broadcasters that would break the financial backs of many . . . and would be the height of redundancy. It would be precisely the same if an automobile mechanic repaired your car, and then each time that you started it up, you were required to pay him a performance fee. If an architect designs a beautiful building, and a builder and his laborers construct it . . . who should receive the credit and payment for the design of the structure? The builder and the laborers are well paid for their efforts in the initial construction. And if they do good work, they will continue to find work for which they will be paid. The architect must come up with new designs . . . and if his original design is used again . . . he should be paid for it. The composers are the architects . . . the performing artists are but the builders.

JOHN T. STAUB,
President.

COMMENT LETTER No. 131

MICHÉLE AUDIO CORP. OF AMERICA,
Massena, N.Y., July 18, 1977.

MS. BARBARA RINGER,
Registrar of Copyright,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: Please find enclosed a copy of my letter this date to Billboard Publications relating to the meeting held on July 6 and July 7, 1977, and particularly, to their July 16th issue, and an article entitled "Disk Performance Royalty Hinges on Copyright Report—Wolff Tells Importance at Hearing".

As I pointed out to Billboard in my letter, I read with total amazement on page 88 of their issue that I was a scheduled witness but failed to show. Let me assure you, as I did Billboard in my letter, that I never was issued an invitation to speak at that meeting; therefore, my non-appearance was a total falsehood.

What I would have testified to would have been on the aspect of the performance copyright and whether such a right would actually help create new sound records, or whether or not such a performance might further decrease the availability of new recordings.

If such a performance right does not spur any new creations but actually inhibits new records this would not, in my estimation, be in keeping with the American scheme of copyright.

The main purpose of the American structure has always been to protect and benefit the *public.* The question here is: does the public benefit from what they are paying for?

I have always been an exponent to return the main purpose of the copyright to what it should be—an incentive for creativity to spur new artistic works, and not a tool to be used to extort money from an uninformed and trusting public.

The performance right, as proposed, may force the public to pay more, and they may not receive anything in return; moreover, the availability of music might decrease.

It would appear in reviewing the article that the main crux of the argument has never been touched upon, and that is: does the public benefit from what they are paying for?

Since I was not notified of the fact that I could appear as a witness, it would seem only fair that my feelings and convictions could be incorporated into the hearing records. Could you advise in this regard, and if such is the case, I could expound upon the subjects just touched upon briefly in this letter.

Kindest regards,

THOMAS GRAMUGLIA,
Vice President.

MICHÉLE AUDIO CORPORATION OF AMERICA,
Massena, N.Y., July 18, 1977.

BILLBOARD PUBLICATIONS, INC.,
Los Angeles, Calif.
(Attention of Mr. Lee Zhito, Editor-in-Chief.)

DEAR MR. ZHITO: Reference your July 16, 1977 issue of Billboard, and particularly to pages 5 and 88 relating to an article entitled "Disk Performance Royalty Hinges on Copyright Report—Wolff Tells Importance at Hearing."

With amazement, I read on page 88 that quote: Thomas Gramuglia onetime spokesman for the tape pirates and head of the so-called Record and Tape Association was a scheduled witness but failed to show, unquote.

I never was issued an invitation to speak at that meeting, and therefore, the report of my non-appearance was a total falsehood, and further, puts me in a very unfavorable light.

Enclosed is a copy of my letter this date to Ms. Barbara Ringer, Registrar of Copyright, Library of Congress, Washington, D.C., which I believe fully sets forth my views on the performance copyright. I am very concerned that the main crux of the matter apparently was never argued, and that is; does the public benefit from what they are paying for?

I am hopeful (in view of the fact that I was not notified that I could appear as a witness) that my feelings could be incorporated into the hearing records. Until I hear from Ms. Ringer on this, however, I would appreciate a retraction and/or correction in your soonest forthcoming issue relative to my non-appearance at the July 6 and 7 hearings.

Respectfully,

THOMAS GRAMUGLIA,
Vice President.

COMMENT LETTER NO. 132

BUFORD BROADCASTING, INC.,
Buford, Ga., July 14, 1977.

REGISTER OF COPYRIGHTS,
Copyright Office,
Library of Congress,
Washington, D.C.

DEAR SIR: As President of Buford Broadcasting Inc., licensee of Radio Stations WDYX, Buford, Georgia and WGCO FM Buford, Georgia and Vice President of Joseph Broadcasting Inc., licensee of Radio Station WIAF, Clarkesville, Georgia, I am opposed to the establishing of a new performance royalty in sound recording. I urge you to recommend to Congress that Section 114 of the Copyright Act (17 U.S.C. paragraph 114) be retained indefinitely.

The creation of a performance royalty would establish a new area of copyright protection that is not contemplated by the Constitution and, contrary to the Constitution's intent, would likely produce disadvantages to the public welfare.

As an operator of three small Georgia radio stations, I have seen declining profits while costs have greatly increased including music license fees. Recording companies artist and composers have substantially benefited over many years through the efforts of broadcasters who have given valuable and free exposure to new recordings. To now require broadcasters to pay substantial fees to record companies and recording artists who benefit most directly under current commercial arrangements from broadcast use of sound recordings would, in my view, constitute a most unfair and harmful proposition.

Broadcasters operate in the public interest, convenience and necessity, recording companies and artist do not.

I support the position of the American Broadcasting Company in statements filed May 31st and June 15th of 1977.

Very cordially yours,

ROBERT P. JOSEPH,
President.

COMMENT LETTER NO. 133

RADIO SAN JUAN INC.,
Durango, Colo., June 29, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: We should like to go on record as opposing any recommendation to Congress by the Register of Copyrights that a performance royalty fee be enacted.

Our industry is already subject to enough fees and regulations.

Sincerely,

KAREN MAAS,
Assistant General Manager.

COMMENT LETTER NO. 134

MINNESOTA STATE BOARD,
Minneapolis, Minn., July 25, 1977.

MS. BARBARA RINGER,
Register of Copyright, Copyright Office,
Library of Congress,
Washington, D.C.

DEAR MS. RINGER: I am writing with some comments that I wish to become part of the record of the hearings on a performance right in sound recordings.

The perspective from which I write is a combined one. As the executive director of a state arts agency, I am concerned with public policy as it reflects on the economic status of artists. The reason for this is that agencies like mine throughout the country are asked to provide publicly-appropriated funds to assist artists to carry out their creative work. At least part of the need for this type of assistance is directly a result of the inability of artists to support themselves from the marketing of their creative talents. Therefore, a public policy which addresses the income potential of artists is one in which I have a professional interest. Another perspective is a personal one. I am a musician who has played professionally and I have participated in professional recordings. I am currently a member of the St. Paul Musicians Association, Local 30 of the American Federation of Musicians, AFL–CIO.

The contention that the performer's contribution to a recording is not a unique creative act does not stand up to scrutiny. Beyond the fact that a composed and/or arranged work exists only when performed, each and every performance is unique, resulting from the inspiration, experience and energy of the performer. No two performances are alike, as evidenced by the fact that audiences attend many performances of the same works in their lifetimes, not only to hear different performers doing the same works, but to hear the same performers doing the same works, knowing that each performance is a revelation which can and does stand alone. This observation can be obtained everywhere in the world as regards the live performance. It is a creative act in itself which cannot exclude the performer's contribution. It is axiomatic, then, that the recording is an extension of the live performance, which calls upon the creativity of the performer as in the live performance, as well as those whose musical/technical skills translate the studio performance into a finished product for the market.

As noted in my second paragraph, above, governments at state, local and federal levels are being asked to provide financial support for performing artists. This support takes the form not only of arts grants, but unemployment compensation and various other assistance programs for persons in financial need. Performing artists are frequently unable to earn sufficient incomes from their creative work to avoid calling upon these various forms of government financial assistance. Commercial entrepreneurs and broadcasters are presently able to use the work of these artists without compensating them for it. While the change in the current system being suggested here may not relieve the government of all of its financial responsibilities for performing artists, some improvement in performing artists' income potentials would definitely have an impact. As such, a royalty right for performers in recordings would definitely serve a public purpose.

Sincerely yours,

STEPHEN SELL,
Executive Director.

COMMENT LETTER NO. 135

MAINE ASSOCIATION OF BROADCASTERS,
Augusta, Maine, August 1, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The Maine broadcast industry is wholly opposed to another payment in the matter of musical broadcasts, namely an additional charge, for recording artists! Should such a measure come to pass, the entire recording industry might very well find itself in dire difficulty, based upon a system formerly practiced by broadcasters, wherein commercial records were not aired.

At one time, broadcasters subscribed to special transcription services—the output of material produced only for radio broadcast, in which the producing company and licensed societies were paid through the subscription or rental costs which such library services involved.

It is possible that the "library service" would again be revived, thereby cancelling all commercial recordings by individual radio stations, and thereby eliminating all exposure of a high percentage of artists who are presently benefiting. Their present benefits currently accrue through radio station air plays.

That the above is a possibility, is more than a realistic approach, at a time when many radio stations are marginal in operation, and whereby for many existence is on a week-to-week concern.

Sincerely yours,

NORMAN G. GALLANT,
Executive Director.

COMMENT LETTER NO. 136

TABBACK BROADCASTING CO.,
Sedona, Ariz., August 7, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

HARRIET L. OLER: All performers require a theater to demonstrate their capabilities. Musical artists and performers have the benefit of demonstrating their capabilities over the nations radio stations, up to 24 hours a day. These radio stations (theaters) do not charge a fee to their audience, in other words it's a "free" performance.

Radio stations devote a significant percentage of their costs towards donating this "big theater in the sky".

KAZM, a daytimer, serving Sedona, Arizona's population of approximately 6000, would like to review these related costs:

(a) KAZM, licensed since Nov. 1, 1974, has purchased over 4500 records and tapes for the music library. (Records and tapes are not free to all radio stations as some persons would believe.) The cost of each record and tape has increased a minimum of 50 percent since 1974 and KAZM has received notices from record distributors that prices are going up again.

(b) KAZM has paid fees of over $6000, since November 1974, to music licensing societies and there is action pending to increase those fees to all broadcasters.

(c) KAZM reimburses all employees involved with musical programming, sound equipment operation operation, filing and logging of musical selections, telephone special requests and the maintenance of all equipment to assure that the performers sounds are "always at their best."

(d) KAZM's initial cost of construction and equipment are still under mortgage, with none of the monthly payments subsidized by the using music societies, composers, authors and performers.

As a broadcaster, I feel "enough is enough" and radio broadcasters are doing more than enough. Your office is sitting in judgment on the matter of performance rights in sound recording. I feel strongly that your office must recommend a denial of any additional fees paid for use of music by broadcasters.

Broadcasters already pay for the sound recordings, pay the music societies of authors and composers, pay the "stagehands" and other theater costs, for the privilege of providing music free, as a public service. Isn't that enough?

Sincerely,

JOSEPH P. TABBACK,
President.

COMMENT LETTER No. 137

KSUM RADIO,
Fairmont, Minn., August 11, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I would like to register my opposition to the payment of performance rights to record companies by broadcasters. In the first place, such a payment would be a duplication of payments already made to ASCAP, SESAC and BMI. Through these licensing companies, artists are already well compensated.

Secondly, without the broadcasting industry, it is doubtful whether there would be a record industry, since the records played by radio stations publicize the artists and their works. If this were not the case, why would record companies engage in the illegal practice of "payola"? We regularly receive notes of thank you from various artists for playing their records and helping publicize their songs.

I am enclosing copies of several articles in which the importance of broadcasting to the record industry is emphasized. I hope you will find them of interest.

Perhaps broadcasters should charge the record companies for the publicity given their product. Thank you for your consideration.

Sincerely,

ROBERT LAIRD,
General Manager.

Enclosures.

AIRPLAY CONFRONTS PLAYLIST AT TORONTO RADIO FORUM

(By Eliot Tiegel)

TORONTO.—Billboard's first ratio programming conference held outside the U.S. displayed an international flavor in speeches and panel sessions, but the age-old question of how record companies can break new artists without greater radio participation lent an air of familiarity to the proceedings.

This 10th annual Radio Programming Forum attended by 550 at the Harbour Castle Hotel, Wednesday through Saturday (3-6), rekindled old frustrations between broadcaster and music supplier in the panel session, "How Records Affect Your Station, Your Life, And Your Pocketbook."

Danny Davis, promotion vice president for Screen Gems EMI Music, Los Angeles, moderator of the Thursday (4) panel, affirmed the axiom that the "business is dependent on each other and while we would like for all our product to find exposure that's not to be" Davis cited strangulating short playlists plus competition from the record promotion community itself as key reasons why it's difficult to get new records on major market playlists. "The feeling of anger and frustration when a playlist tightens up is felt by all promotion men and radio programmers," Davis said.

No radio programmers or disk jockeys in the audience responded affirmatively to this comment which linked them to those frustrated persons having to deal with restrictive playlists.

Lenny Silver, owner of Best and Gold Distributing, Buffalo, and Amherst Records, in emphasizing the need for more cooperation from broadcasters, suggested program directors take more time to study the background of the new artist, its producer and material before refusing to take a chance on a new record. Doug Morris of Big Tree Records, New York, claimed it was sour grapes on the part of record men who claimed they cannot get new disks aired. "If you've got the goods," he said from the audience, "everyone plays it."

Ed Rosenblatt, Warner Bros. Records sales vice president, continued this thought from the floor with: "If the record's there, a good promotion team will get through." Rosenblatt additionally pointed to the potency of retail exposure as being an underrated area of promotion. "Go to many towns in the U.S. and you'll see stores like Peaches and Tower. You can get exposure there. The clerks are interested in music and you can sell albums. Get these clerks out to see an artist on tour. The promotion man who only goes to radio is only doing half his job."

The executive pointed to two examples of new artists being broken recently in which small market radio and retail exposure worked hand-in-hand. "We broke Sanford and Townsent out of Atlanta and Michael Franks out of Pittsburgh. Today, you have full-line retail stores and these people are involved in the record business."

Asked by Davis whether friendships enter into the decision to add a new record to a playlist, panelist Rosalie Trombly, music director of CKLW, Windsor, Ont., answered that the quality of the record was uppermost. If she had two friends on an equal plane with good product, she'd "flip a coin."

Panelist Mike Klenfner, Atlantic Records senior vice president, recalled his days as a FM broadcaster to comment on the question thusly: "You had to weigh whether you do a favor or wait for the quality record." He subsequently admitted that "down home promotion" would affect his decision.

Panelist Larry Green of WEA of Canada asked the audience what it was looking for from new Canadian artists in order to qualify for representation in the U.S. Shelly Cooper, Warner Bros, advertising director, also on the panel, said her company looked at Canadian artists in the same terms as it does other new acts; how potent is its style, music, management, touring capabilities? Green suggested that labels should commit themselves to more time in the artist development process if that glorious hit doesn't happen with the first release.

Panelist David Urso, Warner Bros. national promotion director, answered a reflection from Niles Siegel, RCA promotion man from New York, that radio stations "are not in the business of selling records" with: "stations do care about sales."

The significance of the Forum being held in Canada was emphasized by Ed Prevost, chairman of the Canadian Assn. of Broadcasters, Thursday in his welcoming address.

Prevost pointed to some of the [sic] to improve the relationships between the English and French speaking segments of the population.

Canada's 60 million persons—23 million in isolated regions of its vast land—are serviced by radio which Prevost said is more regulated than that in the U.S. He referred to the 30% Canadian content for all stations, with French speaking stations only allowed to play 25% of its material from English speaking groups between the hours of 6 p.m. and midnight.

Prevost said Canadian radio is looked upon heavily as a social instrument, adding: "I find this creatively stifling."

Claude Hall, Forum director, in his Thursday keynote speech, issued warnings to broadcasters. He said that while radio "refuses to play most new records," there are groups like Kiss which sell extremely well without any airplay, indicating some record companies are not 100% dependent on radio play.

He said the computer was a "reality" in programming but that it "could destroy radio because of the sameness of programming" if not used inventively.

He said that radio, which he called an "instant art," had to go beyond merely transporting recorded music—itself an art form—in order to achieve distinctiveness.

Hall chided some Top 40 and AOR stations for failing to achieve their potential by not allowing their air personalities to emerge and give the station character.

He cited the need for more research by stations into what generates listenership. Said Hall: "We need to know why people don't listen to radio more."

Stating that lots of music is bland, Hall asked: "Are we too restricted, too regimented and too complacent to become musical boredom carriers?"

Hall emphasized the need to let the human computer gets involved more to instill creative excitment into music programming.

Fifteen panel sessions comprised the conference plus an awards presentation (see separate story in the radio section) highlighted by entertainment by Leo Sayer. Additional conference coverage will be provided next week.

TEES AT CHERRY HILL, N.J.—BASIC SELLING TO BE STRESSED AT 12 REGIONAL NARM MINI-CONFABS

(By Dick Nusser)

NEW YORK.—The basics of merchandising will be stressed at the forthcoming 12 NARM regional meetings to be held nationwide, NARM officials say. The first all day meeting is set for Sept. 20 at the Cherry Hill (N.J.) Hyatt House.

Geared toward middle management branch executives, salesmen, buyers and store managers, NARM hopes the meetings will hopefully open "a complete circuit of communications among the local merchandiser, the local salesman and regional manager and national marketing executives."

In a poll undertaken to determine the interests of potential attendees, NARM officials discovered that many people in the music business today are drawn to it via a dedication to the music, rather than through a fascination with merchandising.

"This happens in the record business on account of the nature of the product," Mickey Granberg of NARM says, explaining why the emphasis is on fundamentals rather than "how to set up a store display."

Each meeting will be divided into three parts. One segment will feature a merchandising expert selected to appeal to the needs of the attendees in that locale. Another segment will feature a luncheon/discussion with NARM executive vice president Joe Cohen. Since the meetings will be small compared to the annual NARM get-together, Cohen is expecting to hear the views of many workers in the industry who wouldn't be on hand for the annual.

"These are people who only know what NARM does from what their boss tells them when he returns from (remainder of sentence is illegible).

Each meeting will be structured to correspond to the prevalent activity in the area. Granberg explains that the Philadelphia meeting, for example, may be largely comprised of retailers, while the Texas meet would draw small rack jobbers.

Here are the dates for the other NARM meetings:

Detroit (Detroit Plaza) Oct. 17; Cleveland (The Keg & Quarter) Oct. 19; Chicago (Ritz Carlton) Oct. 21; Miami (Omni International) Nov. 1; Atlanta (Omni International) Nov. 2; Los Angeles (Century Plaza) Jan. 9; San Francisco (Union Square Hyatt) Jan. 11; Seattle (Washington Plaza) Jan. 12; Washington, D.C. (L'Infant Plaza) Feb. 7; New York (Essex House) Feb. 9; and Dallas (Registry Hotel) Feb. 16.

COMMENT LETTER NO. 138

SCANTLAND BROADCASTING,
Marion, Ohio, August 10, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIET: What an outrage. I can't believe they are actually trying to raise fees paid to the music licensing societies. In radio, a common term is the "instant ripoff, and this is the biggest one yet!

Record companies, promotion people and artists are continually calling, writing and showing up at our doorsteps to help sell their product. Yet, we have to pay to play it! This is truly senseless!

Here is an average month as Music Director. I receive usually about 50 music calls. A music call is when a representative of the company will call to either check the progress of his companies records or to "plug" new ones. During a month's period, these same record promoters will drive to Marion and stop in to personally promote their product. During July, I had four artists call me personally to promote their records. Included on this list during July were Al Martino and George Fischoff. I also received a personally hand written letter from Al Martino.

Why should we have to "pay to play" when record companies give us free product to give-away on the air? All this to help promote their product.

I truly hope all stations in the N.A.B. get together and take action against this ridiculous proposal.

"On your side",

JIM ROBERTS,
Music Director.

COMMENT LETTER NO. 139

KBLU BROADCASTING CO.,
Yuma, Ariz., August 11, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This letter concerns a report which I understand your office has been asked to prepare for Congress concerning performance rights in sound recordings.

We would like to register our strong opposition to such performance rights. I worked for one of the major record companies for three years before I became involved in broadcasting here in Yuma, Arizona. My job primarily was to get radio stations to play on the air the new recordings released each month. There is no question that record companies consider exposure on radio stations to be vital to their sales. I know that from first-hand experience as an employee of a record company.

And as a broadcaster for eighteen years here in Yuma, Arizona, I know how vital such air play is to the record companies. Additional fees resulting from the broadcast of phonograph records would cut into our profit and reduce our ability to serve the public. The simple fact that record companies send free copies of their new releases to radio stations in the hope that they will be played on the air would appear to clearly contradict the argument that they need to be compensated when these recordings are broadcast. What other industry would continue to give away its product with one hand, while asking for payment for the use of the product with the other?

Sincerely,

ROBERT W. CRITES,
President.

COMMENT LETTER NO. 140

WIOD,
Miami, Fla., August 16, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Enclosed please find numerous photos of the various "gold" records and plaques awarded to WIOD over the past several years. These were presented to us as recognition, by the manufacturers themselves, for contributing to the sales success of the titles cited. We played the records, often before any other broadcast property in the country, our listeners enjoyed them, and responded by buying them. We have a total of 19 plaques from recording manufacturers. (Note photos and explanation on reverse side.)

The record manufacturers would not honor and commemorate their appreciation to us for playing records, if indeed we were not ultimately responsible for the sale of same records. To have WIOD "pay to play" records makes as much sense as having us pay Chevrolet to air their commercials. . . . so they can sell more cars!

Sincerely,

WILLIAM L. VIANDS, Jr.

COMMENT LETTER NO. 141

SAN RAFAEL, CALIF., *August 16, 1977.*

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress,
Washington, D.C.

DEAR MS. RINGER: In his testimony before your panel last month, Sanford I. Wolff of AFTRA urged that you support legislation to establish performance rights for sound recordings. I would like to underline his testimony by pointing out to you that there are in this country literally tens of thousands of performing artists who have created outstanding entertainment for which they received

a modest one-time fee. These recorded performances have become the basis for a large, flourishing and profitable industry which—until now has paid nothing for the use this material.

It is inequitable.

Please help correct what is clearly an injustice. I would urge you to recommend to Congress that it pass legislation requiring radio stations and others who make similar profitable use of recorded material to pay royalties to the artists who make their profits possible.

Respectfully,

BILL HILLMAN.

COMMENT LETTER No. 142

PLOUGH BROADCASTING CO., INC.,
Memphis, Tenn., August 16, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Noting that performance rights in sound recordings are again a matter of much discussion in Washington and throughout the broadcast industry, I should very much appreciate consideration of appropriate parties of the enclosed data.

It will be noted that Plough Broadcasting Company, Inc., which operates in six cities, last year paid $211,982.73 to ASCAP, BMI and SESAC. In the first seven months of 1977, our Company has paid $154,429.89 to these licensing organizations.

In the past seven months, it is estimated by Mr. Craig Scott, who is Vice President/Operations for Plough Broadcasting Company which operates twelve radio stations, that our Company has given away a minimum of 6,000 albums in a variety of contests, conducted mostly on the AM stations in our six markets. Most of these albums are, of course, given to the stations for promotional purposes and are indeed useful to the station in a variety of contests but, at the same time, do constitute promotion for record companies.

I shall enclose a letter from Mr. Craig Scott, who is most familiar with record company promotion and its impact on broadcasting.

Speaking for our Company and, I am sure, for broadcasters generally, it is felt that the record companies benefit sufficiently already, both monetarily and in terms of promotion, and that any additional fees paid to performers or to anyone else in the recording business would indeed be superfluous and unfair. Thank you for your consideration.

Sincerely,

H. WAYNE HUDSON.

COMMENT LETTER No. 143

PLOUGH BROADCASTING CO., INC.,
Memphis, Tenn., August 16, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am writing in response to your recent report to Congress concerning the recommendation that Broadcasters "pay to play." Having spent fifteen of my thirty one years in this business, I find it hard to fathom that; someone once suggested that record companies should pay us.

By their own investment of dollars in promotion personnel salaries, promotional LP giveaways, station contest support, free artist interviews, exclusive advances on product and other obvious tactics, it is apparent that the true profit line of the record industry is directly tied to radio station airplay. Without exposure through radio airplay, the record industry would be in immediate trouble but as things now stand *their* profits continue to soar.

"Pay for play" would further limit the ability for new artists to be heard. Why would a radio station gamble with any new act if it had to pay to take

the chance? The careers of many potential superstars would be stifled in favor of familiar, proven acts.

Ms. Oler, the radio industry is now directly responsible for 80% of a record sales in this country—we certainly don't want to have to pay for the right to do this. With ASCAP and BMI rights already burdening our bottom line, this would be unbearable for most broadcasters.

Sincerely,

CRAIG SCOTT,
Vice President, Programing.

COMMENT LETTER NO. 144

RADIO STATION WSST,
Largo, Fla., August 18, 1977.

MS. HARRIET L. OLER,
Office of General Counsel, Copyright Office,
Washington, D.C.

DEAR MS. OLER: Please be advised that WSST is categorically against any sort of "performance charge" or tax on records played on our station facilities.

It's ludicrous to think that performers, whose careers are enhanced and often initiated into success through the air-play of their records, should get a performance stipend above that granted by their valuable exposure.

If such a charge, tax, or sitpend is granted, two things come to mind: First, we'll be mighty careful about which records we do play, with an eye to economics perhaps more than an eye to musicianship.

And secondly, we shall obviously play fewer records.

To give you an idea as to how much air-play can "make" or enhance a performer's career, note that in 1976 and 1977, the Word record company paid us approximately $2,000 just to get their records on the air!

Rather than have the tail wag the dog, perhaps there should be legislation introduced which would pay radio stations a tax, or stipend, for each air-play. But then, this would be probably termed "plugola."

We here at WSST appreciate copyright protection. We do not appreciate further legislative encroachment upon a field of communications which is now so ham-strung by regulations and monetary restrictions it's hard to remain in business at all.

Thank you for your time, and we hope these facts can assist you in your report to Congress.

Sincerely,

ROBERT J. HENSLER,
Station Manager.

COMMENT LETTER NO. 145

SUN MOUNTAIN BROADCASTING,
Kingman, Ariz., August 19, 1977.

HARRIET L. OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress,
Washington, D.C.

(Re: Performer Right In Sound Recordings.)

As a small station operator we oppose the above. It would be very time consuming in record keeping and prohibitive in cost.

At the present time we have to purchase most of the recordings we use. We receive very few free copies of the current hits. The only ones you receive are those that an artist wants played to try and make it a hit.

On our FM station we subscribe to a program service which is of considerable expense.

We feel this would be another cost that a small station cannot afford to pay. It will bankrupt many of the small stations across the country.

Very cordially,

DAL STALLARD,
General Manager.

COMMENT LETTER NO. 146

NASHVILLE, TENN., *August 18, 1977.*

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: Recently Bud Wolff, the National Executive Secretary of AFTRA, has been representing AFTRAN's, of which I am a member, in hearings before Congress and the Register of Copyrights concerning the legislation to require the payment of performers' royalties for airplay of their performances on record.

I am writing to let you know that I strongly support Mr. Wolff's testimony on this legislation. I too, think it's time that broadcasters paid what was due to the artists and the record manufacturers whose products they've been exploiting.

Very truly,

JACQUELINE M. FRANTZ CUSIC.

COMMENT LETTER NO. 147

AFTRA SINGERS' CAUCUS,
Nashville, Tenn., August 18, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: I am writing in support of legislation to require the payment of performance royalties by broadcasters for the use of recorded music.

It was my privilege to be in Washington in 1975 in connection with hearings on this subject before sub-committees of both Houses of Congress and was disappointed in their failure to include this provision in the general Copyright Revision bill after the presentation of what I perceived to be overwhelming arguments in its favor.

The case for performer's royalties has been well presented again by Sanford Wolff, National Executive Secretary of AFTRA, and as one who has been an active performer on phonograph recordings for twenty-five years, I must underline his statements and add my own feelings that fairness demands that this legislation now be passed. I urge your recommendation to the Congress favoring such legislation.

Sincerely,

LOUIS D. NUNLEY,
National Chairman.

COMMENT LETTER NO. 148

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

To: The Register of Copyrights.

COMMENTS OF METROMEDIA, INC.

Metromedia, Inc. ("Metromedia"), by its attorneys, herewith submits its comments in response to the Notice of Inquiry issued by the Register of Copyrights on April 21, 1977, in the above-captioned matter.[1]

Preliminary statement

Metromedia is the owner, operator, and Federal Communications Commission ("FCC") licensee of six television stations (five VHF and one UHF) and twelve radio stations (five AM and seven FM), located in principal cities

[1] The original Notice appeared at 42 Fed. Reg. 21527 (Apr. 27, 1977). The Notice of Public Hearing was reprinted at 42 Fed. Reg. 28191 (June 2, 1977). The latter Notice permitted the submission of supplemental statements until the close of the record on August 26, 1977. Both Notices were issued to implement the directive contained in Section 114(d) of Public Law 94-553 (90 Stat. 2541).

throughout the continental United States. In carrying out its responsibilities as a licensee, the Metromedia stations broadcast programs incorporating music, recorded on sound recordings, videotape and film. Metromedia also has performing rights licenses issued by each of the Performing Rights Societies (ASCAP, BMI and SESAC) and pays very substantial fees ot each of these societies.

The imposition of so-called performance royalties will present an undue and unreasonable burden upon broadcasting industry

During calendar year 1975, the broadcasting industry (radio and television stations and radio and television networks) paid music performance license fees totaling some $42 million for radio stations and radio networks and some $57 million for television stations and television networks. These figures come from official reports compiled by the Federal Communications Commission.[2] These dollars represent hefty payments made to the copyright proprietors through their authorized Performing Rights Societies, which monies are distributed among the various copyright proprietors entitled thereto pursuant to the existing copyright law and rights agreements based thereon. To assess additional costs on the broadcasting industry to be paid to performers, musicians and record companies, who are not the copyright proprietors of the music and lyrics, constitutes a tax, without reason or justification, on top of what the industry is already paying—a tax which is not justified by law or equity.

Those desirous of the additional performance royalties have adequate means to obtain extra compensation should they feel they are "underpaid". Record companies have the power to increase the price of records which they produce and sell to the public. Recording artists and musicians are represented by powerful labor unions, who can negotiate with the employers of such individuals (not the broadcasting industry) for additional monies. Distilled to essentials, this is simply an attempt by employees (recording artists and musicians) to obtain more money for the work for which they have been engaged. The suggested broadcasting performance royalty is not the proper means to obtain such additional consideration.

The musicians' union has faced this problem in the past and has solved it by negotiating with employers of the musicians for the establishment of special trust funds. To be specific, a Hollywood Film Trust was set up some 30-odd years ago through negotiations between the musicians' union and the Hollywood film producers. This trust fund called for the payment of a specified percentage of the license fees obtained by the film producers for certain uses of films incorporating the services of musicians. Payments are made into the trust fund by the film producers, as employers, and the monies are administered by a Trustee. The funds are used to arrange for concerts and other activities employing musicians, so as to supplement their earnings. Another trust fund, known as Phonograph Manufacturers Special Payments Fund, was negotiated between the musicians' union and the phonograph record manufacturers. As in the other fund, a percentage of the revenue obtained by the phonograph record manufacturers from the sale of records is placed in the fund to be administered by a Trustee. These funds are used to provide added earnings for the musicians who participate in the recordings, as well as to the general membership of the union. It is important to note that in the instance of each trust fund, it is the employers, in negotiation with the employees' representatives, who make added payments for the benefit of the employees. This is the proper route for the recording artists and the musicians to adopt, if their cry for added remuneration has any justification. The broadcasting industry is not the employer of either the recording artist or the musician in connection with the production or sale of records. These individuals have very adequate representation through their respective unions and their appeal should be directed to their unions which, in turn, can place these matters on the bargaining table.

Insofar as the record companies are concerned, they have their own means to obtain additional revenue, and there is no basis for them to come to the broadcasting industry to swell their coffers. Hearings before various Congressional

[2] See tables 5 and 6 of FCC Public Notice (Mimeo No. 68100) issued Aug. 2, 1976; and tables 5, 6, and 15 of FCC Public Notice (Mimeo No. 73357) issued Nov. 6, 1976.

Committees have established, without dispute, that the record companies are in extremely sound financial condition and are able to take care of their own needs.[3]

Performers, musicians and record companies are not "authors"

The Constitution grants Congress the power to provide protection for limited periods to authors and inventors in order to "promote the Progress of Science and Useful Arts. . . . "[4] It was pursuant to this Constitutional authority that Congress established the Copyright Act of 1909 and the more recent Coypright Act, which was signed by the President in 1976.

The proposal being considered by the Copyright Office requires a return to fundamentals. In this connection, what the word "author" actually means is of utmost significance.

Webster's Third New International Dictionary (1971) defines "author" as: "one that is the source of some force of intellectual or creative work" and "one that writes or otherwise composes a book, article, poem, play, or other work which involves literary composition and is intended for publication".

The Random House Dictionary (1973) defines "author" as: "A person who writes a novel, poem, essay, etc.: the composer of a literary work, as distinguished from a compiler, translator, editor, or copyist". . . . "to originate".

Black's Law Dictionary (Third Edition) defines "author" as: "One who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself."

It is clear that the term "author" connotes one who creates a writing, in this instance, a lyricist or composer. A performer who is the recording artist certainly is not the "originator" within the definition of the Constitution. Neither is the musician who carries out the musical notes which have been created for him by another person—the author.

Attempts to broaden the coverage of the Copyright Law to include artists such as the performers and musicians have been made over three decades. And all means of persuasion have been unsuccessful. Furthermore, nothing has taken place in recent years to justify a differing approach. If our Founding Fathers desired to extend the protection of an "Author" to any person or entity who had a part in the publication of a writing or the manufacture of an instrument which incorporates a writing, the restrictive language found in the Constitution would be absent.

In addition, the Constitutional purpose in granting "Authors" a limited monopoly in their works was to promote the Science and useful Arts for the general public welfare. None of the proponents of the imposition of a secondary use royalty have mounted an argument that will hold water as to how such a royalty will promote the general public welfare. All it would do is further recompense those who are already well compensated and who are not within the ambit of persons envisioned by the Founding Fathers as deserving of a monopoly for their efforts.

Moreover, and while we do not address the question here since it has already been amply ventilated by others in this proceeding,[5] it is submitted that there is a substantial question as to whether the Congress has the requisite Constitutional authority to enact a secondary use royalty.

The broadcast industry makes a substantial contribution by its constant use of records

Testimony before several Congressional Committees considering the so-called performers' royalties has brought forth substantial evidence that the continued air play of records has been, and will continue to be, the major contributing force to the increased sale of records. Free publicity and promotion are given to the recording artists by broadcasters. As a result, viewers and listeners have the incentive to purchase records after the broadcasting industry has provided

[3] It is a documented fact that the revenues of the recording industry surpass those of the radio broadcast industry. It is also well documented by official governmental press releases that the radio broadcast industry's ratio of profit to revenue has been declining over the course of the years. Any secondary use royalty would merely exacerbate this trend, which could very well have an adverse impact on the quantity and quality of the informational services provided the public by this industry.

[4] Constitution of the United States, Article I, § 8, Clause 8.

[5] See, e.g., Comments of Ameriacn Broadcasting Companies, Inc. dated May 31, 1977.

unusual exposure at no cost to the record artist or recording company.[6] Witness after witness representing record companies acknowledged that if the broadcasting industry did not use records as part of its programming fare, record companies as well as recording artists would be dealt a serious blow. The ability of a recording artist, be he a vocalist or musician, to command the unbelievably high remuneration for concerts and other similar engagements is directly attributable to the fact that the American public has heard or seen the performer through the aegis of the broadcasting industry and is anxious to see or hear more. This fact is so self-evident it needs no further comment. To say that the broadcasting industry does not "pay" for the records it uses is a distortion of the facts. Substantial payments are made through the fees paid to the Performing Rights Societies. Further "pay" redounds to the performers and the recording companies as a result of the promotion accorded both of them by the broadcasting industry.

Were it not for the broadcasters' obligation to operate in the public interest, a stranger to this scene might very well inquire why broadcast ownership should not demand payment from record companies for the promotion accorded individual records by air play on their station. With appropriate identification, this is no more ludicrous than a study by the Copyright Office (admittedly mandated by legislation) as to whether there should be a secondary use royalty payment.

The imposition of the proposed added payments would encourage resurgence of payola

We are all aware of the "payola" scandals which surfaced in the late '50's and resurfaced in the early '70's. As a result of such nefarious activities, the Communications Act of 1934 was amended to provide stiff criminal penalties for those involved in offering or accepting payments for the inclusion of material in the programs scheduled for broadcast without full disclosure of such arrangements.[7] The Federal Communications Commission adopted implementing regulations. It also issued policy statements to all broadcast licensees, putting them on notice with regard to their responsibilities insofar as "payola" was concerned. In addition, the Commission has conducted hearings and inquiries to determine whether this form of commercial bribery is influencing the exposure of certain records for reasons other than their artistic ability.

Were a secondary use royalty to be enacted, this would only constitute a spur to others who would hope to benefit economically by attempting to push the exposure of recording product for their own personal gain. In short, it would constitute an incentive for others to promote "their" product contrary to the public interest.

Conclusion

Nothing has been submitted to the Office of The Register of Copyrights that has not been presented to Congressional Committees previously which would justify a change in the decisions made by the Congress to reject a so-called performers' royalty.

Section 114 of the Copyright Act (17 U.S.C. § 114) should be retained in its present form.

Respectfully submitted.

JAMES A. STABILE.
THOMAS J. DOUGHERTY.
PRESTON R. PADDEN.

AUGUST 18, 1977.

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[6] The value to the recording industry of broadcast station exposure has been documented beyond *cavil*. It has been highlighted on this record by the testimony of Mr. Theodore R. Dorf, General Manager of Stations WGAY and WGAY–FM. Mr. Dorf's radio stations program a format wherein several recordings are clustered and the artists and the titles of the selections are "back-announced". Since there is no immediate association of the artist, title and recording company with the particular recording played, there has been an apparent lack of promotional value to the recording companies inherent in this type of format. As a consequence, the recording companies have been disinclined to produce music utilized by these so-called lush beautiful music stations. This dis-incentive is mute evidence of the value to the recording industry of the promotion for their product brought about through contemporary announcement of artist, title and in some instances recording company utilized in the majority of radio station formats. Further evidence of this promotional value to recording companies and artists (which promotional value translates into dollars) is the practice of providing substantial numbers of records (above the number required for air play) for "give-aways". One might legitimately inquire: if there is no sales value to recording companies and artists, why are 'not for sale' records supplied broadcasting stations in the first instance? Obviously, the recording industry recognizes the value of the *quid pro quo*, or the Recording Industry Association of America would have banned this practice by its members.

[7] See Public Law 86–752 (Sept. 13, 1960), codified as 47 U.S.C. § 508.

COMMENT LETTER No. 149

SOUTHWESTERN MEDIA, INC.,
Phoenix, Ariz., August 4, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Library of Congress, Washington, D.C.

DEAR MS. OLER: On behalf of our two radio stations in Phoenix, Arizona. I would like to lodge a protest to any action concerning the establishment of performance right fees in sound recordings.

Since the late 1950's, when radio came into its own as a purely music medium and the dependency upon network-originated programs diminished, this form of electronic communication has established itself as a primary area of exposure for music of any type.

The fact that the majority of broadcasters in this country work hand-in-hand with record firms and entertainment sources in exposing this material gives rise to one of the most important avenues of success in show business. Radio could be best "classified" as root dependency by almost every form of entertainment.

The National Association of Broadcasters estimates that it would cost broadcasters an additional $15 million to the fees it pays to the music licensing organizations.

The effect of this performance right could be catastrophic in the radio industry—to the point that music may have to find a new medium to expose its product. At the current time, I don't think that you or I could improve on a wireless method of communication that's free to the public that could be a more efficient method of exposure than . . . radio.

Your cooperation will be greatly appreciated. Let's not ruin or even threaten a good thing when we have it.

Cordially,

LOWELL E. HOMBURGER,
President.

COMMENT LETTER No. 150

ARNOLD & PORTER,
Washington, D.C., August 26, 1977.

HARRIET OLER,
Esq., General Counsel's Office, Copyright Office,
Crystal City, Va.

DEAR MS. OLER: I am enclosing ten copies of a Supplemental Statement by the Recording Industry Association of America for inclusion in Docket S 77-6 in connection with the study on performance rights being conducted by the Copyright Office.

Sincerely yours,

CARY H. SHERMAN.

Enclosures.

SUPPLEMENTAL STATEMENT OF RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This Supplemental Statement is submitted by the Recording Industry Association of America, Inc. ("RIAA"), a trade association of recording companies whose members create and market approximately 90 percent of the records and tapes sold in the United States.

In the course of hearings held by the Copyright Office in Arlington, Virginia on July 6-7, 1977, the National Association of Broadcasters made reference to the findings of a study by Dr. Fredric Stuart, entitled "Distribution of Income From Broadcast Performance and Sale of Phonograph Records," which the NAB had commissioned some years earlier. Although their testimony relied extensively on the conclusions reached by Dr. Stuart, the NAB refused to make the study available to RIAA, or the Copyright Office, in time for RIAA to analyze it and comment on it at the hearings held in Los Angeles on July 26-28, 1977. Instead, the NAB filed a copy of the Stuart study with the Copyright Office on July 26, 1977, after the Los Angeles hearings were already in progress.

RIAA has now had an opportunity to review Dr. Stuart's study and is submitting this Supplemental Statement in order to comment on its findings. In preparing this analysis, RIAA obtained the views of the Cambridge Research Institute, an independent management consulting and economic research firm. The technical information contained in this Supplemental Statement is based on CRI's objective analysis.

SUMMARY

The NAB's reliance on Dr. Stuart's study as support for its opposition to a performance right in sound recordings is grossly misplaced.

The thrust of Dr. Stuart's conclusion is that, in the aggregate, artists and recording companies "make" more money than composers and publishers. Unfortunately, to arrive at this fallacious conclusion, Dr. Stuart compared the proverbial apples and oranges. He compared relative revenue shares without making a comparable analysis of relative contributions and investments.

More important, even if Dr. Stuart had taken relative contributions and investments into account, the study would tell us nothing meaningful about whether a performance right in sound recordings should be granted. Determining the distribution of aggregate income for composers, publishers, artists and recording companies is irrelevant to the need or equity of individual (personal and corporate) income levels.

Furthermore, what the study tells us is largely incorrect. Dr. Stuart's methodology, in key instances, has yielded erroneous results. By not utilizing publicly available financial data on the recording industry,[1] Dr. Stuart failed to take into account certain economic facts of the recording industry. As a result, although he correctly estimated the share of monies received by publishers and composers (through a series of offsetting errors), he overestimated the share of monies received by recording companies, and underestimated the share received by artists.

Finally, Dr. Stuart's results are outdated. The recordings analyzed in the study are for years 1967–69. Since then, the recording industry has changed dramatically. Retail sales have nearly doubled. At the same time, there have been significant increases in the rate of returns, the break-even point, and artists' royalties. And beginning January 1, 1978, the statutory royalty for mechanical licenses from composers and publishers will increase as well.

Dr. Stuart's model

To analyze the actual distribution of monies generated by record broadcasts and sales, Dr. Stuart constructed a "model" of the recording industry, which can be summarized as follows:

1. A recording company decides to record a song performed by an artist. The recording company incurs out-of-pocket costs for studio expenses of $1,000 for a single and $2,500 for an album.

2. The recording company presses the record. Seventy percent of all records pressed do not recover their production costs. If the record is unsuccessful, the recording company loses $2,500 for a single and $15,000 for an album.

3. If the record is successful, the recording company gives away 300 "freebie" singles for every 1,000 singles distributed, and 200 "freebie" albums for every 1,000 albums distributed.

4. Composers and publishers each receive a mechanical royalty of 1 cent for every record sold (excluding "freebies"). Taking "freebies" into account, composers and publishers each receive a mechanical royalty of .769 cent per tune for singles, and .833 cent per tune for albums.

5. On the average, artists receive 5 percent of the list price, less album cover costs, on 90 percent of all albums sold (excluding "freebies"). Taking "freebies" into account, an artist typically receives 3.39 cents per single, and 16.8 cents per album. Moreover, if a record is successful, the artist must reimburse the recording company for the use of the sound studio for recording ($1,000 for singles, $2,500 for albums).

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[1] *See, e.g.*, Hearings on H.R. 4347 before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 839 (1965) (Statement of John Desmond Glover). Instead, Dr. Stuart based his study on *estimates* of how the record industry behaved from interviews and magazine articles.

6. When a popular record is played by a radio station, the composer typically receives 2.5 cents and the publisher 3.6 cents.

7. In many cases, the artist and composer, artist and publisher, composer and publisher, and recording company and publisher are the same.

The Failings of Dr. Stuart's Analysis

As is shown below, the weaknesses in the model, data, and methodology used by Dr. Stuart have resulted in errors which are fatal to the accuracy of his study. Moreover, the study is outdated. Most important, however, there exists no logical nexus between the subject matter of the study and the issue of whether to grant a performance right in sound recordings.

The Study Is Irrelevant

The distribution of aggregate income for composers, publishers, artists and recording companies has no relevance to the question of the need or equity of individual (personal and corporate) income levels.

The fundamental issue raised by the proposal to grant a performance right to recording companies and artists is not one of need, but rather one of equity—i.e., whether those who exploit for their own commercial gain sound recordings created by others should compensate the creators of those works for the benefits they derive. Determining how monies are distributed in the aggregate tells us nothing about the equity of such a distribution.

Moreover, even if need were a relevant issue, the aggregate figures analyzed by Dr. Stuart do not provide any useful information. Artists, composers, and some publishers attempt to earn a living in the form of a yearly income; recording companies and some publishers attempt to earn an appropriate return on investment for their stockholders. The aggregate distribution of monies that Dr. Stuart calculated tells us nothing about the individual income levels of the average (or the above average or the below average) composer, publisher, artist or recording company.

For example, Dr. Stuart's results show that publishers as a class earn less than any other group, but we have no inkling as to whether the average publisher earns $1,000, $5,000, $25,000, $100,000 or more as personal income. Nor do we know if publishers obtain 5 percent, 10 percent, 25 percent, 100 percent or more return on capital. Likewise, the income of all artists tells us nothing about the income needs of such diverse groups as background vocalists and musicians, members of symphony orchestras, or recording superstars.

It follows that the NAB's reliance on Dr. Stuart's study is unfounded, as conclusions regarding the appropriateness of a performance royalty for recording companies and artists find no support in the analysis which Dr. Stuart undertook.[2]

The Results of The Study Are Incorrect

The problems with Dr. Stuart's methodology are numerous and substantial.

1. Dr. Stuart's method of estimating relative income ignores the fact that composers and publishers obtain income from the broadcast performance of "oldies," while recording companies and artists receive income only from the sale of records. In fact, a considerable proportion of income of composers and publishers derives from oldies, while recording companies realize very little income from this source.[3] From this standpoint, Dr. Stuart underestimated the performance royalties paid by radio broadcasters to composers and publishers. He accumulated only the performance earnings for his sample recordings during the period he studied. Many of these recordings are today, ten years later, likely

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[2] Indeed, in light of the irrelevancy of the study results to the performance rights controversy, it is simply astounding that Dr. Stuart could draw the conclusion that he did:

"The high proportion of monies accruing to the record companies not only throws into question their need for performance royalties, but also suggests that additional payment to performing artists could easily come from that direction, rather than from broadcasters who would bear the burden under the proposed revision of the Copyright Law."

This statement, on what is essentially an issue of equity, can only be regarded as a gratuitous comment beyond the stated scope of Dr. Stuart's study. It cannot logically be derived from an analysis of aggregate income distributions.

[3] A survey of radio stations conducted by CRI in 1977 determined that 53 percent of music programming consisted of "oldies". (See pages 58–59 and Exhibit 3 of RIAA's Statement of July 27, 1977.) A similar survey conducted in 1975 found that 56 percent of music programming consisted of "oldies".

to be played as "golden oldies" and to earn income for their publishers and composers, but not for the recording companies.

2. In his model, Dr. Stuart significantly discounted royalties paid to artists, composers and publishers by recording companies (a discount of 10/13 for singles and 10/12 for albums) on the ground that "freebie" records are given away without charge. But "freebies" are only one flow of free records. The other is "returns" to record companies. In 1969, 15.9 percent[4] of gross sales reported by recording companies were returned. Here again, Dr. Stuart significantly underestimated royalty payments by recording companies to artists, composers, and publishers.

3. Recording companies have many other expenses besides studio cost. They bear the day-to-day cost of being in business. In fact, in 1968 recording expenses—the only cost identified and taken into account by Dr. Stuart for successful recordings—came to only 4.2 percent of recording companies' net sales. (See Exhibit 1.) As a result, Dr. Stuart overestimated the monies available to recording companies.

4. Although a recording may be unsuccessful from the vantage point of the recording company—because it does not even cover its cost of production—composers and publishers will still earn income from the sale of such recordings in the form of mechanical royalties. Dr. Stuart did not consider this source of income for composers and publishers. (His figures are based only on the sales of successful records.) Again, Dr. Stuart underestimated the income of composers and publishers.

5. Artists' royalties, too, were underestimated. In Exhibit 1, line 4, CRI estimates (on the basis of actual recording company financial data) that in 1967 artists' royalties were 14.1 percent of net sales. Dr. Stuart estimated these artists' royalties at 5 percent of list sales (equivalent to 10 percent of net sales).

6. It is certainly true that composers, publishers, artists, and recording companies are not mutually exclusive groups. Some composers are also artists; some recording companies also publish, etc. Nevertheless, we believe it only fair, in conducting an analysis of income distribution, to allocate income by function served for a recording, not to attempt to allocate monies by what is (arbitrarily) considered to be the main function performed, as Dr. Stuart did in the summary on page 12 of his report. Dr. Stuart's technique suggests that it would be just as appropriate to allocate the profits of some recording and publishing companies to their parent broadcasting companies. Obviously, this would serve no analytical purpose. Neither does Dr. Stuart's approach.

7. CRI has developed the following estimate of the gross distribution of income by function only (i.e., monies distributed to artists for composing are allocated under royalties to composers, not under income to artists).

[In millions of dollars]

	1967	1968	1969
Composers:			
Mechanical royalties	26.4	29.3	31.9
Performance royalties	8.2	8.7	9.2
Total	34.6	38.0	41.1
Publishers:			
Mechanical royalties	26.4	29.3	31.9
Performance royalties	11.8	12.6	13.3
Total	38.2	41.9	45.2
Artists	117.6	118.3	144.3
Recording companies	22.3	38.8	75.6

Source: See app. A.

[4] The Financial Survey of Thirteen Recording Companies conducted by Cambridge Research Institute for the year 1969.

CRI's estimates of allocations are compared to Dr. Stuart's figures (page 36 of his study) in the following chart:

	Dr. Stuart, 1967–69		CRI					
			1967		1968		1969	
	Millions	Percent of total	Millions	Percent of total	Millions	Percent of total	Millions	Percent of total
Composers	$2.6	15	$34.6	16	$38.0	16	$41.1	13
Publishers	2.9	17	38.2	18	41.9	18	45.2	15
Artists	2.2	13	117.6	55	118.3	50	144.3	47
Record companies	9.2	55	22.3	11	38.8	16	75.6	25
Total	16.9	100	212.7	100	237.0	100	306.2	100

Comparison of the two sets of numbers leads to the conclusion that Dr. Stuart accurately estimated the percentage of distribution of monies to composers and publishers, but dramatically misestimated the percentage distribution to artists and recording companies. The misestimates are apparently due to his limited understanding of the financial behavior of the recording industry.

The Study is Outdated

Dramatic changes have occurred in the recording industry since Dr. Stuart performed his analysis.

1. In 1967, the retail sales of records at list price amounted to approximately $1.1 billion. In 1974, retail sales were approximately $2.2 billion. (See Exhibit 2.) In aggregate terms alone, then, the recording industry has changed significantly.

2. Artists' royalties have increased substantially, too. In 1967, artists' royalties were 14.1 percent of net sales; in 1974 they were 19.2 percent of net sales. (See Exhibit 1.) In absolute terms, the increase was from $82 million to $211 million—a 157 percent increase.

3. Dr. Stuart assumed mechanical royalty payments of 2 cents per tune (generally divided 1 cent each for composers and publishers), the generally accepted going rate. On January 1, 1978, however, the statutory royalty will be raised to 2¾ cents, or 0.5 cents per minute of playing time, whichever is greater.

4. The rate of record returns has likewise been increasing. In 1969, record returns amounted to 15.9 percent of gross sales. By 1974, the number had increased to 21.2 percent.

5. At the same time, the break-even point—the point at which a recording generates sufficient revenue to cover the cost of producing, manufacturing and marketing—has gone up. In 1963, 74 percent of all 45 RPM single record releases failed to break even. In 1972, 81 percent failed. Sixty-one percent of popular LP's did not break even in 1963; by 1972, that number had increased to 77 percent.[5]

6. Record company profit levels have fluctuated widely. Recording companies' aggregate net profit levels during the period 1967-74 were as high as 6.9 percent of sales (in 1967) and as low as 3.4 percent of sales (in 1973)—51 percent below the high.

The implication of the foregoing is apparent: if Dr. Stuart were able to redo his study for 1977, he would be likely to distribute the aggregate monies in a different manner than in his study covering a decade earlier.

Conclusion

Dr. Stuart's study is substantially inadequate—indeed, irrelevant—to any questions as to the equity of and need for a performance right in sound recordings. Moreover, the results of the study are largely incorrect. In any event, the study is likely to be of historical interest only, since the data are obsolete.

[5] Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st sess. 1477–78 (1975) (Statement of John D. Glover).

It follows that Dr. Stuart's study provides no support for the opponents of performance rights legislation.

EXHIBIT 1

ESTIMATED FINANCIAL STATISTICS FOR THE RECORDING INDUSTRY, 1967–74

[Percentages of net sales]

	1973 survey statistics and updates in 1974 and 1975									
	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
1. Contribution to artists' funds			1.9	1.9	1.7	1.4	1.8	1.5	1.7	2.0
2. Talent costs			2.5	2.0	2.0	1.8	2.0	2.0	3.3	1.8
3. Recording expenses			4.2	4.2	3.8	3.8	4.0	4.0	4.3	3.2
4. Artists' royalties			14.1	13.5	14.6	15.9	18.7	18.7	19.5	19.2
5. Total artist and recording expenses (1+2+3+4)			22.7	21.6	22.1	22.9	26.5	26.2	28.8	26.2
6. Production and manufacturing			34.8	33.8	33.0	33.7	33.6	32.3	33.3	31.8
7. Sales, promotion, general and administrative expenses			29.5	30.0	27.2	27.0	26.9	27.8	28.7	30.3
8. Total costs other than mechanical royalties and profits (5+6+7)			87.0	85.4	82.3	83.6	87.0	86.3	90.8	88.3
9. Copyright mechanical royalties			9.1	8.7	8.1	8.2	8.7	8.1	7.6	7.2
10. Total costs (8+9)			96.1	94.1	90.4	91.8	95.7	94.4	98.4	95.5
11. Profits from recording sales before taxes and foreign fees, etc			3.9	5.8	9.6	8.2	4.3	5.5	1.6	4.5
12. Net sales (10+11)			100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
13. Foreign fee income, etc.[2]			4.2	4.9	4.9	5.5	5.6	6.3	6.2	6.5
14. Profits before taxes (11+13)			8.1	10.7	14.5	13.7	9.9	11.8	7.8	11.0
15. Income taxes			3.9	5.4	7.6	6.9	4.9	5.9	4.4	6.0
16. Net profits after taxes			4.2	5.2	6.9	6.8	5.0	5.9	3.4	5.0
Number of reporting firms			7	8	10	12	13	13	13	13
Estimated percent of industry represented			44.0	43.0	52.0	63.0	62.0	60.7	56.8	63.8
Estimated sales of all U.S. recording firms (million)[3]			$586	$697	$793	$830	$872	$962	$1,008	$1,100
Retail sales at list prices[4] (millions):										
Records	$862	$959	$1,051	$1,124	$1,170	$1,182	$1,251	$1,383	$1,436	$1,550
Tapes	[5] NA	[5] 50	122	234	416	478	493	541	581	650
Total	862	1,009	1,173	1,358	1,586	1,660	1,744	1,924	2,017	2,200
Percent change from previous year	+13.7	+17.1	+16.3	+15.8	+16.8	+4.7	+5.1	+10.3	+4.8	+9.1

[1] Includes depreciation.

[2] Foreign fee income and other miscellaneous income are not included in net sales. Foreign fee income is from the licensing of U.S. record masters for pressing overseas, and is estimated to be roughly ½ of the total figure shown. The remainder is from donestic fees from record and tape clubs, inventory adjustments, other one-time items, interest, and rent. They are expressed as a percentage of net sales to show how much they contribute to the profits recording firms make on their recording sales.

[3] Recording company sales are estimated to be half of retail sales at list prices. This estimate is supported by the prices the surveyed record companies reported charging for their various types of recordings.

[4] Retail sales figures are from RIAA. They are based on sales at list prices. Since sales are usually made at a sizable discount, actual retail sales are about 20–25 percent lower than the figures given.

[5] Tapes sales began to develop in 1965 and were becoming significant in 1966. The 1966 figure is an estimate by CRI. No RIAA figures on tape sales are available before 1967

Source: John D. Glover, testimony on behalf of the Recording Industry Association of America before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House o fRepresentatives, 94th Cong., 1st sess Sept. 11, 1975 "Statement on sec. 115 of H.R. 2223," p. 48.

EXHIBIT 2

ESTIMATED INCOME STATEMENT OF THE U.S. RECORDING INDUSTRY, 1967–74

[In millions of dollars]

	1967	1968	1969	1970	1971	1972	1973	1974
1. Contribution to artists funds	$11.1	$13.0	$13.7	$12.1	$15.5	$14.3	$17.1	$21.6
2. Talent costs	14.5	13.7	15.6	15.2	17.6	18.9	33.8	19.4
3. Recording expenses	24.5	28.1	30.0	31.6	35.6	38.9	43.0	35.0
4. Artists' royalties	82.0	91.2	115.0	131.4	165.2	179.6	196.1	211.1
5. Total artist and recording expenses (1+2+3+4)	132.3	146.0	174.4	190.3	233.9	251.7	290.0	287.1
6. Production and manufacturing	203.0	228.4	260.0	278.6	297.4	310.5	335.4	350.3
7. Selling, promotion, administrative and general expenses [1]	172.3	202.3	214.8	223.6	238.2	267.7	289.3	333.7
8. Total costs other than mechanical royalties and profits (5+6+7)	507.5	576.7	649.2	692.5	769.5	830.0	914.6	971.2
9. Copyright mechanical royalties [2]	52.7	58.6	63.7	67.6	77.3	78.1	77.1	79.3
10. Total costs (8+9)	560.2	635.3	712.9	760.2	846.8	908.1	991.7	1,050.5
11. Net profits on recording sales before taxes and foreign fees, etc	22.3	38.8	75.6	67.1	38.4	52.9	16.5	49.8
12. Net sales (10+11)	582.7	674.6	788.7	827.3	885.2	961.3	1,008.3	1,100.3
13. Foreign fee income, etc. [3]	24.5	32.8	38.7	45.7	49.5	60.8	62.5	71.6
14. Net profit before income taxes (11+13)	47.0	71.6	114.2	112.9	88.1	113.7	79.0	121.3
15. Income taxes [4]	22.7	36.7	60.0	57.6	43.9	56.7	44.4	65.8
16. Net profit after income taxes	24.3	34.9	54.4	55.4	44.2	57.0	34.7	55.5
Estimates based on statistics from this number of reporting companies	7	8	10	12	13	13	13	13
Estimated percent of industry sales represented by reporting companies [5]	44.0	53.0	52.0	63.0	62.0	60.7	56.8	63.8

[1] Includes depreciation.

[2] The 1973 figure is based on statistics supplied by 13 companies with about 57 percent of the industry's sales; as for the 1974 figure, the same 13 companies had 64 percent of the industry's sales in that year. Statistics supplied in response to an additional questionnaire by 34 companies with 98 percent of the industry's 1973 sales indicate that 1973 mechanical royalties paid were closer to $82,100,000, and, for 1974, closer to $83,500,000. These figures do not include mechanical royalties paid to U.S. copyright holders by foreign record companies or by foreign subsidiaries of U.S. record companies. Foreign mechanical royalties grew rapidly. In 1973, they were approximately $35,000,000, or nearly 50 percent of the mechanical royalties paid by U.S. recording companies This estimate of the 1973 foreign mechanical royalties earned by U.S. publishing companies and other copyright owners is more than 5 times the royalties estimated to have been paid in 1963. The 1973 estimate is based on Billboard reports about sales abroad of recordings of U.S. music.

[3] Foreign fee income and other miscellaneous income are not included in net sales. Foreign fee income is from the licensing of U.S. record masters for pressing overseas, and is estimated to be roughly ½ of the total figure shown. The remainder is from domestic fees from record and tape clubs, inventory adjustments, other 1-time items, interest, and rent. They are expressed as a percentage of net sales to show how much they contribute to the profits recording firms make on their recording sales.

[4] Income taxes include State as well as Federal taxes.

[5] Estimates of the percent of industry sales represented by the surveyed companies are based on the assumption that industry sales are about half retail sales at list prices as reported by Billboard. This assumption is supported by the prices the surveyed companies reported charging for their various types of recordings. These figures almost surely overstate the profits of the recording industry, for they are based on statistics supplied by larger companies whose profit levels are generally far higher than those of the multitude of small companies not encompassed in the CRI survey. These profit figures are only for the U.S. operations of record companies; they do not include the profits of foreign subsidiaries.

Note: Totals do not always add precisely because of rounding. The figures here are only for the U.S. operations of the record companies. Figures for their foreign subsidiaries are not included.

Source: See exhibit 1, p. 49.

APPENDIX A

SOURCE DATA FOR CRI CALCULATIONS OF INCOME DISTRIBUTION COMPARABLE TO DR. STUART'S ESTIMATE

1. Composers' Mechanical Royalties are ½ of Copyright Mechanical Royalties, from Exhibit 2.

2. Publishers' Mechanical Royalties are ½ of Copyright Mechanical Royalties, from Exhibit 2.

3. As to Composers' and Publishers' Performance Royalties:

(a) From page 21 of Dr. Stuart's study, it appears that BMI has released to Dr. Stuart the figures that writers obtain 2.5 cents and publishers 3.564 cents per broadcast performance of popular songs. This is equivalent to 41 percent for writers (composers) and 59 percent for publishers.

(b) Broadcasting Magazine estimated that radio revenues paid to BMI for performance royalties were $8 million in 1967 and $8.5 million in 1968. (See Broadcasting Magazine, September 23, 1968, page 23.) CRI estimates that 1969 payments to BMI were at least $9 million.

(c) Boradcasting Magazine estimated that during the time period 1967-1968 performance royalties paid to BMI were ⅔ those paid to ASCAP. (See Broadcasting Magazine, September 23, 1968, p. 24.)

(d) Payments to SESAC are not counted as the amount is relatively small.

(e) The foregoing data lead to the table following.

[In millions of dollars]

	1967	1968	1969
Radio payments to:			
BMI	8.0	8.5	9.0
ASCAP (3/2 BMI)	12.0	12.8	13.5
Total	20.0	21.3	22.5
Distribution of total to:			
Composers (41 percent)	8.2	8.7	9.2
Publishers (59 percent)	11.8	12.6	13.3

4. Artists' Gross Income is derived from Exhibit 2 as the sum of Contribution to Artists' Funds, Talent Costs, and Artists' Royalties.

5. Recording Companies' Income is taken from Exhibit 2 labeled Net Profits on Recording Sales Before Taxes and Foreign Fees, etc.

COMMENT LETTER No. 151

NATIONAL BROADCASTING CO., INC.,
New York, N.Y., August 26, 1977.

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Pursuant to the Notice of Inquiry issued by the Copyright Office on April 27, 1977, the National Broadcasting Company hereby submits five copies of its comments on the Office's study of performance rights in sound recordings.

Very truly yours,

ELEANOR D. O'HARA.

Enclosures.

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF PERFORMANCE RIGHTS IN SOUND RECORDINGS

S. 77-6

COMMENTS OF THE NATIONAL BROADCASTING CO., INC.

The National Broadcasting Company, Inc. (NBC) hereby submits its comments to the Copyright Office (the "Office") in connection with the Office's Congressionally-mandated study on the establishment of performance rights in copyrighted sound recordings.

The Office in its Notice of Inquiry[1] asked for public comment in four major areas:

(1) Constitutional and legal constraints arising from performance royalties;

(2) The projected economic effects of performance royalties on performers, copyright owners and users;

[1] 42 Fed. Reg. 21527, Apr. 27, 1977.

(3) The proper beneficiaries of performance royalties; and
(4) The mechanisms necessary to implement performance royalties. In these comments, NBC will treat each of these areas.

Before the Office issued its Notice of Inquiry, Representative Danielson introduced a bill to amend the Copyright Law to create performance rights in copyrighted sound recordings, H.R. 6063.

Constitutional and legal constraints

NBC opposes the creation of performance rights in copyrighted sound recordings because such rights are inconsistent with the purpose of the Constitutional guarantee of copyright protection.[2] Article I, Section 8 of the Constitution authorizes Congress to create performance rights in copyrighted sound recordings only "to promote the progress of science and the useful arts." Thus, Congress is required to conclude that a type of copyright protection serves a public policy interest that outweighs other important national goals such as freedom of speech and competition in the marketplace.

Before an additional copyright monopoly is conferred upon special interest groups, the need for it should be patently proven, and the new monopoly should achieve the desired results. The need does not exist nor will the desired benefits be realized by creation of a sound recording performance right.

When performance rights were first seriously discussed by Congress in the late 1960s, performers and record companies claimed to be suffering serious economic losses through widespread record piracy. It was then, perhaps, appealing to consider the benefit they would reap if users of records were required to pay performance fees. Whatever the merits of these claims were at that time, clearly, those economic circumstances are not present today. The vigorous enforcement of the Sound Recording Act passed in 1971 has brought the problem of record piracy under control. It is difficult to believe that Congress could find that a new source of money for performers is necessary in order to stimulate recording artists to issue new works. That simply ignores the economic realities that are discussed below.

Projected economic effects of performance royalties

The proponents of performance rights suggest that the fees generated by such rights would benefit struggling new recording artists and classical recording artists. That argument is spurious. It ignores the economic structure of the recording industry and, more significantly, the amount of public performances of recorded classical music and music of new struggling artists. Under the performance rights bills introduced by Senator Scott[3] over the years, it has been estimated that performance royalties on classical records would amount to less than $60,000 a year and those earned by unknown artists, an even more minuscule amount.[4]

The Office and the Congress must be aware that the principal beneficiaries of any pool of performance fees will be the highest paid and most popular recording artists. Any equitable distribution of performance fees has to count the number of performers by users as a significant factor in determining the fees earned for particular sound recordings. Creating sound recording performance rights will only succeed in making the rich richer. Assuming that record companies are excluded from receiving any portion of performance rights (discussed in the next section below), only a limited number of star performers and a small pool of popular backup singers and musicians stand to benefit from the creation of performance rights.

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[2] The Office is well aware of the other significant constitutional questions posed by the creation of performance rights in copyrighted sound recordings. For example, there is substantial doubt whether performers qualify as "authors" or their interpretations of music constitute "writings."

[3] Mr. Danielson's bill, H.R. 6063, provides that "One-half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to the performers to be shared equally on a per capita basis, of the sound recordings for which claims have been made . . ." NBC assumes that the reference to sharing "equally on a per capita basis" refers to all of the performers on a particular sound recording. Nothing indicates that Mr. Danielson intends all performers to have equal interests in the performance fee pool. Such equal participation would certainly not create an incentive to have one's record performed more than once a year.

[4] Bard and Kurlantzick. "A Public Performance Right in Sound Recordings: How To Alter The Copyright System Without Improving It." 43 Geo. Wash. L. Rev. 152, 186 (1974).

Many of these leading recording artists not only perform but also write and publish the works they record—Bob Dylan, Elton John, Stevie Wonder, Paul Simon, James Taylor, Carly Simon, Paul McCartney, Paul Williams, Neil Sedaka, Barry Manilow, Barbra Streisand, Frank Sinatra, to name but a few. As composers and publishers, these artists already benefit from substantial payments broadcasters make annually to the performing rights societies—more than $7 million per year in the case of NBC's Television Network with substantial additional sums paid by each of its owned radio and television stations and by its Radio Network.

Those who would include record company copyright owners as beneficiaries of performance fees argue that the additional sums earned by record companies will subsidize the issuance of new recordings, especially recordings which might not otherwise be released including certain classical records. This proposition is equally unrealistic. Legislation compelling record companies who receive performance fees to invest them in new recording ventures unlikely to achieve profits seems particularly vulnerable to Constitutional attack. Indeed, despite the rhetoric, none of the peformance rights bills have imposed such an investment obligation upon record companies. There is no reason to believe that the recording industry will turn itself into an eleemosynary institution.

The principal beneficiaries of any performance fees will thus be record companies and the most popular performers. The Office and the Congress are well aware of the high profits in the multi-billion dollar recording industry and of the huge sums earned by the most popular recording artists.

Indeed, the profits of the record industry and of recording artists have become increasingly tied to the demand created for sound recordings by broadcasters, principally by radio music broadcasters. Radio sells records. If it did not, record companies would not send free promotional copies to stations.

It is particularly surprising that in every proposed bill regarding performance rights in copyrighted sound recordings that broadcasters, particularly radio broadcasters, would be forced to underwrite almost the entire pool of performance fees in order to play sound recordings on the air. Under H.R. 6063, the NAB has estimated that the radio industry alone would pay more than $15 million in fees; that sum represents approximately 17% of the radio industry profits in 1975.

The effect of proposals such as H.R. 6063 on the radio broadcasting industry are enormous, and such proposals ignore the economics of radio broadcasting. Indeed, as the FCC's most recent published statistics indicate, almost 40% of AM and combined AM/FM stations and approximately 60% of independent FM stations lost money. All those stations would nonetheless have to pay performance fees under H.R. 6063. It is difficult to perceive how public policy should require radio stations to pay additional compensation to multi-million dollar record companies and million dollar stars.

Beneficiaries

For these reasons, NBC opposes creation of performance rights in copyrighted sound recordings. The proposal is also defective in terms of who would benefit from its provisions.

Performance fees would simply represent a windfall for record companies. Such a legislated windfall seems particularly unwarranted because record companies are largely responsible for the financial problems most recording artists face before they become successful. With the exception of star performers, recording artists historically have had a weak bargaining position with record companies.

At the time of the enactment of the Sound Recording Act, record companies pointed to their technological contributions to the quality of sound recordings and convinced the Congress that they satisfied by those efforts the Constitutional definition of an "Author." When we turn to performance rights, it is difficult to imagine how copyright owners and record companies can establish sufficient creative endeavor to satisfy that definition.

Indeed, only featured conductors, instrumentalists and vocalists can present any plausible argument that their performances are works of authorship. Yet, under the proposed bill such featured performers have no exclusive claims to the performance fee pool, nor should they, given the fact that most of these performers are already successful.

Implementation

Finally, the Notice of Inquiry asked for comments on the mechanisms necessary to implement performance rights in sound recordings.

NBC believes that if Congress decides to establish performance rights, it will obviously have to approve some form of compulsory licensing. We note this although NBC is firmly opposed to the expansion of compulsory licenses which, we believe, are antiethical to a free and competitive marketplace. No radio or television station could learn the identities of all the performers on a record and negotiate licenses with each of them. Clearance problems would be almost as great if the rights were limited to featured performers.

We would also observe that the administration of any such compulsory licenses should be lodged with the Copyright Royalty Tribunal. We firmly oppose granting antitrust immunity to Organizations of performers and record companies or to the existing performing rights societies. Such immunity would grant them unparallelled pooled bargaining power [5] over individual users of copyrigthted works.

Conclusion

It is ironic that the position of broadcasters on the issue of performance rights seems, at first blush, to be analogous to cable television's position on retransmission of broadcast signals. Indeed, there are certain common elements. The public does benefit from the broadcast of sound recordings even as Congress found the public benefits from receiving broadcasting signals from cable television. Similarly, the revenues of music radio stations are made possible by the broadcast of sound recordings even as the revenues of cable systems flow from retransmission of broadcast signals.

There is, however, a very significant difference that destroys the analogy. Copyright owners lost revenues because of cable television's retransmission of broadcast signals. The opposite is true here. Record companies and performers earn revenues because the broadcast of sound recordings demonstrably increases the sale of records. Broadcasters are not parasites on the recording industry. Broadcasters, primarily radio stations, give performers access to a vast public they could not otherwise hope to reach. This enables the public to become familiar with a performer's talent. The public responds by buying the performer's records.

NBC does not believe that the creation of performance rights will do anything to benefit unproven performers or to stimulate the issuance of new recordings that otherwise would not be produced. If those are the goals, let the Congress enact legislation to subsidize unknown recording artists and to create incentives for the production of new sound recordings. Do not recommend to the Congress an additional tax on broadcasters for the purpose of creating a windfall fund for the recording industry and star performers.

Creating a new monopoly should be avoided if other means are available to achieve the desired goals, and other means do exist. One solution would be for performers to work together more cohesively to get a better deal for all performers from the record companies. Another would be for the record companies to increase the amounts they contribute to the Phonograph Record Manufacturers Special Payments Fund which was established in recognition of an obligation to performers not being met in their contracts. A third option would be to raise the amount of mechanical royalties paid by record manufacturers and to permit performers to share in the proceeds along with composers and publishers. Such solutions would place the financial burden where it belongs.

NBC thanks the Office for this opportunity to submit its comments.

Respectfully submitted.

JAY E. GERBER,
Vice President and Associate General Counsel.
ELEANOR D. O'HARA,
Assistant General Attorney.
TOD A. ROBERTS,
Senior Attorney.

AUGUST 26, 1977.

[5] ASCAP and BMI do not presently enjoy such immunity. In *CBS* v. *ASCAP*, the Second Circuit held "that the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a 'market necessity' defense." (Opinion, p. 18, August 8, 1977).

COMMENT LETTER No. 152

CONSUMER FEDERATION OF AMERICA,
Washington, D.C., August 26, 1977.

Re Performance Right for Sound Recordings.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: These comments are submitted by the Consumer Federation of America, the nation's largest consumer organization, in response to your request for comments regarding the creation of a performance right for sound recordings.

CFA has a long-standing tradition of being committed to the welfare of the American consumer, both in the role of purchaser and wage earner. Our interest in this proceeding stems from its potential impact on the purchasers of sound recordings, as well as those who create recordings.

The sound recording is the only copyrighted work which has not been granted a performance right by Congress. We believe that as a matter of fairness, those who use the creative work of others for commercial purposes should pay for the privilege. This is basic to copyright law.

There seems little doubt that sound recordings would enjoy a performance right if technology had been more advanced and records had been popular in 1909 when other "writings" were granted a performance right by Congress.

We believe creation of a performance right for sound recordings would be beneficial to the consumer.

At present, the consumer who buys records for personal use finances the creation and production of sound recordings. Those who use recordings for commercial purposes, such as broadcasters, jukebox operators and background music services, realize substantial economic benefits from sound recordings, Therefore, it seems equitable that these commercial users should pay a performance royalty to the creators of sound recordings and relieve consumers of some of the financial burden.

Very truly yours,

KATHLEEN F. O'REILLY,
Executive Director.

COMMENT LETTER No. 153

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., August 26, 1977.

HON. BARBARA A. RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: At the recent hearings conducted by the Copyright Office with regard to establishment of a performance right in sound recordings, John Dimling and I agreed to submit responses to certain questions which you raised. This letter is in response to your question concerning the relevancy of the Supreme Court's decision in *Zacchini* v. *Scripps-Howard Broadcasting Company*, 49 U.S.L.W. 4954 (Sup. Ct. June 28, 1977). Mr. Dimling will respond to questions more appropriately within his area of expertise in a separate letter.

You indicated that the Court's decision clearly indicated that establishment of a performance right in sound recordings would not contravene the First Amendment. As you noted, the Court stated that:

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's act without his consent. The Constitution no more prevents a state from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner." 45 U.S.L.W. at 4957.

The Court went on to recognize that the considerations underlying the State of Ohio's decision to protect a right of publicity were identical to those underlying the patent and copyright laws. *Id.*

The constitutionality of a performance right in sound recordings cannot be sustained, even in light of the *Zacchini* holding. In *Zacchini*, the Court reasserted the traditional tension between protecting First Amendment values and furthering the public policy goals which the right of publicity and the copyright law were designed to promote. That same tension exists with regard to establishment of a performance right in sound recordings, but the factors which the Court found determinative in deciding that the benefits of a right of publicity overrode First Amendment considerations are absent.

The Court cited "ample reasons" for permitting states to resolve the value conflict in favor of establishing a right of publicity. The Court found the "broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance," and stated that:

"Ohio's decision to protect petitioner's right to publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public." *Id.*

The Court compared this economic incentive to produce something of public value to the copyright law's intention "to grant valuable, enforceable rights in order to afford greater *encouragement to the production of works of benefit to the public.*" *Id.* (Emphasis supplied.)

Establishment of a performance right in sound recordings, however, would produce no countervailing benefits to the public, e.g., it would not encourage production of new works. Inasmuch as my testimony explained NAB's position that a performance right in sound recording would be no more than an "ineffective solution to a nonexistent problem," those arguments will not be repeated here. Suffice it to say, because a performance right in sound recordings is not likely to increase record production, it lacks sufficient impetus to clear the First Amendment hurdle. Thus, despite the analogy drawn by the Court between the right of publicity and the copyright laws, a critical factual distinction remains. In sum, the *Zacchini* case fails to preserve the constitutionality of a performance right in sound recordings against a First Amendment challenge.

I also would like to address two additional matters. First, it is our understanding that the Copyright Office staff has been investigating the operation and effects of the performance right in foreign countries. Any such evaluation of the foreign experience for purposes of predicting the effects of a performance right in this country must not ignore the tremendous differences between the broadcasting system in this country and those in most foreign countries. Unlike most foreign broadcasting systems, the U.S. system is privately owned. Moreover, it has developed into a ubiquitous, nationwide service which provides an invaluable service to the public without government subsidy. In contrast, most foreign systems are state owned and operated and provide a far more limited service. In terms of the impact of a performance right in sound recordings, payments made to recording artists and record producers by state owned broadcast systems really amount to an indirect government subsidy. A portion of the public funds used to operate the broadcasting system is, in effect, reallocated to recording artists and record companies. Furthemore, this subsidization of recording artists and record companies is hardly likely to affect the quality or quantity of service provided by a state owned broadcast system. The cost of performance right fees is paid by government funds allocated to operation of the broadcast system.

In this country performance right fees would be paid by broadcasters and would constitute a transfer of funds from one segment of the private sector to another, rather than a governmental subsidy. As I pointed out in my testimony, this reallocation of broadcast revenues to recording artists and record companies cannot be justified by any commensurate public benefit. Moreover, in contrast to the foreign experience, payment of performance right fees would tend to reduce the quality of radio broadcast service in this country and might jeopardize the continued operation of some stations. Any comparison between the effects of a performance right in sound recordings in this country and foreign countries must be viewed in light of these critical distinctions.

Notably, regarding the experience of other countries, the Canadian experience has shown that a performance right is unnecessary as an incentive to the production of records. There appears to be no shortage of record product in Canada despite the repeal of the performance right in that country.

Finally, NAB opposes establishment of a performance right in sound recordings in any form. The proposal to permit broadcasters to perform recorded music

for the initial 30 days of release, thus, is unacceptable. Such a proposal contains no more promise of any public benefit than the performance right proposal embodied in H.R. 6063.

I very much appreicate your consideration of our views. We, of course, remain ready and willing to work with you and the Copyright Office staff concerning this important matter.

Very truly yours,

JAMES J. POPHAM,
Assistant General Counsel.

COMMENT LETTER No. 154

AMERICAN WOMEN IN RADIO AND TELEVISION INC.,
Washington, D.C., August 17, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: Please add my name to the list of other AFTRA members who are bidding you to recommend to Congress legislation to require radio stations and others to pay a royalty to recording artists when they appropriate their talents for profit. Mr. Sanford I. Wolff, National Executive Secretary of the American Federation of Television and Radio Artists said it most eloquently when he appeared before the copyright panel which you chaired recently.

It's time that the background musicians and singers come to the forefront of your attention and through you to the Congress. Don't you agree, Ms. Ringer?

Thank you.

Sincerely,

BETTE JEROME.

COMMENT LETTER No. 155

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., August 24, 1977.

MS. BARBARA RINGER,
Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. RINGER: During the hearings on performance royalties last month you asked me to give some thought to how the radio industry might have evolved if the sort of performance payments called for in H.R. 6063 had been required of radio stations earlier in radio's development. My recollection is that you were particularly interested in what effect performance royalties might have had on radio programming, and in whether such royalties would have discouraged improper promotional activities like payola. While it's obviously difficult to speculate with much confidence on how the radio industry might have evolved, I'm happy to share with you some thoughts I've had.

My thoughts about the effects of performance royalties are related to my view of what happened to radio during broadcasting's transition into the television era. Until television, radio was a mass medium to which entire families turned for entertainment. As television developed, it supplanted radio (and movies) to become the principal source of family entertainment.

Radio's first response to television was not to program recorded music. During the 1948–1952 period in which the FCC "freeze" on television licenses limited the number of television stations, network radio reached what many considered to be its creative highpoint. Many of the long-running series were still on the air (in 1950 there were 108 different programs that had been on the air for at least 10 years), and a number of new program concepts were introduced. The success of "Stop the Music" in 1948 spanned a succession of merchandise giveaway shows; Edward R. Murrow's "Hear it Now" series began in 1950; and innovative, offbeat comedy like that of Bob and Ray reached the air.

But none of this programming enabled radio to compete with television as a medium of family entertainment, and radio was forced to find another market to serve. Radio service therefore evolved rather quickly from family entertainment to the provision of information and entertainment as a supplement to other

activities being carried on concurrently with listening to the radio. Today, most radio listening is done while the listener is engaged in some other activity—doing housework, driving a car, reading, picnicking, etc.

My feeling, therefore, is that the radio industry turned to recorded music as a programming staple primarily because music fit with the new market that radio sought to serve after television displaced it as the principal family entertainment medium. If this is correct, then it seems unlikely that the imposition of a performers royalty would have substantially altered the evolution of radio.

Elementary economic theory predicts that an increase in the cost of any factor of production tends to reduce the use of that factor, so it is true that a performance royalty would have provided a disincentive to use recorded music. If I'm correct about why radio shifted to recorded music, however, it would seem that there would have been no obvious programming alternatives to recorded music. If so, then radio would have been forced to absorb the increased cost of recorded music, and industry profits would have been reduced. The ultimate effect of a performance royalty would, therefore, have been to reduce the number of radio stations that went on the air.

With respect to payola, the effect of a performance royalty is much simpler and straightforward. Record companies and performers undertake tremendous promotional efforts because the rewards from air play of records—both in record sales, and public visibility of the performers—are great. A performance royalty would increase the rewards realized from air play of records, so its effect would be to increase the level of promotional activity. This effect would presumably be quite small when compared to revenues from the sales of records—but if it had any effect, a performance royalty would encourage promotional efforts, including payola.

As I indicated earlier, much of this is speculative, but I'm happy to share my thoughts with you for whatever they're worth. I should also add that they represent my own judgements, and are not necessarily those of the National Association of Broadcasters.

Sincerely,

JOHN A. DIMLING, Jr.

COMMENT LETTER No. 156

ARLINGTON, VA., *August 24, 1977.*

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.

DEAR MS. RINGER: As a member the Washington-Baltimore Executive Board with a background of thirty-eight years as a broadcast performer, I urge you and the copyright panel to recommend to Congress legislation that would require radio stations and others to pay a royalty to recording artists when they appropriate their talents for profit. These days recorded music fills some 75 percent of all commercial radio air time, yet broadcasters pay nothing to the performing artists or the record manufacturers whose products they exploit.

Sincerely yours,

RAYMOND E. MICHAEL.

COMMENT LETTER No. 157

KRCB AM RADIO,
Council Bluffs, Iowa, August 23, 1977.

Subject: Thoughts on the proposed artists' royalties to be paid by radio stations.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Songwriters have, of course, received airplay royalties along with their publishers for many years through BMI, ASCAP, SESAC, ETC. The thought being that they do not benefit in any other way from the fame and popularity of their songs. However, the artists and singing stars who sing the

songs the composers write do benefit in other ways from radio airplay. They become famous singing stars and make as much as $100,000 a night or more in personal appearances and concerts. Radio stations through their airplay of these artists make their fame and fortune possible. The initial airplay is like a free commercial for the song and the artist. The continued repetitive airplay of these songs once they are established creates the superstars who can command the incredible fees they get for TV guest shots and concerts as well as the extraordinary guaranteed royalties they are able to sign up for with new labels when their contracts expire. In short radio makes the music stars of the times. If radio ever stops playing music, their phenomenal incomes will plummet!

Therefore, why should radio stations be penalized for this service of exposure and publicity which they provide the recording stars absolutely free! In fact, as evidenced by past incidences of payola investigations it has been proven that the recording companies and their artists are willing to unscrupulously bribe certain disc jockeys and program directors to program their product. While we do not condone payola or bribery we do find it extremely paradoxical to propose that we the radio stations pay them for exposing their product. Naturally we benefit from having their product to expose, but there is no denying that they benefit equally or even more so from the exposure. It's a two way street with both parties helping each other. Why should anyone pay?

It is a fact that some smaller radio stations will not be able to afford the proposed royalties and a large percentage of the American radio companies now pursuing music formats will have to abandon them and switch to all talk, all news, all religion or whatever is left when you subtract music!

We foresee a day when both record companies, recording artists, and all facets of the music business will rue the day this proposal was brought forth.

And of course the biggest loser will be the people who for so many years have enjoyed listening to their favorite songs on their favorite radio stations. They will soon be deprived of this opportunity to a significant degree.

In the end we believe the only radio stations able to afford pursuing their music formats after the added burden of these proposed performance royalties will be the large metropolitan tight formated stations which already restrict their music to the top forty, or thirty or twenty hit songs of the day. Who will expose the new unknown artists and their recordings?? The small radio stations who are not in such a competitive situation . . . the same radio stations which will be driven out of the music formats by this proposed performance royalty. It is literally a move by the music industry to kill the goose that lays the golden records, to coin a phrase!

We believe everyone concerned will be the loser in the end!

Sincerely,

JIMMY O'NEILL,
Program Director.

COMMENT LETTER NO. 158

WILS RADIO,
Lansing, Mich., August 23, 1977.

Re performance rights in sound recording.

MS. HARRIET L. OLER,
Senior Attorney, Copyright Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I herewith present my opposition to the consideration or establishment of a performance right in sound recording.

It is inconceivable to think that the performers and/or records companies would consider the implementation of a fee system which would be such a burden to radio, the medium which keeps the record industry and artists popular and so very successful financially. If a fee becomes a reality and the amount is similar to ASCAP and BMI, this station could be paying an additional $15,000 per year, dollars which could be very beneficial to the improvement of programming services.

I'll make a number of quick observations:

1. Gold records are presented to radio stations which start a record on the road to popularity and sells a million copies, as a public relations effort by record

companies, as a token of appreciation and in recognition of the very important role radio plays in selling records.

2. Payola, a devious, unlawful practice which resulted from very strong desires on the part of record companies to get certain records the positive attention of announcers to that "their" record would be played heavily by the record hit maker, radio. More play, more popularity, more sales, more profit. This is pressure to play at its worst.

3. Record lists published weekly by many radio stations are of keen interest to record promoters, who are concerned with the relative position of their records. To be on a list means more air play, more records sold.

4. Record librarians and music directors at radio stations, particularly those in bigger market, spend much of their time talking by phone and in person with records promoters. They are in touch so that they may, if possible, influence the music played.

5. Retail outlets advertise records on the radio station which is the most popular and plays the type of music they offer for sale.

6. Record company field men are compensated in part by their ability to get their music played and sold. Record company advertising budgets are placed on radio because only radio sells music so well.

Many performers do extremely well financially, the result of contracts and recording companies and the royalties paid on record sales. As a result of the popularity created for the artist by radio, personal appearance dollars also pour into the coffers of artists.

Should performance fees be imposed on radio, only the popular artists will be played. The ability of a new artist to become popular will be extremely difficult. So those who have will get more, and the fledgling will get less and less.

If a fee is important to performers, it is an issue to be taken up with and resolved by the performers and the record company. Leave radio free to give all artists a chance to grow, become popular and share in a royalty agreement with promoters and record companies.

Please consider these points of view. I am sure that the present relationship between radio and record companies is the preferred method of marketing records, is beneficial to and in the best interest of the broad spectrum of performers.

Thank you for your willingness to indulge my point of view.

Cordially,

E. L. Byrd, *General Manager.*

Before the Copyright Office, Library of Congress, Washington, D.C.

Comment Letter No. 159

Performance Rights in Copyrighted Sound Recordings

In the Matter of Performance Rights in Copyrighted Sound Recordings

To: The Register of Copyrights.

COMMENTS OF MARYLAND-DISTRICT OF COLUMBIA-DELAWARE BROADCASTERS ASSOCIATION, INC.

The Maryand-District of Columbia-Delaware Broadcasters Association, Inc. (MDCD), by its attorney, herewith submits its Comments in response to the Notice of Inquiry issued by the Register of Copyrights on April 21, 1977 in the above-captioned matter.[1]

1. MDCD is an association consisting of radio and television broadcast stations throughout the Maryland, Delaware, District of Columbia and Northern Virginia area. Its membership consists of many stations which make substantial use of musical compositions. The association's stations broadcast a wide variety of programs that incorporate music recorded on sound recordings, video tape and film. Its members pay substantial fees for the performing rights li-

[1] A later Notice of Public Hearing was reprinted at 42 Fed. Reg. 28191 (June 2, 1977), which permitted the filing of Comments until the close of the record on August 26, 1977.

censes issued by each of the performing rights societies (ASCAP, BMI and SESAC).

2. The members of the association, along with broadcasters throughout the nation, paid over $97 million for payments for music license fees in 1975.[2] These very substantial payments were made to the copyright proprietors through their authorized performing rights societies, which had license agreements with member stations throughout the United States, including the Maryland, Delaware, District of Columbia and Northern Virginia area. Thus, presently both the composer of the musical composition and its music publisher receive from the broadcast industry very substantial fees for the use of each musical composition. It is MDCD's position that there is no need to create a separate performance royalty so as to reimburse those who are not, in effect, the creators or authors of the music.

3. Before deciding to make such a break with tradition and common law so as to enlarge the term "author" to include merely those who interpret another person's work, there must be made some compelling argument for the imposition of this secondary royalty. An examination of the state of affairs in the music industry reveals that there is no need for the establishment of a performance royalty. The recording industry is healthy, and record production and distribution are doing quite well without the need of any new stimulants. The record companies, if they desire to increase their profits, merely have to increase the price of the records, which they have only recently done and sold to an ever-eager public. As for the musicians, they are represented by powerful labor unions which have the necessary strength to bargain with the employers of the musicians for increased compensation for their members. Suffice it to say, there is no reason why the broadcast industry, already faced with almost $100 million paid out annually in royalty fees, should have to foot the bill because musicians and record companies seek to make additional profits.

4. When one considers that it is the broadcast industry which provides entertainment to the general listening public at no cost, and it is the broadcast industry which, through its playing of musical compositions, increases the sales and the profits for both recording companies and musicians, it seems quite unfair, indeed ridiculous, that an additional royalty tax should be placed on an already burdened industry. Broadcasters will not be able to easily meet these additional costs. Many broadcasters are operating on tight budgets with little profit which curtails their ability to provide necessary public service.

5. A performance royalty would be too heavy an economic burden; for example, for the radio broadcast industry has been suffering continually declining profit margins.[3] In addition, the number of radio stations reporting a profit has also been declining. According to the Commission, the number of AM and AM–FM stations reporting a profit dropped from 69 percent in 1973 to 61 percent in 1975. It should be noted that these are the more economically viable stations; and that of the independent FM stations, only 40 percent reported earning a profit in 1975.[4]

6. The major legal question in this proceeding must be whether Congress can enlarge the copyright term of "authors" to include recording artists, arrangers, musicians and record companies. Article I, Section 8, Clause 8 of the Constitution specifically provides that to promote the arts, Congress has the power to assign exclusive rights to authors of their writings. Recording artists, arrangers, musicians, do not come within the definition of "author", nor do they constitute inventors, which are similarly protected by the Constitution. Nor does their work produce what could be called a writing. For some of the above reasons, ex-Senator Sam Ervin (D-North Carolina) concluded in 1974 that a performance royalty in sound recordings was lacking constitutional footing.[5]

7. Even assuming Congress could establish performance royalties, there remains the fact that the primary goal of copyright law is "to stimulate artistic creativity for the general public good."[6] Thus, the question remains whether this performance copyright would serve the public interest. MDCD believes it would have the contrary effect.

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[2] FCC Public Notice, November 8, 1976, Mimeo No. 73357, Tables 5, 6 and 15; FCC Public Notice, August 2, 1976. Mimeo No. 68100, Tables 5 and 6.

[3] Radio profits have gone from 11.09 percent of revenues in 1968 and 9.55 percent in 1972 to a low of 5.3 percent in 1975. FCC Public Notice, November 8, 1976, Mimeo No. 73357, Table 2.

[4] FCC Public Notice, November 8, 1976. Mimeo No. 73357.

[5] Congressional Record—Senate, September 6, 1974, S–16073.

[6] *Twentieth Century Music Corporation* v. *Aiken*, 42 U.S. 151, 156 (1975).

8. According to a study done by two academicians, a performance royalty would result in encouraging record producers to offer broadcasters improper inducements, commonly referred to as payola or plugola, to play their records.[7] The public interest will not be served by encouraging such schemes.

WHEREFORE, Maryland-District of Columbia-Delaware Broadcasters Association, Inc., as an association representing broadcasters throughout the Maryland, Delaware, District of Columbia and Northern Virginia are, believes that a performance royalty is unnecessary, unconstitutional, and would disserve the public interest for the reasons herein stated. In these circumstances, Maryland-District of Columbia-Delaware Broadcasters Association, Inc. urges the Register of Copyrights to recommend to Congress that Section 114 of the Copyright Act (17 USC Statute No. 114) be retained in its present form and that a new performance royalty in sound recordings not be established.

Respectfully submitted.

ALFRED C. GORDON, Jr.,
Attorney.

COMMENT No. 160

RADIO STATION WADR,
August 1, 1977.

Hon. DONALD J. MITCHELL,
House of Representatives, Utica, N.Y.

DEAR MR. MITCHELL: Thank you for your letter of July 28, 1977. My letter to you dated July 25, 1977, expressed my concern over the saccharin issue, and I feel reassured that the proposed ban of broadcast advertising is not gaining momentum.

I am now writing to you about another issue which may seem like a smaller issue, but in the long run it will have a negative impact on the general public. The issue is one of performance record royalties that radio stations have to pay to record licensing companies such as BMI, ASCAP and SESAC. The issue of license fees will be presented before Congress in the near future, and I would like you to hear the broadcasters' position on this matter.

The three companies mentioned above fix their rates and charge this station close to two (2) per cent of its gross revenue to allow the station to play their music. For our station, that amounts to over eight (8) cents every time a song is played. That gets pretty stiff when you consider that some songs are played more than 200 times over the course of one year ($16.00). The musicians "poor-mouth" about having to make a living. I have a hard time accepting this when I see that John Denver made $50,000 for one weekend in Washington, D.C., and Elvis Presley will get over $125,000 for two hours' work in Utica. I should be so poor.

There is a lot of smoke about payola to radio stations. This is isolated to the top 25 metropolitan markets. Let me assure you that stations in the smaller markets do not get payola. Not only do we not get paid; we have to buy many of the records that we play. If radio stations did not provide a service to musicians by playing their music, why would there be payola at all?

In summary:

A. If the license companies are allowed to change ever-increasing rates, stations will be running more and more expensive commercials. This increase will be returned to the general public through advertising budget increases and higher consumer prices.

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[7] "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It," Robert L. Bard and Lewis S. Kurlantzick, The George Washington Law Review, Volume 43, No. 1, pages 152–238, November, 1974, pages 196–199.

B. I am not being hypocritical and trying to tell you that I speak from an altruistic position; I am speaking as a small businessman who is trying to make a living.

C. As a private individual, I am tired of being ripped off by the "greed syndrome" being foisted on me by all of the "stars" from all over the entertainment field.

Thank you for listening, and hopefully you agree with me on this issue. I look forward to meeting with you soon at your convenience.

Sincerely,

LARRY E. MANUEL,
President and General Manager.

COMMENT LETTER NO. 161

RANDALLSTOWN, MD.,
August 13, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. RINGER: As a Board Member of the Washington-Baltimore Local of the American Federation of Television and Radio Artists, I am writing to you to urge the Copyright Panel to recommend to the Congress legislation to require radio stations and others to pay a royalty to recording artists when they appropriate their talents for profit.

I hope that you, as Register of Copyrights will see fit to recommend legislation to this effect.

Sincerely,

S. JAMES ENGLISH III.

COMMENT LETTER NO. 162

RADIO KKUB,
Brownsfield, Tex., September 1, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. RINGER: Please consider this as a request for your recommendation that no Performers' Royalty be included in your report to Congress.

Even in a small, out-of-the-way radio station such as ours, we receive more than 100 records each month from record companies and performers, sent to us without charge, presumably in the hope that we will play them on the air. The only advantage to the companies and performers can be in the sales we might create of their records.

We receive visits from record distributors about 3 times a year, encouraging our consideration of their new releases for broadcast. We are asked by our listeners via telephone about particular records they hear so that they may have information they need to purchase a record or album that they like.

Most companies supply us with past records and albums for 25 cents and $1.25 each.

Cooperation through the years between broadcasters, performers, and record companies has been mutually beneficial. Certainly the financial success of the record companies and many performers can attest to this.

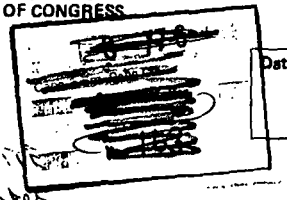
Sincerely,

JIM FARR.

COMMENT LETTER No. 163

CONGRESSIONAL INQUIRY

COPYRIGHT OFFICE
LIBRARY OF CONGRESS



Source of Inquiry: LTR

Date of Receipt: 9/14/77

Member: RICHARD C. WHITE

Address: House of Reps
Wash., D.C. 20515

Constituent:
Address: Jim Taber

GENERAL COUNSEL OR COPYRIGHT
SEP 15 1977
RECEIVED

Nature of Inquiry:

Memo re: opposition to the Copyright Revision Act which would pay performers royalties on records played on the air

Recommended Action: Refer to Harriet Oler

Date: 9/14/77

Date of Reply: 9/17/77

Logged in as public Comment letter
H. Oler 9/17/77

(2/77)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 13, 1977.

MS. HARRIET L. OLER,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. OLER: It would be greatly appreciated if you would add this memo from Mr. Jim Taber to your file of people who are opposed to the provision in the Copyright Revision Act which would pay performers royalties on records played on the air.

Your kind assistance is appreciated.

Sincerely yours,

RICHARD C. WHITE,
Member of Congress.

Memorandum.

AUGUST 10, 1977.

To Johnny Kaye, Rish Wood, Chuck Ashworth.
From Jim Taber.

Should the absurd proposal of paying performers royalties on records played on our stations become law, we will have to take some undesirable actions.

(1) We will not play any new records on speculation until the record is a well-established hit. The reason is we could not afford to take a chance on paying for an unknown quantity. In other words, we won't take any new chances on new artists until they prove that we can afford them.

(2) We will have to begin charging the various record companies an equal amount of the fee for airplay that we will be charged for their artists.

Let's hope that these measures are not necessary. Let's hope that the ridiculous performer's royalties idea is dissolved by rational thinking people.

COMMENT LETTER NO. 164

PHOENIX, ARIZ., *August 23, 1977.*

MS. HARRIET OLER,
Senior Attorney, Office of General Counsel, Library of Congress, Washington, D.C.

As a student in broadcast I feel this concerns me too. I am looking for a career in radio when I finish school so I feel my comments are just as important.

I recently was told in class about radio stations paying a major portion of their income to these record industries.

And now raising it is unbelievable to me. Radio gives it's services free to the public and without radio, very few if any, records would be sold. No one is going to walk into a record store and buy a record they have never heard. And where do they hear it? On radio stations! Having to pay larger fees will surely put many, many stations out of business and the record industry can't possibly want to do that. They're getting the best deal right now. Radio stations are advertising the records for the industry, and paying highly for the opportunity.

Somewhere along the line there must be a mix up. Radio stations should be getting paid by these crooks!

Sincerely,

ESTER KARIM.

COMMENT LETTER NO. 165

MT. SUSITNA BROADCASTING CORP.,
Anchorage, Alaska, August 25, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

To whom it may concern:

KANC is a "new" business, about two years old. This facility's economic viability as a business is marginal now. The impact of additional royalty fees on this station, as a commercial enterprise, would be extremely detrimental; possibly fatal. Obviously, if the station were not able to continue to stay in business, its ability to serve the public of the Anchorage Market area, would be zero!

We do not feel additional royalties are warranted anyway. According to the sources we deal with, the very fact that we play records at all has considerable value to the record retailers, jobbers, manufacturers, studio musicians, other performing artists, and writers. KANC supplies "playlists" to 110 record representatives, weekly, as a key indicator of what records they can expect to sell in the Anchorage market. Regional time buyers frequently will not advertise a record product that is receiving no exposure to the public as part of regular radio air play.

To quote two prominent Anchorage record retailers:

Joe Bacon, Owner/Manager, three Electronics Company stores; "If radio doesn't play a product, we can't sell enough to even pay for the shipping."

Gary Abood, Manager, The Music Almanac; "Ninety percent of our customers come in asking for products they heard on the radio."

Should KANC have to pay to play, we would have to stop playing a lot. Thus, the considerable value in "free" exposure to new records and artists, that prompts the public of Anchorage to be one of the leading per capita record sales markets in the United States, would be lost, at no appreciable gain. We feel this would probably be true in many other markets. Air play of records is the greatest "free advertising" bonanza in contemporary America and accounts for millions of records sales. Anyone involved in marketing or selling records could tell you exactly the same thing. Should stations have to pay additional royalties for records they expose, perhaps they may be driven to charge advertising rates for the benefits of that exposure. The result is obvious. The richer the company, the more it could pay to advertise (play) its record, and the good, new artist, on the small poor label, would wither on the vine. Why, because this rule would force the industry to lobby for legalized "payola" or go bankrupt.

Thank you for your attention.

HARVE ALLEN, *Program Director.*

COMMENT LETTER NO. 166

WYOMING ASSOCIATION OF BROADCASTERS,
August 24, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Never in my years of business management have I ever known an issue so obvious, so black and white as the idiocy of Performance Rights in Sound Recordings. And, yet the issue continues to return and plague us. If morality and fairness were based on this type of thinking, performers should pay broadcasters (which has been ruled illegal and labeled "Payola").

KVOC endeavored to ascertain reaction from sources that might be affected by radio stations not giving complete identification of songs on a regular basis. Our question to two local record shops was, "If radio stations did not play or did not identify the artist on a recording, what affect do you think this would have on record sales?"

Budget Tapes and Records, 220 South David, Casper, Wyo.: "It would definitely cut down record sales at least by 90 percent."

Sunshine Records, Beverly Plaza, Casper, Wyo.: "We wouldn't sell any records. In effect, it's free advertising for the artist."

A similar question was also asked of a local performer with a newly released record. The reply from Wayne Cagle was, "We'd be ———." "A group of us down in Nashville were talking about this a couple of weeks ago and the only guys that seem to be behind this thing are the guys who have been in the business a long time and they're getting tired of having to play concerts and gigs and now just want to sit on their ———". "Generally, almost everyone I've talked to don't want it".

These are direct quotes, sorry we didnt have more time or we could have filled a book, I hope these help to show how artists and business feel.

Sincerely,

FRED HILDEBRAND, *First Vice President.*

P.S.—Please contact me at the following address for any further information: Fred Hildebrand, 2323 East 15th Street, Casper, Wyoming, 82603, Phone: 307–265–2727.

COMMENT LETTER NO. 167

CENTRAL WEST BROADCASTING CO., INC.,
Ballinger, Tex., August 31, 1977.

MS. BARBARA RINGER,
The Register of Copyrights.
HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

There seems to be no end for schemes to get more money from the broadcaster.

We are just a small market station in a community of 3,850 people and it's currently unbelievable what our radio station pays ASCAP, BMI, SESAC each month, in cash.

In addition, we pay $340 per month, for music to run an FM automation and purchase about $150 worth of records per month for our AM station. You see, we promote the sale of records for artists like crazy, sell their records, make them sound like great people and still only receive the junk records free . . . the good ones we still have to pay for like everybody else.

And now, the people who record the stuff want to make a law for us to pay them more?

Likewise, I suppose it would be a good idea if a law could be passed that all recording artists and recording companies would pay us to play their music. Of course, that would be ridiculous, wouldn't it? (It makes as much sense), but that's "payola" and against the law!

Best personal regards,

DEAN SMITH,
President and General Manager.

COMMENT LETTER NO. 168

KJAM RADIO,
Madison, S.D., August 23, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIET L. OLER: We would like to take this means of voicing our views on "Performance Rights for Performing Arts".

We realize the lobbying efforts for "Performing Artists" are very strong, as the name artists are putting on free performances for various people in Washington power positions. May we suggest looking at the small radio station that makes up the bulk of the local broadcasting in this country. The local stations are providing this country with day in day out news, plus the sounding board for the community that has helped make this country a better place to live. Any person in this community has the opportunity to be heard on KJAM. To make this service available it takes money. The "Performing Artists" would take from 15 to 25 percent of our net profit before taxes. This would mean a station like ours would have to cut back on local services. I believe that the whole copyright law is backwards anyway—

Profit in the record industry should come from record sales and not taxing radio stations to make them popular. If you would like further comments, please call.

Thank you for your consideration.

Sincerely,

JOHN A. GOEMAN,
General Manager.

COMMENT LETTER NO. 169

FLOYDATA, TEX., *August 26, 1977.*

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. RINGER: Although we are actors, having no connection with the music/recording business, we are taking this opportunity to express our hope that you will recommend to Congress the enactment of legislation protecting the rights of those artists and their producers who, at present, receive no royalties for their work now being played on radio stations all over this country.

It is our personal opinion that all professional artists, and in this particular case, the recording artist should be protected and paid a fair amount of money for the talent they have developed and put to use to entertain the masses. So many people are enhanced and entertained by the arts, and the least we can do is enact legislation which would enable these recording performers and those who back them up (the "unknown" backup artists) to receive a fair share of the money made by commercial stations off of their particular talents.

Ms. Ringer, I'm sure you will weigh carefully and fairly the arguments of both sides involved. We both hope and strongly urge you to recommend that proper legislation be enacted to require the "payment of performers' royalties for airplay of their performances on record."

Finally, this letter is more than just a "block" effort by an organized group of people to bring about change for their particular side or cause. It is the personal

feelings, thoughts, and opinions of just two individuals who, after taking a look at the facts, think that the above suggested legislation is the fair thing to do.

Sincerely,

DANA SCOTT GALLOWAY.
REBECCA GALLOWAY.

COMMENT LETTER No. 170

ARIZONA BROADCASTERS ASSOCIATION,
Scottsdale, Ariz., August 25, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MISS OLER: To incorporate a performance right in sound recordings in the revised Copyright Law would be economically unjustified and overly burdensome.

Performers on sound recordings receive tremendous promotion of incalculable monetary value as broadcasters play, without charge, their on-going recorded offerings. Broadcast exposure sells recordings, earning performers inestimable income.

In Arizona, many radio markets are quite small resulting in economic returns to station licensees that are, at best, marginal. Even in the few larger markets, a plethora of stations (thirty-four in metropolitan Phoenix, for example) compete for limited advertising revenue. Some are not profitable. Implementation of a performance right in sound recordings could become an intolerable financial burden.

The Board of Directors on behalf of the member stations of the Arizona Broadcasters Association strongly urges that the Register of Copyrights recommend against such performance right in sound recording in her report requested by the Congress.

Sincerely,

KENNETH W. HEADY,
Executive Director.

COMMENT LETTER No. 171

NASHVILLE, TENN., *September 8, 1977.*

DEAR MS. RINGER: As a recording artist for 24 years, I would like to strongly urge you to make a favorable recommendation to the Congressional hearings on performance royalties.

It is long past due, and a positive recommendation from you will go a long way towards making this legislation a reality.

Sincere regards,

JUSTIN TUBB.

COMMENT LETTER No. 172

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF COPYRIGHT OFFICE REQUEST FOR COMMENTS REGARDING PERFORMANCE RIGHTS AND COPYRIGHTED SOUND RECORDINGS

COMMENTS OF THE SCREEN ACTORS GUILD CONCERNING ESTABLISHMENT OF PERFORMANCE ROYALTY

In the interests of fairness, justice and logic, the Screen Actors Guild urges the swift adoption of the proposed performance royalty for performing artists and record companies. It is time to end the free ride that broadcasting stations across the country have had on the backs of artists and producers alike.

The argument put forth by commercial broadcasters, that both artists and record companies benefit from the increased popularity that comes from exposure

on the air, is totally spurious. In fact, only a tiny minority of the records released each week ever receive any air time at all. Furthermore, of those that do, only a small minority of either the artists or the record producers are mentioned on the air. This is increasingly true as one moves beyond the realm of so-called "popular music".

Why should the broadcasting industry be able to profit from the creative endeavors of others while the creators go hungry? The only reason this is allowed to happen today is because sound recording did not exist when the copyright law was first enacted back in 1909. If it had, it is certain that the recording artists and producers would be compensated, just as are those who create books and motion pictures.

The composers and publishers of songs are already compensated under the copyright law. Surely the performers and producers of these songs are no less worthy. No one would seriously suggest today that the producers of and performers in a movie are any less entitled to compensation for and protection of their creaitve efforts than the author of the book upon which the movie is based. Yet this is precisely the distinction that is made when commercial broadcasting stations, which must pay royalties to the composers and publishers of songs, are allowed to exploit the equally valid creative efforts of producers and performers without compensation in any form whatsoever.

Broadcasting stations bill enormous amounts of advertising yearly. But were it not for the audiences cultivated by the playing of records, no advertiser would pay for time on the air. It is monumentally unjust that producers and performers should remain uncompensated for the part they play in attracting revenue to commercial broadcasting stations.

A performance royalty would be good for the recording business. The way things work today, the only way a recording company can make any money is by selling records to the public. The vast majority of these records do not even make a profit, in part no doubt because consumers can hear the songs on the radio and record them on inexpensive devices without having to pay for the right to do so. Since commercial broadcasters make this situation possible, it is only fair that they should help bear the cost of producing the record so exploited.

The procedural obstacles to the collection of such a royalty are minimal. A system for monitoring the use of sound recordings for the benefit of composers and publishers is already used by ASCAP, BMI and SESAC. There is no reason why these or similar agencies could not perform the same function for the benefit of performers and record producers.

The Screen Actors Guild also supports the formula proved by AFTRA for the division of the royalties to be collected: The royalties should be shared evenly by the performers in the recording companies; and the performers' 50 percent share should be split equally among their number.

While the radio show of old was replete with live performances, their modern counterparts are few and far between. Remember the NBC symphony orchestra? Those performers were paid, yet the broadcasters still made profits. Those same performers must find it ironic that they can be heard on the radio today while receiving no compensation because they are on record. The absence of a performance royalty has quite literally pushed them off the air.

The constitutional purpose of the Copyright Act is to protect and encourage creativity, one of our nation's most valuable resources. Yet, in the absence of a royalty for the performers and producers of records, their creativity is stifled. We therefore urge that the Copyright Act be amended as proposed to require the payment of royalties to recording performers and producers when their efforts are used to provide profit for others.

Dated June 22, 1977.

Respectfully submitted.

PAUL S. BERGER,
General Counsel.

COMMENT LETTER No. 173

ARNOLD & PORTER,
Washington, D.C., July 20, 1977.

JAMES J. POPHEM, Esq.,
National Association of Broadcasters,
Washington, D.C.

DEAR JIM: I find it astounding and quite disappointing that the NAB has now changed its position and refuses to make available the Stuart Study which was referred to so extensively in your earlier testimony before the Copyright Office. As we discussed the morning of your testimony at which time you agreed to make the document available to us, RIAA wanted to review the Study and be prepared to discuss it in our testimony in Los Angeles. I believe the colloquy accompanying your testimony made clear that there were vagaries and uncertainties about the derivation of the figures which you were quoting from the Stuart Study.

You now indicate that the NAB will not make the Stuart Study available to the parties and to the Copyright Office until the August filing date. The only rationale for this course of conduct is to prevent a full and fair analysis of the Stuart Study by the parties most affected. The sole inference that one can draw from this is your extreme concern that an objective review of the Study would prove that it is baseless.

I am sending a copy of this letter to the Copyright Office for inclusion in the record because I think it is imperative for the Office to be aware, in weighing credibility of the Stuart Study, to appreciate the fact that you refused to make it available to the other side for evaluation and comment.

Sincerely,

JAMES F. FITZPATRICK.

ARNOLD & PORTER,
Washington, D.C., July 18, 1977.

MS. BARBARA RINGER,
Copyright Office, Library of Congress,
Washington, D.C.

DEAR BARBARA: In the recent hearings on the performance right issue, Harriet Oler raised the point that a discrepancy exists between RIAA and NAB projections of the expected royalty payments under the rate schedule in H.R. 6063.

Our current estimate is that the likely radio broadcast income to be received from the Danielson Bill ranges between $10,623,000 and $14,354,000 a year. Revenues from television stations would yield an additional $483,000.

The basis of our computations are set forth in the attached schedules.

Pursuant to your suggestion, we would be most happy to meet with the NAB officials to attempt to reconcile our figures so that the Copyright Office could have a single set of data with which to work. I am sending a copy of this letter to NAB counsel, along with the attachments, with a request that they contact us if they are interested in such discussions.

Best wishes.

Sincerely yours,

JAMES F. FITZPATRICK.

Enclosures.

Exhibit 16

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER H.R. 6063 (LOWEST FEE ESTIMATED)

Revenue category of radio stations	Number of AM, AM/FM stations in this category in 1975[1]	AM, AM/FM estimated performance royalty (based on 1975 revenues)[2] (thousands)	Estimated number of FM stations in this revenue category in 1975[3]	Estimated number of stations of all types in this revenue category in 1975	All stations' estimated performance royalty (based on 1975 revenues)[2] (thousands)
Less than $25,000	36		71	107	
$25,000 to $100,000	860	$159	361	1,221	$226
$100,000 to $200,000	1,440	799	331	1,771	983
Over $200,000	1,966	8,361	349	2,315	9,414
Total	4,302		1,112	5,414	
Total for stations with revenues of $25,000 or more	4,266	9,319	1,041	5,307	10,623

Source: Analusis made by Cambridge Research Institute based on the Federal Communications Commission's AM–FM Broadcasting Financial Data, 1975, issued Nov. 30, 1976.

[1] This is the number of stations whose revenue category was indicated in the Federal Communications Commission report. Except for stations with revenues under $25,000, the number of stations actually in operation is somewhat larger than the figure here.

[2] The formula for the performance royalty in H.R. 6063 introduced in April 1977 is:

Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250 per year, but the fees would average only about 74.0 percent[4] of this amount.

Stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750 per year, but the fees would average only about 74.0 percent[4] of this amount.

Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts." If allowance is made for stations devoting less than the average air play to recorded music, the performance royalty would average perhaps 74.0 percent[4] of "net sponsor receipts." AM, AM/FM stations in this revenue category had 79 percent of all AM, AM/FM stations' expenses in 1975, and thus, we estimate, earned 79 percent of the $1,430,203,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1975. No data are available on total net revenues earned by FM stations with revenues above $200,000. We estimate that 34 percent of the FM stations with revenues above $25,000 fall in this category, while 46 percent of AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over $200,000 earn 79 percent of total AM, AM/FM revenues. We therefore estimate that FM stations with revenues over $200,000 earned 58 percent of all FM revenues (31 percent +46 percent ×79 percent) or $142,295,000 in 1975.

[3] 1975 Federal Communications Commission data indicate the distribution among various revenue categories of independent FM stations, but do !ot do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations (of both types) with revenue's under $25,000 was reported to be 71 in 1975. Therefore, in this revenue category the number of stations is correct and not an estimate.

[4] See the following table:

Station revenue class [a]	1975 median station revenue [a]	Number of stations sampled [a]	1975 median music license fee [a]	Estimated aggregate music fee actually paid (col. 3× col. 4)	Estimated pro forma aggregate blanket music fee (col. 2× col. 3×3.425 percent [b])
(1)	(2)	(3)	(4)	(5)	(6)
$2,000,000 plus	$3,078,600	31	$78,700	$2,439,700	$3,268,703
$1,000,000 to $2,000,000	1,326,700	84	33,100	2,780,400	4,816,916
$500,000 to $1,000,000	661,300	162	16,100	2,608,200	3,669,223
$300,000 to $500,000	372,300	263	9,500	2,498,500	3,353,585
$250,000 to $300,000	273,600	153	7,100	1,086,300	1,433,732
$200,000 to $250,000	222,700	187	5,700	1,031,700	1,426,338
$150,000 to $200,000	172,600	218	4,600	1,002,800	1,288,718
$125,000 to $150,000	136,000	150	3,700	555,000	698,700
$100,000 to $125,000	111,400	147	3,000	441,000	560,871
$75,000 to $100,000	86,900	126	2,200	277,200	375,017
$50,000 to $75,000	63,400	97	1,600	155,200	210,631
Less than $50,000	39,400	71	900	63,900	95,811
Total				14,939,900	20,198,245

Estimated aggregate music fee actually paid÷Estimated pro forma aggregate blanket music fee=74 percent.

[a] Source: National Association of Broadcasters, NAB Radio Financial Report, 1976.

[b] Assumes all stations would pay the ASCAP license fee of 1.725 percent plus BMI license fee of 1.7 percent.

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER H.R. 6063
(HIGHEST FEE ESTIMATED)

Revenue category of radio stations	Number of AM, AM/FM stations in this category in 1975 [1]	AM, AM/FM estimated performance royalty (based on 1975 revenues) [2] (thousands)	Estimated number of FM stations in this revenue category in 1975 [3]	Estimated number of stations of all types in this revenue in 1975	All stations' estimated performance royalty (based on 1975 revenues) [2] (thousands)
Less than $25,000	36		71	107	
$25,000 to $100,000	860	$215	361	1,221	$305
$100,000 to $200,000	1,440	1,080	331	1,771	1,328
Over $200,000	1,966	11,299	349	2,315	12,721
Total	4,302		1,112	5,414	
Total for stations with revenues of $25,000 or more	4,266	12,594	1,041	5,307	14,354

[1] This is the number of stations whose revenue category was indicated in the Federal Communications Commission report. Except for stations with revenues under $25,000, the number of stations actually in operation is somewhat larger than the figures here.

[2] The formula for the performance royalty in H.R. 6063 introduced in April 1977 is:
Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250 per year.
Stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750 per year.
Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts."
AM, AM/FM stations in this revenue category had 79 percent of all AM, AM/FM stations' expenses in 1975, and thus, we estimate, earned 79 percent of the $1,430,203,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1975. No data are available on total net revenues earned by FM stations with revenues above $200,000 We estimate that 34 percent of the FM stations with revenues above $25,000 fall in this category, while 46 percent o AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over $200,000 earn 79 percent of total AM, AM/FM revenues. We, therefore, estimate that FM stations with revenues over $200,000 earned 58 percent of all FM revenues (31 percent÷46 percent×79 percent) or $142,295,000 in 1975.

[3] 1975 Federal Communications Commission data indicate the distribution among various revenue categories of independent FM stations, but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations (of both types) with revenues under $25,000 was reported to be 71 in 1975. Therefore, in this revenue category the number of stations is correct and not an estimate.

Source: Analysis made by Cambridge Research Institute based on the Federal Communications Commission's AM–FM Broadcasting Financial Data, 1975, issued Nov. 30, 1976.

EXHIBIT 17

PERFORMANCE ROYALTY TV STATIONS WOULD PAY RECORDING COMPANIES AND ARTISTS UNDER H.R. 6063

Revenue category of TV stations	Number of stations	Annual performance royalty per station	Total performance royalty paid per year
$1,000,000 to $4,000,000	312	$750	$234,000
More than $4,000,000	166	1,500	249,000
Total	478		483,000

Source: Federal Communications Commission, TV Broadcast Financial Data, 1975, issued Aug. 2, 1976.

CECIL READ ASSOCIATES, INC.,
Beverly Hills, Calif., August 8, 1977.

MS. BARBARA RINGER,
Register, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. RINGER: Following the Hearings before the Panel of the Copyright Office at the Beverly Hilton Hotel, July 26–28, 1977, I read all of the statements and documents that were available at the Hearings. I was present at the Hearings during the morning session on July 26, and all day during the sessions on July 28, 1977.

From the testimony which I heard, the questions which were asked of other witnesses and of myself during my testimony on July 28th, I felt that a great deal of pertinent and necessary information had not been presented to the Panel.

I searched my files for documents and information that would be helpful, both as to the history of events in recent years concerning the Musicians Union and the recording and film musicians, and statistical information. Although I located much that I believe will be of assistance to the Panel, I find that there is nothing in the way of an organized and complete account of the period from 1956 to the present time with respect to (1) the efforts of the recording and film musicians in their own behalf (Trust Fund Lawsuits, and NLRB, Musicians Guild of America); (2) the policies and actions of the AFM subsequent to Mr. Petrillo's resignation as President in 1958; (3) the steady erosion of employment of musicians in Radio and Television, information showing employment and wages earned by musicians in the years 1955–1976 in Radio, Videotape Television, Motion Pictures, TV Films, Phonograph Recordings, etc., and all areas of live performances, i.e., steady jobs, symphonies, theaters, ballet, and casual employments, i.e., parties, weddings, bar-mitzvah's, etc., in other words there is no comprehensive economic study that presents a clear picture of the deterioration in employment and wages of musicians in the United States and Canada, and no study of the deterioration of the finances of the Union, both the Federation and the Locals, and a corresponding inability to deal with the problems of the members.

In my files I found a copy of the book "The Musicians and Petrillo" by Robert D. Leiter, which was published in 1953 by Bookman Associates, Inc., —Twayne Publishers, 34 E. 23rd Street, New York, N.Y.

Dr. Leiter obtained his Ph. D. in economics from Columbia University in 1947. At the time this book was written he was Assistant Professor of Economics at the City College of New York, teaching courses in economics and labor relations.

I assume that you and the panel can obtain copies of this book. If not, I will be happy to "loan" it to you, but I would like to have it returned as it is the only copy I have been able to locate at this time.

Dr. Leiter's book covers the organized Musicians from the earliest unions in the late 1800's through 1952. He describes the intra-union and organizational problems and the problems of musicians in dealing with technological changes. He describes the policies and actions of the Union with particular emphasis on the Petrillo years as President of the Federation between 1940 and 1952.

His last chapter, however, seems to me to be completely misleading as to the "success of Mr. Petrillo's policies," and his remarks and conclusions seem to indicate that Petrillo had solved the problems of organization of the Union itself and the technological displacement of its members.

No where does he indicate or even suggest the deep resentment and dissatisfaction of the recording, film and symphony musicians, "the Professionals" with the Union and Petrillo, nor does he describe the fear, ignorance, and frustration which kept the professional musicians silent and helpless until the Los Angeles revolt in 1956. I believe that Dr. Leiter obtained his information and developed his views from contacts with the "official" union spokesmen and not from the playing musicians, and that his book stops short just before a major upheaval took place within the Union and in employment problems affecting all musicians, recording as well as those seeking employment in so-called "live" employment.

Because of my personal involvement in Union affairs since 1956 and my knowledg of what has taken place and is now going on, I believe that it is up to me to write a definitive account of the Musicians, the AFM, and technological unemployment during these years.

In view of the time required to complete the research, gather and organize the material, write the book, and get it published, it is apparent that it would not be done in time to be of assistance to you and the Panel in presenting your recommendations to Congress with respect to the "Danielson Bill", H.R. 6063.

I believe that performance rights in sound recordings is the most important issue for musicians and performers today. I am convinced that unless "legal" or "copyright" protection is provided for the individual performer, employment for musicians and the music business as a profession will continue to deteriorate. The AFM and other performers' Guilds have been and will continue to be helpless to stem the tide.

Please tell me how I can be of help to you and the Panel at this time. I don't know what information, testimony, and statistics have been presented to Congress or to your Office in recent years, so I do not know what specific information you may require to present a well-reasoned proposal. I will be better informed when I receive the material on recent hearings on performance rights and the transcripts of these hearings. I understand that Mrs. Lembo has put me on your mailing list and that I will be receiving documents and information from your Office on this subject.

At the close of my testimony I believe that you said that your Office might authorize a Study to gather and organize data, statistics, and other material useful to you in connection with your recommendations to Congress. If such a Study were authorized I am unfamiliar with your possible policies and procedures with respect to obtaining outside help in addition to your own staff.

If my knowledge and services were required, I can make myself available at this time and for the next few months. I am no longer employed by the Musicians' Union, and my new business, Cecil Read Associates, Inc., is still in the embryo stage. I am not in the position, however, to personnally finance any travel, living expenses, or other expenses that might be involved if I devote my time and energies to this project.

I have also considered the possibility of trying to interest some publisher in a book to be written by me recounting the Musicians struggle with the AFM and technological unemployment, hopefully with an advance to cover expenses during the writing of the book; or, to apply to a Foundation for a grant to cover research, expenses, etc., and possibly the publication of the results of my work in book form. I will appreciate any suggestions or advice as to how to proceed at this time.

In the meantime, let me list the information I have furnished to the Panel:

1. Appeal of Local 47 before the International Executive Board, American Federation of Musicians, January 1956.

2. The Los Angeles Musician and the Music Performance Trust Funds, January 1956; An economic study prepared for Local 47, AFM by facts consolidated.

3. A letter from Herman D. Kenin, President of the AFM to Cecil F. Read, President of the Musicians Guild of America, dated September 5, 1961, setting forth the terms of the Agreement between the AFM and MGA resulting in the dissolution of the Guild.

I enclose herewith the following (as per telephone conversation with Jon Baumgarten today, all enclosures are being sent to the attention of Richard Katz, and copies of this letter without enclosures to Ms. Ringer and Mr. Baumgarten):

1. Five (5) copies of statement of Cecil F. Read Before the Copyright Office, Library of Congress, Re: Performance Rights in Sound Recordings, Docket: 77–6, July 28, 1977, Los Angeles, California.

2. One (1) copy of typewritten notes of information from three (3) Congressional Hearings, prepared for use in the Trust Fund Litigation, 1956, as follows:

A. The Use of Mechanical Reproduction of Music. Hearings; September 17, 18, 21, 1942, Subcommittee of the Committee on Interstate Commerce—U.S. Senate—77th Congress, 2nd Session, Senate Resolution 286.

B. Interference with Broadcasting of Non-Commercial Educational Programs. Hearings: February 22, 23, May 8, 10, 1945, Committee on Interstate and Foreign Commerce, 79th Congress, First Session; Senate Resolution 63, House Resolution 1648.

C. Investigation of James C. Petrillo, the American Federation of Musicians. Hearings: In Los Angeles, June 17, 18, 19, and August 4, 5, 6, 7, 1947, and at Washington, D.C., July 7, 8, 1947. 8th Congress, First Session Subcommittee of the Committee on Education and Labor. House Resolution 111.

3. One (1) copy—Musicians Performance Trust Funds Report by Special Subcommittee of Committee on Education and Labor, House of Representatives, 84th Congress, Second Session. Hearings: May 21, 22, 1956 In Los Angeles, California.

4. One (1) copy of reprint from Readers Digest, December 1956, The Union That Fights Its Workers.

5. One (1) copy of Statement and Testimony of Cecil F. Read at Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 85th Congress, 2nd Session. Hearings: March and May 1958, Read's Testimony, May 9, 1958, Pages 675–694.

In addition to the book, "The Musicians and Petrillo" referred to in this letter, I also have the following documents which might be interesting or useful to the Panel in an historical setting; unfortunately I only have one copy of each:

1. My written statement before the Senate Subcommittee Chaired by John F. Kennedy, referred to above.

2. Memorandum in Support of S. 2888 as Amended by H.R. —. "Proposed Amendments of S. 2888 to be introduced in the House and worked out in conference. Landrum-Griffin 1958.

3. Copy of my statement before the Subcommittee of the Committee on Education and Labor, House of Representatives, 87th Congress, Impact of Imports and Exports on Employment. Motion Picture Industry and Musicians Testimony, December 1, 1961, Washington, D.C., pages 587–610 of Part 8.

4. Hollywood at the Crossroads. An Economic Study of the motion picture industry, prepared for the Hollywood A.F.L. Film Council, December 1957, by Irving Bernstein.

5. The Music Performance Trust Fund, a typewritten copy of a chapter sent to me for my comments prior to publication of a book entitled, "Automation Funds," by Thomas Kennedy, Professor of Business Administration, Harvard University Graduate School of Business Administration, published in 1962 or 1963.

6. Legal Files containing much of the documentary evidence and papers, depositions, Court Hearings and Court Orders involved in the Music Performance Trust Fund Litigation, including the Petition for Attorneys' Fees filed with the Court at conclusion of the litigation, outlining the legal battle and problems in these years or more of litigation in the California Superior Court, California Appelate Division, California Supreme Court, the New York Courts, and the United States Supreme Court.

Thank you for your interest in Performers' Right, i.e., Musicians' Problems. I sincerely hope that I can be of some assistance, and that the information I have furnished and will furnish will be useful.

Very truly yours,

CECIL F. READ.

COMMENT LETTER NO. 175

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C. October 25, 1977.

MR. RICHARD KATZ,
Copyright Office, Library of Congress,
Arlington, Va.

DEAR MR. KATZ: Enclosed please find a letter from a constituent, Mr. John Soller, registering his opposition to performance royalties. Since it is my understanding that your office is presently conducting a comment period on such proposals, I would greatly appreciate if you would give Mr. Soller's concerns your full consideration. I would also appreciate if you would report back to me on your reactions to Mr. Soller's objections.

Thank you in advance.

Sincerely,

BILL GRADISON,
Representative in Congress,
First District of Ohio.

Enclosure.

WKRQ RADIO, *September 23, 1977.*

Hon. WILLIS D. GRADISON, Jr.,
House of Representatives,
Washington, D.C.

DEAR WILLIS: This is to put my radio station on official notice that we oppose the performance royalties issue now under study. There are many reasons for our opposition and to highlight a few:

Radio presently is paying copyright fees to lyricists, composers and publishers. Paying out even more fees would be an unfair burden for broadcasters and would be especially crippling to those in smaller markets.

This legislation represents another unneeded discriminatory intrusion of government into the business of broadcasters who should be protected from government interference.

Extra royalties are nothing more than an attempt by record companies and performers to use the Copyright Law to reap windfall profits.

Performing artists now earn big royalties from sale of their records and record company profits are huge.

Most importantly, radio now not only helps sell records for the companies and performers, but assembles, builds and reinforces the audiences for these artists. Imposing an extra fee, which would go to those promoted, is unnecessary, unfair and unjust.

Many thanks for your time on this matter, and should you have questions or comments, please feel free to contact me.

Best regards,

JOHN SOLLER.

COMMENT LETTER NO. 176

OCTOBER 26, 1977.

DEAR MS. RINGER: I have been a member of AFTRA, the American Federation of Television and Radio Artists since 1971. Under the protection of AFTRA, I've come to realize that if it weren't for my union, my interest and welfare would be basically ignored by employers (I am a freelance performer). Were there no codes for producers to follow, I would find it difficult to guard against being underpaid. My concern in writing to you is the considerations being made by Congress and your office about establishing performance rights for sound recordings.

Many performers are needed to produce records—not just the star. The sidemen and backup singers should benefit from air play as well as the recording studios and big name stars.

Radio stations claim they are "promoting" the talent's record sales, but they're also "promoting" their own station to listeners—free of charge. Broadcasters should pay royalties. Thank you for your time and attention.

Sincerely,

JILL BEACH.

COMMENT LETTER NO. 177

OCTOBER 13, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. RINGER: I fully support Mr. Bud Wolff, the National Executive Secretary of AFTRA, and his stand concerning the legislation to require the payment of performers' royalties for airplay of their performances on record.

Sincerely,

JIM OWEN.

Announcement

from the Copyright Office, Library of Congress, Washington, D.C. 20559

COPYRIGHT OFFICE TO HOLD HEARINGS ON PERFORMANCE RIGHTS IN SOUND RECORDINGS

The following excerpt is taken from Vol. 42, No. 106 of the Federal Register for Thursday, June 2, 1977 (p. 28191).

Please note the dates given below for hearings, requests to present testimony, and submission of written statements.

LIBRARY OF CONGRESS

Copyright Office

[S 77-6-A]

PERFORMANCE RIGHTS IN SOUND RECORDINGS

Public Hearings

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of Public Hearings.

SUMMARY: This notice of public hearing is issued to advise the public that the Copyright Office of the Library of Congress is preparing a report to Congress under section 114(d) of Pub. L. 94-553 (90 Stat. 2541), the Act for General Revision of the Copyright Law, pertaining to performance rights in copyrighted sound recordings. This notice announces and invites participation in two public hearings intended to elicit views, comment and information from interested members of the public which will assist the Copyright Office in considering alternatives, formulating a report, and making legislative recommendations, if any.

DATES: The hearings will be held in Arlington, Virginia on July 6, 7, and 8, 1977, and in Beverly Hills, California on July 26, 27, and 28, 1977, commencing at 9:30 a.m.

Members of the public desiring to testify should submit written requests to present testimony for the Virginia hearing before June 21, 1977, and for the California hearing before July 11, 1977 to the address set forth below. The requests should clearly identify the individual or group requesting to testify, the hearing at which testimony will be offered, and the amount of time desired.

ADDRESS: The Virginia hearing will be held in Room 910, Crystal Mall Building No. 2, 1921 Jefferson Davis Highway, Arlington, Virginia. The California hearing will be held in the Monaco Suite, Beverly Hilton Hotel, 9867 Wilshire Boulevard, Beverly Hills, California 90210. Requests to present testimony should be addressed to: Harriet L. Oler, Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559.

FOR FURTHER INFORMATION CONTACT:

Harriet L. Oler, Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559 (703-557-8737).

SUPPLEMENTARY INFORMATION: Section 114 of the newly enacted copyright law, Pub. L. 94-553, specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the sound recording and to distribute copies or phonorecords of the sound recording to the public. Paragraph (a) of section 114 states explicitly that the owner's rights "do not include any right of performance under section 106(4)."

Congress had considered the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings but concluded that the issue required further study. Paragraph (d) of section 114 directs the Register of Copyrights to consult with various interests in the broadcasting, recording, motion picture and entertainment industries; arts organizations; and representatives of copyright owners, organized labor and performers, and to report to Congress by January 3, 1978 whether section 114 should be amended to provide for performers and copyright owners any performance rights in such material. The report is to describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

To assist the Copyright Office in formulating the report and recommendation, the Office published a notice in the FEDERAL REGISTER (42 FR 2127-28, April 27, 1977) soliciting public comment on the subject of performance rights in sound recordings. Copies of all comments received are available for public inspection and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, in the Copyright Office Information Office.

The Copyright Office believes that public hearings are appropriate forums to secure responses to these written comments and reply comments and to obtain additional information, data and public comment on the subject of performance rights in copyrighted sound recordings.

The Office is interested in receiving testimony on the following questions; related observations are welcome.

(1) What are the constitutional and legal constraints and problems arising from a performance royalty in sound recordings?

(2) What are the arguments for and against a performance royalty in sound recordings? What projected economic effect would it have on performers, record companies, broadcasters, cable systems, owners of copyright in musical compositions, background music services, juke-

box operators, record consumers and other interested parties?

(3) In the event that a performance right is enacted, who should enjoy it? If both record producers and performers enjoy it, what royalty split would be advisable?

(4) If a performance royalty is enacted, what mechanism should be established to implement it? Are voluntary negotiations possible and/or preferable? Would a compulsory licensing system work? If so, who should determine the rates, who should distribute the proceeds and how should the beneficiaries be identified? What role, if any, should the Copyright Office play?

(5) What effect would performance rights legislation have on United States international copyright relations? If such legislation is enacted should the United States join the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)? If not, would the United States accord national treatment to foreign sound recordings under the Universal Copyright Convention?

Written Statements: All witnesses are requested to provide 10 copies of a written statement of their testimony to the Office of the General Counsel by June 28, 1977 for testimony to be presented at the Virginia hearing, and by July 18, 1977 for testimony to be presented at the Beverly Hills hearing.

The record of the proceedings will be kept open until August 26, 1977 for receipt of written supplemental statements.

(Title 17 of the United States Code as amended by Pub. L. 94-553: Sec. 114.)

Dated: May 26, 1977.

BARBARA RINGER,
Register of Copyrights.

Approved:

DANIEL J. BOORSTIN,
Librarian of Congress.

[FR Doc.77-15600 Filed 6-1-77;8:45 am]

ML-154
June 1977-15,000

INDEX FOR S–77–6A—PERFORMANCE RIGHTS IN SOUND RECORDINGS

Number Additional material	*From*
1	Thomas Gramuglia, Vice President, Michele Audio Corporation of America, Massena, N.Y.
2	Nicholas E. Allen, Attorney, Washington, D.C.
3	Hal C. Davis, President—AFM, New York, N.Y.
4	Jack Golodner, Executive Secretary, AFL–CIO Council for Professional Employees.
5	James J. Popham, Assistant General Counsel, National Association of Broadcasters, Washington, D.C.
6	Norman P. Leventhal, Attorney, Washington, D.C.
7	Mr. Robert Wade, National Endowment for the Arts (Telephone Message), Washington, D.C.
8	Mr. Allen Jabbour, Director of American Folklore Center (Telephone Message), Washington, D.C.
9	Ralph Black, Executive Director, American Symphony Orchestra, Vienna, Va.
10	Michael Newton, President, Associated Council of the Arts New York, N.Y.
11	Norman P. Leventhal, Attorney, Washington, D.C. (Testimony of Thomas E. Bolger).
12	Norman P. Leventhal, Attorney, Washington, D.C. (Testimony of John Winnaman).
13	T. Michael Barry, Legislative Counsel, National Association of Boadcasters, Washington, D.C. (Request to testify for Mr. Peter Newell).
14	James F. Fitzpatrick, Attorney, Washington, D.C. (Request for Alan Livingston to testify).
15	James D. Boyd, Vice President, F.E.L. Publications, Ltd., Los Angeles, Calif.
Testimony	John Winnaman, Vice President and General Manager of Radio Station KLOS (FM) licensed to American Broadcasting Companies, Inc., Los Angeles, Calif.
Statement	Cecil F. Read, Professional Musician, Beverly Hills, Calif.
Letter	James J. Popham, Assistant General Counsel, National Association of Broadcasters enclosing testimony of Dr. Fredric Stuart.
Letter	James J. Popham, Assistant General Counsel, National Association of Broadcasters enclosing Appendices II and III of the Stuart Study.
Testimony	"Distribution of Income from Broadcast Performance and Sale of Phonograph Records" by Dr. Fredric Stuart, Professor of Business Statistics—Hofstra University.
Letter	Cary H. Sherman of Arnold & Porter, Washington, D.C., submitting a corrected copy (minor editorial changes) of RIAA's statement.
Statement	RIAA (Recording Industry Association of America, Inc.), given by Stanley M. Gortikov.
Statement	Hal C. Davis, President AFL–CIO—American Federation of Musicians.
Statement	Allan W. Livingston, President, Twentieth Century-Fox Film Corp.
Statement	Peter C. Newell, Vice President and General Manager of KPOL AM/FM, Los Angeles, Calif.

NO. 1

MICHÉLE AUDIO CORPORATION OF AMERICA,
June 9, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: This is in response to the recent Announcement sent out by the Copyright Office pertaining to future hearings on performance rights in sound recordings. I would like to testify on behalf of the Independent Record & Tape Association. I have, in the past, represented this same organization and testified before the House hearings during the recently passed Copyright Revision Bill.

I feel very strongly that the performance rights on sound recordings will have a tremendous impact on small recording companies. I only need 15 minutes to express my point of view, backing it up with facts regarding the recording industry.

I would prefer to testify at the Arlington, Viriginia hearing. However, if it is not possible for me to testify at Virginia, I am willing to go to Beverly Hills, California if necessary.

I would appreciate hearing from you soon regarding these hearings and information telling me where and when I may have the chance to speak. Thank you very much for your consideration.

Respectfully yours,

THOMAS GRAMUGLIA,
Vice President.

NO. 2

HERRICK, ALLEN, DAVIS, BAILEY & SNYDER,
Washington, D.C., June 17, 1977.

HARRIET L. OLER,
Senior Attorney,
Office of the General Counsel,
The Copyright Office,
Washington, D.C.

DEAR MS. OLER: In accordance with notice of public hearings in the above matter commencing July 6, 1977, I wish to request opportunity to present testimony in behalf of Amusement & Music Operators Association.

We wish to appear at the Virginia hearings between July 6 and 8, 1977.

Respectfully yours,

NICHOLAS E. ALLEN,
Attorney for Amusement & Music Operators Association.

STATEMENT IN BEHALF OF AMUSEMENT AND MUSIC OPERATORS ASSOCIATION ON THE QUESTION WHETHER CONGRESS SHOULD CREATE A PERFORMANCE RIGHT IN SOUND RECORDINGS

The Amusement and Music Operators Association (AMOA) is unalterably opposed to the creation by Congress of another suggested copyright—a performance right in sound recordings.

By our letter of May 25, 1977, we submitted a statement of AMOA's reasons for opposing this new form of musical copyright. A copy of that letter is attached hereto.

The following comments are directed to the numbered questions in Copyright Office Notice dated May 26, 1977.

1. AMOA's objections on Constitutional grounds are as stated in our letter of May 25, 1977.

2. The economic burden that would result from the creation of a new performance royalty for record manufacturers and performers cannot be accurately assessed until the terms of the new royalty are known. But, if such an add-on royalty were to be at the rate of $1 per machine per year, as in a pending proposal (H.R. 6063, 95th Congress), that would amount to a new burden of $450,000 each year on the estimated 450,000 machines that are now on locations throughout the United States.

It must be remembered that jukebox operators are to be subjected for the first time in history to a jukebox royalty of $8 per machine per year, commencing January 1, 1978. In our letter of May 25th, we endeavored to show the economically marginal condition of this industry of small businessmen, and the severe impact which will result from the $8 royalty, as well as the increase in the mechanical fee from 2 cents to 2¾ cents per recording under the new law.

On the other hand, as we have previously pointed out, record manufacturers and performers have no need for a statutory performance royalty. They can and do exercise full protection through contractually negotiated royalties. A recent announcement reports that musicians throughout the United States are receiving a distribution this year of $11,914,765 from the Phonograph Record Manufacturers Fund, this being an all-time high of the Fund's annual distributions to musicians (*Billboard*, June 4, 1977; *Cashbox*, June 4, 1977).

We submit that, in all fairness, jukebox operators should be allowed a considerable period of time to determine the impact of the recently enacted new royalties, before considering the imposition of another royalty burden upon them.

3. As we have previously contended, we see no Constitutional basis for granting royalty rights to performers and, in particular, to record manufacturers. We have objected, in principle, to the granting of such performance rights. If such rights were granted, a principle would be established that would invite proliferation of royalty claims by all others who may have any part in the process of disseminating music to the public at large. We also object in principle to the creation of more than one performance right for any one play of a piece of recorded music. If, in addition to the original composer, others are to share in royalties for the performance of music, we submit they should do so by sharing in the $8 performance royalty that has now been enacted. How, and in what proportions, they should share is a question we are not prepared to answer.

4. We are not prepared to comment on a royalty implementing mechanism, or on royalty sharing, or on royalty distribution procedures, or other details of a royalty distribution process.

5. We see no reason to inject international considerations into this subject. As we have contended many times in the past, foreign copyright holders can have equal rights with those who hold copyrights under our domestic law, without changing our law to conform to the laws of some other countries. We believe that international comity requires nothing more than that foreign copyright owners whose music is played in the United States shall be given protection equal to that which our domestic law gives to our own nationals.

NICHOLAS E. ALLEN,
Counsel.

HERRICK, ALLEN, DAVIS, BAILEY & SNYDER,
Washington, D.C., May 25, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, The Copyright Office, Washington, D.C.

DEAR MS. OLER: In response to the Notice of Inquiry on the above subject we wish to submit the following comments in behalf of the Amusement and Music Operators Association (AMOA), the national association of jukebox operators.

AMOA opposes the creation of a new royalty for manufacturers and performers of musical recordings for the reasons set forth below.

In summary, AMOA's reasons are as follows:

(1) The unfairness of imposing additional royalty burdens upon this industry of small businessmen.

(2) The lack of any need for a new royalty by manufacturers and performers who already secure royalties by contract.

(3) Objection as a matter of principle to applying a second royalty to a single performance of recorded music, and

(4) Objection on Constitutional grounds to the creation of such a royalty.

UNFAIRNESS OF THE PROPOSED ROYALTY TO JUKEBOX OPERATORS

The Copyright Act of 1976 imposes upon jukebox operators a new royalty of $8 per jukebox per year (Section 116 of the Act), and increases the mechanical fee on record they buy to 2¾ cents per recording, or 5½ cents for both sides of a 2-song record (Section 115 of the Act).

According to data before the Congressional Committees when the new Copyright Act was under consideration, there were approximately 450,000 jukeboxes on location and about 70,000,000 new phono-records purchased by jukebox operators each year. The resulting royalties under the new Act will amount to $7,450,000 a year commencing January 1, 1978—$3,600,000 ($8 x 450,000 machines) and $3,850,000 (5.5 cents x 70,000,000 records). As the jukebox operators' representatives demonstrated to the Congressional Committees many times, this is an industry of small businessmen, it is a marginal industry, those who are engaged in it have found they cannot afford to operate jukeboxes unless they also operate amusement and vending machines. The business has declined so much that Wurlitzer, one of the four American manufacturers of jukeboxes, stopped producing jukeboxes in 1974.

Although operators' costs are increasing drastically, they are not able to make changes in prices-per-play to keep pace with these increases in costs. In some businesses, prices can be increased merely by changing the price tag, and the changes may not be noticed. In the jukebox industry, it is a matter of reducing the number of songs a customer can play for a quarter, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent obtained, for he may object that a raise in the cost to play music will be detrimental to his business. Prices of two plays per quarter have been established by operators in some areas, but this is by no means generally accepted. In many areas, rates are still at 10 cents per play or three plays for a quarter, and there are even some areas where the rate remains at 5 cents per play.

These conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations.

We wish to emphasize, therefore, the apprehension with which jukebox operators view any proposal that would create a new royalty and thereby increase their royalty burden under the Copyright Act. We believe the depressed condition of this industry demonstrates the unfairness of imposing any such added burden upon it.

RECORD MANUFACTURERS AND PERFORMERS HAVE NO NEED FOR A PERFORMANCE ROYALTY

Record manufacturers and performers, traditionally, have secured compensation for their recordings through contractually negotiated royalties. They do not need added Congressional assistance to demand and receive adequate compensation for their recordings. On July 26, 1975, for example, *Billboard* magazine reported a $9,900,000 distribution to musicians throughout the United States from the Phonograph Record Manufacturers Fund, a fund which provides annual distributions to musicians, and was created by private contractual negotiations without the intervention of Congress. We urge the Register of Copyrights, therefore, to require record manufacturers and performers to demonstrate that any such Congressional assistance is needed before any such statutory benefits are conferred upon them.

We also point out that jukebox operators serve as promoters of records, and contend, therefore, that they provide a service to performers and record companies which is of sufficient benefit to obviate any claim for the payment of royalties for play of records on jukeboxes.

DUAL ROYALTIES FOR A SINGLE PERFORMANCE ARE NOT JUSTIFIED

AMOA opposes any new royalty for the recording arts as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kinds of musical copyrights they should be shared in a single royalty among all those who claim to have contributed to the finished product.

A RECORDING ARTS PERFORMANCE ROYALTY IS NOT CONSTITUTIONALLY SUPPORTABLE

Finally AMOA opposes a statutory royalty for record manufacturers and performers because we believe Congress lacks the power to confer such benefits upon them. In our view, record manufacturers, particularly, are not "authors" within the meaning of the Copyright Clause of the Constitution. If equal benefits are given to record manufacturers, along with performers, we believe such a royalty would be fatally defective.

Respectfully submitted.

NICHOLAS E. ALLEN,
Counsel for Amusement and Music Operators Association.

NO. 3

WASHINGTON, D.C., *June 21, 1977.*

HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

The American Federation of Musicians requests permission to testify July 28 in California regarding performance rights and sound recordings. The AFM will be represented by its president, Hal C. Davis.

HAL C. DAVIS.

NO. 4

WASHINGTON, D.C., *June 21, 1977.*

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

Council of AFL-CIO unions for professional employees and American Federation of Television and Radio Artists, AFL-CIO, wish to be represented at public hearings on performance rights of sound recording that will take place July 6 through 8. Testimony for AFTRA will be given by Sanford Wolff, Executive Secretary. Council for Professional Employees will be represented by the undersigned, Jack Goldner, Executive Secretary, Council of AFL-CIO Unions for Professional Employees, 815 16th St. Northwest, Washington, D.C. 20006.

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF COPYRIGHT OFFICE REQUEST FOR COMMENTS REGARDING PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDING

COMMENTS OF THE COUNCIL OF AFL–CIO UNIONS FOR PROFESSIONAL EMPLOYEES

In response to the Office's Notice of Inquiry requesting comments on performance rights in copyrighted sound recordings, I submit the following observations in behalf of the Council of AFL–CIO Unions for Professional Employees which comprises eighteen national and international unions serving more than one million employed professional people.

1. The Council perceives no constitutional or legal restraints inherent in legislative recognition of a performance right in sound recordings. We believe that Congressional action and court decisions in recent years have established that sound recordings are, indeed, appropriate subjects for copyright protection. Furthermore, we believe all sides to this question are in agreement that the per-

formers and record producers make a sufficiently creative contribution to the sound recording to justify protection as "authors" of such "writings". These positions were fully discussed in Congressional hearings that took place in 1975 and in opinions provided that year to both House and Senate subcommittees by the Register of Copyrights.

Indeed, since a performance right currently attaches to every copyrighted item except sound recordings, the establishment of such a right would end an unjustified form of discrimination against the creators of sound recordings, enhance the symmetry of U.S. copyright law and thus tend to resolve inconsistencies rather than create problems in the law.

2. Those who authored our constitution saw a danger in permitting the exploitation of creative efforts by those who deny compensation to the creators. They knew from experience that if a new nation was to depend upon the creative wealth of its inventors, authors and artists, they must be assured of just rewards for their creativeness. "Thou shalt not muzzle the ox that treadeth out the corn". (1. Timothy 5, 18)

Perhaps these thoughts were in the mind of one broadcast industry representative when he testified before a House subcommittee in 1975 and charged that the cable industry took the work of the broadcasters without making recompense. "It is unreasonable and unfair", he said "to let (the cable) industry ride on our backs, as it were, to take our product, resell it and not pay us a dime. That offends my sense of the way things ought to work in America".

The broadcast, juke box and background music industries use the talents of America's performing artists—ride on their backs, as it were—as assuredly as if they directly employed them but they do not pay them a dime. Just as the printing press enabled others to make use of the talents of writers without actually employing them, so does the sound recording make possible the exploitation of the work of the performer. The early legislators of our country saw and understood the potential danger to the creator posed by the printing press. Similarly, in our own era, government must cope with the injustice perpetrated upon the performer by the unrestricted use of sound recordings by commercial interests which contribute nothing (not even a dime) to those who make possible recorded performances that they exploit.

The users of sound recordings argue that they do compensate the originators by popularizing their works. This same sophistry could have been used by the earliest printers with regard to the works of writers and artists. It could be used by those selfsame exploiters of sound recordings to deny performance royalties to composers, arrangers and publishers. After all, isn't their fame being furthered and sheet music sales, as well as sales of their recorded compositions enhanced? In similar fashion, the cable TV industry could argue that by strengthening and improving the broadcasters' over-the-air signals they are providing the TV broadcaster with a larger audience for his programs and the justification for charging advertisers a larger fee.

If all of these practices by the users of copyrighted material truly benefitted the creators, would they (the authors, composers and the broadcasters themselves) have pressed so hard for protection and remuneration? Would the recording industry and the recording artists today, bite a hand that feeds them?

Despite allegations by those who profit by postponing the development of performance rights for sound recordings, the performers have not, on balance, benefitted to the extent claimed.

The use of sound recordings by broadcast licensees served to displace thousands of performing artists from employment in the broadcast media. Whereas the broadcast industry at one time employed and compensated on a regular basis such fine artists as those who comprised the famed NBC Symphony and other ensembles, today it provides employment for but a handful of musicians and regularly sells to advertisers the recorded programs of the old NBC Symphony and others without making any payment whatsoever to the artists.

The use of sound recordings displaced many more thousands of musicians and vocalists formerly employed in restaurants, clubs, etc. Today their work is used in its recorded form to attract customers and help make a profit for the proprietors, juke box operators and background music concerns.

According to testimony given to Congressional committees, many promising artists far from seeing their careers enhanced by exposure of their recordings on the air saw them limited because of overexposure. Testimony was also received from artists and artists' representatives indicating that the commercial use of

their recordings had little or no effect on their careers because they were not identified (most broadcasters only announce the composition, composer and lead artists and rarely inform listeners of the majority of artists who made the recording possible) and/or the record itself is not identified (background music firms never publicize the recording or the artist).

The advent of inexpensive and easy to operate taping equipment by individuals undermines whatever validity there may be to the broadcasters' argument of increasing record sales. The day is rapidly approaching when present individual purchasers of records will be able to tape record music and other performances from stereo on monaural broadcasts thus obviating the need for purchasing records.

In place of the insubstantial and undefined benefits now claimed by broadcasters and other users, a performance royalty in sound recordings would enable the creators of a sound recording to realize a real benefit from the use of their efforts. This would end a long standing inequity that denies the creators of sound recordings the rights enjoyed by other authors of copyrighted works.

Furthermore, it is our belief that the individual consumer who purchases recordings for personal enjoyment would also benefit. At present, the cost of bringing together performers, arrangers, composers and technicians, providing appropriate equipment for making sound recordings and then manufacturing and distributing them is borne almost entirely by the men and women who buy records for their own pleasure and non commercial use. Relative to the profit they realize on the use of these same records, the broadcast industry and other commercial users return very little to the creative source. If, through payment of royalties for performance, these beneficiaries were to share the costs of production in a manner commensurate with the benefit they realize, the burden on the individual record buyer should be lightened.

3. Testimony by both recording company representatives and performing artists before Congressional committees indicate a recognition by both parties that the technology of making sound recordings requires creative effort by both the producer and the artists. Given this condition an equal split of royalties for a performance right is fair.

4. ASCAP, BMI and SESAC provide excellent models of mechanisms for monitoring the use of sound recordings, obtaining payment for such use and ensuring an equitable distribution of appropriate royalty payments. In addition, pursuant to various collective bargaining agreements the recording industry and unions representing musicians and vocalists have, for many years, developed and refined procedures for ascertaining the producers of given recordings as well as the artists who participated. With these mechanisms already functioning, we believe the Register, working with the recording companies and artists representatives could readily devise an effective system for implementing the payment of performance royalties. Insofar as the setting of rates is concerned, we suggest that voluntary negotiations between the parties should be encouraged with the Royalty Tribunal being called upon to resolve impasses.

This Council is deeply concerned because in this as in other areas there is evidence that our society is preoccupied with the mechanisms for distribution to the point of ignoring the needs of the creative core. The broadcaster, the juke box operator and background music suppliers have made it possible for more Americans to hear and enjoy the work of performing artists but they do not create these works and, because of a flaw in our copyright laws, they are not required to assume any obligation whatever for assisting or supporting the creative process. As new technological developments make it possible for sound recordings to be more easily transmitted and duplicated the harm inflicted upon the creative core because of the parasitic position enjoyed by those who profit from its efforts will become even more severe.

A remedy, however, is at hand. We urge the Register to recommend to the Congress that performers and the holders of copyright in sound recordings like other authors of copyrightable material be allowed to enjoy the benefits of a performance right in their works.

Respectfully submitted.

JACK GOLODNER,
Executive Secretary.

Dated May 31, 1977.

AFFILIATES OF THE COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYEES

Actors Equity Association.
American Federation of Musicians.
American Federation of Teachers.
American Federation of Television and Radio Artists.
American Guild of Musical Artists.
Communications Workers of America.
Insurance Workers International Union.
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators.
International Brotherhood of Electrical Workers.
International Federation of Professional and Technical Engineers.
International Union of Electrical, Radio and Machine Workers.
International Union of Operating Engineers.
National Association of Broadcast Employees and Technicians.
Office and Professional Employees International Union.
Retail Clerks International Association.
Seafarers International Union.
Service Employees International Union.
Screen Actors Guild.

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., June 17, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The National Association of Broadcasters (NAB) respectfully requests the opportunity to testify at the public hearings on the above-referenced proceedings scheduled for July 6, 7, and 8, 1977 in Arlington, Virginia. NAB desires a minimum of thirty minutes in which to testify. NAB's testimony will be presented by several of the members of the NAB staff and by a representative on an NAB member station.

We would very much appreciate your consideration of our request. Please do not hesitate to contact me if you need any additional information.

Very truly yours,

JAMES J. POPHAM,
Assistant General Counsel.

STATEMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. As of June 29, 1977, NAB's membership included 2,469 AM broadcast stations, 1,784 FM broadcast stations, 547 TV broadcast stations and all nationwide, commercial broadcast networks. Among the objects of NAB, as specified in its bylaws, is the protection of its members "from injustices and unjust exactions" and the encouragement and promotion of "customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

Todays hearing, in our view, involves not only an "unjust exaction," but also a proposal which would weaken the broadcast industry and prevent it from providing the best possible service to the public. That proposal is the establishment of a performance right in sound recordings.

Every day, at the flick of a switch, literally hundreds of millions of Americans hear music on their radios. The immediate source of that music is a sound recording performed by a broadcast radio station. Radio stations are the primary vehicles for the dissemination of recorded music and, thus, are partners in the business of giving the American people instant, constant, nationwide access to the product of a highly creative and talented record industry.

Establishment of a performance right in sound recordings would require broadcast stations which perform sound recordings to pay copyright fees to record companies and performers for the right to perform their recordings on the air.

NAB's opposition to establishment of a peformance right in sound recordings is long-standing, well-known and well-founded. Those seeking establishment of a performance right in sound recordings attribute our opposition to establishment of such a right to simple distaste for paying additional fees for use of their recordings. Broadcasters, of course, already pay copyright fees to the authors and composers of the recorded music broadcast on their stations. The real issue which Congress has asked you to study, however, transcends the simple question of economic gain or loss to one industry or another. That question is whether a performance right in sound recordings has any place in the copyright law of the United States and to that question, we must answer with a resounding, "No!"

For reasons on which I will elaborate momentarily, NAB submits that establishment of a performance right in sound recordings is constitutionally questionable. Beyond that, as a matter of national policy, it is unnecessary, unwise, and unfair. We also believe the arguments advanced in favor of establishment of a performance right in sound recordings, while superficially and theoretically appealing, fly directly in the face of economic reality and fail to take account of important national goals.

Article I, Section 8 of the Constitution of the United States provides that Congress shall have the power "to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." Article I, Section 8, obviously is permissive, not mandatory. The Constitution hardly demands that Congress afford every type of copyright protection to all varieties of artistic endeavor. It permits Congress to do so, in its legislative judgment, establishment of a particular copyright would constitute sound public policy. Indeed, Congress should be circumspect in establishment of new copyrights because arrayed against such action are two of our most important national policy goals—those of competition and freedom of speech and expression. A copyright, after all is a governmentally sanctioned monopoly. In a nation such as ours with an economic system and philosophy firmly rooted in free competition, monopoly is anathema. Therefore, monopoly status can be conferred on an endeavor only for overriding reasons.

Similarly, we are loathe to place any restraints on an individual's First Amendment rights to speak and express themselves as they do desire. Only those restraints which reasonably further more imperative national interests are tolerated.

The tension between establishment of copyright protection and our long-standing traditions of free speech and free competition requires careful scrutiny of proposals to expand copyright protection. Before we take a step which is inherently inimical to our most fundamental goals and traditions, we must be absolutely certain that step is "necessary and effective" toward promoting "progress in science and the useful arts." To be blunt if a bit more abstract, we should not embrace ineffective solutions to non-existant problems.

Proponents of the performance right in sound recordings have sought to establish the need for a performance right in sound recordings, and their arguments do have some appeal. We have heard about "White Christmas" and the "Yellow Rose of Texas," for example—songs largely unnoticed by the public until certain performers lent their accents or styles to the music and lyrics composed and authored by others. Now, "White Christmas" and the "Yellow Rose of Texas" are veritable classics, thanks to Bing Crosby and Mitch Miller. Certainly, it is argued, Mitch and Bing are as much artists or creative talents as the original composers and authors, and, after all, the authors and composers are compensated by royalty payments. Mitch and Bing should be compensated, too. Furthermore, the proponents imply that numerous "would-be classics" are waiting to be rescued from oblivion, if only performers were properly compensated for their efforts via a performance right in sound recordings.

The romantic appeal of these arguments, however, must give way to a realistic assessment of the need for a performance right. The basic question is whether performers and record companies are adequately compensated in the absence of a performance right in sound recordings, or, must we further reward their talents in order "to promote progress in the useful arts."

We submit performers and record companies are well compensated for their efforts and, thus, no need for establishment of a performance right in sound recordings can be demonstrated. The revenues which would flow to performers and record companies if a performance right in sound recording were established would, in fact, constitute an unwarranted windfall.

During the last Congress, NAB retained Dr. Fredric Stuart, Professor of Business Statistics at Hofstra University, to estimate the relative extents to which the various parties to record production, distribution and performance were compensated in the absence of a performance right in sound recordings. Dr. Stuart calculated the revenue from two sources—record sales and broadcast performance license fees—and estimated the relative amounts of such revenue flowing to the four parties to the production, distribution and performance of the sound recording. The four parties are the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record.

NAB presented the results of Dr. Stuart's research before the last Congress, but those enlightening results bear repeating today. With no performance right in sound recordings, only composers and publishers receive payment for broadcast performances. On the other hand, all four parties—composers, publishers, performing artists and record companies—share in the revenues from record sales. Based on revenue estimates generated by a random sample of records, Dr. Stuart found that performing artists and, to an even greater extent, record companies received shares of record sale and performance revenues which exceeded those of composers and publishers. The income distribution figures themselves are startling. Composers received $2,570,000 or 13 percent of the revenues generated by the random sample of records. Publishers received $2,910,000 or 15 percent of the revenues. Performing artists received $2,860,000 or 15 percent of the revenues. Record companies (after variable manufacturing costs) received $10,720,000 or the remaining 56 percent of the revenues.

Dr. Stuart refined these results to reflect two important factors: (1) the cost of unsuccessful records which must be borne by performing artists and record companies (thereby reducing the amount of money they receive); and (2) the royalties from broadcast performance received by performing artists who also are the composers and/or publishers of the songs they record. When so refined, the revenue distribution from the same random sample of records was as follows: Composers received $1,530,000 or 9 percent of the revenues. Publishers received $1,200,000 or 7 percent of the revenues. Performing artists received $4,200,000 or 25 percent of the revenues. Record companies received $10,000,000 or 59 percent of the revenues. Dr. Stuart concluded: "The foregoing analysis shows the performing artist to be . . . well ahead of . . . composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies, and none of these figures takes into account the substantial revenues generated by live concerts."

This study squarely rebuts allegations of the need for a performance right in sound recordings. The compensation received by performing artists compares favorably with or exceeds the compensation received by composers and publishers. The compensation received by record companies far exceeds that received by performing artists, composers and publishers. Therefore, the present copyright law provides adequate incentives to the production and distribution of sound recordings.

A performance right in sound recordings would be not only unnecessary, but also unproductive. The supposed benefits which would flow from providing greater rewards for creative efforts in the production of sound recordings would be illusory—the assumption that the prospect of additional compensation would stimulate additional creative efforts being valid in theory only. No one can deny that successful recording artists are amply rewarded and hardly need further encouragement. Nor do the record companies which produce and distribute their recordings. The arguments for a performance royalty thus are particularly appealing in the case of unknown, unproven performers who record songs of unproven authors and composers. A performance right in sound recordings alledgedly would provide a new stimulus to recording and distribution of their performances. But would it really?

Law Professors Robert Bard and Lewis Kurlantzick have conducted an extensive analysis of the impact of a performance right in sound recordings. It was published in the George Washington Law Review, Vol. 43, No. 1, November, 1974. at pages 152 through 238. Regarding the possibility that a performance right in sound recordings would stimulate recording of unproven songwriters and performers, they pointed out that:

"Records of new songs from unproven composers, performed by unproven artists, are risky enterprises and decisions to make such records are based on educated guesses regarding the sales potential and the record companies' need to maintain their flow of new releases.

"Public performance revenues in these instances will be very difficult to calculate and only represent a small fraction of revenues obtainable from record sales. The margin of error in these decisions is so large that the small amounts of additional potential revenues from the sale of a public performance right are unlikely to be considered." [1]

In short, a performance right in sound recordings will provide no stimulus to the creative endeavor of unknown and unproven performers.

A performance right in sound recordings would be similarly useless in stimulating production of classical records. Again, Professors Bard and Kurlantizick point out that the "increased income from [the sale of performance rights] is far too small to be considered in estimating the potential revenues from new classical record releases." Looking to legislation proposed in the 93rd Congress, they estimated that performers and producers of classical music recordings would gain "no more than $59,000 from public performance fees, and probably less." [2] This amounts to less than two-tenths of one percent of the $32 million dollars generated by classical music sales in 1973. It would be described generously as a drop in the bucket in terms of providing any stimulus to classical record production or enhancing rewards to classical music performers.

Providing additional compensation to unknown performers and classical music performers is a most appealing goal. The illusory and theoretical benefits of a performance right in sound recordings, however, provides no real means of achieving that goal. Furthermore, it is doubtful that performers would benefit at all from a performance right in sound recordings. The inordinate share of revenues which flow to the record companies evidences the overwhelming strength of the record companies' bargaining position. If we make the relatively safe assumption that the record companies will seek to maximize their gains, through their leverage in the bargaining process, they will have every reason to reduce performers' compensation to the extent the performers benefit from performance royalties. Thus, the record companies already substantial share of the revenues from record sales will be augmented directly by their own performance right windfall and indirectly by the extraction of at least some portion of the performer's share in the per-

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[1] Bard and Kurlantzick "A Public Performance Right in Sound Recordings: How To Alter the Copyright System Without Improving It," 43 Geo. Wash. L. Rev. 152, 181 (1974)

[2] 43 Geo.Wash.L.Rev, *supra* at 186–187.

formance right royalties. Establishment of a performance right in sound recordings then would not shift bargaining power from one party to another in a way which would lead to any increase in performers share of recording industry revenues.

In view of the lack of need for a performance right in sound recording and the performance rights inability to stimulate the creative efforts of recording artists, enactment of a performance right in sound recordings would exceed the powers granted Congress in The Constitution. Article I, Section 8, empowers Congress to establish copyrights to "promote progress in science and the useful arts." It does not empower Congress to establish copyrights merely for the purpose of reallocating revenues from one industry to another. Yet, that would be the only real effect of a performance right in sound recordings. Thus, we submit that establishment of a performance right in sound recordings would constitute not only an unsound public policy judgment, but a Constitutionally unpermissible act as well.

Let me disgress for a moment to anticipate a common, but totally unfounded criticism of our opposition to a performance right in sound recordings. Some say that if Congress has the power to create exclusive reproduction rights in sound recordings, then, certainly, it also must have the power to establish a performance right. NAB, of course, did support establishment of the limited copyright in sound recordings. In contrast to the performance right, however, creation of that right was a necessary and effective measure designed to promote progress in science and the useful arts. It was necessary to provide protection against unauthorized reproduction or "piracy" of sound recordings, which had permitted record pirates to siphon rewards for creative endeavor properly belonging to the recording industry. A performance right, on the other hand, is not necessitated by any similar injustice or threat to the integrity of the creative process.

In view of the above, we submit that establishment of a performance right on sound recordings is unnecessary to satisfy any demonstrable need or otherwise promote any legitimate interest. A performance right in sound recordings in simplest terms would produce no public benefit. On the other hand, establishment of a performance right would be costly in public interest terms and highly inequitable.

Madame Register, I run a radio station. Most of my station's programming is composed of recorded music. I cannot deny that I benefit from use of that recorded music; but the performers of that music, and the record companies which produced and distributed the sound recordings I broadcast also benefit handsomely from the constant, continuous exposure of their products on my station. To require me to pay to play their records, thus, seems to me, highly inequitable. Time on my station is all I have to sell. I should not be required to pay for the right of devoting a substantial portion of that time to promotion of another industry's product.

We obviously disagree with the record industry over the desirability of a performance right in sound recordings. Yet, we clearly agree that the exposure my station provides their product indirectly compensates recording artists and record companies. The promotional benefit reaped by recording artists and record companies is staggering and, perhaps, the very reason for their overwhelming financial success. The record companies readily acknowledge the value of broadcast exposure to their success. Stan Cornyn of Warner Brothers Records is quoted in Daily Variety of March 4, 1975, as saying:

"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 Warners won't even put an album out unless it will get air play."

How important is radio to recording artists? Bobby Colomby, the drummer of the rock group "Blood, Sweat and Tears," appearing on the radio program "The Politics of Pop," broadcast June 5, 1975, put it this way: "Well, that it is . . . what you're doing is . . . you're advertising."

Perhaps the best indication of the value of broadcast exposure to the recording industry is the money they will spend to promote air play of their records. Consider the following excerpt from the October 27, 1975, edition of Newsweek concerning a Bruce Springsteen album.

"The LP has sold 600,000 so far, and Columbia has spent $200,000 promoting it. By the end of the year they will spend an additional $50,000 for TV spots on the album. 'These are very large expenditures for a record company: we depend on airplay, which cannot be bought,' says Bruce Lundvall, Columbia Records' vice president. 'What the public does not understand is that when you spend $100,000 on an album for a major artist, your investment is not so much on media as on the number of people you have out there pushing the artist for airplay.' Now, for the first time, a Springsteen single, 'Born to Run,' has broken through many major AM stations, where the mass audience listens."

In the last Congress, Mr. Wayne Cornil, then general manager of KFXD–AM and KFXD–FM in Nampa, Idaho, related to the House subcommittee considering the performance right in sound recordings how local record retailers on radio exposure to promote record sales. Mr. Cornil quoted one drugstore manager as telling him "If it were not for record exposure on radio, I would not have a record department." He also noted that one local tape retailer ordered 8-track and cassette tapes on the basis of Mr. Cornils' station's play list. Obviously, radio sells records, but it does even more. Radio exposure of recording artists also enables them to charge substantial fees for personal appearances and to play to full houses virtually everywhere they appear.

As is apparent, we broadcasters are more than mere beneficiaries of the creativity of the recording artists and record companies. We are really partners in the creative process. It is, after all, the efforts of radio broadcasters that are primarily responsible for high record sales and high audiences at recording artists' concerts. Radio broadcasters, too, serve the creative process. We ensure broad exposure for creative works via airplay of records and, thereby, promote and stimulate the sale of original artistry. We, too, ensure appropriate records for creative endeavors and encourage additional creative efforts by record companies and recording artists.

Our role in this creative partnership is of considerable benefit to the record industry. Record sales revenues have grown dramatically to $2.76 billion dollars [3] in 1975. Radio industry revenues were over one billion dollars less.[4]

To require broadcasters who contribute so much to the creative process and the success of record companies and performing artists to pay the beneficiaries of our efforts for the right to continue to make this invaluable contribution would be grossly inequitable. In fact, because record companies and recording artists really need no additional stimulus to their creative abilities and because a performance right in sound recordings would provide no real stimulus to creativity in any event, it would be more than inequitable. It would be outrageous.

We have seen that a performance right in sound recordings is unnecessary, and would be nonproductive and inequitable. Common sense would tell us to stop at this point and forget it because no case can be made in support of this addition to our copyright law.

Nonetheless, let me tell you how establishment of a performance in sound recordings would affect the radio broadcast industry and, moreover, how our listeners—the public—would be affected.

Establishment of a performance right in sound recordings would jeopardize achievement of an important national policy goal—namely, the maintenance and development of a nationwide, but locally oriented radio broadcast service. Primary responsibility for achievement rests with the Federal Communications Commission and the United States Supreme Court has stated that "the signifi-

[3] Billboard, March 5, 1977, p. 3.
[4] Public Notice, November 8, 1976, "FCC AM and FM Broadcast Financial Data, 1975."

cance of the Commission's efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.[5] Consequently, the effect of a performance right in sound recordings must be given considerable weight in reaching a determination on the desirability of establishing such a right.

Payments made by radio broadcasters to performers and record companies would impose a substantial burden on the radio industry. They would threaten not only the vitality of the industry and reduce its capacity to serve the public, but also threaten the viability of numerous stations and lead to reduction or total loss of service in many communities.

For purposes of illustration, NAB has calculated the total payments required of the radio industry under the fee schedule in H.R. 6063, based on the latest (1975) FCC AM and FM Broadcast Financial Data. The total payments for the entire radio industry would be $15.2 million.

Payments of this magnitude would have a substantial impact on the radio industry. Total pre-tax industry profits were $90.7 million in 1975. Thus, the total payment under the presently proposed legislation represents 16.8 percent or slightly over one-sixth of industry profits.

While it is easy to think of broadcasting as an industry swollen with alleged monopoly profits and easily able to withstand a reallocation of its one-sixth of its profits to record companies and performing artists, that impression bears little resemblance to reality. First, radio is highly competitive. Just turn your dial and consider the number of stations you hear—and more stations begin operation every month. Secondly, many, many radio stations lose money. In 1975, nearly 40 percent of the AM and Combination AM/FM stations lost money. Most (60 percent) independent FM stations lost money. Notably, unprofitable operation is not characteristic only of smaller stations which pay a flat fee, i.e., those with revenues less than $200,000. Even among stations with revenues greater than $200,000, only 70 percent reported profitable operation in 1975. Obviously, for the many unprofitable and barely profitable stations, imposition of a record performance royalty would be particularly burdensome and severely detrimental to their ability to provide the best possible service to the public.

In conclusion, broadcast stations should not and need not be required to subsidize companies and performers, who already are amply rewarded for their creative efforts and who already benefit continuously from broadcast exposure and promotion of their records. Establishment of a performance right in sound recordings is unsound—economically, constitutionally, and as a matter of fundamental statutory policy. For these reasons, we ask that you recommend against inclusion of a performance right in sound recordings in the copyright law of the United States.

NO. 6

McKENNA, WILKINSON & KITTNER,
Washington, D.C., June 21, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The undersigned has been authorized by Theodore R. Dorf to request that he be permitted to present testimony at the hearings to be held in Arlington, Virginia, with respect to the above-referenced matter. Mr. Dorf will appear on behalf of Greater Media Inc., the Federal Communications Com-

[5] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

mission licensee of radio broadcast stations WGAY–AM–FM, Silver Spring, Maryland. Mr. Dorf requests that he be allotted 15 minutes of time on the morning of July 6, 1977.

Respectfully submitted.

NORMAN P. LEVENTHAL.

TESTIMONY OF THEODORE R. DORF BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS

My name is Theodore R. Dorf. I reside at 10529 Tyler Terrace, Potomac, Maryland. I am presently general manager of radio stations WGAY(AM) in Silver Spring, Maryland and WGAY–FM in Washington, D.C., both licensed to Greater Media, Inc. I am also the current Vice Chairman of the Washington Area Broadcasters Association and a member of the Board of Directors of the National Radio Broadcasters Association. I am a Past President of the Delaware-Maryland-Virginia-District of Columbia Broadcasters Association. I have been in broadcasting for more than 24 years, since 1953 when I began my career at WGAY.

In addition to being the Federal Communications Commission licensee of WGAY–AM and FM, Greater Media owns and operates five other AM and five other FM broadcast stations in various communities around the country. These include:

WTCR(AM)	Ashland, Ky.
WHNE(FM)	Birmingham, Mich.
WHND(AM)	Monroe, Mich.
WGSM(AM)	Huntington, N.Y.
WCTO(FM)	Smithtown, N.Y.
WCTC(AM) and WQMR(FM)	New Brunswick, N.J.
WPEN(AM) and WMGK(FM)	Philadelphia, Pa.
WHEZ(FM)	Huntington, W. Va.

Although all of these stations have a very substantial and direct interest in these proceedings, I am here principally on behalf of WGAY AM and FM with which I am naturally most familiar.

WGAY–AM, a daytime station operating with 1000 watts power at 1050 Khz, began operations more than thirty years ago from studios on Arcola Avenue in Silver Spring. WGAY–FM, operating with 17 Kilowatts power at 99.5 Mhz, is co-located with the AM station at our Silver Spring studios on Georgia Avenue. Both stations—the FM is now simulcast with the AM 25 percent—program what we generally call beautiful music; this type of music ranges in style from standards and modern day standards to recent and current hits arranged in a lush but contemporary fashion. The stations, of course, pay the currently effective percentage of their net advertising receipts to ASCAP, BMI and SESAC for the right to broadcast this music for the benefit of our listening public.

At the outset I wish to note my complete agreement with most of the statements that have been submitted by other broadcast groups in this proceeding to the effect that an additional performance right in sound recordings goes beyond the Constitution's Copyright clause, is unnecessary from the standpoint of the public as well as the record companies and is most unfair to broadcasters. In short, there is no justification for adding yet another burden to the broadcast industry—licensed to serve the public—for the benefit of a few highly successful artists and record companies which are already well paid for their services and products.

Although there are important points to be made in these respects, I do not wish to take the Panel's time in arguing these anew—others I am sure will do so. Rather, I would like to spend a few minutes telling you some of the problems that beautiful music stations like ours encounter in securing music product and why, in my view, the proposed performance royalty fee will do

absolutely nothing to help the situation. Since this is the real purpose of copyright, there is no basis from the public's standpoint for another royalty fee.

I believe I am fairly characterizing the situation pertaining to beautiful music stations when I say there is a general absence of available music product for these stations. There simply is no—or very little—recorded music being produced today which fits in with the kind of music format we have. In fact, a large percentage of our music (about 30 percent) now originates in production centers in England and other European countries (for example, France, Germany and The Netherlands). Much of the remaining music we broadcast today was first produce in the 1960's. And lately, over the last 3 years at least, we have been forced to resort to producing our own music in order to maintain the quality of programming carried on our stations. The record companies are simply not interested in our plight.

In the context of these hearings, I know what the first reaction is likely to be to this situation: if the record companies and recording artists were given a performance royalty, they would have some incentive to produce music product for beautiful music stations like ours. Not so! Let me explain why.

The essential, and indeed principal, reason why record companies are not interested in producing any new beautiful music records is the absence of the artist plugs on beautiful music stations that generally accompany records played on Top-40 and other contemporary rock, country and soul oriented broadcast stations. Most beautiful music stations—ours is one example—play a series of three or four musical selections in a row without artist or record company mention. The record companies find this format very objectionable from the standpoint of record sales. In fact, even back-titling—where after the series of three or four selections the artists and compositions are announced—does not satisfy the record companies' desire for instant on-air recognition. In other words, their feeling is that there is no sense in producing beautiful music records when they do not get any direct benefit from it in the form of on-air plugs and resulting increases in record sales. This reaction—which is predominant throughout the record industry—clearly dispels the notion that record companies do not consider broadcast air play a very valuable asset—one they get free I might add.

Thus, even if a performance royalty is enacted it will do nothing to spur creative effort or further record production in an area that is in sore need of it. Without a change in the format approach now being followed by most beautiful music stations—which I think is highly unlikely and one which I certainly do not intend to recommend for the stations I manage—the record companies will not devote any effort to remedying this very serious problem. The name of the game as far as the record companies are concerned is "instant recognition" and without it they simply are not interested. In terms of any benefits to the public, performance royalty simply will not make any difference at all.

It will, of course, make a difference to the broadcast stations which must pay the added royalties. The plain truth of the matter is that the several hundred beautiful music stations in the country—most of them financially troubled FM stations—are hardly likely to return enough in the way of royalty payments to make any difference to the record companies.

My layman's understanding of the Copyright law is that it is first and foremost intended to provide an incentive for creativity and production so that the general public will benefit from it. However, this fundamental purpose will not be served in this case. Consequently, I am taking this opportunity to urge the Register of Copyrights to recommend to Congress that a record public performance right not be established. A performance royalty will not serve the fundamental purpose intended by traditional notions of copyright; on the contrary, it will only serve as a further tax on broadcasters for the benefit of a few who are already well compensated for whatever creative efforts they put forth.

Thank you for giving me the opportunity to present my views on this matter.

S.776A

MEMORANDUM OF CALL

TO:

Rose

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

Ms. Soinski

OF (Organization)

Nat'l Endowment for the Arts

☐ PLEASE CALL → PHONE NO. CODE/EXT. 634-6588

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

Re Hearings on July (6) - 7 - (8)

Ms. Soinski schedules meetings for Mr. Robert Wade, General Counsel, Nat'l Endowment for the Arts. He wishes to testify and is busy the 7th - hopes to be scheduled on the 8th. Please contact Ms. Soinski

Call on

RECEIVED BY	DATE	TIME
fl	6/21	3:33

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1968—648—16—60341-1 323-889

63-108

S776A [B]

MEMORANDUM OF CALL

TO: Rose

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

Allen Jabbour

OF (Organization) Dir of Am Folklife Center

☐ PLEASE CALL → PHONE NO. CODE/EXT. 6-6599

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

Wants to testify
at Performance Rights
Hearing

RECEIVED BY	DATE	TIME

STANDARD FORM 63 GPO : 1969—348—16—90341-1 382-889 63-108
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

VIENNA, VA.,
June 23, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

The American Symphony Orchestra League desires to testify at the hearings on the performance rights in sound recordings scheduled for July 6, 7, and 8, 1977 in Arlington, Virginia. The American Symphony Orchestra League requests 30 minutes to present its testimony during the hearings. The American Symphony Orchestra League is a federally chartered non-profit service and educational organization dedicated to the development of American symphony orchestras and to the cultural communities they serve.

RALPH BLACK,
Executive Director,
American Symphony Orchestra.

AMERICAN SYMPHONY ORCHESTRA LEAGUE,
Vienna, Va., June 21, 1977.

HARRIET L. OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MISS OLER: This will confirm my telephone call to you this morning wherein you advised sending the testimony request by telegram due to the deadline date of today.

The telegram was given to Western Union for dispatch at 10:30 AM this date and is as follows:

HARRIET L. OLER,
Senior Attorney, Office of General Counsel, Copyright Office, Library of Congress, Washington, D.C.

The American Symphony Orchestra League desires to testify at the hearings on performance rights in sound recordings scheduled for July 6, 7, 8, 1977, in Arlington, Virginia. The American Symphony Orchestra League requests 30 minutes to present its testimony during the hearings. The American Symphony Orchestra League is a federally chartered, non-profit service and educational organization dedicated to the development of American symphony orchestras and to the cultural communities they serve.

RALPH BLACK,
Executive Director,
American Symphony Orchestra League.

Sincerely yours,

FRANCES E. LINDEN
(For Ralph Black, Executive Director).

NO. 10

[Mailgram]

WASHINGTON, D.C.,
June 21, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

In behalf of the associated council for the arts request opportunity to testify at forthcoming hearings on performance rights of sound recordings prefer July 7 or 8 testimony will be presented by Louis Harris chairman of the board ACA and Theo Bikel Vice Chairman.

MICHAEL NEWTON,
President, Associated Council of the Arts.

STATEMENT OF MICHAEL NEWTON, PRESIDENT, ASSOCIATED COUNCILS OF THE ARTS

It is my pleasure to appear before you as representative of ACA (Associated Councils of the Arts). ACA is a national non profit coalition of arts interests comprising state and community arts councils and agencies, performing arts or-

ganizations, universities, libraries and allied arts groups. In addition, ACA embraces a program called Advocates for the Arts which brings together nearly 4,000 individuals concerned about the cultural life of the United States.

We are indeed grateful for this opportunity to appear before you and feel deeply indebted to the Copyright Office for addressing a most serious and unfortunate shortcoming in our nation's copyright laws. I refer, of course, to the lack of a performance right attaching to sound recordings.

We believe there are few more important functions for government than providing a legal and political environment in which creative people in society can work and flourish. Clearly, it was this human creativity that the Constitution tried to protect and encourage by giving to Congress the power ". . . to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights in their respective Writings and Discoveries . . ."

The sound recording has been held to be and is a "writing". Who, then, is the author? The composer and arranger are recognized in current law. We believe it is unconscionable that our law ignores the creative contribution of the performer. Among those who know the art of music and acting there is no doubt that every performance of a given work is unique and what makes it unique is the work of the performing artist. If this were not so, why would people argue over the merits of a Beethoven Ninth recorded by the Boston Symphony versus one done with the Los Angeles. Why does the same composition performed by one group of musicians sound differently from one recorded by another group? Can anyone seriously contend that folk and jazz artists are interchangeable?

The arguments for passing a performance royalty are uncomplicated, but, as always, subject to misinterpretation and self-interest.

Less than 20 percent of all recorded works are successful—which means they earn more than they cost to record. The other 80 percent stimulate the growth and expansion not only of the recording industry, but of the nation's artistic life as well. Recording companies have one source of support—the individual consumer. Under current practices, those who benefit most from the recording industry's development are broadcasters and juke-box owners who pay the least for these benefits which yield them profit.

The debate can be clouded by tales of extraordinary sales of pop records and astronomical incomes of the latest and hottest rock group. These are momentary winners in the royalty sweepstakes. The consistent loser, however, is the consumer who buys individual recordings, for it is currently up to the consumer to bear the entire cost of the recording industry—including a royalty for intepretive artists while broadcasters, back-ground music merchants, and juke-box chains pay nothing.

Regardless of the fleeting popularity of most of our so-called popular artists, the income of pianists, violinists, singers, concert performers, dancers, opera companies, theater groups, and symphony orchestras is also affected. These artists and arts organizations should be compensated along with the composer and author every time a work in which they have a part is used commercially.

As Erich Leinsdorf, conductor of the Boston Symphony Orchestra, stated in his testimony for the Senate Copyright hearings in 1967, "When the artist performs twice in live performance, he is paid twice. If you perform six times, you are paid six times; but with a recorded performance my work can be "exhibited" as often as the station likes—and the cost to the radio station will be the same, nothing. There is something wrong about this, there is no doubt about it.

". . . Radio sations will play recordings time and time again over many, manv years, long after it is possible to buy that recording in a music shop. For the composer and the publisher that is not a problem as they continue to benefit from fees. But the performer gets nothing, even though in most instances it is the performers . . . who create the demand.

"And do not forget that . . . all sorts of musical performers, particularly singers, have a limited time in their careers. One problem prevailing with singers . . . is that they have no way of depreciating themselves in the tax structure. It is not fair for others to be making a profit from performers' talents long after the performers stop receiving any income."

There is an urgent need for Congress, through a revised copyright law, to encourage the creative talent of the performer and provide value for its expression through legal protection and economic incentive.

Before the Copyright Office, Library of Congress, Washington, D.C.

IN THE MATTER OF COPY OFFICE REQUEST FOR COMMENTS REGARDING PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

COMMENTS OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS CONCERNING ESTABLISHMENT OF PERFORMANCE ROYALTY

The establishment of a Performance Right for sound recordings in the Copyright Law would, however belatedly, return to the creative artists and to the recording companies some small measure of compensation when their talents and products are used by commercial broadcasters and others for their own profit.

The American Federal of Television and Radio Artists, on behalf of its 34,000 members who perform in the broadcasting and recording industry, most strongly urges that such a performance right be recommend and swiftly enacted. Logic requires it, economic just demands it, and even the opponents of such a performance right, whose opposition is motivated entirely by greed, have offered no valid argument to deny it.

Our argument is simple: Performing artists, musicians and record producers deserve to be compensated by those who profit from their creativity, as broadcasters and jukebox operators and others profit through their use of sound recordings. Neither the performers whose talents are exploited nor the legitimate record manufacturer who hires the performer has any say or conrtol over the unauthorized use of their recorded works. The broadcasting industry has enjoyed a "free ride" unprecedented in the annals of American business. Approximately 75 percent of all radio air time is devoted to playing recorded music. Broadcasting stations sell time to sponsors based on the popularity of recorded music with the station's listeners. These stations derive enormous advertising revenues from this unconscionable exploitation. Yet they return not one penny of their profits to the people who made them possible.

If the sound recording as we know it today had existed back in 1909, when the Copyright Law first was enacted, the creators of these recordings would now be compensated for their profitable use, just as those who create books and motion pictures are compensated. The royalty fees that have been proposed are minimal. Objections, even on economic grounds, cannot be factually supported.

Radio stations pay for other types of programming. Why should they not also make modest payments to those whose talents are used to fill the bulk of their air time?

Adoption of a performance royalty would also help the companies offset the increasing cost of recording, a high-risk business. As matters now stand, the consumer pays the entire cost of a record. Broadcasters and other commercial users should help share that cost. Creation of such a royalty for records might even make it easier for the less experienced, experimental or classical artist to get his work recorded.

The royalty should be shared evenly by the performers and recording companies, on a fifty-fifty basis. Among the performers, we believe their (50 percent) share of the royalty should be split equally among those whose talents are recorded on the individual recording (e.g., a lead performer and five backup musicians would mean six equal shares).

This formula is supported by AFTRA, the American Federation of Musicians and by the Recording Industry Association of America.

A system for monitoring the use of sound recordings could be devised similar to that employed by ASCAP, BMI and SESAC, which now monitor the use of recordings for the benefit of composers and publisher. Perhaps an arrangement could be devised whereby these agencies could agree to do the same for performers and record producers.

Identification of the beneficiaries poses no problems for the two unions representing the performers (AFTRA and the AFM), or for the recording companies. There are existing mechanisms, developed under collective bargaining agreements, which can be utilized for this purpose.

Recordings, today, have, for the most part, replaced live performances on radio stations. Broadcasters used to pay for live performances and still enjoy handsome profits. Today, they pay nothing to the artists and musicians who have been displaced on radio by their own recordings. There is no justification for continuing to deny the creators of sound recordings the same right enjoyed by those who create other copyrighted products.

We respectfully urge that the Register of Copyrights recommend to Congress that the Copyright Act be amended to provide for payment of royalties to performers and recording companies when their recorded works are used by others for profit.

Respectfully submitted.

SANFORD WOLFF,
Executive Secretary.

Dated May 31, 1977.

NO. 11

MCKENNA, WILKINSON & KITTNER,
Washington, D.C., July 1, 1977.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The undersigned has been authorized by Thomas E. Bolger to request that he be permitted to present testimony at the hearings to be held in Beverly Hills, California, with respect to the above-referenced matter. Mr. Bolger will appear on behalf of Forward Communications Corporation, the Federal Communications Commission licensee of radio and television broadcast stations. Mr. Bolger requests that he be allotted 15 minutes of time on the morning of July 28, 1977.

Respectfully submitted.

NORMAN P. LEVENTHAL.

TESTIMONY OF THOMAS E. BOLGER BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS

My name is Thomas E. Bolger. I reside at 2 Parklawn Place, Madison, Wisconsin. I am presently President and General Manager of television broadcast station WMTV, Channel 15 in Madison, Wisconsin, licensed to Forward TV, a Division of Forward Communications Corporation. I am also an officer and Director of Forward Communications. I serve as Vice Chairman of the TV Board of the National Association of Broadcasters and am a Past President of the Broadcast Education Association. I am also on the Board of Directors of the Television Information Office and the IRTS Foundation. I have been in broadcasting for more than 21 years, since 1956 when I began my career at Forward's Wausau, Wisconsin station, WSAU.

In addition to being the Federal Communications Commission licensee of WMTV. Forward owns and operates nine AM and FM broadcast stations in various communities around the country as well as five other television broadcast stations. These include:

WSAU(AM), WIFC(FM), and WSAU–TV, Wausau, Wis.
WONS(AM) and WBGM(FM), Tallahassee, Fla.
WRAU–TV, Peoria, Ill.
KCAU–TV, Sioux City, Iowa.
KVGB(AM) and KVGB–FM, Great Bend, Kans.
KOSA–TV, Odessa, Tex.
WTRF(FM) and WTRF–TV, Wheeling, W. Va.
WKAU(AM) and WKAU(FM), Kaukana, Wis.

Since all of the Forward stations have a very substantial and direct interest in these proceedings, I am appearing here on behalf of the entire Forwards Group.

I am, like other broadcasters, strongly opposed to the establishment of another music license fee, this one for the benefit of performers and record companies. Our stations, basically located in small markets, already pay the currently effective percentage of their net advertising receipts to ASCAP, BMI and SESAC for the right to broadcast music for the benefit of our listening public—more than $388,000 annually. In my view, that is enough.

Whatever creative contribution is made by artists—assuming it is sufficiently unique to be entitled to Copyright protection and, in my mind, this is a major question, particularly in the case of record producers—they are already well compensated through existing contractual arrangements. And the argument be-

ing made here by the record industry that some artists receive little money from record sales, is no reason for having broadcasters pay a further tax to support them. Why should broadcasters have to contribute further to the well-being of recording artists, arrangers, musicians and others when the very people that employ them—the record producers—refuse to do so. From what I can see, the record industry is growing by leaps and bounds; it is a huge financial success. It can well afford to increase the remuneration being paid to artists and performers. I respectfully suggest that these people—if indeed they are entitled to further compensation for their efforts—turn their attention to their own industry rather than ours.

I have often heard the argument that since the proposed performance royalty amounts to only 1 percent of gross receipts, it is too small to cause any injury to the broadcast industry. There are several mistaken assumptions in this kind of "logic". First of all, the 1 percent is levied against gross advertising receipts without regard to any particular station's financial viability; it bears no relation to a station's financial position or its ability to pay. An additional 1 percent fee on a station grossing $300,000 can make a very big difference if the station is already showing a net operating loss; an additional $3,000 loss can be a very serious matter not only in terms of the station's financial position but its programming decisions as well. I would hate to see the day when the "one more 1 percent" is the straw that breaks the camel's back and a small radio station somewhere goes off-the-air or, at a minimum, is forced to cut back on programming. A good example of what I am talking about is illustrated by Forward's own WIFC–FM in Wausau, Wisconsin. Gross sales for this station totaled $190,000. The $750 payment envisioned by the last performance royalty proposal for stations grossing between $100,000 and $200,000 would itself represent 11 percent of that station's after-tax profit. When, and if, the station's revenues reach the $200,000 level, the 1 percent performance royalty fee will take 30 percent of the same after-tax profits. Adjustments would obviously have to be made.

There is another point to be made here. The last proposal was for a 1 percent fee; the one before that was for a 2 percent fee. There is no doubt in my mind that once the principle of a performer's royalty is established, the record industry will spend the next twenty years actively seeking to increase it. As I understand the last bill before Congress on this matter, the fee would have been subject to review after only 18 months and then every five years thereafter. No matter how "small" the fee is now—and believe me 1 percent of gross receipts is not small—it is an unfair burden on broadcasters. (And it is unclear to me how television stations are going to be treated under this plan. Any proposal requiring television stations—which play far less recorded music than radio, for example—to pay 1 percent of gross revenues for a performer's royalty would be outrageously unfair.)

The broadcast industry already pays more than $97 million each and every year for the right to play music on-the-air. By no means are we getting a free ride as the record industry would have you believe. It is disturbing to me that the record companies—well able to afford additional payments to its "employee" artists, arrangers and musicians—would seek an additonal subsidy from the broadcasters, the one group who is probably most responsible for the huge financial success of the record industry.

Let me give you a few facts about both of these industries to illustrate my point. First, the record industry is much larger than the radio broadcast industry. In 1975, the record industry grossed almost $2.4 billion; radio on the other hand, took in only 70 percent of that amount, about $1.7 billion. Second, during the ten year period from 1969–1974, record industry revenues increased by an astounding 164 percent; radio revenues, on the other hand, increased by only 107 percent.

But this really does not tell the whole story as far as radio is concerned. As I mentioned earlier, revenues are not the whole picture. Recently published FCC statistics paint a much gloomier picture of the radio industry—one hardly in a position to bear a substantial increase in music license fees. Thus, although radio revenues have increased, profits (as a percentage of revenues) have not: 1968—11.09 percent; 1972—9.55 percent; and 1975—5.30 percent.

Also, the number of radio stations operating profitably have steadily declined: 1973—69 percent of AM and AM/FM stations reported a profit; 1974—67 percent of AM and AM/FM stations reported a profit; and 1975—61 percent of AM and AM/FM stations reported a profit.

In 1975, only 40 percent of independent FM stations reported a profit. Closer to home, of Forward's nine radio stations, three are losing money and a fourth is operating marginally. Indeed, in the latter case (WTRF–FM, Wheeling, West Virginia), our current music license fee payments are already double the station's after-tax profit of about $1,200.

While the record industry maintains that these increased costs can simply be passed on to advertisers, this can not be accomplished easily. In fact, in many cases, it cannot be done at all. The station's rates must remain competitive with other media and since an evaluation of advertising buys is often premised on cost efficiencies alone, stations will be forced to absorb the fee themselves.

Ignoring for the moment what I understand to be serious constitutional questions concerning the performance royalty proposal and the lack of need for its establishment from the public's standpoint, a second use payment would principally serve only to impose yet another substantial cost on the broadcaster for the right to provide musical entertainmnet to its listening public. In view of the fact that it is the broadcast industry which is singularly responsible for the financial success of composers, artists, record publishers and producers alike, it is an unfair and burdensome tax that should be kept where the Congress left it.

My layman's understanding of the Copyright laws is that they are first and foremost intended to "promote the progress of science and useful arts"; in other words, to increase creativity and productivity for the general public welfare. Without some public benefit, there would not appear to be a justification for copyright protection of any kind. The absence of any showing that the general public welfare will be advanced by the institution of a performance right in sound recordings makes the case for a performer's royalty one solely of economics and fairness. Essentially, this boils down to whether recording artists and record companies are entitled to additional compensation at the expense of broadcasters (and jukebox operators). In my mind they are not.

The attempt by some to liken this situation to the question of copyright payments by cable television systems is completely off base. In the cable case, prior to the recent legislation, cable systems—although using the copyrighted works of others for commercial purposes—paid nothing to the copyright owner. Broadcasters, on the other hand, are permitted to utilize sound recordings and musical compositions only on condition that they pay a percentage of their station revenues to one of three publishing associations (ASCAP, BMI, SESAC). And let me make something else clear which has been confused; cable systems do not pay broadcasters for the use of their signals. Rather, they now pay a relatively insignificant compulsory license fee to the copyright owner—in the great majority of cases this is the program producer, not the broadcast station.

In view of the fact that more than adequate compensation is already being received by both record companies and recording artists for their efforts in producing sound recordings, and the manifest unfairness of imposing a further substantial tax on the broadcast industry, particularly in view of the direct and monetarily significant benefit provided to the record industry by broadcast stations and the inability of many stations to absorb any increase in copyright payments, I firmly believe that the establishment of a record public performance right is unnecessary and unfair. Accordingly, I urge the Register of Copyrights to recommend to Congress that a performance royalty not be established.

I thank you for giving me the opportunity to be heard on this very important matter.

NO. 12

McKENNA, WILKINSON & KITTNER,
Washington, D.C., July 1, 1977.

Re performance rights in sound recordings, S77–6.

HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: The undersigned has been authorized by John Winnaman to request that he be permitted to present testimony at the hearings to be held in Beverly Hills, California, with respect to the above-referenced matter. Mr. Win-

naman will appear on behalf of American Broadcasting Companies, Inc., the Federal Communications Commission licensee of radio broadcast station KLOS (FM), Los Angeles, California. Mr. Winnaman requests that he be allotted 20 minutes of time on the morning of July 26, 1977.

Respectfully submitted.

NORMAN P. LEVENTHAL.

NO. 13

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., July 8, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: I am writing at the request of Mr. Peter Newell, General Manager, KPOL, Los Angeles, California. Mr. Newell would like 15 minutes time to testify in Los Angeles during the performance rights hearings on July 26 to 28.

Mr. Newell is Chairman of the Southern California Broadcasters Association which has about two hundred stations in membership. Mr. Newell's address is as follows:

Mr. Peter Newell,
General Manager,
Radio Station KPOL,
5700 Sunset Boulevard,
Los Angeles, California 90028.

Thank you for your prompt attention to this matter.

Sincerely yours,

T. MICHAEL BARRY,
Legislative Counsel.

NO. 14

ARNOLD & PORTER,
Washington, D.C., July 8, 1977.

HARRIET OLER, Esq.,
General Counsel's Office, Copyright Office, Library of Congress, Washington, D.C.

DEAR HARRIETT: This is to confirm my earlier conversations in connection with Recording Industry testimony and to make an additional request. Alan Livingston, President of 20th Century Fox Entertainment Group, will testify for fifteen minutes as the first witness in the hearings on July 26 at 9:30 a.m. As I indicated to you earlier, as soon as that testimony is over, Livingston has to dash to catch a plane to the Midwest for a board meeting. Stan Gortikov and I will testify for two hours first thing the morning of July 27; Herb Alpert, Vice Chairman of A & M Records, will testify for fifteen minutes right after lunch on the 27th; and Joe Smith, President of Elektra-Asylum Records, would like to testify for fifteen minutes immediately after Alpert.

Many thanks for your assistance.

Sincerely.

JAMES F. FITZPATRICK.

NO. 15

F.E.L. PUBLICATIONS, LTD.,
Los Angeles, Calif., July 11, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Pursuant to your hearings on performance rights in sound recordings to be held at the Beverly Hilton Hotel in Beverly Hills, Ca. on July 26, 27 & 28, 1977, please be advised that I would be willing to give testimony of this company's opinion on this matter.

As a small, closely held religious music publisher, F.E.L. publishes both sound recordings of its own and printed books and hymnals. We also license

use of our songs to other publishers of both printed matter and sound recordings using our copyrighted songs.

A number of our more popular copyrighted songs have been used both on radio and television by Oral Roberts, The Billy Graham Crusade, etc. They are also used in public performances at conventions, meetings, group gatherings such as the recent World Wide Marriage Encounter convention held in Los Angeles in June at which liturgies were held using our songs at the Convention Center and the L.A. Coliseum.

We do depend upon these one-time use performance fees for a substantial portion of our company's license and reprint revenue. Thus we are very interested in seeing that performance rights remain with the copyright owner so that fees may be realized of which the author/composer also receives his proportionate amount.

Please advise if you wish to hear our testimony.

Sincerely,

JAMES D. BOYD, *Vice President.*

[In the Matter of Performance Rights In Copyrighted Sound Recordings, S77-6]

TESTIMONY OF JOHN WINNAMAN BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS, JULY 26-28, 1977

My name is John Winnaman. I reside at 3509 Adamsville Avenue, Woodland Hills, California. I am Vice President and General Manager of radio station KLOS(FM) in Los Angeles, California, licensed to American Broadcasting Companies, Inc. I am also the current Treasurer of the Southern California Broadcasters Association and a member of the Board of Directors of the California Broadcasters Association. In addition, I serve as Vice Chairman of the ABC FM Radio Network Advisory Board. In the past I have served as West Coast Regional Vice President of the National Association of FM Broadcasters and as a director of that association. I have been in broadcasting for more than 17 years.

In addition to being the Federal Communications Commission licensee of KLOS(FM), ABC owns and operates seven AM and six other FM broadcast stations in New York, Chicago, San Francisco, Los Angeles, Detroit, Houston and Washington, D.C., as well as five television broadcast stations in New York, Chicago, San Francisco, Los Angeles and Detroit.

ABC also operates radio and television networks which distribute news, public affairs, sports and entertainment programming to more than 1600 affiliated stations (including its own) in all parts of the country. Although all of the ABC stations and network organizations have a very substantial and direct interest in these proceedings, I am here principally on behalf of KLOS(FM) with which I am most familiar.

KLOS (FM), operates at 95.5 Mhz with 68 KW power. It began operations almost thirty years ago from studios in Los Angeles. Presently, KLOS programs what we generally call album oriented rock, which is in my judgment, the best blend of the popular album/singles music available today. Our station is in the main stream of today's music. The station, of course, pays the currently effective percentage of its net advertising receipts to ASCAP and BMI for the right to broadcast this music for the benefit of our listening public, despite the fact that during past years we operated at a loss.

I would like to take a few minutes today to explain why other broadcasters and I are strongly opposed to the establishment of another music license fee, this time for the benefit of performers and record companies.

First of all, both the record companies and the performing artists are already well paid for their efforts—there is no need to tax the broadcast industry further so that these entities and individuals can increase their already sizeable incomes. (The May, 1977 issue of Time, for example, indicates that Peter Frampton earned $6,000,000 from just one album—"Frampton Comes Alive".)

It is said that performers engage in creative activity when they use their artistic skills and talents to produce a unique arrangement and performance of a musical composition. I do not question that this is the case.

It is similarly argued that record companies also play a creative role in the production of a sound recording—for example, determining the orchestration

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and directing the sound engineers and technical enhancement—and again, this may be considered creative in many cases.

The point, however, is that these people are already well paid for what they do. The performer is often the recipient of lucrative record contracts; if successful he (or she) will increase his remuneration substantially by concert engagements, television appearances, even feature film contracts. Similarly, the record companies receive by far the lion's share of the record or album price—the record industry is thriving.

This is not a matter of copyright at all—it is pure dollars and cents.

Generally, if a sound recording is to be set apart for its particular style or musical approach, it is usually the result of the efforts of the music arranger or the recording artist. The music arranger is generally compensated by the recording artist who employs him (or her) or by the record company. If his contribution and/or improvement to the sound recordings of the artist are meritorious over time, he will be able to increase his compensation. Indeed, the arranger is compensated by the recording artist principally for the uniqueness of his musical contributions and creative ability; he has already been rewarded for doing the job he is employed to do.

To the extent the recording artist makes a creative and original contribution to the musical composition—over and above that inherent in the music and lyrics—he, too, is compensated by the recording company. If the uniqueness of his contributions continue over time, the recording artist will also be able to increase his compensation from the record producer as well as obtain additional sources of income (e.g., concert performances, etc.). He is well able to protect his financial interests by suitable contractual arrangements.

Another argument that is often made in support of a performance royalty is that it is unfair to reward composers and publishers with copyright protection and not artists and record companies. This is not a valid comparison. First, there is the very important question whether artists and record companies make a sufficiently unique contribution that would fall within the usual boundaries of copyright protection. Secondly, there is the fact that composers and publishers must generally look only to their copyright entitlements for compensation. Not so for the artists and record companies, they have additional—and usually far more lucrative—sources of income. We are all well aware of the substantial sums being paid to recording stars for concert engagements, television appearances, feature film contracts, product promotions, and the like.

A few examples will illustrate my point. Seven years ago Variety was reporting that Tom Jones was being paid $75,000 for a two-hour concert (April 1, 1970); Johnny Cash, $50,000 per appearance (April 29, 1970); and Led Zeppelin $25,000 for a night's work (March 10, 1970). These sums have grown even more. The following article recently appeared in Parade magazine (May 22, 1977, page 4):

"The Rolling Stones have negotiated one of the richest recording contracts in history. It's a complicated deal worked out in Toronto and London with Atlantic and EMI, but generally it guarantees them $20 million, based on a $2 million guarantee for each of their next six albums."

What composer has been able to negotiate a $20,000,000 contract? And, when was the last time a composer was given his own show on network television?

While we are on this particular aspect of the problem let's pinpoint exactly who will benefit from a performance royalty. Some have suggested that unknown artists and classical and other unrecognized musicians will benefit from a performance royalty. This, however, will not be the case; the struggling new artist will not benefit from it significantly. The real beneficiary will be the record companies and the established artists—Rolling Stones, Fleetwood Mac, Eagles—none of whom need additional compensation for their efforts. Since it is their records that are played most often on-the-air, they are the ones who will get the lion's share of any royalty fee; not the classical musician and not the sixteen members of an orchestra providing necessary background music. A special study commissioned by the National Association of Broadcasters on this issue showed that fully 60% of the total dollars from record sales and existing broadcast license fees went to the record companies—the composers received less than 10 percent. And, the argument that some artists receive little money from record sales, even if true, is no reason for having broadcasters subsidize them by a performance fee. If record sales are meager, that's the nature of the business. Why should broadcasters have to be a revenue reservoir when the

record industry which employs these people is thriving and well able to provide additional compensation?

If the recording artist is entitled to more money, let the record companies pay him. They have ample means; indeed, changes in a few of what I understand to be current industry practices would go far towards increasing their compensation. For instance,

the practice of paying royalties on only 90 percent of the records sold;

the practice of charging costs of the recording session to the artist as an offset against royalties; and

the practice of deducting the cost of the album cover from the album list price before the artists' royalty percentage is applied (this can often be as high as 10–15 percent of the retail price).

Before turning their sights on the broadcast industry, the artists should start looking to their employers.

Another reason for repecting a performance royalty is that it imposes one more burden on the broadcast industry—an industry which has been largely responsible for the rapid growth and financial success of the recording business. (I will get to this in a moment.) The argument is made that broadcasters should be required to pay for the use of records, just as they do for all other types of program product, and a performance royalty is thus fair. What this argument conveniently ignores is that broadcasters do pay for the right to use copyrighted musical works—to the tune of some $97,000,000 annually. This is not a case of copyright owners not being compensated for their creative efforts or of broadcasters obtaining free program product. Rather, it is a situation where—in exchange for providing valuable exposure to recording artists and companies—the broadcaster is asked to pay even more in order to provide programming to its listening public.

A third and perhaps principal reason why a performance royalty is unjust and unfair is the existing relationship between broadcasters and record companies. In fact, it is the broadcast industry which is mostly responsible for the financial success of composers, artists, record publishers and producers alike—and it has been so for more than half a century. The representatives of the recording industry will try to convince you that free broadcast exposure is not valuable to them, indeed, that it is sometimes more harmful to record sales than beneficial. This is just not the case. The value of free broadcast air play to the record companies (and the recording artist) is incalculable. Radio station exposure can make the difference between success and failure of a record. The record companies want and need exposure to the broadcast audience—as much as they can get—and over 800,000 people in Los Angeles alone listen to KLOS every week.

The importance to the record industry of this "free" exposure is easily documented. In fact, the record companies maintain large staffs and budgets devoted to persuading radio stations to play their records; even the artists themselves are frequently involved in efforts to encourage air play of their records. This effort has now reached a point where we have been forced to allocate only two days of the week when record company promotion representatives may visit the station.

The fact that some record companies purchase separate advertising time on radio stations to promote records has nothing whatever to do with the fairness of a performance royalty—it is irrelevant to the question of performance royalty. There is no trade-off between such advertising and a royalty payment in return. The record companies already receive a service for what they pay for—advertising time. Actually, direct advertising by record companies is really the result of competition between them and supports rather than contradicts the proposition that radio airplay is a valuable asset.

If broadcast air exposure is not as valuable as I think it is, I wonder if record companies (and artists)—in exchange for their performance royalty—would be willing to pay us a fair price for the air time now provided to them free. I think not; they get too much of a good bargain now.

In conclusion, I urge the Register of Copyrights to recommend to Congress that a record public performance right not be established. A performance royalty would be most unfair to broadcasters who are solely responsible for the well-being of the record industry. An additional music license fee such as is proposed, will only serve as a further tax on broadcasters for the benefit of the few who are already well compensated for whatever creative efforts they put forth.

Thank you for giving me the opportunity to present my views on this matter.

STATEMENT OF CECIL F. READ BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS, JULY 28, 1977, LOS ANGELES, CALIF.

Ms. Barbara Ringer, Register of Copyrights, and members of the panel, thank you for the opportunity to make a statement and to testify in this matter.

My name is Cecil Read. I reside at 9415 Olympic Boulevard, Beverely Hills, California.

In testifying before the panel, and furnishing certain documents and other information, my only purpose is to provide a complete historical account of the circumstances, events, problems, policies, and conflicts which musicians and the Musicians Union faced and experienced between 1930 and the present time, July 1977;—a period of drastic changes in the lives and employment and prospects of musicians as a group, and as individual human beings seeking a good life.

In reviewing the policies and actions of the American Federation of Musicians in trying to cope with the immense changes brought about by technological progress in the recording and filming of musical performances, it is not my intention to open up past conflicts between the Federation and many of its members, primarily the Los Angeles group of recording and film musicians, or to rehearse old problems culminating in litigation against the music performance trust funds and the Federation, and eventually resulting in the organization of the Musicians Guild of America in the late 1950's. Those conflicts have been long settled and should be laid to rest.

My purpose is (1) to provide the panel with information and statistics which may be useful in arriving at its recommendations to Congress with respect to performance rights for sound recordings; (2) to give an accurate and personal picture of the adverse impact on Musicians' employment caused by the unauthorized and unrecompensed use of sound recordings; (3) to give the background for the apparent change in the position of the Federation with respect to "performance rights" for musicians in the 50's or 60's; (4) to show the difficult dilemma faced by the Federation in trying to reconcile the interests of its members who make the sound recordings and its members who have been and are being denied the opportunity for gainful musical employment as a result of the unauthorized use of these sound recordings; and, (5) to show the steps taken by the Federation in trying to meet the problems resulting from the development, use, and "misuse" of sound recordings.

I have been a professional musician, a trumpet player, for over fifty (50) years. I was one of the few, who, through talent, hard work, and perhaps luck, survived in the music business. First, in Chicago, where I worked in theaters before there were sound movies; in radio stations before there was an NBC or CBS Network; and in hotels and dance halls before live musicians were displaced by Juke Boxes playing records and Wired Music Services.

In 1943–1945 I was Solo Trumpet with the United States Air Force Band at Bolling Field, Washington, D.C.

In 1947 I moved from Chicago to Los Angeles where I have worked in Network Radio Programs before this employment disappeared; Network Videotape Television Variety Shows; Motion Pictures, TV Films, and Phonograph Recordings.

I have lived through and experienced as a playing or performing musician all the changes in musical employment from the inception of sound recordings. I have known and seen the destructive impact on the employment and lives of musicians caused by these changes.

In 1955, as Vice-President of Local 47, AFM, I became the spokesman for the Los Angeles recording and film musicians and leader of the revolt against the Federation's Trust Fund policies established under the leadership of James C. Petrillo.

From 1956 through 1964 I was Chairman of the musicians defense fund, the voluntary organization which prosecuted and financed the litigation seeking changes in Federation collective bargaining policies which had diverted wages raises and residual payments away from the musicians who made the records and films to the music performance trust funds, and which had been destructive of employment opportunties in TV Films.

From 1958 through 1961 I was President of the Musicians Guild of America, which for three (3) years replaced the Federation as certified bargaining rep-

resentative in the Hollywood Motion Picture and TV Film industries and with a few California-based Record Companies.

From 1962, after the Musicians Guild and the Federation were re-united, and through 1968 I served as the Representative of the Los Angeles Recording Musicians Advisory Committee and participated in all Federation negotiations with the record, motion picture and TV film, and network television companies.

Between 1964 and 1972 I was the special claims agent for the receiver, Crocker National Bank, appointed by the Superior Court of California to assist the receiver in the processing of claims of musicians or their heirs entitled to participate in some $3½ million resulting from the settlement of the trust fund law suits.

From March 1974 until April 1977 I was employed by Local 47 as the administrator of all recording and film employment of musicians under the Federation's National Labor Agreements which took place in the Los Angeles Area.

I am now President of Cecil Read Associates, Inc., a company which I have organized to act as Consultant and Advisor on Musicians Contracts and employment to Recording, Motion Picture, and Television Producers in Los Angeles and elsewhere.

I have furnished the panel with the following documents:

1. "Appeal of Local 47 before the International Executive Board, American Federation of Musicians," January 1956.

2. "The Los Angeles Musician and the Music Performance Trust Funds." An economic study for Musicians' Mutual Protective Association, Local 47, American Federation of Musicians. January 1956.

3. A copy of a letter dated September 5, 1961 to Cecil F. Read, President of the Musicians Guild of America from Herman D. Kenin, President of the American Federation of Musicians.

I ask that these documents be considered as part of my testimony and included in the record of these hearings.

I wish to repeat and to stress that the introduction of these documents and my testimony is not to rehearse old conflicts, but to provide a complete historical record that I believe will throw light on the critical issues before this panel.

The legal, constitutional, and economic objections raised by those who are opposed to the establishment of performance rights in sound recordings have been dealt with in the statement of the Recording Industry Association of America, Inc. and in the testimony and statements of others.

The questions of "equity" and "morality"—i.e., the inequity and immorality inherent in the situation that has developed because of the lack of Copyright protection of sound recordings—have also been dealt with by the RIAA statement as well as the testimony and statements of individuals, record company executives, and the Performers' Unions.

I adopt and endorse all of these statements in support of meaningful legislation to provide for performance rights in sound recordings.

I would like to address my remarks to two (2) other issues raised or arguments made by those opposed to this legislation.

1. The Union should protect its members employment and economic welfare by "contracts" with the record companies.

2. Copyright protection of performance rights in sound recordings is not necessary "to promote the useful arts and sciences."

I believe that I can also fill in the gaps on pertinent subjects that have not been covered in previous testimony, such as:

1. Sound track regulations in all past and present AFM Labor Agreements, and Federation policies with respect to "new use" and "re-use" payments to musicians.

2. The genesis, structure, and operation of the Musicians Phonograph Record Special Payments Fund, the Television Film Special Payments Fund, and the Theatrical Motion Picture Special Payments Fund.

3. Supplemental rights provisions of current Motion Picture and TV Film and Videotape Television Agreements covering the use and payment of films and TV shows on PAY–TV and CATV, home cassettes, and closed circuit exhibition.

4. Current AFM practice and policies covering the "new use" or "re-use" of sound recordings, ie records, film and TV show clips in new productions of Motion Pictures, Film and Videotape shows.

In point of time the first and most obvious problem of displacement of musicians and loss of employment came with the advent of "sound movies" in the late 20's and early 30's. Over 35,000 musicians lost their jobs in theaters over night.

This dramatic loss of musicans' employment had a deep and lasting effect on the thinking of the Federation and its members, and probably was the controlling influence in Mr. Petrillo's thinking and policies as President of the Federation, 1940 through 1958.

The next or concurrent big loss of musicians' employment came with the inception and development of the Juke Box industry and its use of records that had been made for "home use only".

With these two situations as a background the Union was aroused to try to do something to stop or limit the inroads of sound recordings on the live employment of musicians.

In some of the statements and testimony of the broadcasters and radio station owners it has been said that the Union should protect its members' employment and economic welfare by contract with the record producers.

The American Federation of Musicians has tried consistently and continually to do just that in all of its Labor Agreements and it has failed. The Federation's efforts to protect employment opportunities and to stop the unauthorized and unrecompensed use of sound recordings of its members have been counter productive.

I believe that history will show that there was a basic error in policy under which the Federation, Petrillo, tried to solve this problem by the Union's economic strength and by Labor Agreements with employers who did use our members, rather than by advocating and pursuing a policy of performance or "neighboring" rights in sound recordings for musicians.

In the late 30's or early 40's Court decisions in the *Waring* and *Whiteman* cases made it impossible for the Union to enforce the terms of its collective bargaining agreements with the Record Companies set forth in the familiar phrase "Not Licensed for Radio Broadcast" which appeared on all phonograph records sold prior to that time.

This immediately opened the door for the unrestricted, unauthorized, and unrecompensed use of phonograph records on radio stations, with a corresponding loss of employment and wages of musicians on Network and Local stations and programs.

The Federation's solution was to stop making phonograph records. Mr. Petrillo took action to prohibit the recording of phonograph records in the United States and Canada by members of the Federation.

After a strike which lasted for twenty-seven (27) months, the record companies agreed to pay "royalties" to the Union on all records sold which had been recorded by members of the Federation.

This was the original Recording and Transcription Fund. The royalties paid to the Union were used to provide wages for performances by musicians in free concerts, at charitable institutions etc. The available funds were allocated to be spent in the jurisdiction of some 700 Locals of the Federation based on the number of members in each Local and weighted to favor the smaller Locals.

During the 40's and 50's the Union's main concern, under the leadership of Mr. Petrillo, was to use its economic strength and collective bargaining agreements to try to find work for its members who had been hit by technological unemployment and by the commercial use of sound recordings and network broadcasting, and to obtain more money for its R & T Fund.

THE LEA ACT

Prior to the passage of the Lea Act the Federation had attempted to protect and continue the employment of Union Members in Radio Stations by economic pressure and contract provisions in Network and Local Radio Station Labor Agreements.

The broadcasters and the anti-labor press had a field day directed against the Union but focussing on the person and actions of its President, James Caesar Petrillo. Unfortunately, Mr. Petrillo was unwilling or unable to counteract this bad publicity which laid the groundwork for passage of the Lea Act, and subsequently the passage of the Taft-Hartley Act.

THE TAFT-HARTLEY ACT

Provisions of this Act made it illegal for employers to pay royalties to the Federation's Recording and Transcription Fund, and so there was another strike in the Record Industry which lasted about a year. (1948).

THE MUSIC PERFORMANCE TRUST OF THE RECORDING INDUSTRY

The strike was settled with the establishment of the Music Performance Trust Funds which were essentially the same as the Union's Recording and Transcription Fund as far as the percentage of royalties on records sold, the use of the Funds "to promote live music". And the allocation of monies collected to all "area" corresponding to the jurisdiction of the 700 AFM Locals on the same pro rata basis of number of Union members.

The only real difference was that the MPTF was under the administration of a Trustee nominated by the Record Industry and appointed by the Secretary of Labor. Theoretically, in order to comply with the provisions of the Taft-Hartley Act, the Fund was not under the control of the Union.

This Fund was Mr. Petrillo's solution to the problems of unemployment of musicians by all forms of sound recordings, and he used all the economic and bargaining powers at his command to increase the royalties and other payments to these Funds.

The Federation's policies did not really change until the recording and film musicians revolted in 1956 and Mr. Petrillo retired as President of the Federation in 1958.

By this time, 1958, the Union's power to protect its members and their potential employment had been seriously weakened by the Lea Act, the Taft-Hartley Act, and the technological advances and techniques in the recording of music for records, motion pictures, TV films and all other forms of taped and recorded music. The Union had no real economic power and its hands were tied by restrictive legislation.

Despite its best efforts under President Kenin, Mr. Petrillo's successor, and now under President Davis, the Federation has seen a steady lessening of employment in the industries that make and use sound recordings—no relief or compensation from the industries that exploit these sound recordings (the Juke Boxes, radio and TV stations, the Networks) and the resulting loss of opportunities for employment of musicians in every city, town, and village in the United States.

I have heard all the reasons and arguments advanced by those opposed to performance rights for sound recordings to try to justify or to account for the illogical and immoral fact that work for musicians has declined in direct proportion to the dramatic increased availability and quality of musical performances enjoyed by listeners through records, tapes, radio, television, and in theaters. And if one compares the total revenues of the users, or exploiters, of our recorded and filmed performances with the pitiful amounts filtering through to the musicians whose talents and work produces the records, films, and tapes, the picture is still more unjust, and has been steadily getting worse until today it is intolerable.

The impact on the lives and hopes of thousands of talented individuals who will never have the opportunity to develop and utilize their talents professionally is even more devastating.

I am convinced that the underlying and overriding cause for the deplorable situation that faces musicians today is the lack of legal protection for performers' sound recordings.

I believe that the American Federation of Musicians, under the leadership of James C. Petrillo, adopted and followed mistaken policies in trying to stop or limit unauthorized and unrecompensed use of sound recordings.

The Union tried to stem the tide of unemployment by contracts with some of the employers and with the economic power of the Union. I believe that it was done in good faith, but it failed; and every effort by the Union to try to protect and secure employment for its members has been counter-productive and ineffective.

Thank you for the opportunity to testify in support of legislation to provide performance rights for sound recordings.

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., July 26, 1977.

Re S 77–6

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: During my testimony at the recent hearings on the establishment of a performance right on sound recordings, I cited a study conducted for NAB by Dr. Fredric Stuart. Ten copies of that study are enclosed for inclusion in the record of this proceeding.

Yours truly,

JAMES J. POPHAM,
Assistant General Counsel.

Enclosures.

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., August 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C.

DEAR MS. OLER: Enclosed are 10 copies of Appendices II and III of the Stuart study which we filed in S 77–6 last week.

Yours truly,

JAMES J. POPHAM,
Assistant General Counsel.

Enclosures.

DISTRIBUTION OF INCOME FROM BROADCAST PERFORMANCE AND SALE OF PHONOGRAPH RECORDS

(By Dr. Fredric Stuart, professor of business statistics, Hofstra University)

PURPOSE OF THE STUDY

A bill introduced in 1969 in the Congress of the United States[1] proposes revision of the Copyright Law, to provide for extension of rights to royalties for public performance of recorded musical compositons. Specifically, such rights at present accure only to copyright owners (usually, composers and music publishers); it is the intent of the bill to vest them also in performing artists and record companies.

Under present arrangements, all four parties—composers, publishers, performing artists, and record companies—share (not equally) in proceeds from sales of phonograph records, but only composers and publishers receive royalty payments for broadcast performances. These are collected through membership in performing rights licensing societies, principally BMI and ASCAP.[2] The funds distributed by these societies are in turn collected from radio and television broadcast statons, in the form of blanket annual license fees charged to individual stations, which permit use of the entire society "library" of musical compositions.

Since an evident purpose of the proposed revision is augmentation of the total monies generated by record broadcasts and sales, as well as redistribution of the proportions of such monies among the four parties mentioned above, the National Association of Broadcasters commissioned this study to determine what sort of distribution actually results from current arrangements.

STUDY METHOD

Four basic kinds of information are required, for assembling estimates of monies received by various participants in the proceeds of record broadcasts and sales. The first of these is information on usual contractual arrangements (especially regarding payment rates) between the participants. Secondly, since payments for broadcast performances are generally based on the number of such performances, information on total broadcast performances of particular records

[1] 91st Congress, 1st Session; S. 543, December 10, 1969. Introduced by Senator McClellan.
[2] SESAC is of much lesser importance quantitatively.

is required. Third, sales data for the same records is necessary for estimation of proceeds distributed among the four parties from this source.

Finally, data on mutual identities and interlocking ownerships is necessary, to assign functional income to actual recipients. For example, there are numerous instances in which performing artist and composer are in fact the same person(s)—and in many cases music publishing firms are owned (in whole or in part) by performing artists, composers or record companies.

The first and second types of information are more readily available for musical compositions in the BMI catalogue than for ASCAP songs. BMI payment rates are more closely tied to estimated current broadcast performances.[3] ASCAP employs a complicated "spreading of payments" arrangements in which (a) payments for current performances may vary according to such factors as historical importance of the composer's works in the ASCAP library, and (b) composers and publishers are given some options to defer income, by placement in one of several "funds".

Furthermore, the BMI sampling method for estimating current total performances has been in continuous operation longer than ASCAP's.

For these reasons, this study is based on a sample of recordings restricted to BMI-licenses compositions. Since BMI is acknowledged to license well over half [4] of the music currently broadcast, this is not considered a serious limitation on the generality of the study. It may be assumed that ASCAP composers and publishers eventually accrue monies at approximately the same per-performance rate as their BMI counterparts.

The third type of information, record sales data, is available in sufficient detail through the end of 1968. During a ten-year period ending then, the Market Research Department of Billboard Magazine produced detailed quarterly estimates (sold as commercial data to record companies and others) of national sales for individual records and albums. These were based on extensive sampling procedures at the retail outlet level. Availability of this data [5] dictated choice of the study period as 1968–69 for single records, and 1967–69 for albums.

It should be noted that the national estimates of broadcast performances (BMI) and of record sales (Billboard) were both produced by sampling procedures, rather than by full census of broadcast stations or record outlets. There will be no attempt here to discuss the technical factors governing reliability of such estimates. In both cases, however, the sampling procedures were carefully designed (stratified random) methods, using appropriate weighting techniques to expand sample results into national estimates.

In the case of the BMI broadcast performance figures, the question of "accuracy" has little relevance anyway, since any systematic errors would be incorporated into actual payments to composers and publishers. That is, since our interest is in how much money accrues to those parties from broadcast performances, the BMI estimates are "perfect", in that (right or wrong) they are actually used as the basis for payment. The BMI sample usually consists of 140 different stations each month, selected on a 24-stratum basis.

The Billboard estimates (referred to as the Title and Artist Survey) were based on monthly samples of 125 "rack" and 125 "non-rack" retail outlets. The latter term refers to specialized record stores, while the former includes outlets such as supermarkets, variety stores, drug stores, etc. Respondents were asked to supply actual sales infomation on individual records. This should not be confused with the weekly Billboard "chart" sampling (producing the "Hot 100", "Top LP's", etc.), which is based on smaller samples obtained by telephone,[6] and is restricted to categorical repsonses ("very good", "good", "fair", etc.).

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[3] There is some variation according to type of composition (e.g., works written for motion pictures receive higher per-broadcast payments) and broadcast station size (two size classes, divided at annual license fee of $1,000).

[4] Estimated at 55 percent of radio music time in 1968, the sample period for this study. See "BMI in Final Negotiations", Broadcasting Magazine, Nov. 25, 1968, p. 66. The importance of the BMI catalogue in the record industry is also illustrated in "BMI Extends its Music Licenses", Broadcasting Magazine, Sept. 16, 1968, p. 55. It is there observed that in the prior twelve month period, BMI compositions accounted for 25 of 39 million-selling single records, 53 of 65 million-dollar albums, 32 of 48 "Grammy" awards, and 8 of 8 motion picture "Oscar" awards.

[5] Thanks to the cooperation of the Billboard research staff. In general, it appears that professional research personnel in the music industry are concentrated within the BMI and Billboard organizations.

[6] Usually, 75 weekly telephone calls. See Andrew J. Csida, "The Hot 100—How It Is Compiled", Billboard Magazine, Sept. 13, 1969, p. 60. Note that the "Hot 100" chart is based exclusively on sales activity estimates in the first fifty positions, and on a combination of sales and broadcast activity in the 51st through 100th positions. The radio information is based on a fifty-four station sample.

The selection of records for the study was, however, based on the Billboard "Hot 100" and "Top LP's" charts, since they provided a sampling frame representing records obtaining at least minimal broadcast and sales activity during the study period. Specifically, the selection of "singles" records was made by using all recordings which made a first appearance on the Billboard "Hot 100" chart during the first twenty weeks of 1968, subject to the restriction that both sides of the recording must contain compositions licensed by BMI (to assure availability of broadcast data). This selection process produced 139 usable singles records.

Since albums appear to have a longer sales life than single records, album selection was made for the middle of 1967, by "systematic" sampling from the Billboard "Top LP's" chart of July 22, 1967, which contains two hundred albums. Specifically, every fourth album therein listed was first selected; of the fifty albums thus chosen, twenty proved to contain a sufficiently high proportion of BMI-licensed songs to permit inclusion in the study. A total of 244 recorded songs are included in these albums;[7] this compares with 274 separate compositions represented by the "singles" sample.[8]

While the sample of records and albums thus selected may not be described as a probability sample (e.g., as a simple random sample of all records released during the period), the selection method is free of any systematic bias relative to the variables of interest (money payments), with two exceptions:

1. The restriction to BMI-licensed compositions, already mentioned.
2. Use of the Billboard "charts" eliminates from the sample records which never succeed in reaching such listings. Three possible effects of such exclusion are (a) over-estimation of the average total monies generated per record released, (b) misestimation of the distribution of monies, if that distribution differs systematically with success level of the record, (c) over-estimation of the net monies accruing to record companies (who bear most of the cost of unsuccessful production) and performing artists (who usually bear the cost of the recording session itself).

The effect in (a) is of little consequence, since our main interest is in the distribution of monies between the four parties (composers, performing artists, publishers, record companies). Per-record and (per-album) amounts received by each of the parties should not be interpreted as per-released-record, because of the exclusion of unsuccessful records; but the analysis will focus on the relative amounts received by the parties.

The effect in (b) is necessarily minor, since only small amounts of monies are generated for any of the parties, by unsuccessful records. This is illustrated in Table 1 (page 9), which shows per-record total amounts distributed (from both broadcast performances and sales) for single records in our sample attaining various decile levels on the Billboard charts. The implication is that records which do not succeed in reaching such charts do not generate significant amounts of money for distribution, form either source (broadcasts or sales). It is therefore unlikely that inclusion of unsuccessful records in the sample could significantly alter the distribution of total monies between the four parties.

The effect in (c) will be approximately eliminated, by subtracting from record company and performing artist totals estimated losses resulting from unsuccessful records.

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[7] Actually, 213 of these are recorded in the albums themselves, and 31 are "flip" side compositions appearing on singles records "spun off" from the albums. This will be explained in detail shortly.

[8] In four cases, a lengthy composition was recorded on both sides of a single record.

TABLE 1.—*Average moneys accruing from broadcast performances and record sales, by Billboard chart position*

[Per-record moneys accruing from broadcasts and sales]

Records attaining chart positions:	
1 to 10	$123, 792
11 to 20	52, 451
21 to 30	42, 341
31 to 40	32, 597
41 to 50	28, 031
51 to 60	12, 922
61 to 70	8, 725
71 to 80	3, 133
81 to 90	5, 041
91 to 100	4, 055

Source: See App. II, table 7.

For each of the 139 single records and 20 albums in the sample, sales data was obtained from the Billboard Title and Artists Survey, from its earliest appearance in the survey [9] through the end of 1968, when the survey was discontinued. For each song represented on these records (518 songs in total), broadcast performance data was obtained from BMI logging records, from its earliest appearance on the station logs [10] through the third quarter of 1969, the latest compilation available.

Information on rates payable to composers and publishers for broadcast performances came from the current BMI Writer and Publisher Payment Schedules. Contractual arrangements between record companies and performing artists, bearing on rates of payment, are obviously subject to some variation dependent on individuals' bargaining power.[11] Average rates used were based on published estimates to be found in the literature of the industry, examination of some actual contracts, and interviews with record company executives, performing artists' representatives, and other knowledgeable persons in the music industry.

Data on mutual identities and interlocking ownerships was traced as far as possible, by attempting to identify all members of performing groups, and comparing these with composers' names (and pseudonyms), and by using directory information on record companies and BMI publisher files on ownership of music publishing companies.

All information on broadcast performances, sales, rates accruing to each of the parties from each source, and joint identities was transferred to machine-readable documents, and the major portion of the necessary computations was accomplished by two computer programs (one for the single records and one for the albums; shown in Appendix III). Since some of the assumptions about such matters as rates payable and discounting practices are subject to variation, these programs were used to examine results under varying sets of such assumptions.

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[9] For single records, the earliest appearance was usually in the fourth quarter of 1967; for albums, the first quarter of 1967 was a frequent point of appearance.

[10] For single records, broadcast performances generally appeared first in the first quarter of 1968, but occasionally in the last quarter of 1967; for album songs, broadcasts in late 1966 were frequently found.

[11] This is true for rates payable by the record company to the performing artist, but not a problem with regard to payments ("mechanical royalties") to composers and publishers. The latter rates are fairly standard.

A BRIEF SUMMARY OF RESULTS

Before detailed description of the study method and results, a very brief summary of the overall findings may serve to orient the reader. For the 139 single records and 20 albums in the sample, the final distribution of net monies from broadcasting and sales looked like this:

Composers [a]	$1,500,000
Performing artists [b]	4,200,000
Publishers [c]	1,200,000
Record companies [d]	10,000,000

[a] Includes only composers not performing as recording artists for their own compositions. The money figure includes performance and mechanical royalties earned as publishers for those composers owning interest in the publishing firms payable for the recordings.

[b] The money figure includes performance and mechanical royalties earned as composers, for those artists performing their own compositions; and performance and mechanical royalties earned as publishers, for those artists owning interest in the publishing firms payable for their recordings.

[c] Includes only publishing firms not owned by either the performing artists, composers, or record companies payable for the recordings.

[d] The money figure includes performance and mechanical royalties earned as publishers, for those record companies owning interest in the publishing firms payable for the recordings.

The description of the above figures as "net" specifies subtractions having been made, as follows:

1. Estimated sales discounts (from record companies to distributors) have been incorporated.
2. All charges usually made to performing artists' royalty accounts (e.g., cost of recording sessions) have been estimated, and removed from performing artist totals.
3. Estimated costs of "unsuccessful" recordings have been removed from record company totals; similarly, estimated costs of recording sessions for such records have been removed from performing artist totals. (These are the adjustments referred to earlier, to compensate for selection of the sample from only those records reaching the Billboard "charts").
4. The record company practice of paying performers only on 90 percent of sales has been incorporated.
5. The record company total is after subtraction of manufacturing costs, album cover costs, payments to producers, payments to Musicians Trust Fund, artist royalties, and mechanical royalties.

There are several factors probably leading to underestimation of the performing artists' and record companies' proportions of the total monies earned:

1. Albums ("LP's") are under-represented, in the study sample. Actual unit sales in 1968 were 183,000,000 singles and 196,000,000 albums.[12] Since albums thus constituted almost 52 percent of unit sales, the 139/20 ratio of singles to LP's in the sample (less than 13 percent albums) represents convenience in data collection, rather than a realistic proportion. (The album data is especially difficult to compile). The underrepresentation of albums has significance because the performing artist appears to do better, relative to composers and publishers, on albums than on single records.
2. Sales data terminated at the end of 1968, when the Billboard Title and Artists Survey was discontinued, but broadcast performance data was available for the first three quarters of 1969. While these availabilities were sufficient to cover the probable entire broadcast and sales life of many of the records, underestimates of eventual total sales are more likely than for eventual total broadcast performances. (This is particularly true for the albums, which appear to have longer selling lives than singles). In general, each unit sale returns more to the performing artist and the record company than to the composer and publisher.
3. Discounting practices of record companies are probably overestimated,[13] leading to underestimates of monies returned to all four parties. Such under-

[12] 1969–70 International Music-Record-Tape Buyer's Guide, Billboard Publications, New York, 1969.

[13] The highest estimates made by record company executives were used. These amounted to free distribution of 300 singles records for every 1,000 sold, and 200 albums for every 1,000 sold to distributors.

estimates, however, are larger for performing artists and for record companies than for composers and publishers (since the former groups receive larger per-sale payments).

4. Broadcast performance data includes all versions of the musical composition played on the air. In some instances, more than one performing artist (and record company) has "hit" recordings of the same song. Since in these cases only one of the recordings appears in the sample, composer and publisher broadcasting performance royalties are not matched against all the relevant revenues from sales of the recorded composition.

5. The broadcast data also includes some "live" performances, which are not germane to the issue here, since performing artists and record companies could not be entitled to royalties from such performances even under the proposed revision of the Copyright Law.

6. Fifteen of the performing artist groups could not be identified as to individual membership. In some of these cases, composition of performed songs by members of the groups may have taken place, and/or ownership of interest in the companies publishing the recorded music.

7. The estimated cost of "unsuccessful" records is probably on the high side. A 1967 estimate appearing in Fortune[14] stated that about 70 percent of records issued do not succeed in recovering production costs. We have used the assumption that the sample records represent only 30 percent of the population of all records released, and that the other 70 percent return no monies at all to any of the parties (therefore, they are neither broadcast on the air nor sold at retail). Using industry estimates of $2,500 as the average production cost of a single record, and $15,000 for an album, the record company deduction is:

324 unsuccessful singles, at $2,500	$810,000
47 unsuccessful albums, at $15,000	705,000
Total	1,515,000

(based on

$$\frac{139}{139+24}=\frac{20}{20+47}=.30)$$

From performing artist totals, the deduction made is for recording session costs (not included in the figures above) pertaining to "unsuccessful" records:[15]

324 at $1,000	$324,000
47 at $2,500	117,000
Total	441,500

The high proportion of monies accruing to the record companies not only throws into question their need for performance royalties, but also suggests that additional payment to performing artists could easily come from that direction, rather than from the broadcasters who would bear the burden under the proposed revision of the Copyright Law. There are, in fact, four practices by which the record manufacturer reduces the royalty amounts payable to performing artists (and in the fourth case, to composers and publishers also), each of which appears subject to negotiation:

1. The practice of paying royalties (to performing artists) on only ninety percent of records sold is an anachronism, originally installed to cover returns of records to the company, for breakages and other reasons.[16] Currently, however, record companies do not *pay* royalties on returned records. An excerpt from a recent contract read:

"In computing the number of records manufactured and sold hereunder, we shall have the right to deduct returns and credits of any nature including, without limitation, those on account of 100% return privilege, defective merchandise, exchange privilege, promotional credits, errors in billing, usable overstock and errors in shipment."

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[14] Stanley H. Brown, "The Motown Sound of Money", Fortune Magazine, Sept. 1, 1967, p. 102.

[15] Some detail leading to estimates of recording session costs appears in a later section.

[16] See Sidney Shemel and M. William Krasilovsky, "This Business of Music," Billboard Publications, New York, 1964, p. 2.

Thus royalties are to be paid only on records eventually sold at retail. Yet in a preceding clause,

"We will pay you a royalty of ------% (of the retail price) * * * in respect of 90% of all phonograph records, embodying on both sides thereof a composition or compositions performed by you * * *.

The effect is merely to reduce the effective percentage below that stated in the contract. Thus, for example, if one fills in a five percent figure in the first blank above, the performing artist is actually to receive 4.5 percent of the list price, for all records sold at retail (and this goes down successively further, in each of our next three paragraphs).

2. Record companies currently charge all or part of recording session costs directly to performing artists' royalty accounts. If, for example, $1,000 of cost (for musicians, studio rental, etc.) is incurred in cutting the master record for a single, the performer's royalty account starts out at minus $1,000; the first $1,000 of royalties earned (as percentage of list price) is used to cancel this debit.

The effect is to pass much of the risk involved in a new production on to the performing artist, as well as to reduce the total amount of royalties received. Yet the record companies are generally large in size, better able to assume the risk than the performing artist, and eventually make much larger amounts from the recording than the artist does. Note that the sample of 139 single records and 20 albums contains 132 different performing groups, but only 36 parent record companies are represented! (There are 72 different record labels in the sample, but many of the large companies are multi-label; MGM has six labels in the sample, CBS, Paramount, and Warner Brothers each have five, Bell, MCA, Mercury, and Motown have four each, etc.).

Thus the large amount of money accruing to the record companies from sales is divided among relatively few parent companies, while the other sample recipients include 132 different performing groups, and more than 200 different composers.

3. The cost of album cover production is deducted from the album list price, before application of the royalty percentage stated in the performer's contract. A common rate is ten percent of retail list price (amounting to about fifty cents per album, in most cases); but the charge may be as high as fifteen percent of list price. When an album becomes a hit, reductions in the per-cover cost of production are not passed on to the performing artists.

4. The practice of giving free records to distributors in some specified proportion to records purchased is a method of discounting employed by the record companies, which leads effectively to lower average retail prices (for purposes of figuring performers' royalties) than those publicly quoted. Such discounting deals (referred to in the industry as "freebies") have been estimated as high as 300 per 1,000 single records, and 200 per 1,000 LP records (albums).

These free records given to distributors are not counted in sales figures. Therefore, for example, a performing artist who supposedly receives 5 percent of a $5.00 list price (ignoring for the moment other reductions mentioned above) should receive, for sale of 1,300 single records,

$$0.05 \times 5.00 \times 1{,}300 = \$325.$$

This would be the amount due him, if the record company sold the 1,300 records at some discounted *wholesale* price, but counted all 1,300 records as sold, for purposes of computing royalty payments. But instead, the performer receives

$$0.05 \times 5.00 \times 1{,}000 = \$250.$$

And if we now incorporate the practices mentioned above, the 90-percent-of-sales practice produces

$$0.05 \times 5.00 \times 1{,}000 \times 0.90 = \$225.$$

and the substraction of album cover costs produces

$$0.05 \times 4.50 \times 1{,}000 \times 0.90 = \$202.50.$$

We are now down to $202.50 instead of the $250 implied by "five percent of retail list price"; and this royalty must also be used to pay off the cost of

the recording session. If this is the first set of sales for the record, the performing artist is still in debt to the record company, by several hundred dollars.

This "freebie" practice also reduces mechanical royalties to composers and publishers payable on a per-sale basis, in the same way. A composer who expects 1 cent per song per record sold (the going rate) does not receive

$$0.01 \times 1{,}300 = \$13.$$

Instead, he gets, for 1,300 single records sold,

$$0.01 \times 1{,}000 = \$10.$$

PAYMENT RATES USED IN COMPUTATIONS

1. Payments to composers and publishers for broadcast performances

The BMI standard per-performance payment (for popular songs) to writers is 2.5 cents. For publishers, the per-performance rate depends on broadcast station size; it is 4 cents for (performances on) stations paying $1,000 or more in annual blanket license fees, and 3 cents for those paying less. Based on the latest available proportion of performances reported for stations of each type, the average payment is 3.564 cents per performance; this figure was used in computation of publishers' earnings.

Higher rates are payable for "Movie works";[17] five compositions in the sample qualified under this definition, and were therefore credited at rates of 7.13 cents per performance (the result of weighted averaging of the station-group rates, 8 cents and 6 cents).[18]

Higher rates are also payable for compositions used as television theme music (one instance in the sample; front side of single record no. 64), and background music (flip side of record no. 64). Since the program (Mission Impossible) is network-originated, rates of 24 cents and 11.346 cents were used, respectively.

Finally, there was on instance in the sample of television network feature performance (front side of record no. 8), credited at 24 cents per performance.

2. Payments to composers and publishers for record sales

The payments from record companies to composers and publishers for sales of records are referred to as mechanical royalties; they are fixed at standard rates throughout the industry. The rate is 1 cent per song to each party, per record sold.[19] (For albums, the rate remains the same, with mechanical royalties amounting to 24 cents to composers and publishers, for a twelve-song album). We have noted earlier, however, that the record company discounting practices (distribution of "freebies") reduces the effective rate per record sold at retail, to something less than this rate (actually, to about 10/13 of this rate, for singles songs, and 10/12 of the rate, for album songs).

3. Payments to performing artists for record sales

We have already indicated that the usual arrangement between record company and performing artist(s) specifies a percentage of the retail list price as the latter's royalty payment for each record sold.[20] We have also discussed

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[17] The definition is "a complete musical work originally written for and performed in full in a full-length motion picture which is (a) released in the United States after September 1, 1962 (b) shown in motion picture theaters in the United States prior to its television release, and (c) which musical work has been commercially recorded and distributed as an individual composition other than as part of a sound track recording."

[18] The five compositions are those numbered in the singles tables as 3, 4 (both sides), 43, and 101. It may be noted that this higher rate for broadcast performances produces a substantially higher ratio of composer and publisher accruals to those of the performing artists, for such works, than is usually the case.

[19] The rate actually varies with retail list price of the record: but rates lower than 1 cent per song to composer and to publisher apply only to single records priced lower than 61 cents (retail), and albums priced lower that $3.01. None of the sample records were priced this low; indeed, the application of less than the 1 cent rate is currently rare, occurring mostly for children's records.

[20] Two companies, CBS and Capitol, currently quote a percentage applied to the whole sale price. It is generally conceded, however, that higher percentage rates are used, to compensate approximately for the lower base. For example, the artist who would receive 5 percent of retail list price will receive 10 percent of wholesale price, where such wholesale price amounts to about half of the retail list.

four practices operating to yield an effective rate (per record sold at retail) lower than the quoted rate. These four factors were duly used in computations;[21] the present question is that of the average percentage rate appearing in contracts.

This percentage rate varies significantly with the status (essentially, with the bargaining power) of the performing artist. It apparently may be as low as 3 percent for new ("unknown") artists, and as high as 10 percent for outstanding performers with proven hit-record histories. There are indications that 5 percent is a likely average. For example, a 1965 study of the industry states:

"The going rate of artist royalties is 5 percent of the list price of single records * * *. However, a number of singles artists are receiving considerably more than 5 percent, with some reportedly getting up to 10 percent * * *."[22]

The 5 percent rate was described as "the norm" by a record company executive interviewed in connection with the present study. A music publishing executive expressed the opinion, however, that the actual range in most cases is from 3 to 5 percent (and that these rates are from 6 to 10 percent when quoted on wholesale price). A similar range appears in Shemel and Krasilovsky;

"For a new artist, the royalty may be 2 percent or 3 percent of the suggested retail list price * * * as the artist increases in stature the royalty rate * * * may increase to 5 percent * * *."[23]

While the best estimate of the average percentage rate quoted in contracts is probably 5 percent, the computations were performed for several alternative rate averages, to examine the resulting differences in the distribution of monies.

4. Money to record companies for record sales

a. Single records

Price and cost data obtained from the literature and from interviews with record company executives are as follows:

	Cents
Price of single record to distributors	45.00
Various costs per record manufactured:	
Physical manufacturing cost	10.00
Musicians trust fund payment	1.00
Costs per record sold to distributors:	
Mechanical royalties	4.00
Artist royalties (at 0.05 rate)	[1] 4.41
Producer (at 0.03 rate)	[2] 2.65

[1] $0.05 \times 0.98 \times 0.90$.
[2] $0.03 \times 0.98 \times 0.90$.

Since the above costs are on two different bases, we convert the first set to the sold to distributors basis, by multiplying by 13/10 (i.e., allocating the physical costs of "freebies" to records actually sold to distributors): Physical manufacturing cost, 13 cents; Musicians trust fund payment, 1.30 cents. Then the gross profit per record sold to distributors is

$$45.00 - 13.00 - 1.30 - 4.00 - 4.41 - 2.65 = 19.64 \text{ cents.}$$

This is now adjusted to a per record sold at retail basis by multiplying

$$19.64 \times 10/13 = 15.11 \text{ cents.}$$

We have observed earlier that adjustment of the performing artist accrual to a per record sold at retail basis produces (at the 5 percent quoted artist rate)

$$4.41 \times 10/13 = 3.39 \text{ cents.}$$

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[21] Actual computing methods incorporated the 90-percent-of-records and "freebie" practices into the rate of artist return per sale. For example, the singles money rate for an artist with a 5 percent contract was:

$$0.05 \times 0.90 \times 10/13 \times \$0.98 = \$0.0339.$$

That is, the artist actually earns 3.39 cents for each record sold at retail (The retail list price for single records is usually 98 cents).

The same computation for albums (using the lower "freebie" discount rate and the most common album price of $4.98) yields:

$$0.05 \times 0.90 \times 10/12 \times \$4.48 = \$0.1680.$$

That is, the artist earns 16.80 cents for each album sold at this price (but the computer program uses actual album prices, in each case; note that the 50-cent estimated cost of the album cover is subtracted from the list price before computation of the royalty).

The practice of charging performers for recording session costs appears as a subtraction from performing artists' totals, within the computer output; that is, it is recorded at the end of each set of computations.

[22] Catherine S. Corroy, The Phonograph Record Industry; An Economic Study; Library of Congress Legislative Reference Service, Washington, D.C., 1965, p. 94.

[23] Shemel and Krasilovsky, op. cit., p. 2.

The two figures record company and artist income per record (sold at retail) add up to 18.50 cents, which is divided as follows for various quoted artist rates:

Contract rate	Per retail sale net revenue (cents)	
	To performing artist	To record company
3 percent	2.04	16.46
4 percent	2.71	15.79
5 percent	3.39	15.11
6 percent	4.07	14.43
7 percent	4.75	13.75

b. Albums

Cost data for a $4.98 (retail list price) album are as follows (Price of album to distributors, $1.97):

	Cost per album manufactured (cents)	Per album sold to distributor (cost at left times 12/10)
Physical manufacturing cost	29	34.80
Mus. trust fund	5	6.00
Album cover cost	25	30.00
Producer	8	9.60
Mech. royalties		24.00
Artist royalties (at 0.05 rate)		[1] 20.16

[1] 0.05 times $4.48 × 0.90.

The gross profit per album sold to distributors is thus

197.00—34.80—6.00—30.00—9.60—24.00—20.16 = 72.44 cents

To adjust to a per album sold at retail basis,

72.44×10/12=60.37 cents.

Adjustment of the performing artist accrual to a per album sold at retail basis:

20.16×10/12=16.80 cents.

The two figures add up to 77.17 cents, which is divided as follows for various quoted artist rates:

Contract rate	Per retail sale net revenue (cents)	
	To performing artist	To record company
3 percent	10.08	67.09
4 percent	13.44	63.73
5 percent	16.80	60.37
6 percent	20.16	57.01
7 percent	23.52	53.65

The above figures are predicated on the $4.98 retail price. The computer program, however, uses the actual album price to compute performing artist shares.[24]

EXPLANATION OF TABLES IN APPENDIX II

Table 2 summarizes broadcast, sales, and joint identity data for the 139 single records in the sample. (Table A in Appendix I lists the song titles, composers, performing artists, publishers, and record companies in the order noted by the sequence number at the far right in Table 2.)

[24] The right-hand column remains constant, however, on the premise that the record company's gross margin remains approximately the same at alternative retail list prices, after subtraction of all costs including artist royalties. Errors from this assumption cannot be large, since 17 of the 20 albums in the sample were actually priced at $4.98.

Column (1) shows the highest Billboard "chart" position ("Hot 100") attained by each record, and column (2) indicates the total number of weeks the record remained on the chart. Columns (3) and (4) indicate total broadcast performances for the front and "flip" side compositions. Column (5) contains total sales (through the end of 1968) of the record.

In column (6) a "1" indicates that the front and flip side compositions were written by the same composer(s); and a "1" in column (7) indicates the same music publisher(s) on both sides of the record. In the remaining columns, the first digit refers to the front side and the second to the flip side, a "1" indicating joint identity of the parties listed at the head of the column. For example, record no. 3 shows that the performing artists (Simon and Garfunkel) were composers of the songs on both sides of the record, and that they also held a major interest in the publishing company listed.

For the 139 sample records, Table 2 shows the following averages and totals:

Average number of weeks on Billboard charts	8.25
Average number of broadcast performances:	
Front side	102,943
Flip side	9,326
Total	112,269
Average sales	137,857
Number of cases same composer(s) on both sides	72
Number of cases same publisher(s) on both sides	83
Number of cases of joint identity (in 274 total songs):	
Artist/composer	114
Artist/publisher	52
Composer/publisher	86
Record company/publisher	79

Table 3 shows basic data on broadcasts and joint identities for individual songs apearing in the albums included in the sample. (Table 8 in Appendix I lists album and song titles, composers, publishers, and record companies.) In addition to sales data for the albums themselves, additional sales information appears on single records "spun off" from the album. This practice of issuing some of the album songs as separate singles (using the same master recording) appears to be quite common; there were 58 such singles issued in connection with the 20 albums in the sample.

In many instances the front and flip sides of such singles are both compositions recorded in the album, but in some cases an album song is combined with a non-album song on the single. Broadcast performance data for these additional compositions is shown in the column headed "single flips". The "extra sides" information at the top of each album listing gives the number of such compositions. Note that the column headed "singles sales" contains redundant information, for album songs recorded "back-to-back" on single records; actual total sales of singles "spun off" the album appear at the top of each album listing. The joint identity listings are in the order album song/single flip (most of the latter representing empty positions).

Each album is treated as a unit along with the single records "spun off" from it. This is logically necessary, since the broadcast performance data reflects total "plays" of both the album and singles versions, for any composition. In two instances, sets of two albums are treated as a unit for analysis. (These sets are Album "3": Paul Revere, and Album "16": Rolling Stones). This is because some songs (three in album "3", six in album "16") appear in both albums making up the set. Treatment as a single unit avoids double-counting of singles sales data and broadcast performance data, for these compositions. Thus album "3" actually consists of two albums (Greatest Hits and Spirit of 67) each containing 11 songs, for a net total of 19 compositions—and album "16" consists of two albums (Go Live If You Want It and High Tide & Green Grass) each containing 12 songs, for a net total of 18 compositions.

In all but three of the albums, some of the compositions recorded (not more than three per album) could not be traced through broadcast performance records (usually the result of non-BMI licensing). These are marked "N.A." in Table 3. Each album unit listing shows at the bottom an upward adjustment of total broadcast performances made to compensate for these omitted songs. The adjustment was made by assuming for each of the "N.A." compositions the average broadcast performances for all other compositions in the album.

Table 4 presents a summary of broadcast performance and sales data for all albums in the sample. Averages (based on twenty albums) are summarized below:

Per-album broadcast performances	897,764
Per-album average album sales	495,427
Per-album average spun-off singles sales	608,524

Total number of cases of joint identity (in 244 total songs):

Artist/composer	105
Artist/publisher	56
Composer/publisher	67
Record company/publisher	67

Table 5 shows the results of application of the various payment rates discussed earlier (using the 5 percent artist rate) to the broadcast performances and sales data in Table 2 (single records); and Table 6 does the same with respect to the Table 3–4 data (albums). Tables 7 and 8 cumulate the functional income accruing to each of the four parties from the various sources listed in the prior two tables, on a record-by-record basis. The totals are summarized below:

Source of payment	Recipient			
	Composer	Performing artist	Publisher	Record company
Broadcast performances:				
Singles	$573,912	----------	$720,765	----------
Albums	448,881	----------	639,925	----------
Record sales:				
Singles	295,098	$649,598	295,098	$2,895,409
Albums	1,048,416	1,796,197	1,048,416	5,981,785
Singles spun off albums	202,841	412,578	202,841	1,838,958
Total	2,569,148	2,858,373	2,907,045	10,716,152

Thus the total monies generated by the sample record broadcasts and sales produced fairly equal shares ($2.9 million) for publishers and performing artists, slightly less for composers ($2.6 million); and a much larger gross income for the record companies ($10.7 million—it should be remembered that this is after subtraction of all variable manufacturing costs).

This summary does not, however, incorporate two major deductions discussed earlier: (1) recording session costs charged to performing artist royalty accounts, (2) estimated losses from "unsuccessful" records.

A typical answer to "how much does a recording session cost?" is "It varies". The range is undoubtedly large; any "average figure used conceals dispersion dependent on the type of performing group, the type of composition, the technical methods used, the recording company, etc. Some of the major contributory costs are:

Musicians: basic scale $85 each, for three hours (double the above fee, to the leader, and the contractor.)

Studio time rental: $115 per hour.

For five musicians (one of them the "leader"), these costs add up to slightly over $1,000 for a three hour recording session. This figure was used as the "average" estimate chargeable to performing artist accounts for single records. This results in a subtraction of $139,000 from the performing artist total shown above. For albums, a $2,500 average recording session cost was assumed (providing for about eight hours of recording), yielding a debit of $50,000.

The "unsuccessful" record deductions have been explained earlier (see page 16); they come to $441,500 chargeable to performing artists for recording session costs, and $1,515,000 estimated loss to record companies, for records not recovering any part of the cost of production.

These deductions leave the following functional totals:

Composers	$ 2,569,148
Performing artists	2,227,873
Publishers	2,907,045
Record companies	9,201,152

(This assumes, of course, a zero cost of "unsuccessful" songs to composers and publishers—really a questionable assumption).

The analysis thus far treats composers and performing artists as separate parties. But we have noted that over forty percent of the songs recorded in the sample (219 or the 518 songs) were in fact written by the artists performing them.[25] Tables 9 and 10 show (for single record compositions and album songs, respectively) the re-allocation of composers' royalty incomes to performing artists, in all such cases of joint identities. The results are summarized below:

Nonperforming composers	$ 1,320,879
Performers (including composing income)	3,476,143
Publishers	2,907,045
Record companies	9,201,152

(These totals have been adjusted for recording session costs and "unsuccessful" records).

The publishing function is also one in which performing artists (108 songs in the sample) and composers (153 sample songs) and record companies (146 sample songs) frequently hold complete or partial interest. Tables 11 and 12 show (for single records and albums, respectively) the re-allocation of publishers' income to these other recipients, in such instances.[26] The results are summarized below:

Composers	$ 1,525,018
Performing artists	4,201,058
Publishers [a]	1,204,211
Record companies	9,974,932

The total monies generated are of course the same as shown in the prior two summaries ($16,905,219); but the distribution is radically changed, as compared with the original distribution by function, not considering joint identities.

This set of computations is based on the 5 percent contract rate for performing artists (negotiated with the record companies). Since this rate is subject to considerable variation, and indeed to some disagreement as to what is "typical" or "average" in such contracts, all programs were also run to produce all results for assumed average rates as low as 3 percent and as high as 7 percent. The results are summarized below: [27]

Assumed average artist rate	Final distribution of moneys (including functional reallocations)			
	Composer	Artist	Publisher	Record company
3 percent	$1,525,018	$3,059,588	$1,204,211	$11,063,777
4 percent	1,525,018	3,628,757	1,204,211	10,520,921
5 percent	1,525,018	4,201,058	1,204,211	9,974,932
6 percent	1,525,018	4,773,360	1,204,211	9,428,043
7 percent	1,525,018	5,345,661	1,204,211	8,882,954

As may be seen, the effect of changing the assumption as to average artist contract rate is redistribution of income between performing artists and record companies.

Another interesting method of altering the distribution, in favor of performing artists, composers, and publishers (at cost to the record companies) is the abandonment of two of the practices discussed earlier: the "90-percent-

[25] This does not necessarily mean written jointly by all the artists performing on the record. For example, only Paul Simon actually writes the songs performed by Simon and Garfunkel. However, in such cases the performing artists are treated here as a unit, on the assumption that some method of dividing royalties from various functional activities is usually arranged between the performers; in the same way that joint composers (and publishers) make such arrangements.

[26] For cases in which more than one of the other three parties held such an interest in the publishing function, the reallocation hierarchy was first to performing artists, then to composers, and then to record companies. Thus if composer and performing artist are the same individual(s), and he (they) also hold the publishing interest, the publishing money is listed in the performing artist column. This method treats the performing function as primary, in any performer-composer-publisher combination, a realistic conceptual method.

[a] This figure now includes only moneys received by publishers who have no other functional connection with the (individual) records; i.e., these publishing firms are not owned by composers, performing artists, or record companies payable for the records. See page 12 for a full set of table notes.

[27] The grand total monies generated rise slightly in this summary; an assumption discussed earlier, that albums priced higher than $4.98 return more to the artist without altering record company net, accounts for the discrepancy.

of-sales" practice, and the "freebie" distribution practice. We now show the results of a hypothetical computation, based on two changes:

1. The performing artist is paid the royalty (at the quoted contract percentage rate) on all sales to distributors, rather than on 90 percent of such sales.

2. Instead of discounting by giving away "free" records, the record company sells to distributors at the effective current per-record price, but counts all records transferred to distributors as *sold*. This increases payments to performing artists and to composers and publishers, for the "mechanical royalty."

The effective current per-record price is computed as follows:

Single records: 1,300 records now "sold" for 1,000×.45=$450. Effeceive price=$450/1,300=34.62 cents.

Albums: 1,200 albums now "sold" for 1,000×$1.97=$1,970. Effective price=$1,970/1,200=$1.64.

The results of these hypothetical computations (applied to the actual sample data, using the same computer programs) are summarized below:

Final distribution of moneys

Assumed artist rate: 5 percent.

Composers	$1, 703, 632
Performing artists	5, 555, 556
Publishers	1, 338, 676
Record companies	7, 813, 608

Comparison with the prior summary table shows that composers, performing artists, and publishers would benefit significantly from abandonment of the two practices. Note that the performing artist total is higher (and the record company total lower) than those arrived at with a seven percent average artist rate, under current actual practices.

PERSONAL APPEARANCES OF PERFORMING ARTISTS

The foregoing analysis shows the performing artist to be (on average) well ahead of (non-performing) composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies. Although composers and publishers alone receive broadcast performance royalties, the other two functions (performing and manufacturing) are better rewarded per sale of the record than are composers or publishers; and the "average" record outsells its broadcast performances (See sales/broadcasting ratios, in the last column of Table 5, Appendix II).

It is also obvious that record sales are stimulated by the broadcast performances, which thus produce income for all the parties, a little less directly than the performance royalties themselves. In fact, it would not be an overstatement to declare that a record must have broadcast exposure, in order to sell. The literature of the industry is full of such declarations, and the "payola" scandals of the early 1960's were a surface emergence of the constant pressure placed by record company (and publishers') promotion men on broadcasters, to air their works.

A far larger income stream, however, is generated by the combination of broadcasts and sales, for the performing artist—personal appearance income. While the other three parties (composers, publishers, record companies) derive their main income from the distribution we have examined, the performing artist is heavily engaged in the business of selling "live" services; and the demand for these services is unquestionably linked to recording success.

A small sampling of published performance fees appears below:

Performing artist(s)	Source	Performance fee mentioned
Johnny Cash	Variety, Apr. 29, 1970	$50,000 per appearance.
Simon and Garfunkel	New York Times, Oct. 13, 1968	$50,000 per night.
Supremes	Look, Sept. 23, 1969	$27,500 per week.
Diana Ross	Ebony, February 1970	$30,000 to $70,000 per week.
The Band	New York Times, May 4, 1969	$20,000 per weekend.
Steppenwolf	Newsweek, Feb. 17, 1969	$10,000 per night.
Led Zeppelin	Variety, Mar. 10, 1970	$25,000 per night.
Wes Montgomery [1]	Hi Fi, May 1969	$10,000 per week.
Tom Jones	Variety, Apr. 1, 1970	$75,000 for 2 hours.
Alice Cooper Band	Variety, Sept. 11, 1968	$3,000 per appearance.
Blood Sweat and Tears	New York News, June 3, 1969	$5,000 to $40,000 per night.
Cream	New York Post, Oct. 29, 1968	$25,000 per night.
Credence Clearwater Revival	Time, June 27, 1969	$30,000 per night.
Doors	New York Free Press, Aug. 8, 1968	$25,000 per night.

[1] Deceased.

For most such performers, the increase in such fees is large and sudden, following any hit record. The Band is reported (the same source as above) to have been earning $100 per man per night at Cafe Au Go Go, one year earlier. Steppenwolf made $650 per night one year prior to the $10,000 rate reported above. In 1966 the Doors earned $35 per week per man at a small (now defunct) club on Sunset Strip. In 1968 Credence Clearwater Revival earned $30 per night playing club dates in the Bay area.

Furthermore, the high fees are not for occasional dates; most such performers play large numbers of engagements per year. Led Zeppelin is reported (same source as above) to have played 26 one-night stands within a one-month period.

Thus, if the generation of income from the recording/broadcasting/sales process were to be followed further than the record-sale point, the eventual performing artist relative share would rise considerably.

APPENDIX I

TABLE A.—SINGLE RECORDS IN THE SAMPLE

Number, record label, and performing artists	Composers	Publishers
1. Atlantic—Archi Bell and the Drells:		
Tighten Up	Bell/Butler	Cotillion/Orell.
Dog Eat Dog	Bell	Do.
2. Volt—Ot s Redding:		
The Dock of the Bay	Redding/Cropper	East, Pine, & Redwal.
Sweet Lorene	do	Do.
3. Columbia—Simon and Garfunkel:		
Mrs. Robinson	Simon	Charing Cross.
Old Friends/Bookends	do	Do.
4. RCA Victor—Hugo Montenegro and orchestra:		
The Good, the Bad, and the Ugly	Morricone	Unart.
March With Hope	do	Do.
5. Columbia—Union Gap, with Gary Puckett:		
Young Girl	Fuller	Viva.
I'm Losing You	Fuller/Puckett	Viva/Blackwood.
6. Mala—Box Tops:		
Cry Like a Baby	Pennington/Oldham	Press.
The Door You Closed to Me	do	Do.
7. Roulette—Tommy James and the Shondells:		
Mony Mony	Bloom et al	Patricia.
One, Two, Three and I Fell	Gentry et al	Do.
8. Colgems—Monkees:		
Valleri	Boyce/Hart	Screen Gems-Columbia.
Tapioca Tundra	Nesmith	Do.
9. Gordy—Temptations:		
I Wish It Would Rain	Whitfield et al	Jobete.
I Truly, Truly Believe	Johnson et al	Do.
10. Buddah—1910 Fruitgum Company:		
Simon Says	Chiprut	Kaskat.
Reflections From the Looking Glass	Gutkowski/Jeckell	Do.
11. Capitol—Beatles:		
Lady Madonna	Lennon/McCartney	Maclen.
Inner Light	Harrison	Do.
12. Philly Groove—Delfonics:		
La-La Means I Love You	Hart/Bell	W-Clearance.
Can't Get Over Losing You	do	Nickel Shoe.
13. Buddah—Ohio Express:		
Yummy, Yummy, Yummy	Resnick/Levine	T. M. Kaskat.
Zig Zag	Katz/Kasenetz	Do.
14. Atlantic—Aretha Franklin:		
Since You've Been Gone	Franklin/White	Fourteenth Hour/Cotillion
Ain't No Way	Franklin	Do.
15. Reprise—First Edition:		
Just Dropped In	Newbury	Acuff-Rose.
Shadow in the Corner of Your Mind	Settle	Hollis.
16. Decca—Irish Rovers:		
The Unicorn	Silverstein	Hollis.
Black Velvet Band	Miller	Antrim.
17. Fontana—Troggs:		
Love is All Around	Presley	James.
When Will the Rain Come	Bond	Do.
18. Bell—Merrilee Rush:		
Angel of the Morning	Taylor	Blackwood.
Reap What You Sow	Zambon	Press.
19. Tamla—Marvin Gaye and Tammi Terrell:		
Ain't Nothing Like the Real Thing	Ashford/Simpson	Jobete.
Little Ole Boy, Little Ole Girl	James et al	Do.
20. Epic—Sly and the Family Stone:		
Dance to the Music	Stewart	Daly City.
Let Me Hear It From You	do	Do.
21. Stax—Sam and Dave:		
I Thank You	Porter/Hayes	East/Pronto.
Wrap It Up	do	Do.

APPENDIX I—Continued

TABLE A.—SINGLE RECORDS IN THE SAMPLE—Continued

Number, record label, and performing artists	Composers	Publishers
22. Tamla—Stevie Wonder:		
Shoo-Be-Doo-Be-Doo-Da-Day	Wonder et al	Jobete.
Why Don't You Lead Me to Love	do	Do.
23. Warner Bros.—Association:		
Everything That Touches You	Kirkman	Beechwood.
We Love Us	Bluechel	Do.
24. Tamla—Smokey Robinson and the Miracles:		
If You Can Wait	Robinson	Jobete.
When the Words From Your Heart Get Caught in Your Throat.	Robinson/Cleveland	Do.
25. Columbia—Simon and Garfunkel:		
Scarborough Fair	Simon/Garfunkel	Charing Cross.
April Come She Will	Simon	Do.
26. Atlantic—Percey Sledge:		
Take Time to Know Her	Davis	Gallico.
It's All Wrong but It's All Right	Hinton/Greene	Quinvy/Ruler.
27. Gordy—Temptations:		
I Could Never Love Another	Whitfield et al	Jobete.
Gonna Give Her All the Love I Got	Whitfield/Strong	Do.
28. Motown—Four Tops:		
Walk Away Renee	Lookofsky et al	Twin Tone.
Your Love Is Wonderful	Hunter et al	Jobete.
29. Capitol—People:		
I Love You	White	Mainstay.
Somebody Tell Me My Name	Fridkin/Levin	Beechwood.
30. Atco—Bee Gees:		
Words	Gibb	Nemperor.
Sinking Ships	do	Do.
31. Soul—Gladys Knight and the Pips:		
The End of Our Road	Whitfield et al	Jobete.
Don't Let Her Take Your Love From You	Whitfield/Strong	Do.
32. Atlantic—Wilson Pickett:		
She's Lookin' Good	Collins	Veytig.
We've Got To Have Love	Pickett/Womack	Cotillion/Tracebob.
33. Musicor—Gene Pitney:		
She's a Heartbreaker	Foxx/Williams	Catalogue/Cee & Eye.
Conquistador	Anisfield	Primary.
34. TRX—Gene and Debbie:		
Playboy	Thomas	Acuff-Rose.
I'll Come Running	do	Do.
35. Atco—Arthur Conley:		
Funky Street	Conley/Simms	Redwal/Time.
Put Our Love Together	Conley	Time/Redwal.
36. Atlantic—Sweet Inspirations:		
Sweet Inspiration	Oldham/Pennington	Press.
I'm Blue	Perry/Muschweck	Gravenhurst.
37. Columbia—Paul Revere and the Raiders:		
Too Much Talk	Lindsay	Boom.
Happening '68	do	Do.
38. Motown—Four Tops:		
If I Were a Carpenter	Hardin	Faithful Virtue.
Wonderful Baby	Robinson	Jobete.
39. Cadet—Dells:		
There Is	Miller/Miner	Chevis.
O-O I Love You	Miller	Do.
40. Steed—Andy Kim:		
How'd We Ever Get This Way?	Kim/Barry	Unart.
Are You Ever Coming Home?	do	Do.
41. MGM—Cowsills:		
We Can Fly	Cowsill/Kornfeld	Akbestal/Akbestal Luvlin.
A Time for Remembrance	Cowsill	Do.
42. Mercury—New Colony Six:		
I Will Always Think About You	Kummel/Rice	New Colony/TM.
Hold Me With Your Eyes	Graffia	Do.
43. Dot—Mills Bros.:		
Cab Driver	Parks	Blackhawk.
Fortuosity	Sherman	Wonderland.
44. Hi—Willie Mitchell:		
Soul Serenade	Ousley/Dixon	Kilynn/Vee Ve.
Mercy Mercy Mercy	Zawinul	Zawinul.
45. Philips—Four Seasons:		
Will you Love Me Tomorrow	Goffin/King	Screen Gems-Columbia.
Around and Around	Crew/Gaudio	Saturday/Season Four.
46. Volt—Otis Redding:		
The Happy Song (Dum Dum)	Redding/Cropper	East/Redwal/Time.
Open The Door	Redding	Do.
47. Sound Stage 7—Joe Simon:		
(You Keep Me) Hangin' On	Allen/Mize	Alanbo/Garpax.
Long Hot Summer	Orange	Cape Ann.
48. Epic—Donvan:		
Jennifer Juniper	Leitch	Peer International.
Poor Cow	do	Peer-Donovan.

APPENDIX I—Continued

TABLE A.—SINGLE RECORDS IN THE SAMPLE—Continued

Number, record label, and performing artists	Composers	Publishers
49. Motown—Diana Ross and the Supremes:		
Forever Came Today	Holland/Dozier	Jobete.
Time Changes Things	Holland et al	Do.
50. RCA Victor—Elvis Presley:		
U.S. Male	Hubbard	Vector.
Stay Away	Woodford	Fame.
51. Soul City—5th Dimension:		
Carpet Man	Webb	Rivers.
Magic Garden	do	Do.
52. Mercury—Spanky and Our Gang:		
Sunday Mornin'	Guryan	Blackwood.
Echoes	Sutton	Seventh Year.
53. Dial—Joe Tex.		
Men Are Gettin' Scarce	Arrington	Tree.
You're Gonna Thank Me, Woman	do	Do.
54. Tamla—Marvin Gaye:		
You	Kerr/Barnes	Jobete.
Change What You Can	Gaye/Stover	Do.
55. Cadet—Etta James:		
Security	Redding/Wesson	East/Time.
I'm Gonna Take What He's Got	Covay	Pronto/Rag Mop.
56. King—James Brown and His Famous Flames:		
There Was a Time	Brown/Hobgood	Lois.
I Can't Stand Myself	Brown	Dynatone.
57. Atlantic—Billy Vera and Judy Clay:		
Country Girl—City Man	Taylor/Daryll	Blackwood.
So Good (To Be Together)	Taylor/Vera	Do.
58. Laurie—Balloon Farm:		
A Question of Temperature	Appel et al	H. & L./Avemb.
Hurtin' for Your Love	do	Avemb.
59. Kapp—Hesitations:		
Born Free	Greenfield/Fischoff	Screen Gems-Columbia.
Love Is Everywhere	Lewis/Poindexter	Zira.
60. Acta—American Breed:		
Green Light	Tucker/Mantz	Four Star.
Don't It Make You Cry	Ciner	Yuggoth.
61. Bluesway—B. B. King:		
Paying the Cost To Be the Boss	King	Pamco/Sounds of Sounds Lucil of Lucil/Pamco/Yvonne.
Having My Say	do	Do.
62. Smash—Jay and the Techniques:		
Strawberry Shortcake	Irby	Bradley.
Still (in Love With You)	Ross/Shuman	Rumbalero/Legae.
63. Epic—Hollies:		
Jennifer Eccles	Nash/Clarke	Marious.
Try It	Nash/Hicks	Gralto.
64. Dot—Lalo Schifrin:		
Mission: Impossible	Schifrin	Bruin.
Jim on the Move	do	Do.
65. RCA Victor—Elvis Presley:		
Guitar Man	Hubbard	Victor.
Hi-Heel Sneakers	Higginboth	Medal.
66. Epic—Tremeloes:		
Suddenly You Love Me	Pace et al	Ponderosa.
Suddenly Winter	Blakley/Hawkes	Mainstay.
67. Cadet—Dells:		
Wear It on Our Face	Miller	Chevis.
Please Don't Change Me Now	do	Do.
68. Buddah—Lemon Pipers:		
Rice Is Nice	Leka/Pinz	Kama Sutra.
Blueberry Blue	do	Do.
69. Liberty—Bobby Vee and the Strangers:		
Maybe Just Today	Sharp	Screen Gems—Columbia.
You're a Big Girl Now	Velline	Metric.
70. Capitol—Beach Boys:		
Friends	Wilson/Jardine	Sea of Tunes.
Little Bird	Wilson/Kalinich	Do.
71. Revue—Mirettes:		
In the Midnight Hour	Cropper/Pickett	East/Cotillion.
To Love Somebody	Gibb	Abigail/Nemperor.
72. Kama Sutra—Lovin' Spoonful:		
Money	Sebastian	Faithful Virtue.
Close Your Eyes	Sebasian/Yester	Do.
73. Sound Stage 7—Joe Simon:		
No Sad Songs	Carter	Press.
Come on and Get It	Simon et al	Cape Ann.
74. Imperial—Johnny Rivers:		
Look to Your Soul	Hendricks	Rivers.
Something Strange	Rivers/Hendricks	Do.
75. Columbia—Robert John:		
If You Don't Want My Love	Pedrick/Gately	Bornwin.
Don't	Pedrick et al	Do.

APPENDIX I

TABLE A.—SINGLE RECORDS IN THE SAMPLE—Continued

Number, record label, and performing artists	Composers	Publishers
76. Atlantic—Wilson Pickett:		
Jealous Love	Womack/Curtis	Cotillion/Tracebob.
I've Come a Long Way	Womack	Do.
77. A. & M.—Herb Alpert and the Tijuana Brass:		
Carmen	Alpert/Katz	Irving.
Love So Fine	Asher/Nichols	Do.
78. Bell—James and Bobby Purify:		
I Can Remember	March et al	Big Seven.
I Was Born To Lose Out	Schroeder/Dillard	Papa Don.
79. Bang—Neil Diamond:		
New Orleans	Royster/Guida	Rock Masters.
Hanky Panky	Mitchell	Gandalf.
80. Monument—Ray Stevens:		
Unwind	Stevens	Ahab.
For He's a Jolly Good Fellow	Ragsdale	Do.
81. Capitol—Lettermen:		
Sherry Don't Go	Janssen/Keske	Grey Fox.
Never My Love	Addrisi	Tamerlane.
82. A. & M.—Tommy Boyce and Bobby Hart:		
Goodbye Baby	Boyce/Hart	Screen Gems-Columbia.
Where Angels Go Trouble Follows	do	Do.
83. Epic—Lulu:		
Me, the Peaceful Heart	Hazzard	James.
Look Out	Morgan	Nom.
84. MGM—Cowsills:		
In Need of a Friend	Cowsill	Arkbestal.
Mr. Flynn	do	Do.
85. Capitol—Glen Campbell:		
Hey Little One	Bornette/de Vorzon	Tamerlane.
My Baby's Gone	Campbell/Fuller	Four Star.
86. Date—Peaches and Herb:		
The Ten Commandments of Love	Chess	Arc.
What a Lovely Way	Williams/Sturm	Daedalus.
87. Phil. L.A. of Soul—Fantastic Johnny C.:		
Got What You Need	James	Dandelion/James.
New Love	do	Do.
88. Atco—Bee Gees:		
Jumbo	Gibb	Nemperor.
The Singer Sang His Song	do	Do.
89. White Whale—Turtles:		
Sound Asleep	Pons et al	Ishmael/Blimp.
Umbassa and the Dragon	do	Do.
90. Paula—John Fred and His Playboy Band:		
Hey, Hey Bunny	Gourrier/Bernard	Su-Ma/Bengal.
No Letter Today	do	Bengal.
91. UNI—Neil Diamond:		
Brooklyn Roads	Diamond	W-Clearance.
Holiday Inn Blues	do	Do.
92. ABC—Impressions:		
We're Rolling On	Mayfield	Camad.
We're Rolling On (pt. 2)	do	Do.
93. Stax—Otis Redding and Carla Thomas:		
Lovey Dovey	Curtis/Nuggy	Progressive.
New Year's Resolution	Parker et al	East/Time/Redwal.
94. Reprise—Frank Sinatra:		
I Can't Believe I'm Losing You	Costa/Zeller	Vogue/Hollyland, Don C.
How Old Am I	Senn/Stough	Four Star.
95. Gordy—Martha Reeves and the Vandellas:		
I Promise To Wait My Love	Gordy et al	Jobete.
Forget Me Not	Morris/Moy	Do.
96. Atlantic—Clarence Carter:		
Looking for a Fox	Carter et al	Fame.
I Can't See Myself	Carter	Do.
97. Buddah—1910 Fruitgum Company:		
May I Take a Giant Step	Chiprut	Kaskat.
Mr. Jensen (Poor Old)	Kasenetz et al	Do.
98. Goldwax—James Carr:		
Man Needs a Woman	McClinton/Claunch	Rise/Aim.
Stronger Than Love	Shields	Do.
99. Cadet—Soulful Strings:		
Burning Spear	Evans	Discus.
Within You Without You	Harrison	Northern.
100. ABC—Ray Charles:		
That's a Lie	Charles/Holiday	Tangerine.
Go on Home	Taylor	Northway.
101. Atco—Cream:		
Anyone for Tennis	Clapton/Sharp	Coseb.
Desert Ride	Styner	Dijon.
102. Original Sound—Dyke and the Blazers:		
Funky Walk, pt. 1	Christian	Drive-In/Westward.
Funky Walk, pt. 2	do	Do.

APPENDIX I—Continued

TABLE A.—SINGLE RECORDS IN THE SAMPLE—Continued

Number, record label, and performing artists	Composers	Publishers
103. Tamla—Marvin Gaye and Tammi Terrell:		
If This World Were Mine	Gaye	Jobete.
If I Could Build My World Around You	Bullock et al	Do.
104. Crimson—Soul Survivors:		
Impossible Mission	Huff/Gamble	Double Diamond/Downstairs.
Poor Man's Dream	do	Do.
105. Buddah—Five Stairsteps and Cubie:		
A Million to One	Hedley	Jobete.
Tell Me Who	Burke	Kama Sutra/Burke.
106. Venture—Calvin Arnold:		
Funky Way (To Treat Me)	Arnold	Mikim.
Snatchin' Back	do	Do.
107. Laurie—Royal Guardsmen:		
I Say Love	Taylor/Winslow	Roznique.
I'm Not Gonna Stay	Heller	TM.
108. Bell—James and Bobby Purify:		
Do Unto Me	Levy et al	Big Seven.
Everybody Needs Somebody	Schroeder/Crawford	Papa Don.
109. Immediate—Small Faces:		
Tin Soldier	Marriott/Lane	Nice Songs.
I Feel Much Better	McLagan et al	Do.
110. Stax—Ollie and the Nightingales:		
I Got a Sure Thing	Hoskins et al	East.
Girl, You Make My Heart Sing	Jones/Bell	Do.
111. Soul—Shorty Long:		
Night Fo' Last	Long/Paul	Jobete.
Do	do	Do.
112. Verve—Howard Tate:		
Stop	Ragovoy/Shuman	Ragmar/Rumbalero.
Shoot 'Em All Down	do	Do.
113. Soul—Jimmy Ruffin:		
I'll Say Forever My Love	Dean et al	Jobete.
Everybody Needs Love	Holland/Whitfield	Do.
114. MGM—Eric Burdon and the Animals:		
Anything	Burdon et al	Slamina/Sealark.
It's All Meat	do	Do.
115. Reprise—Jimi Hendrix Experience:		
Up From the Skies	Hendrix	Sea-lark.
One Rainy Wish	do	Sea-lark/Yameta.
116. MGM—Formations:		
At the Top of the Stairs	Huff/Akines	Double Diamond/Mured/Blockbut.
Magic Melody	Drayton/Akines	Do.
117. Cameo—Ohio Express:		
Try It	Levine	Blackwood.
Soul Struttin'	Thau/Orlando	Unpublished.
118. Brunswick—Jackie Wilson and Count Basie:		
Chain Gang	Cooke	Hi-Count/Mags.
Funky Broadway	Christian	Routeen/Drive-In.
119. Reprise—Miriam Makeba:		
Malayisha	Makeba/Ragovoy	Raj Komar.
Ring Bell Ring Bell	Ragovoy/Weiss	Ragmar/Crenshaw.
120. Columbia—Cryan' Shames:		
Up on the Roof	Goffin/King	Screen Gems-Columbia.
The Sailing Ship	Fairs/Kerley	Destination.
121. Stax—William Bell:		
A Tribute to a King	Bell/Jones	East.
Every Man Oughta Have a Woman	do	Do.
122. Abnak—Jon and Robin and the In Crowd:		
Dr. Jon (the Medicine Man)	Thompson	Barton/Barto/Jetstar.
Love Me Baby	Rambo et al	Do.
123. Warner Bros.—Long John Baldry:		
Let the Heartaches Begin	Maculay/Macleod	January.
Hey Lord You Made the Night Too Long	Baldry et al	Do.
124. Ric Tic—Detroit Emeralds:		
Showtime	Weems et al	Jobete.
Do	do	Do.
125. Imperial—Classics IV:		
Soul Train	Buie/Cobb	Low-Sal.
Strange Changes	do	Do.
126. Bell—Oscar Toney, Jr.:		
Without Love (There Is Nothing)	Small	Progressive/Papa Don.
Love That Never Grows Cold	Toney	Suffolk.
127. Columbia—Johnny Cash:		
Rosanna's Going Wild	Carter	Melody Lane/Copper Creek.
Ballad of Ira Hayes	La Farge	E. B. Marks.
128 Shout—George Torrence and Naturals:		
Lickin' Stick	Torrence/Manley	Wobiv.
So Long Good Bye	Torrence/McElrath	Do.

APPENDIX I—Continued

TABLE A.—SINGLE RECORDS IN THE SAMPLE—Continued

Number, record label, and performing artists	Composers	Publishers
129. ABC—Troy Keyes:		
Love Explosions	Harris/Kerr	Zira/Floteac/Min.
I'm Crying (Inside)	do	Zira.
130. Okeh—Vibrations:		
Love in Them There Hills	Gamble et al	Downstairs/Double Diamond.
Remember the Rain	Gamble/Huff	Do.
131. Capitol—Linda Ronstadt and the Stone Poneys:		
Up to My Neck in High Muddy Water	Yellin et al	Ryerson.
Carnival Bear	Howard	Gorman.
132. Vegas—Kenny O'Dell:		
Springfield Plane	O'Dell/Gay	Beautiful.
I'm Gonna Take It	O'Dell	Mirwood/Coor S.
133. Verve Forecast—Jim and Jean:		
People World	Glover	Akbestal.
Time Goes Backwards	do	Wild Indigo.
134. Bell—Oscar Toney, Jr.:		
Never Get Enough of Your Love	Floyd	East.
Love That Never Grows Cold	Toney	Papa Don.

TABLE B.—ALBUMS IN THE SAMPLE

No.	Record label and performing artists	Composers	Publishers
1	Capitol—Beatles (Sgt. Pepper's Lonely Hearts Club Band):		
	1. Sgt. Pepper's Lonely Hearts Club Band	Lennon/McCartney	Maclen.
	2. Day in the Life	do	Do.
	3. Lucy in the Sky With Diamonds	do	Do.
	4. Within You Without You	Harrison	Do.
	5. With a Little Help From My Firends	Lennon/McCartney	Do.
	6. Getting Better	do	Do.
	7. She's Leaving Home	do	Do.
	8. When I'm Sixty-Four	do	Do.
	9. Lovely Rita	do	Do.
	10. Good Morning, Good Morning	do	Do.
	11. Benefit of Mr. Kite	do	Do.
2	Soul City—Fifth Dimension (Up Up and Away):		
	1. Up Up and Away	Webb	Rivers.
	2. Another Day, Another Heartache	Sloan/Barri	Trousdale.
	3. Which Way to Nowhere	Unknown	Unknown.
	4. California My Way	Hutchison	Rivers.
	5. Misty Roses	Hardin	Faithful Virtue.
	6. Go Where You Wanno Go	Phillips	Trousdale.
	7. Never Gonna Be the Same	Unknown	Unknown.
	8. Pattern People	Webb	Rivers.
	9. Rosecrans Boulevard	do	Do.
	10. Learn How To Fly	Unknown	Unknown.
	11. Poor Side of Town	Rivers/Adler	Rivers.
3(a)	Columbia—Paul Revere and the Raiders (Greatest Hits):		
	1. Ups and Downs	Lindsay/Melcher	Daywin.
	2. Steppin' Out	Revere/Lindsay	Do.
	3. Just Like Me	Hart/Dey	Do.
	4. Louie, Louie, Louie	Berry	Limax.
	5. Louie, Go Home	Revere/Lindsay	Daywin.
	6. Kicks	Mann/Weil	Screen Gems-Columbia.
	7. Hungry	do	Do.
	8. Great Airplane Strike	Lindsay/Melcher	Daywin.
	9. Good Thing	do	Do.
	10. Legend of Paul Revere	do	Boom.
	11. Melody for an Unknown Girl	Lindsay	Daywin.
3(b)	Columbia—Paul Revere and the Raiders (Spirit of 67):		
	1. (Good Thing)		
	2. All About Her	Revere et al	Daywin.
	3. Louise	Kincaid	Do.
	4. Why, Why, Why	Unknown	Unknown.
	5. In My Community	Volk	Daywin.
	6. Oh To Be a Man	Revere/Lindsay	Boom.
	7. 1,001 Arabian Nights	Unknown	Unknown.
	8. (Hungry)		
	9. Undecided Man	Revere/Lindsay	Boom.
	10. Our Candidate	Unknown	Unknown.
	11. (Great Airplane Strike)		

TABLE B.—ALBUMS IN THE SAMPLE—Continued

No.	Record label and performing artists	Composers	Publishers
4	Gordy—Temptations (Temptations Live):		
	1. My Girl	Robinson/White	Jobete.
	2. Beauty Is Only Skin Deep	Holland/Whitfield	Do.
	3. I Wish You Love	Beach/Trenet	Leeds/Ed. Salaber.
	4. Ol' Man River	Unknown	Unknown.
	5. Get Ready	Robinson	Detroit Jobete.
	6. Fading Away	Robinson et al	Jobete.
	7. My Baby	do	Do.
	8. Baby, Baby I Need You	Robinson	Do.
	9. Don't Look Back	Robinson/White	Do.
	10. Medeley	Unknown	Unknown.
5	London—Rolling Stones (Between the Buttons):		
	1. Ruby Tuesday	Jagger/Richards	Gideon.
	2. Yesterday's Papers	do	Do.
	3. Cool and Collected	Unknown	Unknown.
	4. Let's Spend the Night Together	Jagger/Richards	Gideon.
	5. Connection	do	Do.
	6. All Sold Out	do	Do.
	7. Complicated	do	Do.
	8. My Obsession	do	Do.
	9. She Smiled Sweetly	do	Do.
	10. Who's Been Sleeping Here	do	Do.
	11. Miss Amanda Jones	do	Do.
	12. Something Happened to Me Yesterday	do	Do.
6	A & M—Sergio Mendes and Brasil 66 (Equinox):		
	1. Constant Rain	Gimbel/Ben	Apis-Brazil.
	2. Cinnamon and Clove	Bergman/Mandel	Shamley.
	3. Watch What Happens	Legrand/Gimbel	Jonwore/Vogue.
	4. For Me	Gimbel/Labo	Butterfield.
	5. Bim-Bom	Gilberto	Ed. Sacha.
	6. Night and Day	Unknown	Unknown.
	7. Triste	Jobim	Corcovado.
	8. Gente	Crespo	Mons.
	9. Wave	Jobim	Corcovado
	10. So Danco Samba	Jobim/DeMoraes	Ludlow.
7	Dunhill—Mamas and Papas (If You can Believe Your Eyes and Ears):		
	1. California Dreamin,	Phillips	Trousdale.
	2. Monday, Monday	do	Do
	3. Got a Feelin'	Phillips/Doherty	Do.
	4. I Call Your Name	Lennon/McCartney	Maclen.
	5. Go Where You Wanna Go	Phillips	Trousdale.
	6. Straight Shooter	do	Do.
	7. Do You Wanna Dance	Freeman	Clockus.
	8. Spanish Harlem	Unknown	Unknown.
	9. Somebody Groovy	Phillips	Trousdale.
	10. Hey Girl	Phillips/Gillian	Do.
	11 You Baby	Sloan/Barri	Do.
	12. In Crowd	Unknown	Unknown.
8	Motown—Four Tops (Four Tops Live):		
	1. Reach Out, I'll Be There	Holland/Dozier	Jobete.
	2. You Can't Hurry Love	do	Do.
	3. It's the Same Old Song	do	Do.
	4. It's Not Unusual	Mills/Reed	MCA/Leeds.
	5. Baby I Need Your Loving	Holland/Dozier	Jobete.
	6. I'll Turn to Stone	Holland et al	Do.
	7. I Left My Heart in San Francisco	Unknown	Unknown.
	8. I Can't Help Myself	Holland/Dozier	Jobete.
	9. Ask the Lonely	Stevenson/Hunter	Do.
	10. Climb Ev'ry Mountain	Rodges/Hammerstein	Rodgers.
	11. If I Had Hammer	Hays/Seeger	Ludlow.
	12. I Like Everything About You	Holland/Dozier	Jobete.
9	Atco—Sonny and Cher (Good Times):		
	1. I Got You Babe	Bono	Chris-Marc/Cotillion.
	2. It's the Little Things	do	Do.
	3. I'm Gonna Love You	do	Five West.
	4. Good Times	do	Chris-Marc/Cotillion.
	5. Trust Me	do	Do.
	6. Just a Name	do	Do.
	7. Don't Talk to Strangers	do	Do.
10	Motown—Supremes (Supremes A'Go Go):		
	1. You Can't Hurry Love	Holland/Dozier	Jobete.
	2. I Can't Help Myself	do	Do.
	3. Love Is Like an Itchin in My Heart	do	Do.
	4. Hang on Sloopy	Unknown	Unknown.
	5. These Boots Are Made For Walkin	do	Ed. Musicale.
	6. Get Ready	Robinson	Detroit Jobete
	7. This Old Heart of Mine	Holland et al	Jobete.
	8. Money (That's What I Want)	Gordy/Bradford	Do.
	9. Come and Get These Memories	Holland/Dozier	Do.
	10. Baby I Need Your Lovin'	do	Do.
	11. Put Yourself in My Place	Unknown	Unknown.
	12. Shake Me, Wake Me	Holland/Dozier	Detroit Jobete.

TABLE B.—ALBUMS IN THE SAMPLE—Continued

No.	Record label and performing artists	Composers	Publishers
11	Atco—Sonny and Cher (In Case You're in Love):		
	1. Beat Goes On	Bono	Chris-Marc/Cotillion.
	2. Groovy Kind of Love	Unknown	Unknown.
	3. Podunk	Bono	Chris-Marc/Cotillion.
	4. You Baby	Sloan/Barri	Trousdale.
	5. Monday	Bono	Chris-Marc/Cotillion.
	6. Love Don't Come	do	Do.
	7. Little Man	do	Do.
	8. We'll Sing in the Sunshine	Unknown	Unknown.
	9. Living for You	Bono	Chris-Marc/Cotillion.
	10. Misty Roses	Hardin	Faithful Virtue.
	11. Stand By Me	King	Progressive/Trio/A.D.T.
	12. Cheryl's Going Home	Unknown	Unknown.
12	Capitol—Lou Rawls (Carryin' On)		
	1. Mean Black Snake	Rawls/Alexander	Beechwood.
	2. Walking Proud	Evans/Simmons	Fantastic/Anpet.
	3. Devil in Your Eyes	Scott/Radcliffe	Hastings.
	4. Find Out What's Happening	Crutchfield	Champion.
	5. You Can Bring Me All Your Heartaches	Raleigh/Barnum	Rawlou.
	6. Woman, Who's A Woman	do	Wertz.
	7. Life That I Lead	Westlake	Bigtop.
	8. Trouble Down Here Below	Unknown	Unknown.
	9. Yesterday	Lennon/McCartney	Maclen.
	10. You're Gonna Hear From Me	Unknown	Unknown.
	11. Something Stirring in My Soul	Radcliffe/Scott	Roosevelt.
	12. Broadway	Woode et al	Rayven.
13	Smash—Roger Miller (Walkin' in the Sunshine):		
	1. Walking in the Sunshine	Miller	Tree.
	2. Million Years or So	do	Do.
	3. Ruby	Unknown	Unknown.
	4. You Didn't Have To Be So Nice	Miller	Tree.
	5. Green Green Grass of Home	Putman	Do.
	6. I'd Come Back To Me	Miller	Do.
	7. Absence	do	Do.
	8. Our Little Love	do	Do.
	9. Pardon This Coffin	do	Do.
	10. Hey Good Lookin'	Unknown	Unknown.
	11. Riddle	do	Do.
14	Warner Bros.—Association (Insight Out):		
	1. Windy	Friedman	Irving.
	2. Wasn't It a Bit Like Now	Kirkman	Beechwood.
	3. On A Quiet Night	Sloan	Trousdale.
	4. We Love Us	Bluechel	Beechwood.
	5. When Love Comes to Me	Yester	Do.
	6. Reputation	Randazzo et al	Razzle Dazzle.
	7. Never My Love	Addrisi	Tamerlane.
	8. Happiness	do	Do.
	9. Sometime	Giguere	Beechwood.
	10. Wantin' Ain't Gettin'	Deasy	Do.
	11. Requiem for the Masses	Kirkman	Do.
15	Valiant—Association (And Then . . . Along Comes The Association):		
	1. Along Comes Mary	Almer	Daven.
	2. Enter the Young	Kirkman	Beechwood.
	3. Your Own Love	Alexander/Yester	Do.
	4. Don't Blame It on Me	Addrisi	Sherman-deVorzez.
	5. Blistered	Unknown	Unknown.
	6. I'll Be Your Man	Giguere	Beechwood.
	7. Cherish	Kirkman	Do.
	8. Standing Still	Bluechel	Do.
	9. Message of Our Love	Almer/Buettcher	Since/Irving.
	10. Round Again	Alexander	Beechwood.
	11. Remember	Unknown	Unknown.
	12. Changes	Alexander	Beechwood.
16(a)	London—Rolling Stones (Got Live if You Want It):		
	1. Have You Seen Your Mother, Baby, Standing in the Shadow.	Jagger/Richards	Gideon.
	2. Under My Thumb	do	Do.
	3. (Get Off My Cloud)		
	4. Lady Jane	do	Do.
	5. I've Been Loving You Too Long	Redding/Butler	Time/Burton.
	6. Fortune Teller	Neville	Minit.
	7. (Last Time)		
	8. (Time Is on My Side)		
	9. (19th Nervous Breakdown)		
	10. (Not Fade Away)		
	11. (Satisfaction)		
	12. I'm Alright	Stewart	Acuff-Rose.

TABLE B.—ALBUMS IN THE SAMPLE—Continued

No.	Record label and performing artists	Composers	Publishers
16(b)	London—Rolling Stones (High Tide and Green Grass):		
	1. 19th Nervous Breakdown	Jagger/Richards	Gideon.
	2. Satisfaction	do	Immediate.
	3. As Tears Go By	Unknown	Unknown.
	4. Last Time	Jagger/Richards	Immediate.
	5. Time Is on My Side	Meade	Rittenhouse/Maygasy.
	6. It's All Over Now	Womack	Kags/Hi Count.
	7. Tell Me	March	Unart/Fiore.
	8. Heart of Stone	Jagger/Richards	Immediate.
	9. Get Off My Cloud	do	Gideon.
	10. Not Fade Away	Hardin/Petty	Nor Va Jak.
	11. Good Times, Bad Times	Jagger/Richards	Immediate.
	12. Play With Fire	Watts/Jon	Do.
17	Reprise—Kinks (The Kinks Greatest Hits):		
	1. Dedicated Follower of Fashion	Davies	Noma/Hi Count.
	2. Tired of Waiting for You	do	Jay Boy.
	3. All Day and All of the Night	do	Do.
	4. You Really Got Me	do	Do.
	5. Well Respected Man	do	Amer. Metrop. Ent.
	6. Who'll Be the Next in Line	do	Amer. Metrop. Ent.
	7. Till the End of the Day	do	Noma/Hi Count.
	8. Everybody's Gonna Be Happy	do	Amer. Metrop. Ent.
	9. Set Me Free	do	Amer. Metrop. Ent.
	10. Something Better	do	Amer. Metrop. Ent.
18	Columbia—Johnny Cash (Johnny Cash's Greatest Hits):		
	1. Jackson	Luther	Unknown.
	2. I Walk the Line	Cash	Hi Lo.
	3. Understand Your Man	do	Southwind.
	4. Orange Blossom Special	Slotkin/Morino	Metric.
	5. One on the Right Is on the Left	Clement	Jack.
	6. Ring of Fire	Kilgore/Carter	Painted Desert.
	7. It Ain't Me Babe	Unknown	Unknown.
	8. Ballad of Ira Hayes	La Farge	E. B. Marks.
	9. Bakel	Unknown	Unknown.
	10. Five Feet High and Rising	Cash	Southwind.
	11. Don't Take Your Guns to Town	do	Cash.

HIGHEST CHART POSITION	WEEKS ON CHART	BROADCAST PERFORMANCES FIRST SIDE	/ FLIP SIDE	RECORD SALES	FLIP SIDE SAME COMPOSER	FLIP SIDE SAME PUBLISHER	JOINT IDENTITIES ARTIST COMPOSER		ARTIST PUBLISHER		COMPOSER PUBLISHER		PUBLISHER RECORD CO.			
1	15	213724.	1284.	425560.	1	1	1	1	0	0	0	0	1	1	16	1
1	16	531083.	2118.	674040.	1	1	1	1	1	1	1	1	1	1	43	2
1	13	868655.	6964.	764390.	1	1	1	1	1	1	1	1	0	0	137	3
2	22	411073.	22170.	509910.	1	1	0	0	0	0	0	0	0	0	63	4
2	15	374633.	2056.	757910.	1	1	0	1	0	0	0	0	0	1	73	5
2	15	246727.	1829.	449710.	1	1	0	0	0	0	0	0	0	0	127	6
3	17	206280.	4264.	587880.	1	1	1	0	0	0	0	0	1	1	53	7
3	10	195506.	36955.	573370.	0	1	0	0	0	0	0	0	1	1	97	8
4	14	183667.	7215.	374500.	0	1	0	0	0	0	0	0	1	1	5	9
4	14	220950.	486.	797800.	0	1	0	1	0	0	0	0	0	0	7	10
4	11	298681.	9581.	597040.	1	1	1	1	1	1	1	1	0	0	39	11
4	15	158965.	489.	195160.	1	0	0	0	0	0	0	0	0	0	71	12
4	14	216289.	900.	654200.	0	0	0	0	0	0	0	1	0	0	90	13
5	12	147485.	78460.	254870.	0	1	1	0	1	1	1	0	1	1	13	14
5	10	128754.	1386.	252550.	0	0	0	1	0	0	0	0	0	0	107	15
7	12	298199.	10866.	577680.	0	0	0	1	0	0	0	0	0	0	61	16
7	16	199021.	129.	406160.	0	1	1	1	0	0	0	0	0	0	92	17
7	16	314501.	0.	463210.	0	0	0	0	0	0	0	0	0	0	95	18
8	13	137570.	393.	195330.	0	1	0	0	0	0	0	0	1	1	18	19
8	15	139679.	287.	282690.	1	1	0	0	1	1	0	0	0	0	70	20
9	13	109472.	10921.	359420.	1	1	0	0	0	0	0	0	1	1	8	21
9	12	101791.	1172.	203380.	1	1	1	1	0	0	0	0	1	1	17	22
10	9	187950.	6655.	249320.	0	1	1	1	0	0	0	0	0	0	47	23
11	12	117668.	460.	134740.	1	1	1	1	0	0	0	0	1	1	10	24
11	11	628916.	20200.	139490.	1	1	1	1	1	1	1	1	0	0	40	25
11	14	163750.	1667.	94880.	0	0	0	0	0	0	0	1	0	0	83	26
13	10	86429.	2511.	108780.	1	1	0	0	0	0	0	0	1	1	25	27
14	8	177575.	1169.	223130.	0	0	0	0	0	0	0	0	0	1	28	28
14	18	182168.	250.	426590.	0	0	0	0	0	0	0	0	0	1	118	29
15	11	143034.	1497.	274270.	1	1	1	1	0	0	0	0	0	0	1	30
15	10	76824.	7209.	159520.	1	1	0	0	0	0	0	0	1	1	57	31
15	10	85903.	1366.	53080.	0	0	0	1	0	0	0	1	0	1	84	32
16	13	119310.	119.	231480.	0	0	0	0	0	0	1	1	1	0	35	33
17	16	168832.	1160.	371710.	1	1	1	1	0	0	0	0	1	1	9	34
18	12	94337.	2732.	159720.	1	1	1	1	0	0	0	0	0	0	78	35
18	14	119081.	0.	235520.	0	0	0	0	0	0	0	0	0	0	125	36
19	8	98787.	16019.	113890.	1	1	1	1	1	1	1	1	0	0	62	37
20	10	219449.	876.	203130.	0	0	0	0	0	0	0	0	0	1	37	38
20	11	74446.	2653.	223760.	1	1	0	0	0	0	0	0	1	1	48	39
21	12	155265.	427.	231500.	1	1	1	1	0	0	0	0	0	0	24	40
21	9	296704.	1765.	297710.	1	1	1	1	1	1	1	1	0	0	60	41
22	13	139848.	5738.	237120.	0	1	1	1	1	1	1	1	0	0	66	42
23	15	205281.	68988.	140520.	0	0	0	0	0	0	0	0	0	0	45	43
23	15	113631.	105564.	215760.	0	0	0	0	0	0	1	0	0	0	128	44
24	8	123379.	1335.	104530.	0	0	0	1	0	1	0	1	0	0	46	45
25	8	71037.	12103.	149320.	1	1	1	1	1	1	1	1	1	1	22	46
25	15	86916.	2602.	93540.	0	0	0	0	0	0	1	0	0	0	41	47
26	9	142984.	3144.	99290.	1	1	1	1	0	1	0	1	0	0	67	48
28	9	117232.	2949.	89200.	1	1	0	0	0	0	0	0	1	1	15	49
28	9	126093.	0.	167110.	0	0	0	0	0	0	1	0	0	0	117	50
29	9	101084.	6000.	56010.	1	1	0	0	0	0	0	0	1	1	6	51
30	8	190513.	97.	58220.	0	0	0	0	0	0	0	0	0	0	126	52
33	7	47483.	239.	96180.	1	1	0	0	0	0	0	0	0	0	72	53
34	7	7168.	24.	189260.	0	1	0	1	0	0	0	0	1	1	4	54
35	10	50318.	453.	35570.	0	0	0	0	0	0	0	1	0	0	124	55
36	8	69546.	21017.	681920.	1	0	1	1	0	1	0	1	1	1	2	56
36	6	42626.	0.	24090.	1	1	0	1	0	0	0	0	0	0	109	57
37	8	51436.	0.	65040.	1	1	0	0	0	0	0	0	0	0	134	58
38	10	1239.	0.	41860.	0	0	0	0	0	0	0	0	0	0	122	59

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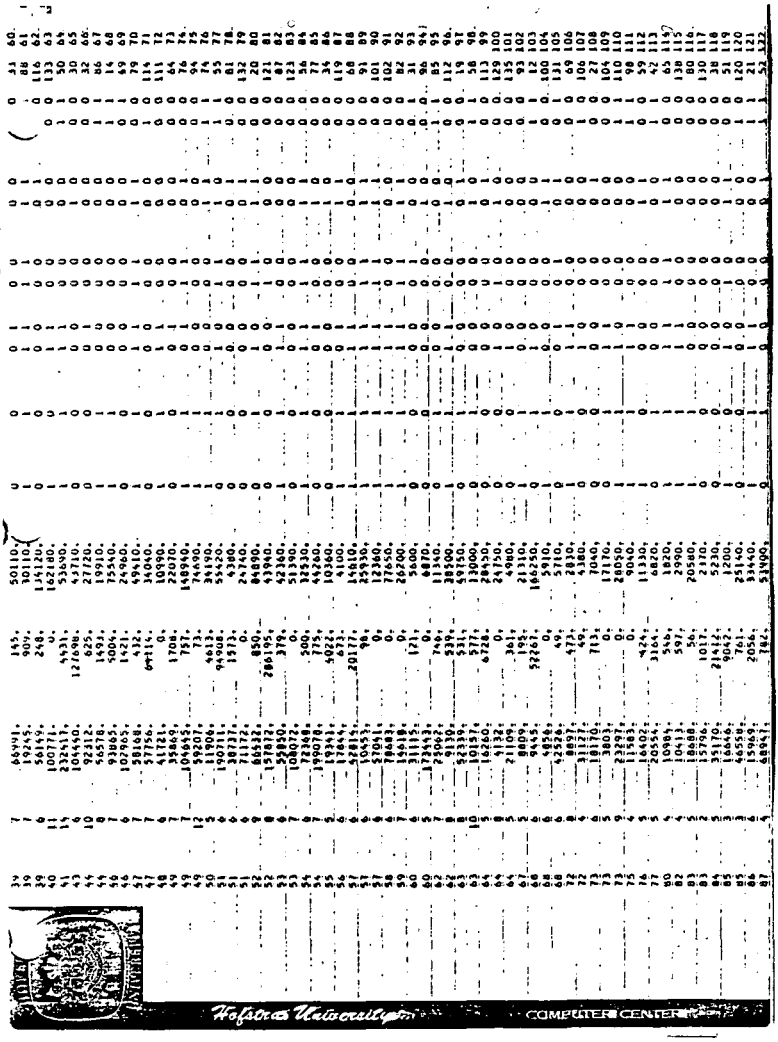
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TABLE 3

ALBUM 1 PERF. ARTISTS BEATLES — ALBUM SALES 2290280. — SINGLES SALES 0. (0 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	36967.	0.	36967.	0.	1 0	1 0	1 0	0 0	1
2	57790.	0.	57790.	0.	1 0	1 0	1 0	0 0	2
3	19640.	0.	19640.	0.	1 0	1 0	1 0	0 0	3
4	11726.	0.	11726.	0.	1 0	1 0	1 0	0 0	4
5	213207.	0.	213207.	0.	1 0	1 0	1 0	0 0	5
6	6267.	0.	6267.	0.	1 0	1 0	1 0	0 0	6
7	32668.	0.	32668.	0.	1 0	1 0	1 0	0 0	7
8	95252.	0.	95252.	0.	1 0	1 0	1 0	0 0	8
9	24111.	0.	24111.	0.	1 0	1 0	1 0	0 0	9
10	6426.	0.	6426.	0.	1 0	1 0	1 0	0 0	10
11	2049.	0.	2049.	0.	1 0	1 0	1 0	0 0	11
	506103.	0.	506103.	0.					
	ADJUSTMENT FOR N.A.	0.	506103.						

ALBUM 2 PERF. ARTISTS ALBUM SALES SINGLES SALES

FIFTH DIMENSION 451950. 805340. (2 EXTRA SIDES)

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST	ARTIST COMPOSER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	1136117.	0.	1136117.	388700.	0	0	0	1 0	1
2	53386.	0.	53386.	131940.	0	0	0	0 0	2
3	N.A.	0.	0.	388700.	0	0	0	0 0	3
4	21695.	0.	21695.	0.	0	0	0	1 0	4
5	56360.	0.	56360.	0.	0	0	0	0 0	5
6	79962.	2486.	82428.	87150.	0	0	0	0 0	6
7	N.A.	0.	0.	0.	0	0	0	0 0	7
8	4529.	0.	4529.	0.	0	0	0	1 0	8
9	2780.	0.	2780.	131940.	0	0	0	1 0	9
10	N.A.	0.	0.	0.	0	0	0	0 0	10
11	369920.	74209.	4241129.	197550.	0	0	0	1 1	11
	1704129.	76695.	1781424.	805340.					
	ADJUSTMENT FOR M.A.	5344427.	23156851.						

ALBUM 3 PERF. ARTISTS ALBUM SALES SINGLES SALES

PAUL REVERE 737040. 1057270. (0 EXTRA SIDES)

	BROADCAST PERFORMANCES				JOINT IDENTITIES								
	ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	ARTIST COMPOSER		ARTIST PUBLISHER		COMPOSER PUBLISHER		PUBLISHER RECORD CO.		
1	84219.	0.	84219.	671440.	1	0	0	0	1	0	0	0	1
2	14834.	0.	14834.	0.	1	0	0	0	0	0	0	0	2
3	91480.	0.	91480.	0.	0	0	0	0	0	0	0	0	3
4	239375.	0.	239375.	5440.	0	0	0	0	0	0	0	0	4
5	1958.	0.	1958.	5440.	1	0	0	0	0	0	0	0	5
6	105023.	0.	105023.	0.	0	0	0	0	0	0	1	0	6
7	143233.	0.	143233.	378360.	0	0	0	0	0	0	1	0	7
8	53907.	0.	53907.	378360.	1	0	0	0	1	0	0	0	8
9	130713.	0.	130713.	671440.	1	0	0	0	1	0	0	0	9
10	3633.	0.	3633.	1810.	1	0	1	0	1	0	0	0	10
11	452.	0.	452.	0.	1	0	0	0	1	0	0	0	11
12	5500.	0.	5500.	0.	0	0	0	0	0	0	0	0	12
13	N.A.	0.	0.	0.	0	0	0	0	0	0	0	0	13
14	2420.	0.	2420.	0.	1	0	0	0	0	0	0	0	14
15	604.	0.	604.	0.	1	0	1	0	1	0	0	0	15
16	N.A.	0.	0.	0.	0	0	0	0	0	0	0	0	16
17	9213.	0.	9213.	0.	1	0	1	0	1	0	0	0	17
18	N.A.	0.	0.	0.	0	0	0	0	0	0	0	0	18
19	24435.	0.	24435.	0.	1	0	0	0	0	0	0	0	19
	998999.	0.	998999.	1057270.									

ADJUSTMENT FOR N.A. 107312. 1106311.

Polytechnic University

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ALBUM 4 PERF. ARTISTS TEMPTATIONS ALBUM SALES 297420. SINGLES SALES 810320. (2 EXTRA SIDES)

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	222568.	1049.	223617.	49530.	0 0	0 0	0 0	1 0	1
2	126624.	N.A.	126624.	438650.	0 0	0 0	0 0	1 0	2
3	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	3
4	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	4
5	39542.	0.	39542.	261290.	0 0	0 0	0 0	1 0	5
6	2243.	0.	2243.	261290.	0 0	0 0	0 0	1 0	6
7	9250.	0.	9250.	60000.	0 0	0 0	0 0	1 0	7
8	291.	2431.	2722.	850.	0 0	0 0	0 0	1 1	8
9	77270.	0.	77270.	60000.	0 0	0 0	0 0	1 0	9
10	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	10
	477788.	3480.	481268.	810320.					
	ADJUSTMENT FOR N.A.	240634.	721902.						

ALBUM 5 PERF. ARTISTS ALBUM SALES SINGLES SALES

ROLLING STONES 666740. 846670. (0 EXTRA SIDES)

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	136451.	0.	136451.	846670.	1 0	1 0	1 0	0 0	1
2	242.	0.	242.	0.	0 0	0 0	0 0	0 0	2
3	N.A.	0.	0	0.	0 0	0 0	0 0	0 0	3
4	40134.	0.	40134.	846670.	0 0	0 0	0 0	0 0	4
5	3264.	0.	3264.	0.	1 0	1 0	1 0	0 0	5
6	270.	0.	270.	0.	0 0	0 0	0 0	0 0	6
7	337.	0.	337.	0.	1 0	1 0	1 0	0 0	7
8	1131.	0.	1131.	0.	1 0	1 0	1 0	0 0	8
9	3566.	0.	3566.	0.	1 0	1 0	1 0	0 0	9
10	56.	0.	56.	0.	1 0	1 0	1 0	0 0	10
11	517.	0.	517.	0.	1 0	1 0	1 0	0 0	11
12	1089.	0.	1089.	0.	1 0	1 0	1 0	0 0	12
	183860.	0.	183860.	846670.					
	ADJUSTMENT FOR N.A.	16716.	200574.						

ALBUM 6 PERF. ARTISTS ALBUM SALES SINGLES SALES

SERGIO MENDES 273290. 0. 10 EXTRA SIDES)

	BROADCAST PERFORMANCES			SINGLES SALES	JOINT IDENTITIES		
	ALBUM SONGS	SINGLE FLIPS	TOTAL		ARTIST COMPOSER PUBLISHER	ARTIST COMPOSER PUBLISHER	PUBLISHER RECORD CO.
1	124271.	0.	124271.	0.	0 0 0	0 0 0	0 0
2	N.A.	0.	0.	0.	0 0 0	0 0 0	0 0
3	313830.	0.	313830.	0.	0 0 0	0 0 0	0 0
4	78133.	0.	78133.	0.	0 0 0	1 0 0	0 0
5	N.A.	0.	0.	0.	0 0 0	0 0 0	0 0
6	N.A.	0.	0.	0.	0 0 0	0 0 0	0 0
7	19777.	0.	19777.	0.	0 0 0	0 0 0	0 0
8	0.	0.	0.	0.	0 0 0	0 0 0	0 0
9	90851.	0.	90851.	0.	0 0 0	1 0 0	0 0
10	21298.	0.	21298.	0.	0 0 0	0 0 0	0 0
	648160.	0.	648160.	0.			10
	ADJUSTMENT FOR M.A.		277702.	925962.			

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Holyoke University

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ALBUM 7 PERF. ARTISTS ALBUM SALES SINGLES SALES

MAMAS AND PAPAS 1131190. 1264750. (1 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	461596.	0.	461596.	541690.	1 0	0 0	0 0	1 0	1
2	522138.	0.	522138.	666020.	1 0	0 0	0 0	1 0	2
3	7655.	0.	7655.	666020.	1 0	0 0	0 0	1 0	3
4	57390.	0.	57390.	0.	0 0	0 0	1 0	0 0	4
5	79941.	0.	79941.	0.	1 0	0 0	0 0	1 0	5
6	7202.	N.A.	7202.	57040.	1 0	0 0	0 0	1 0	6
7	104808.	0.	104808.	0.	0 0	0 0	0 0	0 0	7
8	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	8
9	3694.	0.	3694.	541690.	1 0	0 0	0 0	1 0	9
10	1525.	0.	1525.	0.	1 0	0 0	0 0	1 0	10
11	55915.	0.	55915.	0.	0 0	0 0	0 0	1 0	11
12	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	12
	1301864.	0.	1301864.	1264750.					
	ADJUSTMENT FOR N.A.	390559.	1692423.						

Fortune University

COMPUTER CENTER

ALBUM 8 PERF. ARTISTS FOUR TOPS — ALBUM SALES 353450. — SINGLES SALES 884530. (6 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	254365.	1581.	255946.	581670.	0 0	0 0	0 0	1 1	1
2	138272.	0.	138272.	0.	0 0	0 0	0 0	1 0	2
3	35123.	345.	35468.	12350.	0 0	0 0	0 0	1 1	3
4	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	4
5	127407.	634.	128041.	9660.	0 0	0 0	0 0	1 1	5
6	23788.	78254.	102042.	259390.	0 0	0 0	0 0	1 1	6
7	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	7
8	33376.	431.	33807.	17970.	0 0	0 0	0 0	1 1	8
9	17061.	542.	17603.	3490.	0 0	0 0	0 0	1 1	9
10	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	10
11	262467.	0.	262467.	0.	0 0	0 0	0 0	0 0	11
12	10192.	0.	10192.	0.	0 0	0 0	0 0	1 0	12
	902051.	81787.	983838.	884530.					
	ADJUSTMENT FOR N.A.	196767.	1180605.						

ALBUM 9 PERF. ARTISTS ALBUM SALES SINGLES SALES

SONNY AND CHER 102210. 93260. (2 EXTRA SIDES)

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	STNGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.
1	106443.	2997.	107440.	16220.	1	1	1	1
2	66597.	23897.	90494.	17040.	1	1	1	1
3	0.	0.	0.	0.	1	0	1	0
4	261.	0.	261.	0.	0	1	0	0
5	708.	0.	708.	0.	1	0	1	0
6	0.	0.	0.	0.	1	0	1	0
7					0	1	0	1
	172015.	26894.	198909.	93260.				
	ADJUSTMENT FOR N.A.	0.	198909.					

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ALBUM ID PERF. ARTISTS ALBUM SALES SINGLES SALES

SUPREMES 617100. 1119450. (1 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	138271.	0.	138271.	839760.	0 0	0 0	0 0	1 0	1
2	33377.	0.	33377.	0.	0 0	0 0	0 0	1 0	2
3	112590.	8866.	121456.	279690.	0 0	0 0	0 0	1 1	3
4	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	4
5	0.	0.	0.	0.	0 0	0 0	0 0	0 0	5
6	39542.	0.	39542.	0.	0 0	0 0	0 0	1 0	6
7	128514.	0.	128514.	0.	0 0	0 0	0 0	1 0	7
8	52518.	0.	52518.	0.	0 0	1 0	0 0	1 0	8
9	9861.	0.	9861.	0.	0 0	0 0	0 0	1 0	9
10	127906.	0.	127906.	0.	0 0	0 0	0 0	1 0	10
11	N.A.	0.	0.	839760.	0 0	0 0	0 0	0 0	11
12	72707.	0.	72707.	0.	0 0	0 0	0 0	1 0	12
	715266.	8866.	724132.	1119450.					
	ADJUSTMENT FOR N.A.	131660.	855792.						

ALBUM 11 PERF. ARTISTS ALBUM SALES SINGLES SALES

SONNY AND CHER 171670. 507220. 11 EXTRA SIDES!

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	278264.	0.	278264.	432720.	1	0	1	0	1
2	N.A.	0.	0.	0.	0	0	0	0	2
3	N.A.	433328.	443711.	6070.	0	1	0	0	3
4	55913.	0.	55913.	0.	1	0	1	1	4
5	2438.	0.	24338.	685130.	0	0	0	0	5
6	906.	0.	906.	432720.	1	0	1	0	6
7	76468.	0.	76468.	685130.	0	0	0	0	7
8	N.A.	0.	0.	0.	0	0	0	0	8
9	16509.	0.	16509.	0.	0	0	0	0	9
10	163260.	0.	163260.	0.	0	0	0	0	10
11	1622262.	0.	1622262.	0.	0	0	0	0	11
12	N.A.	0.	0.	0.	0	0	0	0	12
	6501335.	433328.	6934663.	507220.					
	ADJUSTMENT FOR N.A.		208038.	901501.					

ALBUM 12 PERF. ARTISTS ALBUM SALES SINGLES SALES

LOU RAWLS 111330. 31630. (0 EXTRA SIDES)

	BROADCAST PERFORMANCES					JOINT IDENTITIES			
	ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	ARTIST COMPOSER	ARTIST COMPOSER PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	875.	0.	875.	0.	1	0	0	0	1
2	5701.	0.	5701.	0.	0	0	1	0	2
3	838.	0.	838.	0.	0	0	0	0	3
4	17511.	0.	17511.	0.	0	0	0	0	4
5	18130.	0.	18130.	0.	1	0	0	0	5
6	2999.	0.	2999.	0.	0	1	0	0	6
7	402.	0.	402.	31630.	0	0	0	0	7
8	0.	0.	0.	31630.	0	0	0	0	8
9	1062693.	0.	1062693.	0.	0	0	1	0	9
10	0.	0.	0.	0.	0	0	0	0	10
11	11167.	0.	11167.	0.	0	0	0	0	11
12	29206.	0.	29206.	0.	0	0	0	0	12
	1109769.	0.	1109769.	31630.					

ADJUSTMENT FOR N.A., 2790153, 1936922.

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ALBUM 13 PERF. ARTISTS ALBUM SALES SINGLES SALES

ROGER MILLER 19170. 0. (0 EXTRA SIDES)

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.
1	344159.	0.	344159.	0.	0	0	0	0
2	9496.	0.	9496.	0.	0	0	0	0
3	404.	0.	404.	0.	0	0	0	0
4	348934.	0.	348934.	0.	0	0	0	0
5	2181.	0.	2181.	0.	0	0	0	0
6	5274.	0.	5274.	0.	0	0	0	0
7	18286.	0.	18286.	0.	0	0	0	0
8	890.	0.	890.	0.	0	0	0	0
9	0.	0.	0.	0.	0	0	0	0
10	0.	0.	0.	0.	0	0	0	0
11								
	367316.	0.	367316.	0.				
	ADJUSTMENT FOR N.A.	959594.	1302972.					

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ALBUM L4 PERF. ARTISTS ASSOCIATION — ALBUM SALES 619130. — SINGLES SALES 2498320. (1 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	743757.	0.	743757.	1423270.	0 0	0 0	0 0	0 0	1
2	1063.	0.	1063.	0.	1 0	0 0	0 0	0 0	2
3	711.	0.	711.	0.	0 0	0 0	0 0	0 0	3
4	6990.	187950.	194940.	249320.	1 1	0 0	0 0	0 0	4
5	312.	0.	312.	0.	1 0	0 0	0 0	0 0	5
6	269.	0.	269.	0.	0 0	0 0	1 0	0 0	6
7	516166.	0.	516166.	825730.	0 0	0 0	0 0	1 0	7
8	8126.	0.	8126.	0.	0 0	0 0	0 0	1 0	8
9	2138.	0.	2138.	1423270.	1 0	0 0	0 0	0 0	9
10	54.	0.	54.	0.	0 0	0 0	0 0	0 0	10
11	14146.	0.	14146.	825730.	1 0	0 0	0 0	0 0	11
	1293732.	187950.	1481682.	2498320.					
	ADJUSTMENT FOR N.A.	0.	1481682.						

Indiana University COMPUTER CENTER

ALBUM IS | PERF. ARTISTS | ALBUM SALES | SINGLES SALES

ASSOCIATION | 450890. | 1019840. | ( ) EXTRA SIDES)

	BROADCAST PERFORMANCES			SINGLES SALES		JOINT IDENTITIES		
	ALBUM SONGS	SINGLE FLIPS	TOTAL		ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.
1	251837.	0.	251837.	1019840.	0	0	0	0
2	9479.	0.	9479.	0.	1	0	0	0
3	2861.	0.	2861.	0.	1	0	0	0
4	4036.	0.	4036.	0.	0	0	0	0
5	N.A.	0.	0.	0.	0	0	0	0
6	452.	0.	452.	0.	1	0	0	0
7	547822.	0.	547822.	1019840.	0	0	0	0
8	8066.	0.	8066.	0.	1	0	0	0
9	310.	0.	310.	0.	0	0	0	0
10	129.	0.	129.	0.	1	0	0	0
11	N.A.	0.	0.	0.	0	0	0	0
12	223.	0.	223.	0.	1	0	0	0
	825215.	0.	825215.	1019840.				
	ADJUSTMENT FOR N.A.		150039.	975255.				

Hofstra University COMPUTER CENTER

ALBUM 16 PERF. ARTISTS ROLLING STONES — ALBUM SALES 1245330. — SINGLES SALES 921190. (10 EXTRA SIDES)

	BROADCAST PERFORMANCES: ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES: ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	59466.	N.A.	59466.	121170.	1 0	1 0	1 0	0 0	1
2	24304.	0.	24304.	0.	1 0	1 0	1 0	0 0	2
3	65800.	93051.	158851.	267940.	1 1	1 1	1 1	0 0	3
4	38436.	0.	38436.	0.	0 0	0 0	0 0	0 0	4
5	24300.	0.	24300.	0.	0 0	0 0	0 0	0 0	5
6	N.A.	0.	0.	0.	0 0	0 0	0 0	0 0	6
7	134372.	1441.	135813.	327520.	1 1	1 1	1 1	0 0	7
8	171027.	791.	171818.	53490.	1 0	0 0	0 0	0 0	8
9	N.A.	3008.	3008.	97770.	0 1	0 1	0 1	0 0	9
10	24181.	0.	24181.	8290.	1 0	0 0	0 0	0 0	10
11	16449.	888.	17337.	8490.	0 1	0 0	0 0	0 0	11
12	17028.	0.	17028.	5730.	0 0	0 0	0 0	0 0	12
13	0.	N.A.	0.	1010.	0 0	0 0	1 0	0 0	13
14	8578.	2578.	11156.	8370.	1 1	0 0	0 0	0 0	14
15	55782.	800.	56582.	17090.	1 1	1 1	1 1	0 0	15
16	13400.	6331.	19731.	2320.	0 0	0 0	1 0	0 0	16
17	1402.	0.	1402.	5730.	1 0	0 0	0 0	0 0	17
18	10382.	0.	10382.	9290.	0 0	0 0	0 0	0 0	18
	665107.	108688.	773795.	921190.					
	ADJUSTMENT FOR N.A.	120965.	902760.						

Fujita University COMPUTER CENTER

ALBUM 17 PERF. ARTISTS ALBUM SALES SINGLES SALES

KINKS 326800. 235320.

1 1 EXTRA SIDES!

	BROADCAST PERFORMANCES			SINGLES SALES	JOINT IDENTITIES			
	ALBUM SONGS	SINGLE FLIPS	TOTAL		ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.
1	30384.	0.	30384.	19700.	1	0	0	0
2	16800.	0.	16800.	11700.	0	0	0	0
3	23401.	0.	23401.	11700.	0	0	0	0
4	26410.	N.A.	26410.	3900.	0	0	0	0
5	91030.	0.	91030.	200120.	0	0	0	0
6	5390.	0.	5390.	19700.	0	0	0	0
7	35280.	0.	35280.	0.	0	0	0	0
8	1969.	0.	1969.	0.	0	0	0	0
9	5655.	0.	5655.	200120.	0	0	0	0
10	2091.	0.	2091.	0.	0	0	0	0
	2379641.	0.	2379641.	235320.				
	ADJUSTMENT FOR N.A.		23796.					
			2617760.					

ALBUM ID PERF. ARTISTS ALBUM SALES SINGLES SALES

JOHNNY CASH 42750. 75560.

1 3 EXTRA SIDES!

	BROADCAST PERFORMANCES ALBUM SONGS	SINGLE FLIPS	TOTAL	SINGLES SALES	JOINT IDENTITIES ARTIST COMPOSER	ARTIST PUBLISHER	COMPOSER PUBLISHER	PUBLISHER RECORD CO.	
1	1797.	19122.	20919.	10430.	0	0	0	0	1
2	246383.	0.	246383.	3370.	1	0	0	0	2
3	50246.	0.	50246.	0.	0	0	0	0	3
4	17041.	0.	17041.	3370.	0	0	0	0	4
5	132801.	21183.	173951.	40880.	0	0	1	0	5
6	160176.	0.	160176.	13940.	0	0	0	0	6
7	N.A.	0.	0.	13960.	0	0	0	0	7
8	11539.	N.A.	11539.	5050.	0	0	0	0	8
9	N.A.	0.	0.	0.	0	0	0	0	9
10	14855.	0.	14855.	1800.	0	0	0	0	10
11	16493.	0.	16493.	1800.	1	0	1	0	11
	674698.	40305.	715003.	75560.					
	AJUSTMENT FOR N.A.	195000.	910003.						

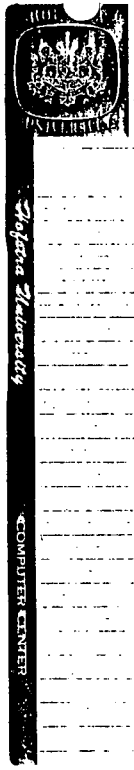
TABLE 4

Rutgers University COMPUTER CENTER

ALBUM SUMMARY

		-------BROADCAST PERFORMANCES---------- ALBUM SONGS	SINGLE FLIPS	ADJ. TOTAL	SINGLES SALES	ALBUM SALES
1	BEATLES	506103.	0.	506103.	0.	2290280.
2	FIFTH DIMENSION	1704729.	76695.	2315051.	805340.	451950.
3	PAUL REVERE	998999.	0.	1186311.	1057270.	737840.
4	TEMPTATIONS	477788.	3480.	721902.	810320.	297420.
5	ROLLING STONES	183860.	0.	200574.	866470.	668740.
6	SERGIO MENDES	648160.	0.	925962.	0.	273290.
7	MAMAS AND PAPAS	1301864.	0.	16492423.	1264150.	1131190.
8	FOUR TOPS	902051.	81707.	1180605.	884530.	353650.
9	SONNY AND CHER	172015.	24894.	198909.	93260.	102210.
10	SUPREMES	715266.	8864.	855292.	1119450.	617100.
11	SONNY AND CHER	650135.	43328.	901501.	507220.	171670.
12	LOU RAWLS	1195769.	0.	5534922.	316030.	111330.
13	ROGER MILLER	947616.	0.	1302972.	0.	19170.
14	ASSOCIATION	1203732.	187950.	5481682.	2498320.	619130.
15	ASSOCIATION	825215.	0.	975254.	1019840.	450890.
16	ROLLING STONES	665107.	108688.	902760.	921190.	1293330.
17	KINKS	237964.	0.	261760.	239320.	324000.
18	JOHNNY CASH	674698.	40305.	910003.	19360.	42750.
		14101071.	577993.	17959272.	12170470.	9908550.
		705054.	28900.	897764.	608524.	495427.

TABLE 5



ALLOCATION OF MONIES FROM BROADCASTIN) SALES

	FROM BROADCAST PERFORMANCES TO COMPOSERS SIDE I	TO COMPOSERS FLIP	TO COMPOSERS TOTAL	FROM BROADCAST PERFORMANCES TO PUBLISHERS SIDE I	TO PUBLISHERS FLIP	TO PUBLISHERS TOTAL	FROM RECORD SALES TO COMPOSERS	TO ARTISTS	TO PUBLISHERS	TO RECORD COS.	SALES/BC RATIO
1	5343.	32.	5375.	7617.	45.	7662.	6553.	14426.	6553.	64302.	1.98
2	13277.	52.	13330.	18927.	75.	19003.	10380.	22849.	10380.	101847.	1.26
3	61935.	174.	62109.	61935.	248.	62183.	11771.	25912.	11771.	115499.	0.87
4	29309.	1580.	30890.	29309.	1580.	30890.	7852.	17285.	7852.	77047.	1.18
5	9365.	51.	9417.	13351.	73.	13424.	11671.	25693.	11671.	114520.	2.01
6	6168.	45.	6213.	8793.	65.	8858.	6925.	15245.	6925.	67951.	1.81
7	5157.	106.	5263.	7351.	151.	7503.	9053.	19929.	9053.	88828.	2.79
8	46921.	923.	47845.	46921.	1317.	48238.	8829.	19437.	8829.	86636.	2.47
9	4591.	180.	4772.	6545.	257.	6803.	5767.	12695.	5767.	56586.	1.96
10	5523.	12.	5535.	7874.	17.	7891.	12286.	27055.	12286.	120547.	3.60
11	7467.	239.	7706.	10644.	341.	10986.	9194.	20239.	9194.	90212.	1.96
12	3974.	12.	3986.	5665.	17.	5682.	3005.	6615.	3005.	29488.	1.22
13	5407.	22.	5429.	7708.	32.	7740.	10074.	22177.	10074.	98869.	3.01
14	3687.	1961.	5648.	5256.	2796.	8052.	3924.	8640.	3924.	38510.	1.13
15	3218.	34.	3253.	4588.	49.	4638.	3889.	8561.	3889.	38160.	1.94
16	7454.	271.	7726.	10627.	387.	11015.	8896.	19583.	8896.	87287.	1.87
17	4975.	3.	4978.	7093.	4.	7097.	6254.	13768.	6254.	61370.	2.04
18	7862.	0.	7862.	11208.	0.	11208.	7133.	15702.	7133.	69991.	1.47
19	3439.	9.	3448.	4902.	14.	4917.	3008.	6621.	3008.	29518.	1.42
20	3491.	7.	3499.	4978.	10.	4988.	4353.	9583.	4353.	42714.	2.02
21	2736.	273.	3009.	3901.	389.	4290.	5535.	12184.	5535.	54308.	2.99
22	2566.	29.	2594.	3627.	41.	3669.	3132.	6894.	3132.	30730.	1.98
23	4698.	166.	4865.	6698.	237.	6935.	3839.	8451.	3839.	37672.	1.28
24	2941.	11.	2953.	4193.	16.	4210.	2074.	4567.	2074.	20359.	1.14
25	15722.	505.	16227.	22414.	719.	23134.	2148.	4728.	2148.	21078.	0.21
26	4093.	41.	4135.	5836.	59.	5895.	1461.	3216.	1461.	14336.	0.97
27	2160.	62.	2223.	3080.	89.	3169.	1675.	3687.	1675.	16436.	1.22
28	4439.	29.	4469.	6328.	42.	6371.	3436.	7566.	3436.	33714.	1.25
29	4554.	6.	4560.	6492.	8.	6501.	6569.	14461.	6569.	64457.	2.34
30	3575.	37.	3613.	5097.	53.	5151.	4223.	9297.	4223.	41442.	1.90
31	1920.	180.	2100.	2738.	256.	2994.	2456.	5407.	2456.	24103.	1.90
32	2147.	34.	2181.	3061.	48.	3110.	817.	1799.	817.	8020.	0.61
33	2982.	2.	2985.	4252.	4.	4256.	3584.	7847.	3584.	34978.	1.94
34	4220.	29.	4249.	6017.	41.	6058.	2675.	12600.	5726.	56165.	2.19
35	2398.	68.	2426.	3362.	97.	3459.	2459.	5414.	2459.	24133.	1.65
36	2977.	0.	2977.	4244.	0.	4244.	3627.	7984.	3627.	35587.	1.98
37	2469.	400.	2870.	3520.	570.	4091.	1753.	3860.	1753.	17208.	0.99
38	5486.	21.	5508.	7821.	31.	7852.	3128.	6886.	3128.	30692.	0.92
39	1861.	66.	1927.	2653.	94.	2747.	3445.	7585.	3445.	33810.	2.90
40	3881.	10.	3892.	5533.	15.	5548.	3565.	7851.	3565.	34979.	1.49
41	7371.	44.	7461.	10574.	62.	10637.	10092.	22221.	4586.	44983.	1.00
42	3496.	143.	3639.	4984.	204.	5188.	3651.	8038.	3651.	35828.	1.63
43	5132.	4918.	10050.	7316.	4918.	12235.	2164.	4763.	2164.	21232.	0.51
44	2840.	2639.	5479.	4049.	3762.	7812.	3322.	7314.	3322.	32601.	0.98
45	3084.	33.	3117.	4397.	47.	4444.	1609.	3543.	1609.	15794.	0.84
46	1775.	302.	2076.	2531.	431.	2963.	2299.	5061.	2299.	22562.	1.80
47	2172.	65.	2237.	3097.	92.	3190.	1440.	3171.	1440.	14133.	1.04
48	3574.	78.	3653.	5095.	112.	5208.	1529.	3365.	1529.	15002.	0.68
49	2930.	73.	3004.	4178.	105.	4283.	1373.	3023.	1373.	13478.	0.74
50	3152.	0.	3152.	4493.	0.	4493.	2573.	5665.	2573.	25250.	1.33
51	2527.	150.	2677.	3602.	213.	3816.	862.	1898.	862.	8463.	0.52
52	4762.	2.	4765.	6789.	3.	6793.	896.	1973.	896.	8797.	0.31
53	1187.	5.	1193.	1692.	8.	1700.	1481.	3260.	1481.	14532.	2.02
54	179.	0.	179.	255.	0.	256.	2915.	6419.	2915.	28597.	26.92
55	1257.	11.	1269.	1793.	16.	1809.	547.	1205.	547.	5374.	0.70

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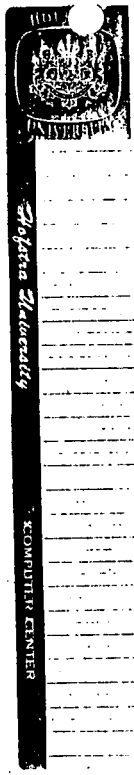
TABLE 6

ALLOCATION OF MONIES FROM BROADCASTING AND SAL...

	FROM BROADCAST PERFORMANCES TO COMPOSERS	FROM BROADCAST PERFORMANCES TO PUBLISHERS	FROM SINGLES SALES, TO COMPOSERS	FROM SINGLES SALES, TO ARTISTS	FROM SINGLES SALES, TO PUBLISHERS	FROM SINGLES SALES, TO RECORD COS.	FROM ALBUM SALES, TO COMPOSERS	FROM ALBUM SALES, TO ARTISTS	FROM ALBUM SALES, TO PUBLISHERS	FROM ALBUM SALES, TO RECORD COS.
1	12652.	18037.	0.	0.	0.	0.	209942.	470652.	209942.	1382642.
2	57896.	82536.	13422.	27301.	13422.	121686.	41428.	75927.	41428.	272842.
3	29657.	42280.	17621.	35841.	17621.	159753.	116824.	138345.	116824.	445436.
4	18047.	25728.	13505.	27469.	13505.	122439.	24784.	49966.	24784.	179552.
5	5014.	7148.	14107.	28695.	14107.	127901.	66673.	112012.	66673.	402510.
6	23148.	33000.	0.	0.	0.	0.	22774.	45912.	22774.	164985.
7	42310.	60317.	21079.	42875.	21079.	191103.	113118.	190039.	113118.	682899.
8	29515.	42076.	14742.	29985.	14742.	133652.	35344.	59379.	35344.	213377.
9	4972.	7089.	1554.	3161.	1554.	14091.	5962.	17171.	5962.	61709.
10	21394.	30500.	18657.	37949.	18657.	169148.	61709.	103672.	61709.	372543.
11	22537.	32129.	8453.	17194.	8453.	76640.	17166.	28840.	17166.	103637.
12	35873.	51140.	527.	1072.	527.	4779.	11132.	18703.	11132.	67209.
13	32574.	46437.	0.	0.	0.	0.	1757.	3220.	1757.	11572.
14	37042.	52807.	41638.	84693.	41638.	377496.	56753.	104013.	56753.	373760.
15	24381.	34758.	16997.	36572.	16997.	154097.	45088.	75749.	45088.	272202.
16	22549.	32174.	15353.	31228.	15353.	139191.	186799.	240504.	186799.	751805.
17	6544.	9329.	3921.	7977.	3921.	35556.	27233.	34902.	27233.	197289.
18	22750.	32432.	1259.	2561.	1259.	11417.	3918.	7181.	3918.	25808.
	448881.	639925.	202841.	412578.	202841.	1838058.	1048416.	1796197.	1048416.	5981785.
	22444.	31996.	10142.	20629.	10142.	91948.	52421.	89810.	52421.	299089.

TABLE 7



ALL PARTIES BASIS, SEPARATE IDENTITIES

	COMPOSERS	ARTISTS	PUBLISHERS	RECORD COMPANIES	
1	11928.	14426.	14216.	64302.	104873.
2	23710.	22849.	29383.	101847.	177791.
3	73880.	25912.	73954.	115499.	289247.
4	38742.	17285.	38742.	77047.	171819.
5	21089.	25693.	25097.	114520.	186399.
6	13139.	15295.	15784.	67951.	112119.
7	14316.	19929.	16557.	88828.	139631.
8	56675.	19437.	57068.	86636.	219817.
9	10539.	12695.	12570.	56586.	92392.
10	17822.	27045.	20178.	120547.	185593.
11	16900.	20239.	20180.	90212.	147534.
12	6991.	6615.	8688.	29488.	51784.
13	15504.	22177.	17815.	98849.	154346.
14	9373.	8640.	11977.	38510.	68702.
15	7142.	8561.	8527.	38160.	62391.
16	16622.	19583.	19911.	87287.	143405.
17	11233.	13768.	13352.	61370.	99725.
18	14995.	15702.	18342.	69991.	119032.
19	6457.	6621.	7925.	29514.	50518.
20	7852.	9583.	9341.	42714.	69492.
21	8544.	12184.	9825.	54308.	84863.
22	5706.	6894.	6801.	30730.	50133.
23	8704.	8451.	10775.	37672.	65604.
24	5028.	4567.	6285.	20359.	36240.
25	10376.	4728.	25282.	21076.	69464.
26	5396.	3216.	7356.	14338.	30505.
27	3898.	3687.	4845.	16430.	28868.
28	7905.	7564.	9807.	33714.	58991.
29	11129.	15461.	13070.	64457.	103119.
30	7837.	9297.	9374.	41442.	67951.
31	4557.	5407.	5451.	24103.	39520.
32	2959.	1799.	3927.	8020.	16746.
33	4550.	7857.	7821.	34978.	57195.
34	9974.	12600.	11782.	56169.	90523.
35	4886.	5414.	5919.	24133.	40353.
36	6604.	7984.	7871.	35587.	58046.
37	4624.	3869.	5845.	17208.	31539.
38	8636.	6886.	10980.	30692.	57195.
39	5373.	7585.	6193.	33810.	52962.
40	7457.	7847.	9113.	34979.	59398.
41	12046.	10092.	15222.	44983.	82344.
42	7281.	8038.	8840.	35828.	59988.
43	12214.	4763.	14399.	21232.	52610.
44	8802.	7314.	11134.	32601.	59852.
45	4727.	3543.	6054.	15796.	30120.
46	4378.	5061.	5262.	22562.	37264.
47	3678.	3171.	4630.	14133.	25614.
48	5182.	3365.	6737.	15002.	30287.
49	4378.	3023.	5656.	13478.	26537.
50	5725.	5065.	7067.	25250.	43708.
51	3539.	1098.	4679.	8463.	18580.
52	5661.	1973.	7689.	8797.	24122.
53	2674.	3260.	3181.	14532.	23649.
54	3094.	6415.	3170.	28597.	41278.
55	1817.	1205.	2351.	5374.	10746.
56	12815.	29117.	13800.	103038.	152771.
57	1436.	816.	1890.	3639.	7783.
58	2287.	2204.	2814.	9827.	17154.

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122	2573.	1827.	3315.	8144.		15859.
123	782.	23.	1110.	104.		2020.
124	589.	897.	667.	4001.		6156.
125	910.	334.	1232.	1489.		3966.
126	261.	87.	356.	391.		1097.
127	1883.	164.	2653.	734.		5435.
128	290.	125.	390.	557.		1364.
129	123.	83.	159.	370.		736.
130	358.	107.	490.	477.		1432.
131	107.	53.	142.	238.		542.
132	757.	69.	1065.	309.		2202.
133	211.	40.	293.	181.		727.
134	121.	60.	162.	268.		613.
135	662.	172.	910.	767.		2512.
136	392.	94.	541.	421.		1451.
137	7263.	2804.	9812.	12502.		32383.
138	508.	280.	671.	1249.		2709.
139	89.	73.	113.	327.		604.
	869010.	649598.	1015863.	2895409.		
	6252.	4673.	7308.	20830.		
		-139000.			RECORDING SESSIONS	
		-324000.		-810000.	UNSUCCESSFUL RECORDS	
	869010.	186598.	1015863.	2085409.	ADJUSTED TOTALS	

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TABLE 8

Western Kentucky University COMPUTER CENTER

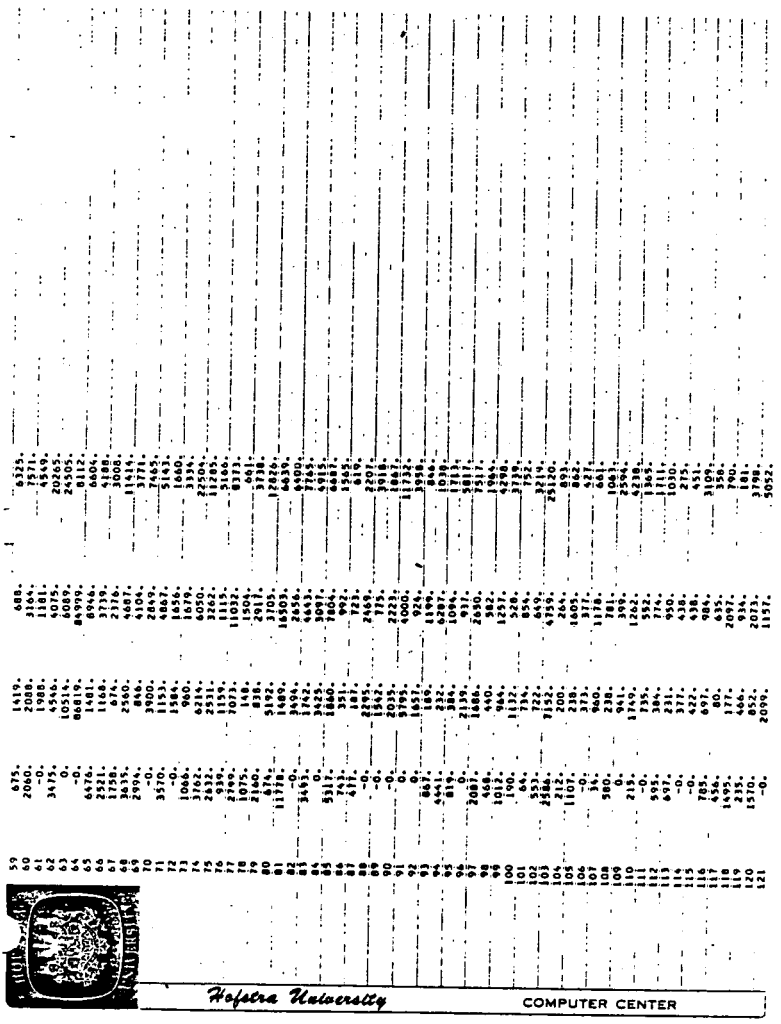
SEPARATE IDENTITIES

		COMPOSERS	ARTISTS	PUBLISHERS	RECORD COS.
1	BEATLES	222594.	470652.	227979.	1382642.
2	FIFTH DIMENSION	112747.	103228.	137387.	394529.
3	PAUL REVERE	164103.	174186.	176725.	605187.
4	TEMPTATIONS	56337.	17436.	64018.	301991.
5	ROLLING STONES	85796.	140707.	87910.	530412.
6	SERGIO MENDES	45922.	45912.	59774.	164985.
7	MAMAS AND PAPAS	176508.	232914.	194516.	874003.
8	FOUR TOPS	79602.	89365.	92163.	347030.
9	SONNY AND CHER	12489.	20332.	14605.	75795.
10	SUPREMES	101762.	141622.	110867.	542692.
11	SONNY AND CHER	48188.	46035.	57750.	180278.
12	LOU RAWLS	47533.	19775.	62800.	71989.
13	ROGER MILLER	34331.	3220.	48195.	11572.
14	ASSOCIATION	135434.	188706.	151199.	751264.
15	ASSOCIATION	86467.	110322.	96844.	426300.
16	ROLLING STONES	224721.	271732.	236326.	890997.
17	KINKS	37699.	62879.	40484.	232846.
18	JOHNNY CASH	27928.	9743.	37610.	37225.
		1700139.	2208775.	1891183.	7820743.
		85007.	130439.	96550.	391037.
	RECORDING SESSIONS		-50000.		
	UNSUCCESSFUL RECORDS		-117900.		-705000.
	ADJUSTED TOTALS	1700139.	2041275.	1891183.	7115743.

TABLE 9

ACCRUAL OF COMPOSING FUNCTION TO AR

	COMPOSERS	ARTISTS	PUBLISHERS	RECORD COMPANIES
1	-0.	26355.	14216.	64302.
2	-0.	46560.	29383.	101847.
3	-0.	99791.	73954.	115499.
4	38742.	17285.	38742.	77047.
5	15201.	31580.	25097.	114520.
6	13139.	15245.	15784.	67951.
7	4833.	29612.	16557.	88828.
8	56675.	19437.	57068.	86636.
9	10539.	12695.	12570.	56586.
10	11666.	33200.	20178.	120547.
11	-0.	37140.	20180.	90212.
12	6991.	6615.	8688.	29488.
13	15504.	22177.	17815.	98849.
14	3923.	14289.	11977.	38510.
15	5163.	10540.	8527.	38160.
16	11903.	24303.	19911.	87287.
17	0.	25002.	13352.	61370.
18	14995.	15702.	18342.	69991.
19	6457.	6621.	7925.	29514.
20	7852.	9583.	9341.	42716.
21	8544.	12184.	9825.	54308.
22	0.	12600.	6801.	30730.
23	0.	17156.	10775.	37672.
24	0.	9595.	6285.	20359.
25	-0.	23104.	25282.	21076.
26	5596.	3216.	7356.	14336.
27	3898.	3687.	4845.	16636.
28	7905.	7564.	9807.	33714.
29	11129.	14461.	13070.	64457.
30	0.	17134.	9374.	41442.
31	4957.	5407.	5451.	26103.
32	2556.	2242.	3927.	8020.
33	6550.	7847.	7821.	36976.
34	0.	22575.	11782.	58165.
35	0.	10300.	5919.	24133.
36	6604.	7984.	7871.	35587.
37	-0.	8484.	5845.	17208.
38	8636.	6886.	10980.	30692.
39	5373.	7585.	6193.	33810.
40	0.	15305.	9113.	34979.
41	-0.	22138.	15222.	64983.
42	-0.	15329.	8840.	35828.
43	12214.	4763.	14399.	21232.
44	8802.	7314.	11134.	32601.
45	3889.	4381.	6054.	15794.
46	-0.	9439.	5262.	22562.
47	3678.	3171.	4630.	14133.
48	-0.	8548.	6737.	15002.
49	4378.	3023.	5656.	13478.
50	5725.	5665.	7067.	25250.
51	3539.	1898.	4679.	8463.
52	5661.	1973.	7689.	8797.
53	2674.	3260.	3101.	14532.
54	1636.	7873.	3170.	28597.
55	1817.	1205.	2357.	5374.
56	0.	35932.	13800.	103038.
57	1251.	1002.	1890.	3639.
58	2287.	2204.	2834.	9827.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122	2573.	1827.	3315.		8144.	
123	771.	28.	1110.		104.	
124	589.	897.	667.		4001.	
125	-0.	1244.	1232.		1459.	
126	237.	112.	356.		391.	
127	193.	1854.	2653.		734.	
128	-0.	415.	590.		1567.	
129	121.	424.	150.		370.	
130	358.	107.	490.		477.	
131	107.	53.	142.		238.	
132	-0.	826.	1065.		309.	
133	-0.	252.	293.		181.	
134	103.	78.	162.		268.	
135	442.	72.	710.		211.	
136	392.	464.	2613.		1421.	
137	7263.	2804.	9012.		12502.	
138	64.	720.	671.		1249.	
139	18.	144.	113.		321.	
	4509319.	1067669.	1015863.	2895409.		
	3244.	7681.	7308.	20830.		
		-139000.			RECORDING SESSIONS	
		-324000.			810000. UNSUCCESSFUL RECORDS	
	4509319.	6044669.	1015863.	2082529.	ADJUSTED TOTALS	

TABLE 10

ACCRUAL OF COMPOSING FUNCTION TO ARTISTS

		COMPOSERS	ARTISTS	PUBLISHERS	RECORD COS.
1	BEATLES	0.	693247.	227979.	1382642.
2	FIFTH DIMENSION	112747.	103220.	137387.	394529.
3	PAUL REVERE	73700.	264589.	176725.	605187.
4	TEMPTATIONS	56337.	77436.	66018.	301991.
5	ROLLING STONES	5974.	220529.	87930.	530412.
6	SERGIO MENDES	45922.	45912.	55774.	164985.
7	MAMAS AND PAPAS	62825.	346598.	194516.	874003.
8	FOUR TOPS	79602.	89365.	92163.	347030.
9	SONNY AND CHER	0.	32822.	14605.	75795.
10	SUPREMES	101762.	141622.	110867.	541692.
11	SONNY AND CHER	20647.	73946.	57750.	180278.
12	LOU RAWLS	46583.	20725.	62800.	71989.
13	ROGER MILLER	23746.	13805.	48195.	11572.
14	ASSOCIATION	81429.	242715.	151199.	751264.
15	ASSOCIATION	37441.	139348.	96844.	426300.
16	ROLLING STONES	102353.	394100.	234326.	890997.
17	KINKS	626.	99952.	40484.	232846.
18	JOHNNY CASH	18244.	19427.	37610.	37225.
		869940.	3038974.	1891183.	7820743.
		43497.	151949.	94559.	391037.
	RECORDING SESSIONS		-50000.		
	UNSUCCESSFUL RECORDS		-117500.		-705000.
	ADJUSTED TOTALS	869940.	2871474.	1891183.	7119743.

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TABLE 11

ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2) COMPOSERS, (3) RECORD COMPANIES

	COMPOSERS	ARTISTS	PUBLISHERS	RECORD COMPANIES
1	-0.	26355.	-0.	78518.
2	-0.	75963.	-0.	101847.
3	-0.	173748.	-0.	115499.
4	38742.	17285.	38742.	77047.
5	15201.	31580.	19187.	120429.
6	13139.	15245.	15784.	67951.
7	4633.	29612.	0.	105385.
8	56675.	19437.	-0.	143704.
9	10539.	12695.	0.	69157.
10	11666.	33200.	20178.	120547.
11	-0.	57321.	-0.	90212.
12	6991.	6615.	8680.	29488.
13	20573.	22177.	12745.	98849.
14	3923.	26267.	-0.	38510.
15	5163.	10540.	8527.	38160.
16	11903.	24303.	19911.	87287.
17	0.	25002.	13352.	61370.
18	14995.	15702.	18342.	69991.
19	6457.	4621.	-0.	37439.
20	7852.	10925.	0.	42714.
21	8544.	12184.	0.	64134.
22	0.	12600.	0.	37932.
23	0.	17156.	10775.	37672.
24	0.	9395.	-0.	26644.
25	-0.	40387.	-0.	21076.
26	6386.	3216.	6566.	14336.
27	3898.	3687.	-0.	21281.
28	7905.	7564.	8046.	35475.
29	11129.	14661.	9777.	67751.
30	0.	17134.	9376.	41442.
31	4557.	5407.	0.	29555.
32	3013.	2242.	3470.	8020.
33	14371.	7847.	-0.	34976.
34	0.	22575.	0.	67948.
35	0.	10300.	5919.	24133.
36	6604.	7984.	7871.	35587.
37	-0.	14330.	-0.	17208.
38	8636.	6886.	9385.	32288.
39	5373.	7585.	-0.	40003.
40	0.	15305.	9113.	34979.
41	-0.	37360.	-0.	55983.
42	-0.	24189.	-0.	35028.
43	12214.	6763.	14399.	21232.
44	14513.	7314.	5423.	32601.
45	3889.	5234.	5202.	15794.
46	-0.	14702.	-0.	22562.
47	7496.	3171.	812.	14133.
48	-0.	9424.	5860.	15002.
49	6378.	3023.	-0.	19135.
50	11506.	5665.	1286.	25250.
51	3539.	1898.	-0.	13142.
52	5661.	1973.	7689.	8797.
53	2674.	3260.	3181.	14532.
54	1636.	7873.	0.	31768.
55	2107.	1205.	2067.	5374.
56	0.	42001.	0.	110767.
57	1251.	1002.	1890.	3639.
58	2287.	2204.	2414.	9827.

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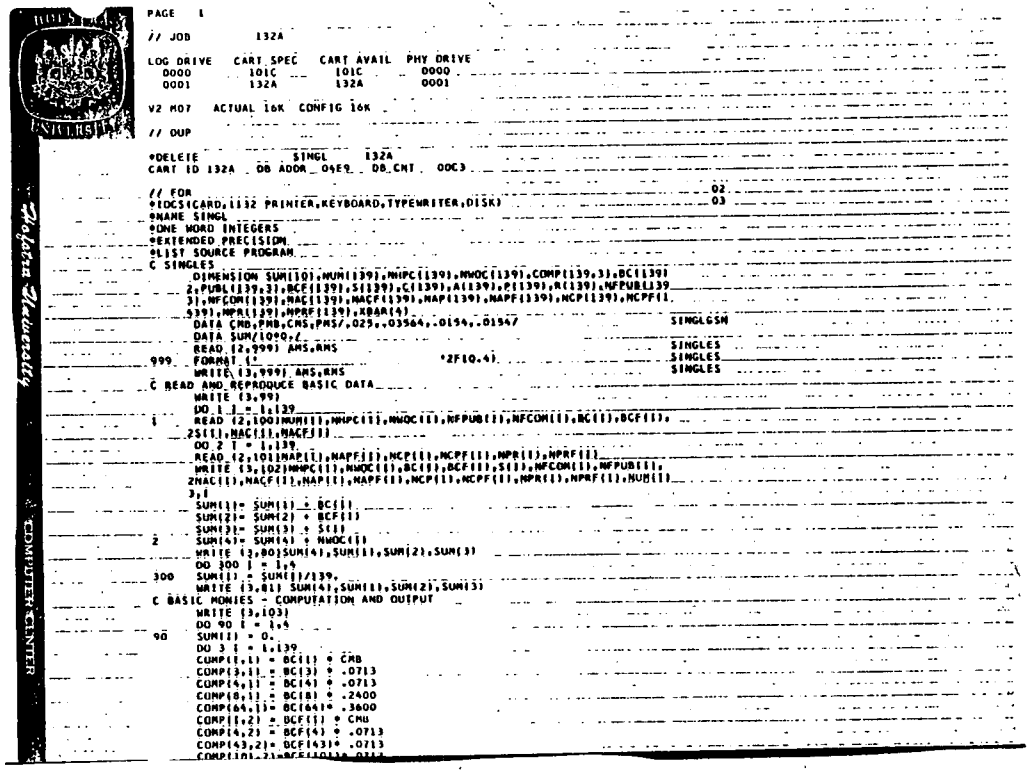
122	3016.	1827.	0.	11016.		
123	7115.	23.	1110.	104.		
124	589.	657.	667.	4001.		
125	1232.	1244.	-0.	1489.		
126	237.	112.	356.	391.		
127	193.	4248.	259.	734.		
128	-0.	415.	590.	557.		
129	282.	83.	-0.	370.		
130	868.	107.	-0.	417.		
131	1607.	125.	142.	2238.		
132	-0.	1869.	23.	309.		
133	-0.	252.	293.	181.		
134	103.	78.	162.	268.		
135	662.	172.	39.	1638.		
136	934.	94.	-0.	421.		
137	7263.	2804.	9612.	12502.		
138	646.	1391.	-0.	1247.		
139	131.	144.	-0.	327.		
	5087 10.	1324147.	397033.	3199990.		
	3660.	9526.	2856.	23022.		
		1390000.			RECORDING SESSIONS	
		324000.		810000.	UNSUCCESSFUL RECORDS	
	5087 10.	861147.	397033.	2389990.	ADJUSTED TOTALS	

TABLE 12

ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2) COMPOSERS, (3) RECORD COMPANIES

		COMPOSERS	ARTISTS	PUBLISHERS	RECORD COS.
1	BEATLES	0.	921227.	0.	1382642.
2	FIFTH DIMENSION	112747.	103220.	53469.	478447.
3	PAUL REVERE	122525.	283529.	81811.	632336.
4	TEMPTATIONS	56337.	77436.	20117.	345893.
5	ROLLING STONES	5974.	302308.	6151.	530412.
6	SERGIO MENDES	59482.	45912.	42215.	164985.
7	MAMAS AND PAPAS	74296.	346598.	46409.	1010637.
8	FOUR TOPS	79602.	89365.	28148.	411045.
9	SONNY AND CHER	0.	47427.	0.	75795.
10	SUPREMES	101762.	148636.	27117.	618427.
11	SONNY AND CHER	20647.	105514.	25781.	180278.
12	LOU RAWLS	86525.	23333.	19291.	72948.
13	ROGER MILLER	23746.	13805.	48195.	11572.
14	ASSOCIATION	86594.	242715.	110144.	707150.
15	ASSOCIATION	37441.	159348.	96844.	426300.
16	ROLLING STONES	123630.	473634.	133515.	890997.
17	KINKS	626.	99952.	40484.	232646.
18	JOHNNY CASH	24368.	23435.	27978.	37225.
		1016308.	3507411.	807178.	8289942.
		50815.	175371.	40359.	414497.
	RECORDING SESSIONS		-90000.		
	UNSUCCESSFUL RECORDS		-117500.		-705000.
	ADJUSTED TOTALS	1016308.	3339911.	807178.	7585942.



```
PAGE   1
// JOB          132A
LOG DRIVE   CART SPEC   CART AVAIL  PHY DRIVE
  0000         101C        101C        0000
  0001         132A        132A        0001
V2 M07   ACTUAL 16K  CONFIG 16K
// DUP
*DELETE              SINGL      132A
CART ID 132A  DB ADDR  04E9  DB CNT  00C3
// FOR                                                              02
*IOCS(CARD,1132 PRINTER,KEYBOARD,TYPEWRITER,DISK)                   03
*NAME SINGL
*ONE WORD INTEGERS
*EXTENDED PRECISION
*LIST SOURCE PROGRAM
C SINGLES
      DIMENSION SUM(10),NUM(139),MHPC(139),MWOC(139),COMP(139,3),BC(139)
     2,PUBL(139,3),BCF(139),S(139),C(139),A(139),P(139),R(139),NFPUB(139
     3),NFCOM(139),MAC(139),MACF(139),MAP(139),MAPF(139),NCP(139),NCPF(1
     439),MPR(139),MPRF(139),XBAR(4)
      DATA CMB,PMB,CMS,PMS/.029,.03564,.0154,.01547                 SINGLGSM
      DATA SUM/1090*0/
      READ (2,999) AMS,RMS                                          SINGLES
999   FORMAT (I*                          *2F10.4)                  SINGLES
      WRITE (3,999) AMS,RMS                                         SINGLES
C READ AND REPRODUCE BASIC DATA
      WRITE (3,99)
      DO 1 I = 1,139
1     READ (2,100)NUM(I),MHPC(I),MWOC(I),NFPUB(I),NFCOM(I),BC(I),BCF(I),
     2S(I),MAC(I),MACF(I)
      DO 2 I = 1,139
      READ (2,101)MAP(I),MAPF(I),NCP(I),NCPF(I),MPR(I),MPRF(I)
      WRITE (3,102)MHPC(I),MWOC(I),BC(I),BCF(I),S(I),NFCOM(I),NFPUB(I),
     2MAC(I),MACF(I),MAP(I),MAPF(I),NCP(I),NCPF(I),MPR(I),MPRF(I),NUM(I)
     3,I
      SUM(1)= SUM(1) + BC(I)
      SUM(2)= SUM(2) + BCF(I)
      SUM(3)= SUM(3) + S(I)
2     SUM(4)= SUM(4) + MWOC(I)
      WRITE (3,80)SUM(4),SUM(1),SUM(2),SUM(3)
      DO 300 I = 1,4
300   SUM(I) = SUM(I)/139.
      WRITE (3,81) SUM(4),SUM(1),SUM(2),SUM(3)
C BASIC MONIES - COMPUTATION AND OUTPUT
      WRITE (3,103)
      DO 90 I = 1,4
90    SUM(I) = 0.
      DO 3 I = 1,139
      COMP(I,1) = BC(I) * CMB
      COMP(3,1) = BC(3) * .0713
      COMP(4,1) = BC(4) * .0713
      COMP(8,1) = BC(8) * .2400
      COMP(64,1)= BC(64)* .3600
      COMP(I,2) = BCF(I) * CMS
      COMP(4,2) = BCF(4) * .0713
      COMP(43,2)= BCF(43)* .0713
      COMP(101,2)=BCF(101)* .0713
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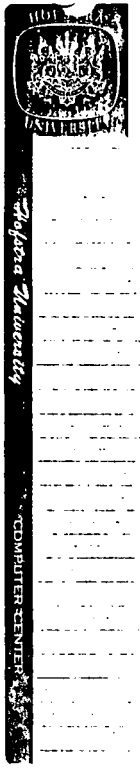
```
PAGE    3
            WRITE (3,109)
            WRITE (3,106)
            DO 10 I = 1,139
            C(I) = COMP(I,1) + COMP(I,2) + COMP(I,3)
            P(I) = PUBL(I,1) + PUBL(I,2) + PUBL(I,3)
            A(I) = SUM(I) + C(I)
            SUM(3) = SUM(3) + P(I)
            T(I) = C(I) + A(I) + P(I) + R(I)
            WRITE (3,107) I,C(I),A(I),P(I),R(I),T(I)                    SINGL
 10         WRITE (3,108) ISUM(K),K=1,4)
            DO 87 I = 1,4
            XBART(I) = SUM(I)/139. +0.5
      87    WRITE (3,109) XBAR                                          SINGL
            AA = SUM(2) = 463000.                                       SINGL
            RA = SUM(4) = 810000.                                       SINGL
            WRITE (3,2000) SUM(1),AA,SUM(3),RA
        C ACCRUAL OF COMPOSING FUNCTION TO ARTISTS
            WRITE (3,2001)
            WRITE (3,106)
            DO 15 I = 1,139
            IF (MAC(I)) 12,12,11
      11    C(I) = C(I) - COMP(I,1) - COMP(I,2)/2.
            A(I) = A(I) + COMP(I,1) + COMP(I,2)/2.
            SUM(1) = SUM(1) + COMP(I,1) + COMP(I,2)/2.
            SUM(2) = SUM(2) + COMP(I,1) + COMP(I,2)/2.
            GO TO 13
      12    IF (MAC(I)) 13,13,14
      13    C(I) = C(I) - COMP(I,2) - COMP(I,3)/2.
            SUM(1)=SUM(1)-COMP(I,2) - COMP(I,3)/2.
            A(I) = A(I) + COMP(I,2) + COMP(I,3)/2.
            SUM(2) = SUM(2) + COMP(I,2) + COMP(I,3)/2.
      14    WRITE(3,107)I,C(I),A(I),P(I), R(I)
            WRITE (3,108) (SUM(K),K = 1,4)
            DO 88 I = 1,4
            XBART(I) = SUM(I)/139. + 0.5                                SINGL
            WRITE (3,109) XBAR                                          SINGL
            AA = SUM(2) = 593000.                                       SINGL
            RA = SUM(4) = 810000.                                       SINGL
            WRITE (3,2000)SUM(1),AA,SUM(3),RA  ARTISTS, (2) COMPOSERS, (3) RECORD COS.
        C ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2) COMPOSERS, (3) RECORD COS.
            WRITE (3,110)
            WRITE (3,106)
            DO 15 I = 1,4
            SUM(I) = 0.
            DO 72 I = 1,139
            IF (MAP(I)) 17,17,16
      16    P(I) = P(I) - PUBL(I,1) - PUBL(I,2)/2.
            A(I) = A(I) + PUBL(I,1) + PUBL(I,2)/2.
            CALL SLITE(I)
      17    IF (MAP(I)-19)19,19,18
      18    P(I) = P(I) - PUBL(I,2) - PUBL(I,3)/2.
            A(I) = A(I) + PUBL(I,2) + PUBL(I,3)/2.
            CALL SLITE(2)
      19    CALL SLITE(I,K)
            GO TO (222,20),K
      222   CALL SLITE(I)
            GO TO 21
      20    IF (I-2)22,22,21
      21    P(I) = P(I) - PUBL(I,1) - PUBL(I,3)/2.
            C(I) = C(I) + PUBL(I,1) + PUBL(I,3)/2.
            CALL SLITE(I)
      22    CALL SLITE(I,K)
```

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PAGE    4

        GO TO (255,23),K
255     CALL SLITE(2)
        GO TO 25
23      IF (NCPF(I)) 25,25,24
24      P(I) = P(I) - PUBL(I,2) - PUBL(I,3)/2.
        C(I) = C(I) + PUBL(I,2) + PUBL(I,3)/2.
        CALL SLITE(2)
25      CALL SLITET(I,K)
        GO TO(28,26),K
26      IF (NPRF(I)) 28,28,27
27      P(I) = P(I) - PUBL(I,1) - PUBL(I,3)/2.
        R(I) = R(I) + PUBL(I,1) + PUBL(I,3)/2.
28      CALL SLITET(2,K)
        GO TO (31,29),K
29      IF (NPRF(I))31,31,30
30      P(I) = P(I) - PUBL(I,2) - PUBL(I,3)/2.
        R(I) = R(I) + PUBL(I,2) + PUBL(I,3)/2.
31      SUM(1) = SUM(1) + C(I)
        SUM(2) = SUM(2) + A(I)
        SUM(3) = SUM(3) + P(I)
        SUM(4) = SUM(4) + R(I)
32      WRITE(3,107)I,C(I), A(I),P(I), R(I)
        WRITE (3,108) (SUM(K),K = 1,4)
        DO 99 I = 1,4
89      XBAR(I) = SUM(I)/139. + 0.5
        WRITE (3,104) XBAR
        AA = SUM(2) - 463000.                                          SINGL
        RA = SUM(4) - 810000.                                          SINGL
        WRITE (3,2000)SUM(1),AA,SUM(3),RA                              SINGL
99      FORMAT ('1HIGHEST  WEEKS  BROADCAST PERFORMANCES'16X' FLIP SIDE SA
       2ME----  ---------JOINT IDENTITIES----------'/'  CHART   ON
       3 ----------'16X'----------'                    ARTIST    ARTIST
       4  COMPOSER   PUBLISHER'/' POSITION CHART  FIRST SIDE / FLIP SIDE
       5RECORD SALES  COMPOSER PUBLISHER  COMPOSER PUBLISHER  PUBLISHER  R
       6ECORD CO.'/' ')
100     FORMAT (515,3F10.0,215)
101     FORMAT (6I13)
102     FORMAT (' '14,18,2F13.0,F12.0,I8,I10,I9,I3,I6,I3,2(I8,I3),I5,I6)
80      FORMAT ('0'F12.0,2F13.0,F12.0)
81      FORMAT ('0'F12.2,2F13.0,F12.0)
103     FORMAT ('1'10X'ALLOCATION OF MONIES FROM BROADCASTING AND SALES'/'
       20'/'0'5X'---------FROM BROADCAST PERFORMANCES----------'/' '5X'---
       3-TO COMPOSERS-----     TO PUBLISHERS----  ------------------FROM
       4RECORD SALES---------------'8X'SALES/BC'/' '5X'SIDE 1  FLIP   T
       5OTAL    SIDE 1  FLIP    TOTAL    TO COMPOSERS  TO ARTISTS  TO PUBL
       6ISHERS  TO RECORD COS.   RATIO'/' ')
104     FORMAT (' '14,3F8.0,F9.0,2FA.0,F12.0,2F13.0,F16.0,F12.2)
105     FORMAT ('0'3X,3F8.0,F9.0,2F8.0,F12.0,2F13.0,F16.0)
1050    FORMAT ('1'10X'CONTRACTING PARTIES BASIS')
106     FORMAT ('0'/' '8X'COMPOSERS    ARTISTS     PUBLISHERS    RECORD CO
       2MPANIES'/' ')
107     FORMAT (' '13,F13.0,F12.0,F13.0,F18.0,F60.0)                   SINGL
108     FORMAT ('0'3X,F13.0,F12.0,F13.0,F18.0)
109     FORMAT ('1'10X'ALL PARTIES BASIS, SEPARATE IDENTITIES')
110     FORMAT ('1'10X'ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2)
       2COMPOSERS, (3) RECORD COMPANIES')
200     FORMAT ('1'10X'ACCRUAL OF COMPOSING FUNCTION TO ARTISTS')
2000    FORMAT('0'20X'-139000.'35X'RECORDING SESSIONS'/'0'20X'-324000.'23XSINGL
       2'-810000.'4X'UNSUCCESSFUL RECORDS'/'0'3X,F13.0,F12.0,F13.0,F18.0,4SINGL
       3X'ADJUSTED TOTALS')                                            SINGL
        CALL EXIT
```


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PAGE   1

// JOB          132A

LOG DRIVE   CART SPEC   CART AVAIL   PHY DRIVE
  0000        101C        101C         0000
  0001        132A        132A         0001

V2 M07   ACTUAL 16K  CONFIG 16K

// DUP

*DELETE              ALBUM     132A
D 26 NAME NOT FOUND IN LET/FLET


// FOR                                                                  02
*IOCS(CARD,1132 PRINTER,KEYBOARD,TYPEWRITER,DISK)                       03
*ONE WORD INTEGERS
*LIST SOURCE PROGRAM
*EXTENDED PRECISION
*NAME ALBUM
C ALBUMS
      DIMENSION S(10),XBAR(4),ALBS(19),SINGS(19),APRCE(19),NSONG(19),MAS
     2(19,19),NAP(19,19),NCP(19,19),NPR(19,19),NSAC(19,19),NSAP(19,19),N
     3SCP(19,19),NSPR(19,19),BC(19,19),SALES(19,19),BCS(19,19),C(19),A(1
     49),P(19),A(19),SUM(19,3),TITLE(19,3),ADJ(19),ASUM(5),COMP(19,3),PU
     5BL(19,3),ART(19,2),REC(19,2)
      DATA SUM,ASUM/62*0./,BNA/'N.A.'/,S/10*0./                         ALBUMS.N
      DATA CMB,PMB,CMS,PMS/.025,.03564,.00833333,.00833333/             ALBUMS
      READ (2,999) AMS,RMS,AMAS,RMAS                                    ALBUMS
999   FORMAT (F                    ,4F10.4)                             ALBUMS
      WRITE (3,999) AMS,RMS,AMAS,RMAS                                   ALBUMS
      WRITE (3,1010)
C READ AND REPRODUCE BASIC DATA
      DO 7 I = 1,10
      MISS = 0
      READ (2,100)ALBS(I),SINGS(I),APRCE(I),NSONG(I),(TITLE(I,J),J=1,3),
     2NPLUS
      WRITE(3,101)I,(TITLE(I,J),J=1,3), ALBS(I), SINGS(I), NPLUS
      K = NSONG(I)
      DO 6 J =1,K
      READ (2,102)NSIG,NAC(I,J),NAP(I,J),NCP(I,J),NPR(I,J),BC1,BC2,SALES
     2(I,J),NSIG1,NSAC(I,J),NSAP(I,J),NSCP(I,J),NSPR(I,J),BC3,BC4
      BC(I,J) = BC1 + BC2
      BCS(I,J) = BC3 + BC4
      T = BC(I,J) + BCS(I,J)
      SUM(I,1) = SUM(I,1) + BC(I,J)
      SUM(I,2) = SUM(I,2) + BCS(I,J)
      SUM(I,3) = SUM(I,3) + T
      IF (NSIG)1,1,2
1     WRITE (3,103) J, BC(I,J), BCS(I,J)
      GO TO 6
2     GO TO (3,4,3),NSIG
3     WRITE (3,104) J, BNA, BCS(I,J)
      MISS = MISS + 1
      GO TO 6
4     IF (NSIG1)1,1,5
5     WRITE (3,105) J, BC(I,J), BNA
      MISS = MISS + 1
6     WRITE (3,106)T,SALES(I,J),NAC(I,J),NSAC(I,J),NAP(I,J),NSAP(I,J),NC
     2P(I,J),NSCP(I,J),NPR(I,J),NSPR(I,J),J
      TSONG =  NSING(I) + NPLUS
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PAGE   3
14    WRITE (3,116) (,(TITLE(I,J),J =1,3),C(I),A(I),P(I),I=1,4)
      WRITE (3,117)(ASUM(I),I=1,4)
      DO 15 I = 1,4
15    XBAR(I) = ASUM(I)/20. + .5
      WRITE (3,117) XBAR
      AA = ASUM(2) - 167500.                                        ALBUM
      RA = ASUM(4) - 705000.                                        ALBUM
      WRITE (3,2000) ASUM(1),AA,ASUM(3),RA                          ALBUM
      ASUM(1) =0.
      ASUM(2) =0.
C ACCRUAL OF COMPOSING FUNCTION TO ARTISTS
      WRITE (3,118)
      WRITE (3,115)
      DO 20 I = 1,10
      K = NSONG(I)
      DO 19 J = 1,K
      IF (NAC(I,J))17,17,16
16    C(I)= C(I) - BC(I,J)*CMB - CMS*ALBS(I) - CMS*SALES(I,J)
      A(I)= A(I) + BC(I,J)*CMB + CMS*ALBS(I) + CMS*SALES(I,J)
17    IF (NSAC(I,J))19,19,18
18    C(I) = C(I) - BCS(I,J)*CMB - CMS*SALES(I,J)
      A(I) = A(I) + BCS(I,J)*CMB + CMS*SALES(I,J)
19    CONTINUE
      ASUM(1) = ASUM(1) + C(I)
      ASUM(2) = ASUM(2) + A(I)
20    WRITE (3,116) J, (TITLE(I,J),J=1,3),C(I),A(I),P(I),I=1,10
      WRITE (3,117)(ASUM(I),I =1,4)
      DO 21 I = 1,4
21    XBAR(I) = ASUM(I)/20. + .5
      WRITE (3,117)XBAR
      AA = ASUM(2) - 167500.                                        ALBUM
      RA = ASUM(4) - 705000.                                        ALBUM
      WRITE (3,2000) ASUM(1),AA,ASUM(3),RA                          ALBUM
C ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2) COMPOSERS, (3) RECORD COS.
      WRITE (3,119)
      WRITE (3,115)
      DO 22 I = 1,4
22    ASUM(I) = 0.
      DO 23 I = 1,10
      M = NSONG(I)
      DO 310 J = 1,M
      IF (NAP(I,J))170,170,160
160   P(I) = P(I) - BC(I,J) * PMB - ALBS(I) * PMS - SALES(I,J) * PMS
      A(I) = A(I) + BC(I,J) * PMB + ALBS(I) * PMS + SALES(I,J) * PMS
      CALL SLITE(1)
170   IF (NSAP(I,J))190,190,180
180   P(I) = P(I) - BCS(I,J) * PMB - SALES(I,J) * PMS
      A(I) = A(I) + BCS(I,J) * PMB + SALES(I,J) * PMS
      CALL SLITE(2)
190   CALL SLITET(I,K)
      GO TO (2220,200),K
2220  CALL SLITE(1)
      GO TO 220
200   IF (NCP(I,J))220,220,210
210   P(I) = P(I) - BC(I,J) * PMB - ALBS(I) * PMS - SALES(I,J) * PMS
      C(I) = C(I) + BC(I,J) * PMB + ALBS(I) * PMS + SALES(I,J) * PMS
      CALL SLITE(1)
220   CALL SLITET(2,K)
      GO TO (2550,230),K
2550  CALL SLITE(2)
      GO TO 250
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PAGE    4

230     IF (NSCP(I,J))250,250,240
240     P(I) = P(I) - BCS(I,J) * PMB - SALES(I,J) * PMS
        C(I) = C(I) + BCS(I,J) * PMB + SALES(I,J) * PMS
        CALL SLITE(2)
250     CALL SLITET(I,K)
        GO TO (280,260),K
260     IF (NPR(I,J)) 280,280,270
270     P(I) = P(I) - BC(I,J) * PMB - ALBS(I) * PMS - SALES(I,J) * PMS
        A(I) = A(I) + BC(I,J) * PMB + ALBS(I) * PMS + SALES(I,J) * PMS
280     CALL SLITET(2,K)
        GO TO (310, 290),K
290     IF (NSPR(I,J))310,310,300
300     P(I) = P(I) - BCS(I,J) * PMB - SALES(I,J) * PMS
        A(I) = A(I) + BCS(I,J) * PMB + SALES(I,J) * PMS
310     CONTINUE
        ASUM(1) = ASUM(1) + C(I)
        ASUM(2) = ASUM(2) + A(I)
        ASUM(3) = ASUM(3) + P(I)
        ASUM(4) = ASUM(4) + R(I)
23      WRITE (3,116) I, (TITLE(I,J),J=1,3),C(I),A(I),P(I),R(I)
        WRITE (3,117) (ASUM(I),I=1,4)
        DO 24 I = 1,4
24      XBAR(I) = ASUM(I)/26. + .5
        WRITE (3,117) XBAR
        AA = ASUM(2) - 167500.                                          ALBUM
        RA = ASUM(4) - 705000.                                          ALBUM
        WRITE (3,2000) ASUM(1),AA,ASUM(3),RA                            ALBUM
100     FORMAT (5X,2F10.0,F5.2,15,9X,3A5,I5)
1010    FORMAT ('1')
101     FORMAT (3X,'ALBUM'I3,5X'PERF. ARTISTS'7X'ALBUM SALES'7X'SINGLES SA
       2LES'/'0'15X,3A5,F14.0,F20.0,5X'('I2,' EXTRA SIDES)'/'0'65X'-------ALB101-2
       3----JOINT IDENTITIES----------'/6X'-------BROADCAST PERFORMANCES
       4-------'25X'ARTIST   ARTIST    COMPOSER    PUBLISHER'/6X'ALBUM SONG
       5S    SINGLE FLIPS   TOTAL     SINGLES SALES    COMPOSER PUBLISH
       6ER  PUBLISHER  RECORD CO.'/' ')
102     FORMAT (5I1,3F10.0,5I1,2F10.0)
103     FORMAT (I4,F11.0,F15.0)
104     FORMAT (I4,6X,A4,F16.0)
105     FORMAT (I4,F11.0,10X,A4)
106     FORMAT ('0'20X,2F14.0,9X,2I3,I6,I3,2(I10,I3),I8)
107     FORMAT ('0'F14.0,F15.0,F13.0,F14.0/'0'   ADJUSTMENT FOR M.A.'F9.0)
108     FORMAT ('0'F42.0/'0'/'0'/'0')
109     FORMAT ('1'   ALBUM SUMMARY'/'0'/' '20X'-------BROADCAST PERFORMAN
       2CES----------'/' '20X'ALBUM SONGS    SINGLE FLIPS  ADJ. TOTAL  SIN
       3GLES SALES   ALBUM SALES'/' ')
110     FORMAT (' '12,2X,3A5,F10.0,F15.0,F13.0,F14.0,F15.0)
111     FORMAT ('0'F29.0,F15.0,F13.0,F14.0,F15.0)
950     FORMAT ('1'   ALLOCATION OF MONIES FROM BROADCASTING AND SALES'/'0'
       2/'0   FROM BROADCAST PERFORMANCES  ---------FROM SINGLES SALES, TO
       3----------  ----------FROM ALBUM SALES, TO----------'/'     TO ALB  950
       4COMPOSERS  TO PUBLISHERS  COMPOSERS  ARTISTS  PUBLISHERS  RECORD CALB  950
       5OS.  COMPOSERS  ARTISTS  PUBLISHERS  RECORD COS.'/' ')          ALB  950
112     FORMAT (I3,F11.0,F14.0,1X,2(F12.0,2F10.0,F13.0))
113     FORMAT ('0'F13.0,F14.0,1X,2(F12.0,2F10.0,F13.0))
114     FORMAT ('1'   SEPARATE IDENTITIES')
115     FORMAT ('0'/'0'23X'COMPOSERS'7X'ARTISTS'7X'PUBLISHERS'4X'RECORD CO
       2S.'/' ')
116     FORMAT (' '12,3X,3A5,F11.0,3F15.0)
117     FORMAT ('0'16X,4F15.0)
118     FORMAT ('1'  ACCRUAL OF COMPOSING FUNCTION TO ARTISTS')
119     FORMAT ('1'   ACCRUAL OF PUBLISHING FUNCTION TO (1) ARTISTS, (2) CO
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ARNOLD & PORTER,
Washington, D.C., July 27, 1977.

HARRIET OLER, Esq.
General Counsel's Office, Library of Congress, Copyright Office, Washington, D.C.

DEAR HARRIET: After submitting RIAA's Performance Rights Statement to you, we did some fly-specking of the legal memorandum attached to the Statement as Appendix B. As a result, we have made some minor editorial changes in that document.

I am enclosing two copies of the revised Performance Rights Statements in its entirety. I would greatly appreciate it if you would substitute one of these copies for the document originally submitted to the Copyright Office and filed in Docket S 77-6. The other copy is for you.

Thanks very much for your attention to this matter.

Sincerely yours,

CARY H. SHERMAN.

Enclosure.

STATEMENT OF RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This Statement is submited by the Recording Industry Association of America, Inc. (RIAA), a trade association of recording companies whose members create and market approximately 90 percent of the records and tapes sold in the United States. Much of the technical information contained in this Statement, identified by footnotes, is based on an objective analysis prepared by the Cambridge Research Institute, an independent management consulting and economic research firm.

SUMMARY

The Register of Copyrights is to prepare a report for the Congress on whether a performance right in sound recordings should be enacted. A "performance right" is the exclusive right of a copyright owner to authorize the public performance of his creative work.

RIAA strongly urges the creation of a performance right in sound recordings.

Fundamental Principles of Copyright and Equity Demand That a Performance Right in Sound Recordings Be Granted

It is a fundamental principle of copyright that one who uses another's product for commercial gain should compensate the creator of that work. That principle has been applied to every copyrighted product that is capable of being performed except one—the sound recording.

1. *Sound Recordings Account for Three-Fourths of Radio Programming.*—The basic staple of radio programming is recorded music. Indeed, 75 percent of commercially available time is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of stations' advertising revenues—or about $1.29 billion annually. Yet broadcasters—who must pay for all their other types of programing—pay no copyright royalties to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

2. *Recordings Have Replaced "Live" Performances.*—Broadcasters used to pay for "live" performers, but these artists have actually been replaced by their own recordings. It is inequitable for these recorded performances to be broadcast for profit without any payment being made to the performers.

3. *Performers and Record Companies Engage in Creative Activity When They Produce Sound Recordings.*—They use their artistic skills, talents, instruments, and engineering to produce and record a unique and creative arrangement and performance of a musical composition.

4. *Composers and Publishers Receive Performance Royalties.*—Under existing law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance, and whose creative contribution is at least equal to, if not greater than, that of the composer, are paid nothing.

5. *Broadcaster Programming Also Earns Performance Royalties from Cable T.V.*—The very same argument that broadcasters used to urge that cable tele-

vision companies pay royalties on their secondary transmissions of broadcaster telecasts can be used in support of a performance right for sound recordings. If CATV should pay for the use of copyrighted programming created by others, so broadcasting should pay for the use of copyrighted recordings created by others.

6. *The Enactment of a Performance Right Would Create a Variety of Benefits.*—Performance royalty income will provide a much-needed boost to the income of musicians and vocalists, especially those who do not presently share in the royalties generated by record sales. For record companies, the infusion of capital can mean the production of more recordings, a delay in price increases, the augmenting of A&R programs, and so on. More important, the existence of a performance right is likely to affect the way in which investment decisions are made. The promise of performance income from the airplay of recordings with an uncertain sales outlook can only serve to encourage further the production of such recordings. Thus, a performance right will create fresh incentives for a broader and more natural distribution of recording opportunities.

A performance right will also protect the recording industry against technological advances. Home taping has already reduced sales. We are not far away from in-home, push-button recall from vast banks of recorded musical repertoire. Technical forecasters anticipate the day when a cable T.V. subscriber need merely press a few buttons to hear a particular album or selection. Such technological capability could deal a serious blow to record-buying.

7. *Record Companies Will Donate a Portion of Their Performance Royalty Income to the Advancement of Musical Culture.*—The Board of Directors of RIAA has pledged that five percent of their respective companies' performance royalty income would be channeled to the National Endowment for the Arts.

8. *Expropriation of Sound Recordings Bestows an Unfair Competitive Advantage.*—Ironically, the very broadcasting and background music firms that profit off the labor and talent of others without compensating them are bestowed an unfair advantage over their competitors, as they are able to charge rates relatively cheaper than those of their competitors which must pay for all of their programming material.

9. *The Creation of a Performance Right Would Bring the United States into Accord with Prevailing International Practices.*—A performance right in sound is already recognized as a matter of law in 51 nations and as a matter of practice in an additional four countries. Payments are currently denied to U.S. recording artists and companies because our country offers no reciprocal right. The enactment of a performance right in this country would improve the balance of international payments and enable domestic record companies and performers to be compensated for the exploitation of their creativity abroad.

The Arguments Advanced in Opposition to a Performance Right in Sound Recordings Are Specious

1. *A Performance Right Is Constitutional.*—There can be no "constitutional" doubt that the production of a sound recording is a creative activity entitled to copyright protection. Copyright protection has never been limited to the "Writings" of "Authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "Writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

Accordingly, the courts have expressly upheld the constitutionality of legislation according copyright protection to sound recordings.[1] Congress, too, has concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution."[2] Attached as Appendix B is a comprehensive legal memorandum addressing this issue. It puts to rest, once and for all, the superficial argument that a performance right in sound recordings would be unconstitutional.

2. *Payments to Recording Companies and Artists Would Not Be Duplicative.*—Broadcasters are not being asked to pay twice for an identical commodity, as

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[1] *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972); *Capitol Records, Inc.* v. *Mercury Records Corporation*, 221 F.2d 656 (2d Cir. 1955); cf. *Goldstein* v. *California*, 412 U.S. 546 (1973).

[2] S. Rep. No. 92–72, 92d Cong., 1st Sess. 4–5 (1971); S. Rep. No. 93–983, 93d Cong., 2d Sess. 139–40 (1974).

some would suggest. The payments broadcasters currently make through ASCAP, BMI and SESAC are to music composers and publishers alone, as compensation for the use of musical compositions. A performance right in sound recordings relates to a completely separate and distinct creation of value—a copyrightable recorded musical performance, a performance that makes the original musical composition come to life in a form usable for broadcasting and public performance.

3. Royalties from Record Sales Do Not Sustain All Performers.—The argument that performers do not need the income that a performance royalty would bring them erroneously equates the thousands of vocalists and musicians working in recording studios with a handful of superstars. Most background musicians and vocalists—working in one of the lowest paid and highly unemployed professions in the country—do not share in the artists' royalties from sales of a record. The benefits of a performance royalty, however, will be shared by all performers involved in the production of a sound recording.

As for the superstars: The percentage of performers who are successful for even a brief period is far smaller than is generally believed by the public. This poor record is not surprising, given the fact that the large majority of recordings do not even recover their costs, let alone make a profit. Performance fees from broadcasting would supplement the income of at least some of these artists who produce records that do not even reach the break-even point in sales. Such royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Although it is true that performance fees would, to some extent, increase the income of those few artists who are presently collecting sizeable artists' royalties from the sales of their recordings, the royalties earned on such superstars' records will result in income to the back-up vocalists and musicians who never before shared in the benefits of a successful recording. Moreover, the recording careers of even successful performers tend to be pitifully short.

4. Performers' and Record Companies' Earnings Are Fundamentally Irrelevant to the Fairness of a Performance Royalty.—In any event, the star vocalist or musician earning a large income is performing a commercially valuable service to broadcasters—bringing in station audiences, selling commercial time, and building station values. Similarly, the fact that recording companies profit from the sales of recordings should not be used as a pretext for denying them a performance right. Other copyright owners routinely earn income from multiple sources. There is no just reason why record producing companies should not also earn additional legitimate income from the use of their recordings by others to sell broadcasting time, aspirin or automobiles.

5. Radio Airplay Is Irrelevant to the Fairness of a Performance Royalty.—There is no question that airplay helps sell some sound recordings. But the fact is irrelevant to the grant of a performance right. The principle underlying the performance right in copyright law is that the creator is entitled to compensation for the commercial use of his creative product. That principle is not conditioned on who benefits from what. While economic factors can be fairly considered in setting the royalty rate for sound recordings, they should have no bearing on the right itself.

In any event, the broadcasters' airplay argument is specious:

Composers and publishers, who benefit from the airplay of sound recordings in the form of increased sales, have long received performance royalties from broadcasters.

Radio stations play sound recordings not to do recording companies and performers a favor, but because it is in their own interest to do so.

The benefits of airplay are overrated. Fifty-three percent of the sound recordings played consist of "oldies" which generate only minor sales for recording companies. But old recordings as well as new ones lure radio audiences and enable stations to make sales through advertisers. Moreover, many stations often start playing records only after they have become significant sellers in their own right. In addition, a typical Top-30 radio station rarely adds more than five or six new songs each week to its airplay, but almost 1,000 tunes are released each week.

Airplay can actually hurt record sales due to overexposure. Moreover, it is increasingly common today for disc jockeys to encourage off-the-air recording, thus further hurting record sales.

If radio airplay itself guaranteed record sales, it would not be necessary for record companies to spend an annual total of about $100 million on radio and T.V. advertising.

6. A Performance Right Will Not Encourage Payola.—Payola is already a crime. To withhold a performance right in order not to encourage payola would be overkill. Moreover, it would hardly be fair to penalize the entire recording industry because of the excesses of a few broadcasters and record company promotion personnel. Certainly, there has never been any suggestion that the existence of a performance right for composers and publishers is a dangerous incentive to payola that should be eliminated. Finally, broadcasters have the capability—indeed the obligation—to curb payola in their own houses.

A Performance Right Would Have No Adverse Impact on Users and Consumers

Although the ability to pay is strictly relevant only to the royalty rate, not the granting of the right, it is nevertheless clear that a performance royalty would have a minimal impact on the principal users of sound recordings and on consumers.

1. Broadcasters Can afford a Performance Royalty.—The radio and television industries are growing and prosperous. Radio stations are now worth more than ever. They offer advertisers unique qualities, an enormous audience, and extremely low rates. As a result, radio has garnered a growing share of all advertising revenues. This means that if radio chose not to pass the cost of a performance royalty on to advertisers, stations would easily be able to absorb the small additional cost required to compensate the creators of the bulk of radio's programming material.

2. Broadcasting Companies Will Be Able to Pass Forward the Costs of a Performance Royalty.—Because of its distinct advantages to advertisers, radio has in the past been able to pass on cost increases in the form of higher advertising rates without losing advertisers to different media. In fact, the competition that radio faces is from other radio stations, more so than other advertising media. Since a performance royalty for sound recordings would affect all radio stations of a similar size equally, it would not substantially affect interstation competition. What will be effected is a slight increase in the cost of radio as a medium relative to all other meda. But the distinct advantages that radio offers advertisers will more than outweigh the modest cost of a performance royalty, thus assuring that radio will retain its competitive advantage unimpaired. It follows that radio would certainly be able to pass along to advertisers the cost of the royalty proposed in H.R. 6063. Indeed, it would be equitable for the stations to pass along such costs, because radio advertisers benefit directly from the audiences that sound recordings attract.

3. The Impact of a Performance Royalty on Consumers Would Be Minimal.—Even if a new performance fee were passed forward fully, the impact on consumer product costs would scarcely be perceptible either to advertisers or to consumers.

4. A Performance Royalty Would Not Affect Composers and Publishing Companies.—Indeed, the new royalties could reduce collection costs to the composer/publisher, if their collection system were utilized for sound recordings.

5. The Bard and Kurlantzick Assessment of the Impact of a Performance Right Is Based on Erroneous Assumptions of Fact.—The analysis referred to by opponents of a performance right is faulty. It totally ignores the realities of the marketplace and presents not a shred of supoprting data. Bard and Kurlantzick have developed a theoretical model as the basis for their predictive analysis. Because virtually all of the assumptions underlying that model are erroneous, the conclusions they draw are unfounded.

Procedures for Implementing a Performance Right in Sound Recordings Can Be Developed

1. Administrative Functions.—One available alternative for implementing a performance right is for ASCAP, BMI or SESAC to perform the administrative functions required, just as they now administer, collect and distribute royalties for music copyright owners under equitable systems. Other alternatives include the creation of an independent agency or the use of an existing commercial enterprise.

The information for distribution of the royalty proceeds is readily available under existing practices. The techniques for making distributions are based on well-established statistical sampling methods.

2. Compulsory Licensing.—We recommend a compulsory licensing to assure broad availability of sound recordings for all who wish to use them.

3. Rate-Setting.—We suggest that rates be set by voluntary negotiations between the parties. If no agreement is reached, we suggest that the Copyright Royalty Tribunal establish the rate based on an in-depth anaylsis of economic and equitable factors.

4. H.R. 6063.—Although RIAA strongly endorses the performance right principle contained in H.R. 6063, it does not necessarily endorse all of the components of that bill. Thus, RIAA does not see any justification at this time for relieving jukebox operators and cable T.V. systems of the obligation to compensate the creators of sound recordings. Similarly, RIAA is not wedded to the royalty rate structure proposed in that bill, which royalties have been based on political compromises. As that bill presently stands, the royalties would be an incredible bargain for all users, radio and T.V. broadcasters in particular.

INTRODUCTION

Section 114(d) of the Copyright Revision Act, Public Law No. 94–553, directs the Register of Copyrights to submit to the Congress by January 3, 1978, a report setting forth recommendations as to whether Section 114 should be amended to provide a performance right for performers and copyright owners of copyrighted sound recordings. A "performance right" refers to the exclusive right of a copyright owner to authorize the public performance of his creative work.

There are two fundamental reasons why sound recordings do not now have a performance right.

First, when the copyright law was enacted in 1909, the popularity of sound recordings was hardly even a dream. Hence, the sound recording was not listed as a copyrightable work and granted a performance right—as was the case with books, articles, musical compositions and other creative works. Now, as a result of revision, copyright law has largely caught up with technology, and the sound recording has received copyright protection—albeit without a performance right.

Second, the broadcasting industry, the principal user of sound recordings for commercial purposes, is adamantly opposed to paying for its use of sound recordings. Because of this powerful opposition, the argument was made, over the years, that if a performance right for recordings were included in the copyright revision bill, it would "kill" copyright revision.

Copyright revision is now largely accomplished. A performance right can stand on its own. Copyright revision can be completed, by granting a performance right to all performable copyrighted products, including sound recordings.

The Recording Industry Association of America, Inc., on behalf of its member companies, large and small,[3] devoted to the enactment of legislation creating a performance copyright, strongly urges the Copyright Office to recommend that Congress create a performance right in sound recordings.

I. FUNDAMENTAL PRINCIPLES OF COPYRIGHT REQUIRE THAT A PERFORMANCE RIGHT IN SOUND RECORDINGS BE GRANTED

It is a fundamental principle of copyright that one who uses another's product for commercial gain should compensate the creator of that work. That principle has been applied to every copyrighted product that is capable of being performed except one—the sound recording.

It isn't as though the creative and aesthetic attributes of sound recordings have not been recognized. The Congress has already agreed that sound recordings possess those special qualities that make them eligible for copyright protection.[4] Likewise, under the Copyright Revision Act, owners of copyrighted sound recordings are protected against the duplication. distribution, and creation of derivative works of copyrighted products without the consent of the copyright owner.[5] But the complementary right that has accompanied the grant of copyright status to every other performable product—the right of performance—has been denied to sound recordings.

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[3] A list of RIAA's member companies is attached as Appendix A.
[4] See Public Law 92–140. The Sound Recording Copyright Act of 1971.
[5] Section 114 of Public Law 94–553.

That this basic element of copyright protection has been withheld from sound recordings for so long is remarkable. It flies in the face of not only basic principles of fairness, but also the most elemental concepts underlying the entire body of copyright law.

Composers and Publishers Have a Performance Right

There exists no justification for denying record companies, musicians and vocalists a performance right. Composers and publishers have had such a right since 1909. In 1975, the publishers' performing rights societies collected nearly $100 million in royalties from broadcasters for the performance of musical compositions,[6] the vast majority of which were performed on sound recordings.[7] Yet the performers and record companies who brought those musical compositions to life collected not one cent for those same performances. Surely, even the most vigorous opponents of performance rights must concede that the contribution of the performers and the record company to the creation of a sound recording is at least equal to, or greater than, the contribution of the composer.

As one vocal opponent of the legislation conceded:

"There are many factors in the total popularity of a record, and the song itself is many times of minor importance. The most important factors vary in predominance from record to record and any one of them may be of prime importance on a particular recording. These are: the artist (singer, instrumentalist, or group) * * *; the song or tune, but never in its original state; the arranger who embellishes the composition, or orchestrates the work and decides how the total musical sounds will be arrived at * * *; the engineers who control acoustics and make electronic alterations in the sounds * * *; and the very important area of exposure and promotion to the public."[8]

The Performer's Creative Contribution.—Certainly, the performer's interpretation of a tune is no less a contribution to the recorded product than is the composer's original lyrics and score. Consider, for example, how the performer's rendition of the tune "Hello Dolly" gave rise to a different recorded product when it was sung by Carol Channing, by Louis Armstrong, or by Pearl Bailey. And in virtually every recorded rendition, skillful musicians and support vocalists intricately weave their artistry around the star performer, fortifying, enriching, complementing, underscoring, accenting—making the performance even more definitive.

Indeed, it is often the artists' performance as much as—or more than—the composers' tune that makes the recording attractive to both record buyers and radio audiences. The artist as much as the tune have made hits of Barbra Streisand's "People", Frank Sinatra's "My Way", and the like. There must be a hundred versions of "White Christmas", but it is Bing Crosby's special rendition which is continuously popular at Christmas each year. Listeners are eager to hear albums by Andy Williams or the Boston Pops Orchestra, but may be less concerned with any particular song or its composer. In some cases a song which enjoyed little success in one recording becomes a hit when a new recording is made with a different artist or arrangement.[9] Yet, ironically, the performer who makes a composer's tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself.

The significance of the performer is not restricted to popular music, either. The performer makes an important creative contribution to every type of recording. The highly talented jazz musician's original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As the Director of the Boston Symphony Orchestra stated,

"Improvisation is one of the earmarks of the performer in music * * *. You're engaged in a creative act whenever you interpret a score. If the per-

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[6] Comment Letter No. 8. Copyright Office Dkt. No. S 77-6, from American Broadcasting Companies, Inc. (May 31, 1977), p. 2.

[7] Moreover, the Copyright Revision Act of 1976 now requires jukebox operators to pay royalties to composers and publishers for the commercial use of the musical composition underlying the sound recording.

[8] Hearings on H.R. 4357 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 560 (1965) (Statement of William Cannon, owner of Cannon Coin Machine Co.).

[9] *See* "Publishers, Labels Find Success With 'Underexposed' Copyrights," Record World, January 25, 1975, p. 4.

former and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third? [10]

The Record Company's Creative Contribution.—Like the performer, the record company, too, makes a unique and creative contribution to the production of a sound recording. The role of the recording company begins when it sifts, identifies and selects the talent components ultimately consolidated into a finished copyrightable recording. The range of creative actions performed under the umbrella of the record company is wide indeed—selecting the recording artists; determining or influencing the musical presentation or character of the key artist; finding or assisting the producer who will best be able to highlight the artist's unique talents; molding the artist's pre-recording musical preparation; sifting and identifying potential songs to be recorded; hiring or working with the appropriate musical arranger attuned to the uniqueness of the song and the artist; picking or assisting in the selection of support musicians and/or background singers who, in combination, will most enhance the recorded product; providing or assisting in the selection of recording studios properly equipped for the sound effects required; providing or assisting engineers and technical talent for multi-track recording, editing, mastering, overdubbing, and performing the complete range of highly sophisticated electronic procedures and discretions that for multitrack recording, editing, mastering, everdubbing, and performing the mark today's inventive recording techniques; [11] developing the album cover graphics and writings that have become an integral artistic component of the recordings; [12] assuring the proper technical quality control and manufacturing processes to assure the maintenance and integrity of the original recorded creative input.

Thus, the record company is a participant in the creative process. One record company head, Jerry Moss of A&M Records, recently described the role that he, his partner Herb Alpert, and their company fulfill in the creation of sound recordings:

"From the beginning of our company up through today, Herb and I spent most of our time and energies seeking, recording and developing high quality recordings. Our label built its reputation on the quality of its music, its art, if you will; the marketing of the records was always easy as long as the music was valid. In fact, A & M has always sold its records on its reputation for consistently producing good music. We were never marketing or advertising specialists. We never invested enormous amounts of dollars into the merchandising of our material, because we always depended on the quality of our art to grow naturally within the marketplace. Even today, every record which has an A & M label has been carefully studied, on the creative end, by either Herb or myself.

"Herb is still a very active and successful artist on the label, as well as discovering and producing many important artists for A & M Records * * *. I find myself constantly seeking new artists, signing music groups, finding producers for certain artists, changing producers, deciding upon the sequence of tunes, etc. This is our most important work. Once the music is there, then the record will sell itself." [13]

In light of the foregoing, it is difficult to understand the justification that can be offered to withhold from performers and record companies the same performance right that is granted to composers and publishers.

Broadcaster Programming, Too, Has a Performance Right

Likewise indistinguishable from a performance right in sound recordings is the performance right that Congress granted just last year to television pro-

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[10] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 821 (1967) (Statement of Erich Leinsdorf, then Music Director of the Boston Symphony Orchestra).

[11] An article in The Wall Street Journal of February 12, 1974 (page 1) describes "How Record Producers Use Electronic Gear to Create Big Sellers:"

"Each instrument has its own microphone leading to its own track on the big console's recording tape * * *. (The producers) will cut, slice and dub tracks from the best of the musicians' performances to eliminate flubs by one or two of them, and they'll pick tapes from (the singer's) performances for her best lead vocal. For her harmony parts, they can manipulate the tapes to make her sound like a duo, a trio, a quartet—or even if necssary, a 16-voice choir. They also will add violin flourishes, called 'sweeteners'. Finally they will blend and distill all this into two stereo record tracks."

[12] See The Wall Street Journal, "What Sells Records In These Zany Times Is Good Graphics" (June 15, 1977), p. 1.

[13] Comment Letter No. 124, Copyright Office Dkt. No. S 77–6, from Jerry Moss, Chairman, A&M Records (June 15, 1977).

gramming. Indeed, the very same argument that broadcasters used to urge that cable television companies pay royalties on their secondary transmissions of broadcaster telecasts can be used in support of a performance right for sound recordings. Just as broadcasting companies sought compensation from CATV for the commercial exploitation of their product without their consent, so performers and recording companies are seeking performance fees from radio and television broadcasting companies. If CATV should pay for the use of copyrighted programming created by others, so broadcasting should pay for the use of copyrighted recordings created by others. If CATV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

In hearings before the Kastenmeier Subcommittee of the House Judiciary Committee in 1975, a broadcasting industry spokesman used these words in his testimony:

"[I]t is unreasonable and unfair to let [the cable] industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America." [14]

If the word "cable" were changed to "broadcasting," this quotation could serve just as well to describe the broadcasters' use of copyrighted sound recordings. On the basis of such reasoning, the Senate Judiciary Committee in 1974 stated its belief that "just as cable systems will now be required to pay for the use of copyrighted program material, so should broadcasters be required to make copyright payments under the performance royalty." [15]

A Performance Right Is Constitutional

Faced with copyright principles that leave no room for discriminatory treatment of sound recordings, the opponents of a performance right have retreated to the superficial claim that the grant of such a right would be unconstitutional. They have claimed that record companies and performers are not "authors," and that sound recordings are not "writings." [16] They have claimed that the grant of a performance right is not necessary "to promote the useful arts and sciences," and that such a grant would therefore be beyond the power of Congress.[17]

These claims, and a variety of additional novel arguments disguised as constitutional claims, are specious. Copyright protection has never been limited to the "writings" of "authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

Moreover, Congress has recognized that sound recordings may be granted copyright protection under the Constitution. In the Sound Recording Copyright Act of 1971, where Congress conferred limited copyright protection upon sound recordings, the Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution." [18] The Committee rejected the constitutional objection once again in 1974.[19]

Finally, any remaining doubts concerning the constitutionality of copyright protection for sound recordings have been removed by the courts. In *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972), plaintiff sought to enjoin the enforcement of the criminal provisions of the new Sound Recording Copyright Act of 1971 on constitutional grounds. The court rejected the plaintiff's claims. As a result of "[t]echnical advances, unknown and unanticipated in the time of our founding fathers," the court concluded that "[t]he copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form." 345 F. Supp. at 590. The Court expressly held that "sound recording firms provide the equipment and organize the diverse

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[14] Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 769 (1975).
[15] S. Rep. No. 93–983, 93d Cong., 2d Sess. 14 (1974).
[16] See, e.g., Comment Letter No. 8, Copyright Office Docket No. S 77–6, from American Broadcasting Companies, Inc., p. 5 (May 31, 1977).
[17] See, e.g., Comment Letter No. 7, Copyright Office Docket No. S 77–6, from National Association of Broadcasters, p. 3 (May 31, 1977).
[18] S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5 (1971).
[19] S. Rep. No. 93–983, 93d Cong., 2d Sess., pp. 139–40 (1974).

talents of arrangers, performers and technicians. These activities satisfy the requirements of authorship found in the copyright clause * * * ." Id.

The Supreme Court, too, has indicated that it regards a copyright in sound recordings as constitutionally permissible. In *Goldstein* v. *California*, 412 U.S. 546 (1973), the Court rejected a constitutional attack on a California state piracy statute. The Court specifically noted the historical breadth of the "writings" and "author" standards, 412 U.S. at 561, and cited, without criticism, Congressional findings which recognized sound recordings as protectable items. Id at 568.

In fact, courts have recognized the protectable status of sound recordings since as early as 1955. In *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955), the Court of Appeals concluded that "there can be no doubt that, under the Constitution, Congress could give to one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition." Id. at 660.

It is probably the Register of Copyrights who put it best:

"Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute." [20]

Nevertheless, in spite of this abundance of evidence that a copyright in a sound recording is constitutional, the opponents have persisted in the illreasoned and illogical arguments. RIAA has therefore determined that the time has come to put those arguments to rest once and for all. Attached to this Statement as Appendix B is a comprehensive legal analysis of the constitutionality of a performance right in sound recordings. The memorandum responds to each of the points raised by opponents of such legislation over the years. It establishes, once and for all, that there can be no doubt that Congress has the constitutional power to enact, and that the courts would uphold, a law granting a performance right in sound recordings.

The Effect of a Performance Right in Sound Recordings

It is apparent from the foregoing that the withholding of a performance right from sound recordings represents a departure from the traditional copyright practice in which an entire bundle of rights is granted to the copyright owner.[21] Precisely what the effects of this legal aberration have been is not really known.

Some would suggest that the absence of a performance right has acted to circumscribe available musical offerings on both radio stations and records. That is, the lack of compensation for airplay has encouraged recording companies to produce records that people buy rather than those to which people simply listen—such as classical, jazz, ethnic and experimental recordings.[22] Similarly, the availability of free recordings for airplay has encouraged radio stations to adopt cost-free formats almost guaranteed to succeed—such as a "Top 30" format—rather than more costly innovative and diversified programming featuring live as well as recorded entertainment.

The range of effects that can be attributed to the absence of a performance right in sound recordings is wide indeed.[23] These effects can only be debated,

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[20] 120 Congressional Record 27340, 27341 (1974).

[21] See sec. 106 of Public Law No. 94–553.

[22] The testimony of Theodore R. Dorf, general manager of WGAY(AM) and WGAY–FM, before the Copyright Office on July 6, 1977, confirms that some types of recordings have great performance potential—such as "beautiful music"—without enjoying significant sales potential.

[23] One interesting example is the theory advanced in Rolling Stone (May 19, 1977) that "the lack of a performer's royalty has a direct effect on what songs are recorded." Rolling Stone argues that the present copyright system favors writers over performers and arrangers, thus encouraging recording artists to write their own material rather than rearrange and reinterpret somebody else's. "Since the best writers and best performers are rarely the same people, a lot of bad music results." Rolling Stone concedes, "A performer's royalty wouldn't remove the incentive—it would still be more lucrative to write and sing—but it might even things up sufficiently for common sense to prevail: better to sell a million of someone else's song than 100,000 of your own." (Page 16)

however, not proved. Our focus must therefore be on the beneficial effects that a performance right in sound recordings is likely to have in the future.

Infusion of Capital.—Performance royalty income can strengthen the economic health of the recording industry, from recording company to recording artist. Those musicians and vocalists who currently perform on sound recordings, but do not share in the royalties generated by sales, will be primary beneficiaries of a performance right. It will provide a much-needed boost to their income. What will be done with the income earned by record companies will necessarily vary; the responses are likely to be as numerous as there are record companies. For some, the infusion of additional capital will mean the ability to produce more recordings, possibly of groups that were previously borderline. For others, performance royalties might be used to offset increased operating costs, thus delaying price increases. For still other companies, the additional income could represent capital with which to expand capacity, or to augment an A&R program, or to increase promotional activity for recording artists, and so on through an infinite variety of possibilities.

Investment Decisions.—More importantly, the existence of a performance right is likely to affect the way in which investment decisions are made. For the first time, a record company executive deciding how to allocate his company's funds will know that the recording he is considering can generate a return not just from sales, but also from performance. The prospect of airplay might encourage a record company to produce an otherwise marginal album, even if the sales outlook is uncertain. This means that the number of copies of a particular record that have to be sold just to recoup the company's investment—the breakeven point—might be lowered. Moreover, losses from unsuccessful records might be reduced, leaving more funds available for investment in other recordings.

Recording companies take seriously the responsibility to provide all types of music on sound recordings, and to foster and encourage the creation, performance and enjoyment of music. Although individual company patterns vary, they record classical music, folk music, ethnic music, country music, experimental music, plays, poetry and educational material. They help find and develop young artists, musicians and composers, and bring much-needed income to some symphony orchestras. As it is, it is only because these companies have a commitment to provide all types of music on sound recordings, that recordings of classical music—which lose money on 95 percent of all releases[24]—are produced. The promise of additional income from the performance of such music—*i.e.*, the prospect that such recordings will be better able to "pay their own way"—can only serve to encourage further the production of such recordings.

The creation of a performance right might serve to advance all forms of musical culture in yet another way: The Board of Directors of the Recording Industry Association of America has pledged that 5 percent of their respective companies' performance royalty income would be channeled to the National Endowment for the Arts.

Safeguard Against Technological Change.—Still another effect of a performance right would be to lessen the dependency of the recording industry on the technological status quo. At the present time, the recording industry is at the peril of technological advances. Consider, for example, what would have happened to the movie industry with the advent of television if movie producers had had no right to demand royalties for the performance of their works.

So, too, there exists the prospect that the only existing base for compensating record companies and performers at this time—proceeds from the sales of sound recordings—may be eliminated as technology moves into American homes. Even now, the individual who enjoys recordings is but a pushbutton away from appropriating recorded music of his choice, capturing it on tape, and enjoying it at will. Indeed, more and more frequently, radio stations facilitate home taping by playing announced selections at designated times and specified frequency levels. Unfortunately, the easier it is for individuals to record the music of their choice, the greater the number of sales that are diverted from those who provide the creativity and the talent for that recorded music in the first place.

Home taping is but the horse and buggy portent of things to come. We are not far away from in-home, push-button recall from vast banks of recorded

[24] See Exhibit 2.

musical repertoire. This is no Buck Rogers fantasy. Technical forecasters anticipate the day when a cable TV subscriber need merely press a few buttons to signal his desire to hear a particular album or even a particular selection. Such technological capability could deal a serious blow to record buying.

Needless to say, the enactment of a performance right—especially with the modest royalties proposed in H.R. 6063—will not result in wholesale changes to the existing system overnight. But the creation of a performance right would be a significant step forward. For the first time, there would exist fresh incentives for a broader and more natural distribution of opportunities in the recording industry, and in American musical culture.

II. EQUITY DEMANDS THAT A PERFORMANCE RIGHT IN SOUND RECORDINGS BE GRANTED

Separate and apart from traditional copyright principles are even more basic issues of fairness and morality. Broadcasters, jukebox operators, discotheques, nightclubs and background music operators are growing rich off the creative recorded works that others have produced, and they pay not one cent for the privilege of using them. Equity demands that vocalists, musicians and recording companies be compensated for this exploitation of their work.

Radio Makes Extensive Use of Records at No Cost

The Basic Staple of Radio Programming is Recorded Music.—Indeed, 75 percent of commercially available time on radio is used to play sound recordings.[25] Thus, recorded music accounts for roughly three-quarters of station's advertising revenues—or about $1.29 billion annually.[26] Yet broadcasters—who must pay for all their other types of programming, including news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, commentators, financial and business services—pay nothing to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

Payments to Recording Companies and Artists Would Not Be Duplicative.—The broadcasters argue in response that they already pay for recorded music, that a second performance royalty would constitute a burdensome double tax.[27] But broadcasters are not being asked to pay twice for an identical commodity. The payments they currently make through ASCAP, BMI and SESAC are to music composers and publishers alone, as compensation for the use of musical compositions.[28]

The performance right which is the subject of Copyright Office study relates to a completely separate and distinct creation of value—a copyrightable recorded musical performance, a performance that makes the original musical composition come to life in a form usable for broadcasting and public performance. Paying for the performance would be no more of a duplicate payment than paying a news broadcaster to deliver the news is duplicative of a payment to the Associated Press for news wire service.

Moreover, the payments that radio stations make to composer/publishers for the use of their tunes equal only 2.6 percent of radio station expenses.[29] (See Exhibit 1.)

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[25] A survey conducted by the Cambridge Research Institute earlier this year indicated that 75 percent of radio programming is devoted to recorded music. See description of survey at pp. 58–59, infra, and Appendix D, infra.

[26] See Exhibit 8.

[27] An analysis of the comments filed by broadcasters with the Coppyright Office is attached as Appendix C. It indicates quite clearly that the same arguments are repeated over and over again. Of 91 broadcaster submissions, 62 claimed that a performance royalty for sound recordings would constitute an unfair burdensome extra payment for a service already compensated by broadcasters through payments to ASCAP, BMI and SESAC.

[28] Many of the comments filed with the Copyright Office reflect a gross misunderstanding of the facts. For example, the South Carolina Broadcasters Association wrote that "[ASCAP and BMI] collect and distribute royalties among recording artists, arrangers and musicians." Comment Letter No. 111, Copyright Office Dkt. No. S 77–6 (June 13, 1977). Similarly, a radio station in Dothan, Alabama—WDIG—suggested that instead of "an additional fee from another source" it would be preferable "for the music-licensing services to apply for increased rates." Comment Letter No. 91, Copyright Office Dkt. No. S 77–6 (June 8, 1977).

[29] Indeed, payments to composers/publishers comprise a diminishing percentage of radio station expenses: they declined from 3.0 percent of all expenses in 1970 to 2.6 percent in 1975. Thus, overall program costs as a percentage of the total have declined gradually but steadily for radio stations while their selling, general and administrative costs have risen in a comparable fashion.

EXHIBIT 1

BREAKDOWN OF EXPENSES OF ALL RADIO STATIONS[1]

	Amount (thousands)						Percent of total expenses for all stations					
	1970	1971	1972	1973	1974	1975	1970	1971	1972	1973	1974	1975
Program costs:												
Payroll for program employees	$208,224	$222,078	$240,841	$260,275	$279,934	$298,247	20.9	20.1	19.7	19.3	19.1	18.9
All other programs expense not itemized below	34,522	40,543	42,468	48,837	54,524	58,776	3.5	3.7	3.5	3.6	3.7	3.7
Music license fees paid to composers and publishers	29,937	32,274	35,616	37,310	40,409	40,779	3.0	3.0	2.9	2.8	2.8	2.6
Other performance programing rights	11,903	12,950	13,245	14,410	15,321	17,487	1.2	1.2	1.1	1.1	1.0	1.1
Cost of outside news services	19,933	20,908	23,355	24,930	26,025	28,941	2.0	1.9	1.9	1.8	1.8	1.8
Payments to talent not on payroll	8,203	8,443	9,080	9,355	9,018	8,462	.8	.8	.7	.7	.6	.5
Records and transcription	5,123	5,678	6,063	6,763	7,293	7,975	.5	.5	.5	.5	.5	.5
Total program costs	317,845	342,876	370,669	401,881	432,524	460,668	31.8	31.0	30.2	29.8	29.5	29.2
Nonprogram costs:												
Total technical expenses	102,171	107,984	115,638	120,045	128,180	134,289	10.3	9.8	9.4	8.9	8.7	8.5
Selling, general, and administrative (including depreciation)	578,017	655,890	739,046	826,994	906,962	982,362	57.9	59.2	60.4	61.3	61.8	62.3
Total nonprogram costs	680,188	763,874	854,684	947,039	1,035,142	1,116,651	68.2	69.0	69.8	70.2	70.5	70.8
Total broadcast expenses	998,034	1,106,750	1,225,354	1,348,920	1,467,665	1,577,320	100.0	100.0	100.0	100.0	100.0	100.0

[1] These figures are for all AM, AM–FM, and FM stations with revenues of more than $25,000. They do not include networks, whose figures are broken down somewhat differently. Last digits may not add to totals, due to rounding.

Source: Federal Communications Commission, AM and FM Broadcast Financial Data, various years.

In sum, the recording industry is providing radio with the bulk of its programming—which not only fills the airwaves but also wins audiences, revenues, and profits for radio stations—but radio is paying virtually nothing for the use of this material. More pointedly, the bulk of the cost of operating a radio station is not in buying "raw materials" (program costs) but in the overhead costs of selling advertising time and managing the operating radio plant. Although paying for the contributions of composers and publishers, radio is profiting from the copyrighted creative products of recording companies and artists without paying these creators a penny for the use of their products.

The expropriation of sound recordings bestows an unfair competitive advantage

Ironically, the very firms that profit off the labor and talent of others without compensating them are bestowed an unfair advantage over their competitors. Thus, because radio stations can obtain 75 percent of their programming material virtually free of charge, they are able to charge advertising rates that are relatively cheaper than those of competing media which must pay for all of their programming material.

So, too, are background music services which choose not to expropriate the talents of others placed at a competitive disadvantage. U. V. Muscio, President of Muzak, has written:

"Since Muzak was organized in 1936, we have created our own renditions of popular musical compositions, using recording artists we hire especially for this purpose. Other background music services, however, have been unwilling to commit the necessary creative and financial resources to the production of their musical offerings. Instead, they have simply spliced together selections from the most popular sound recordings available. Our competitors have been able to offer their customers the talents of the world's greatest performing artists for the nominal cost of a record.

"We believe this practice to be unfair and unjust, both to the creators of the sound recordings, and to companies such as ours. Because Muzak does not expropriate the talents and efforts of others for its own enrichment, we have been put at a competitive disadvantage in the marketplace." (Hearings on S. 1111 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Commission on the Judiciary, 94th Cong., 1st Sess. 91 (1975) (Letter of U. V. Muscio).

The creation of a performance right would eliminate this legal anomaly.

Recordings have displaced performers

There was a time when radio paid for the services of those vocalists and musicians whose talents it now expropriates. As Red Foley pointed out in hearings before the Senate Subcommittee ten years ago,

"At one time the recording artist could look to 'live' radio as an important source of income and employment. But in the 1950's local radio stations discovered greater profits were available by playing recorded music. Therefore, the 'live' shows virtually died and local stations switched from network programming of 'live' shows to the playing of recorded music * * *. Today, instead of 'live' performance opportunities, the artist is in the ironic position of having been displaced by his own recordings, which the radio stations use for profit, without the performer receiving any of the benefit from the profits that his creative performance produces." [30]

The Minority Report of the Senate Judiciary Committee (in July, 1974) expressed concern that, if broadcasters had to pay performance royalties to performers and record makers, "it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale." [31] Performers certainly would have no objection to such a turn of events, but, unfortunately, broadcasters are unlikely to abandon the use of recordings simply because of a new performance royalty which increased their expenses by less than one percent.[32]

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[30] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 815 (1967).
[31] S. Rept. No. 93-983, 93d Cong., 2d Sess. 226 (1974).
[32] See pp. 107-08, infra.

Royalties from record sales do not sustain all performers

Broadcasters argue that performers do not need either the income that radio once afforded them or the income that a performance royalty would bring them. Performers, they say, receive ample income from record sales and live concerts.

Unfortunately, these advocates appear to equate the thousands of vocalists and musicians working in recording studios across the country with a handful of superstars. In fact, they are worlds apart.

As Andrew Biemiller, Legislative Director of the AFL–CIO wrote in 1975: "The overwhelming number of performers who make possible the recorded works we enjoy and take for granted almost every day of our lives are not famous or wealthy. Quite the contrary, they pursue professions that are among the lowest paid and highly unemployed in the country. According to the 1970 census, America's musicians earned a median income of $4,668. The unions representing these professional people indicate that more than 80% of their membership is generally unemployed. Only the few very famous stars achieve notoriety and economic security while the thousands of supporting artists who contribute so much to a recorded performance remain unknown and confront an uncertain future." [33]

At present, these performers reap none of the rewards of successful recordings; they do not share in the artists' royalties from sales of the record. But unlike sales royalties, performance royalties will not be earmarked for the superstars alone. *All* performers will share and share alike. If Elvis Presley, for example, were to record with 15 other musicians and three background singers, or a total of 19 recording artists including himself, then there would be 19 recipients of equal shares of any performers' royalties generated by that recording.[34] Thus, performance royalties would provide badly needed income to thousands of vocalists and musicians.

As for the superstars: The percentage of performers who are successful for even a brief period is far smaller than is apparent to the general public, which has been fed tales of the fortunes earned by the recording world's fleeting stars. Many artists dream of riches, but few actually attain them. One recording company reported in 1967, that of the performers that they list, only 14 percent had earned enough royalties on sales to defray the expenses normally charged to artists' royalty accounts. Only 188 or so of its 1,300 performers had a profit in their royalty account.[35]

This poor record is not surprising. The large majority of recordings do not recover their costs, let alone make a profit, and the proportion of unprofitable recordings is rising. Over 80 percent of the 45 RPM records and over 75 percent of the "popular" LP records released do not have sufficient sales to break even. (See Exhibit 2.) Only about 6 percent make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Ninety-five percent of classical records are produced and marketed at a loss.

Performance fees from broadcasting would supplement the income of at least some of these artists who produce records that do not even reach the break-even point in sales. Such fees would provide needed income to classical artists, jazz artists, and many popular artists as well. Such performers "never burst into stardom because their appeal is only felt by a narrow segment of the public. They may never have a hit record, although they may have many, many records which are performed time and again for commercial profit." [36]

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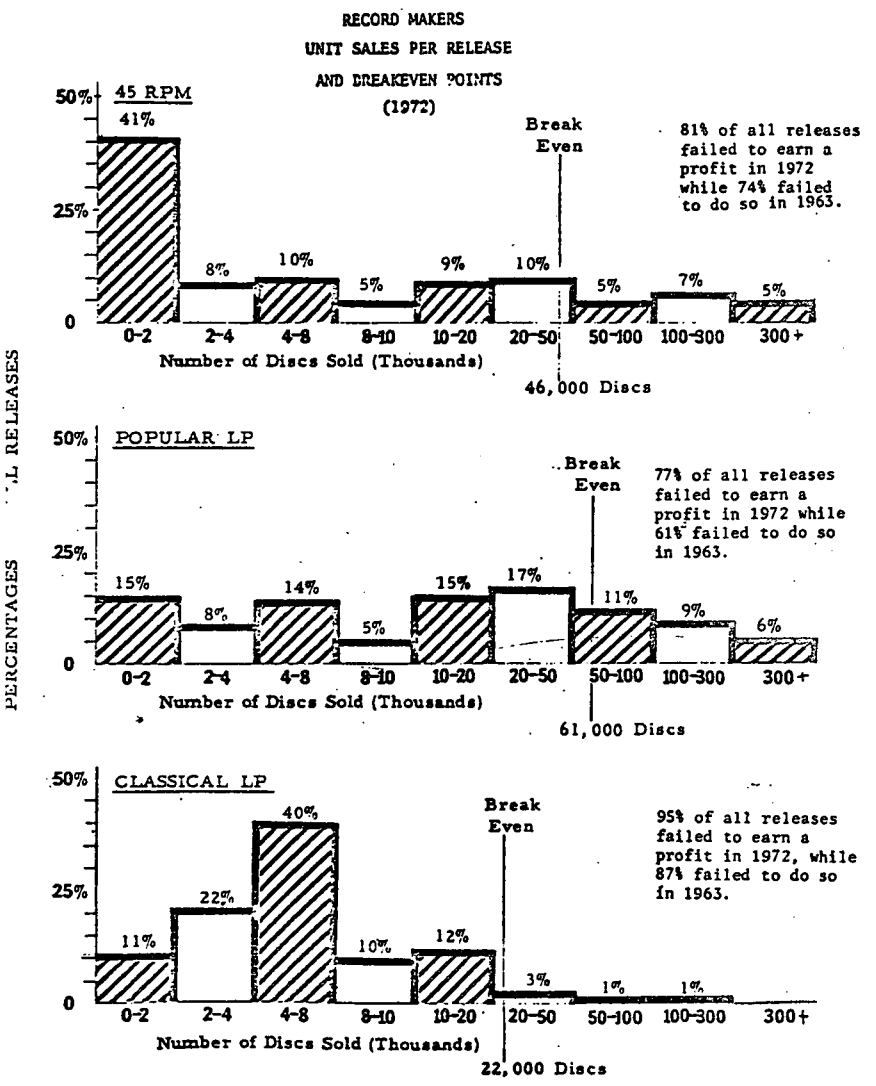
[33] Hearings on S. 1111 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 31 (1975) (Letter of Andrew Biemiller).

[34] Comment Letter Nos. 14 (p. 5), 28 (p. 2), and 29 (p. 3). Copyright Office Docket No. S 77–6, from Council of AFL–CIO Unions for Professional Employees, American Federation of Musicians, and American Federation of Television and Radio Artists, respectively (May 31, 1977).

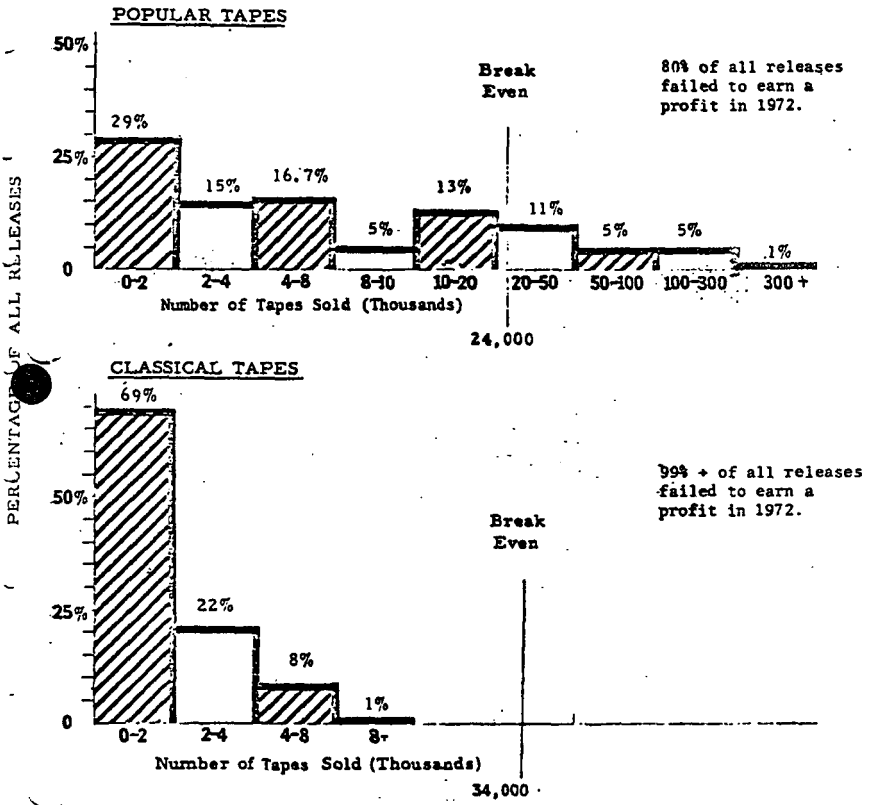
[35] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 832 (1967) (Statement of Michael DiSalle).

[36] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 542–43 (1967) (Statement of Stan Kenton).

EXHIBIT 2


RECORD MAKERS
UNIT SALES PER RELEASE
AND BREAKEVEN POINTS
(1972)
PERCENTAGES OF ALL RELEASES
45 RPM
50%
25%
0
41%
8%
10%
5%
9%
10%
5%
7%
5%
Break Even
81% of all releases failed to earn a profit in 1972 while 74% failed to do so in 1963.
0-2
2-4
4-8
8-10
10-20
20-50
50-100
100-300
300+
Number of Discs Sold (Thousands)
46,000 Discs
POPULAR LP
15%
8%
14%
5%
15%
17%
11%
9%
6%
Break Even
77% of all releases failed to earn a profit in 1972 while 61% failed to do so in 1963.
Number of Discs Sold (Thousands)
61,000 Discs
CLASSICAL LP
11%
22%
40%
10%
12%
3%
1%
1%
Break Even
95% of all releases failed to earn a profit in 1972, while 87% failed to do so in 1963.
Number of Discs Sold (Thousands)
22,000 Discs

Record Companies Unit Sales
er Release and Breakeven Points (1972)



Source: These figures are based on an analysis done by Cambridge Research Institute of a sample of the releases of eight record companies which had 51% of the industry's sales in 1972.

One performer reported that "he is 'very big in supermarkets and elevators', and everywhere he goes he hears his music being played. Yet he does not receive one dime for these commercial performances." [37]

Performance royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Many famous artists, such as Ernie Ford, Mitch Miller, and Pat Boone, sell fewer records today, but airplay of their old records and other "golden oldies" remain heavy. Some radio stations still offer the recorded music of Nat King Cole, and

"* * * everyone benefits but Nat Cole's widow and children. The sponsor attracts an audience with one of the top vocalists of our generation, and the radio station sells time to the sponsor, the writers and publishers of the songs are paid performance fees for the broadcast of these songs, but Nat Cole's widow and children receive absolutely nothing, nor does the record company that spend 20 years building him as a top recording artist, and owns the masters which are used for these delayed performances." [38]

Such performers (and their heirs) should be compensated for the continued commercial exploitation of their endeavors by others.

Concededly, performance fees would, to some extent, increase the income of those few artists who are presently collecting sizeable artists' royalties from the sales of their recordings. But as has already been pointed out, the royalties earned on such superstars' records will result in income to the backup vocalists and musicians who never before shared in the benefits of a successful recording. Moreover, the recording careers of even successful performers tend to be pitifully short, and artists, like baseball players, must often maximize income within short periods. "It is not unusual for a performer to find himself in a high tax bracket for a year or so, to be followed by a lifetime of oblivion. The rise of a star is sometimes meteoric, but his popularity often burns out just as quickly." [39]

Finally, broadcasters should recognize the value of those superstars to their own operations. They bring in station audiences, sell commercial time, and build station values. The star vocalist or musician performs a commercially valuable service, and he may not be doing it for long. The question is not how much money he makes, but for whom he makes money. The individual income (or debt) levels of performing talent are therefore irrelevant factors.

Record Sales Are Fundamentally Irrelevant to the Fairness of a Performance Royalty

Just as performers' earnings are irrelevant in principle to the granting of a performance right, so, too, the fact that recording companies profit from the sales of recordings should not be used as a pretext for denying them a performance right. Other copyright owners routinely earn income from multiple sources. Composers receive royalties from the sale of records, from record-related songbooks, and from the playing of records over the air. Radio and TV broadcasters record, syndicate and sell for re-use some programs which have already created ad sales for them. Motion pictures are secondarily paid for TV showings. There is no just reason why record producing companies should not also earn additional legitimate income from the use of their recordings by others to sell broadcasting time, aspirin or automobiles.

Radio Airplay Is Likewise Irrelevant to the Fairness of a Performance Royalty

Broadcaster opponents of a performance right have also argued, ad nauseum, that radio airplay boosts the sales of sound recordings. From this they conclude that it would be unfair to require broadcasters to pay royalties to the very persons they are giving a "free ride."

There is no question that airplay helps sell some sound recordings. It should be just as apparent that sound recordings provide valuable radio programming material, which sells advertising, builds station audiences, and increases station equity.

These facts, however, while of interest, are not relevant to the grant of a performance right. The principle underlying the performance right in copyright

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[37] Ibid.

[38] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st sess. 500 (1967) (Statement of Alan W. Livingston).

[39] Ibid. at 821 (Statement of Stan Kenton).

law is that the creator is entitled to compensation for the commercial use of his creative product. That principle is not conditioned on who benefits from what. While economic factors can be fairly considered in setting the royalty rate for sound recordings, they should have no bearing on the right itself.

Cable TV operators also claimed they should not have to pay performance royalties to the broadcasters on the ground that they expand the broadcasters' audience and profits when they use copyrighted broadcast programs. Congress rejected that claim, as did the broadcasters.

The jukebox operators, too, made a similar claim. They sought to avoid paying performance royalties to composers and publishers of musical compositions on the ground that "jukeboxes represent an effective plugging medium that promotes record sales and hence mechanical royalties." [40] Congress was not sympathetic to their argument, either.

In any event, the broadcasters' airplay argument is specious. What makes its fallacy apparent is the fact that composers and publishers, who clearly benefit from the airplay of sound recordings in the form of increased sales, have long received performance royalties from broadcasters. No one, including the broadcasters, contends that the owner of music copyrights should not receive performance royalties because of airplay.

As Chairman Kastenmeier stated, in commenting on the House testimony of broadcasting witnesses:

"I would observe a point made that radio sells records. I don't think it is challenged, but it doesn't necessarily go to the point of whether these so-called performances ought to have copyright protection, because many enterprises help sell what may be copyrighted material for which there are royalties due, but that has not much to do with whether or not the royalty should be paid." [41]

Moreover, the airplay argument used by the broadcasters is, in fact, quite misleading. They make it sound as though the radio stations are playing sound recordings to do recording companies and performers a favor. In fact, they do it because it is in their own interest to do so.

Moreover, the benefits of airplay are frequently overrated. For one thing, the sales period for a popular hit, from which most recording company revenues are derived, is extremely brief. The average "chart life" is less than four months, and when a hit has fallen from the charts, its propensity to generate additional sales is sharply reduced. Thus, to the extent that radio airplay *is* devoted to tunes which have left the charts or have been out more than six months, *i.e.*, "oldies," the airplay benefits radio stations without providing any promotional value for recording companies and artists.

No published statistics provide information on the extent to which oldies are played over the air. To develop an estimate for radio, the Cambridge Research Institute conducted a telephone survey of program directors of 267 radio stations in seven major markets. These estimates, based on their knowledge and files, provide the best source of information we know of as to the amount of "oldies" played.

According to the survey results, 75 percent of radio programming is devoted to recorded music, and 53 percent of the music played consists of "oldies." [42]

Even though "oldies" achieve only minor sales for recording companies, old recordings as well as new ones lure radio audiences and enable stations to make sales through advertisers. (See Exhibit 3.) And yet, no compensation is ever paid for the artistry, know-how, enterprise and investment that went into creating that vast repertory which has unequaled commercial value for radio and television companies.

In addition, the stations which play exclusively the so-called "Top 30" songs often start playing them after the songs have become significant sellers in their own right. Not only that, a typical Top-30 radio station rarely adds more than five or six new songs each week to its airplay, but about 77 single records and 100 new albums representing almost 1,000 tunes are released each week. Clearly, many of these receive no airplay at all.

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[40] H.R. Rept. No. 94–1476, 94th Cong., 2d Sess. 113 (1976).

[41] Hearings on H.R. 2223 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st sess. 1373–74 (1975).

[42] These results confirm those of an earlier survey performed by CRI in 1975, which found that 56 percent of music programming consisted of "oldies." The methodology for the 1977 survey is described in app. D.

EXHIBIT 3

ANALYSIS OF MUSIC PROGRAMING OF RADIO STATIONS IN 7 MAJOR MARKETS

Market (and number of music stations responding)[1]	Total daily pro forma revenues[2]	Daily pro forma revenues due to music programing	Percentage of programing revenues that is due to recorded music	Daily pro forma revenues due to "oldies"	Percentage of music that is "oldies"
Baltimore, Md. (22 stations)	$264,024	$172,599	65	$91,612	53
Chicago, Ill. (41 stations)	588,515	389,194	66	219,334	56
Houston, Tex. (22 stations)	256,314	215,926	84	112,929	52
Los Angeles, Calif. (49 stations)	727,988	639,190	88	294,835	46
New York, N.Y. (26 stations)	840,622	589,530	70	343,537	58
Salt Lake City, Utah (17 stations)	88,752	60,965	69	32,123	53
Washington, D.C. (28 stations)	342,698	268,852	78	136,737	51
Total (205 stations)[3]	3,108,913	2,336,256	[4]75	1,231,107	[5]53

[1] News, foreign language, and noncommercial stations omitted.
[2] The pro forma revenue figures do not correspond to actual revenues. They provide the base for developing the percentage figures. As explained in the section on methodology, they were obtained by multiplying for each station its hours of air time per day times minutes of ads per hour times the advertising rates per minute.
[3] A total of 267 radio stations were contacted. 62 did not provide data used in compiling these figures. Of these, 28 were noncommercial and thus had no advertising rate that could be used in the calculations, 18 broadcast entirely in foreign languages, 15 had all news/talk format, and 1 was not active.
[4] Percent of total revenues (weighted sum).
[5] Percent of music revenues (weighted sum).

Notes: This exhibit assumes no systematic bias among the rates charged for, or intensity of advertising during, music programing (as opposed to alternative types of programing).

Not only are the benefits of airplay overstated, but some airplay can actually hurt record sales. Frequent airplay of some popular songs can actually decrease sales due to overexposure. As Sanford Wolff, Chief Executive of the American Federation of Television and Radio Artists, said in his testimony before the Senate in 1975:

"Please disabuse yourselves of the notion so widely cultivated by our opposition that the sales of records directly reflect the number of times the record is played on the air. Even accepting the arrogant premise that radio stations spend 75% of their air time out of eleemosynary concern for the record industry—and in disregard of their own profits—that notion is simply not true. Sales often suffer from overexposure and overplay on radio. Simply put, why buy a record when you can hear it free?" [43]

Another way airplay can hurt a recording's sales is by making it possible for listeners to make a copy on tape without buying the recording.[44] As we noted earlier, it is not uncommon today for disc jockeys to encourage off-the-air recording by announcing the future time at which a hit will be aired, tune lengths and sound levels.

Finally, if radio airplay itself guaranteed record sales, there would be no need for the recording companies to spend the vast sums they do on record advertising over the air. Billboard magazine reported in May, 1975 that record advertising on television soared to $65 million in 1974, including cooperative ads by retailers. The data on radio advertising expenditures developed from a survey by the Cambridge Research Institute indicates that in 1972 the comparable total

[43] Hearings on S. 1111 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 94th Cong., 1st sess. 24 (1975).
[44] Hearings on S. 597 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st sess. 832 (1967) (Statement of Michael DiSalle).

was on the order of $32 million.[45] Thus, there is an annual total of about $100 million spent on radio and TV advertising.

In sum, we suggest that airplay of sound recordings does more to attract advertising profits to radio stations than it does to sell sound recordings. Only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters—old recordings, new recordings, popular ones, and classics. They all build audiences for the broadcasters and enable them to sell time to advertisers.

Consider the question in another context. Should Alex Haley, author of "Roots," be deprived of a performance royalty for the televising of "Roots" because the television spectacular enhanced the sales of his book?

A Performance Right Will Not Encourage Payola

Still another argument advanced by the broadcasters is that the creation of a performance right will lead to an increase in payola—the illicit payments accepted by radio station personnel from those who wish specific tunes to be airplayed. This argument is nothing more than an attempt to exploit prejudicial publicity to the advantage of the broadcasters.

First, payola is not just a deplorable practice condemned by the legitimate recording industry—it is also a crime. Federal laws prohibiting the practice have been enacted.[46] To withhold the extension of a traditional form of copyright protection from the record companies and performers in order not to encourage payola is a classic case of overkill.

Second, it must be recognized that the overwhelming majority of radio and record company employees are honest. Radio practices and record company promotional practices have been subjected to numerous in-depth investigations to uncover payola, and precious little in the way of illegal conduct has been revealed. It would hardly be fair to penalize the entire recording industry because of the excesses from many years ago.

Third, performance royalties have been paid to composers and publishers now since 1909. In 1975, those payments from broadcasters neared $100 million.[47] Composers and publishers derive the same benefits from airplay as do record companies and performers. But there has never been any suggestion that the existence of a performance right for musical compositions is a dangerous incentive to payola and that it should be eliminated.

Finally, it must not be forgotten that payola involves a giver and a taker, and the taker is a broadcaster or broadcaster personnel. Broadcasters have the capability—indeed the obligation—to curb payola in their own houses.

III. CREATION OF A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD BRING THE UNITED STATES INTO ACCORD WITH PREVAILING INTERNATIONAL PRACTICES

A performance right in sound recordings is neither new nor experimental. Fifty-one nations already grant such a right to producers and/or performers of sound recordings by law. In an additional four countries, royalties are paid to record producers even though no formal statutory right exists. (See exhibit 4.) Thus, enactment of a performance right in the United States would bring this nation's copyright law into accord with prevailing international practices.

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[45] The survey conducted for RIAA by the Cambridge Research Institute is based on reporting by seven companies representing 42.3 percent of industry sales, with respect to purchases of non-co-op radio time; as to co-op radio time, six companies representing 40.7 percent of industry sales reported. The total recording industry figure of $32 million was grossed up to 100 percent of the industry from the foregoing bases. See also Billboard May 10, 1975 and May 15, 1975, p. 1. Billboard has estimated that radio advertising including co-op in 1974 was $3.5 million, a figure that obviously is inaccurate.

[46] 47 U.S.C. § 508.

[47] Comment Letter No. 8, Copyright Office Docket No. 5 77–6, from American Broadcasting Companies, Inc. (May 31, 1977), p. 2.

EXHIBIT 4.—*Countries recognizing a performance right in sound recordings*

Argentina	East Germany	Philippines
Australia	West Germany	Poland
Austria	Guatemala	Roumania
Bangladesh	Guyana	Seychelles
Barbados	Iceland	Sierra Leone
Belgium [48]	India	Singapore
Botswana	Ireland	Spain
Brazil	Israel	Sri Lanka
Burma	Italy	Sweden
Chile	Jamaica	Switzerland [48]
Colombia	Japan	Taiwan
Costa Rica	Liechtenstein	Thailand
Czechoslovakia	Mauritius	Trinidad and Tobago
Denmark	Mexico	Turkey
Dominican Republic	The Netherlands [48]	United Kingdom
Ecuador	New Zealand	Uruguay
Fiji	Norway	U.S.S.R.
Finland	Pakistan	
France [48]	Paraguay	

[48] In these countries, royalties are paid to record producers even though no formal statutory right exists.

Sources: International Producers of Phonograms and Videograms, "International Conventions and Copyright/Neighboring Rights Legislation as on 1 January 1977"; United Nations, "Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions," 416–18 (1977).

In addition to the large number of nations which already recognize a performance right, there exists a clear trend among Western nations toward the establishment of such a right. Since 1970, 19 nations have enacted or amended laws either granting, expanding or otherwise affirming this right. Over 25 percent of the countries that have ratified or acceded to the Rome Convention have done so in the last three years. This Convention, formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, provides in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

To date, the Convention has been ratified or acceded to by 20 nations.

Canada, moving in a direction contrary to the rest of the world, recently abandoned performance fees for performers and record companies. However, this action was taken primarily because most payments were remitted to United States recording artists and United States record makers, with no reciprocity for Canadian artists in the United States. This explanation was documented by the statement of The Honorable Ron Basford, the Minister responsible for the introduction and passage of the Government Bill, at the commencement of the hearings before the Standing Senate Committee on Banking, Trade and Commerce in the Canadian Parliament in December, 1971:

"May I be permitted, Mr. Chairman, to draw your attention and that of honourable senators to what I view as certain important considerations * * *. As has been made clear in evidence before you, 95 percent of the record manufacturers, through this performing right society known as Sound Recording Licenses (SRL) Limited, are subsidiaries of, or associated with, foreign firms, in very large measure American firms. The American principals of the SRL group do not have the right in the United States that their Canadian subsidiaries are now demanding and trying to exercise in Canada through the tariff that was accorded to them in the recent decision of the Copyright Appeal Board.

"What is not available to the record manufacturers in the United States is apparently regarded as necessary in Canada. What is not available to the foreign parents is claimed in Canada. Surely this is an anomalous position for us in Canada to find ourselves in, and surely it is an inequitable one from the point of view of Canadian users of records."

In April, 1977, the Canadian Government published a definitive study on "Copyright in Canada" [49] which recommends that the performance right be reinstated. Here, too, however, the thrust of the proposal is nationalistic, and to some extent, anti-American. It is proposed that the right be confined to "Canadian sound recordings"—i.e., those "where the majority of the elements required to produce the recording are Canadian."

The Absence of Reciprocity

As the Canadian example demonstrates, foreign nations are frequently unwilling to grant a right—and the royalties that go with it—to a country which does not offer a reciprocal right.[50] Thus, because U.S. law currently provides for no reciprocal performance royalties, U.S. record producers and performers are often denied performance royalties from abroad.

"For example, in Denmark, payment is made only for the performance of recordings originating in Denmark itself or in a country which grants reciprocal rights to recordings of Danish origin. As a result, no payment is made for the use of U.S. recordings there." [51]

Because of the variety of bases on which royalties are paid in the various foreign nations, and the unpredictable impact that enactment of a performance right in the United States will have on the fee schedules in those nations, we are unable to assess definitively the amount of the remuneration that would be paid to U.S. record companies and performers. Certainly, more performance fees would flow into this country than would flow out. In 1974, for example, ASCAP received from abroad $12.3 million in performance fees, but it paid out to foreign performing rights societies only $5.9 million. Were the performance right enacted, the performance fees paid to U.S. artists and recording companies would contribute positively to the balance of international payments. Moreover, whatever the amount collected, it would provide deserved compensation to U.S. performers and record companies for the exploitation of their creativity abroad.

Royalty Recipients

Needless to say, the identity of the parties granted a performance right—and the royalty sharing arrangements between record companies and performers—vary widely in the 55 nations in which a performance right is recognized. Thus, for example, in Japan, the four Scandinavian countries, Austria, Italy and Czechoslovakia, the law grants performing rights to both record producers and performers. In the United Kingdom, Ireland and Spain, the law grants performing rights to record producers alone, but the record producers have sharing arrangements on a voluntary basis with performers. In West Germany, on the other hand, a law gives performing rights to performers, with a share to be paid producers.

Summary of Parties Granted the Right.—Of the 51 nations granting a performance right as a matter of law, 45 accord the right to the producing companies, 29 of them exclusively. Twenty-two accord the right to performers, five of them exclusively.

Summary of Royalty Split.—In countries where performance royalties are paid, nearly half divide the fees equally between companies and performers. In those countries where the royalties are not shared equally, the overwhelming majority pay the larger share to the record company. Thus, just as there is ample precedent for the performance right principle, so, too, is there international precedent for the 50/50 split jointly recommended by the RIAA, the American Federation of Musicians, and the American Federation of Television and Radio Artists.

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[49] A. A. Keyes and C. Brunet, "Proposals for a Revision of the Law" (1977).

[50] It is noteworthy, for example, that seven of the nations which have ratified or acceded to the Rome Convention filed reservations under Article 16 which, in essence, require reciprocity for Article 12 to be fully applicable. These nations include Austria, Czechoslovakia, Denmark, the Federal Republic of Germany, Italy, Sweden, and the United Kingdom.

[51] Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st sess. 508 (1967) (Statement of Sidney Diamond).

IV. A PERFORMANCE RIGHT IN SOUND RECORDINGS WOULD HAVE NO ADVERSE IMPACT ON USERS AND CONSUMERS

Those who use sound recordings for thier own commercial gain have been quick to argue that they cannot afford to pay, or should not have to do so. It seems clear, however, that neither ability to pay nor desire to pay is a material consideration here. Economic arguments are irrelevant to the issue of whether such a right should be granted. To weigh economic matters in considering the granting of the right, as opposed to the royalty rate, would make a shambles of copyright law and the principles on which it is based.

Moreover, as we earlier described, the broadcasters themselves were singularly unresponsive to cable operators' pleas of inability and lack of desire to pay.

In any event, available data prove that a performance royalty would have minimal impact on the principal users of sound recordings—radio and television broadcasters.

Broadcasters Can Afford a Performance Royalty

Summary.—The broadcasters' claims of poverty notwithstanding, the radio and television industries can easily afford to pay a performance royalty, especially as modest a royalty as is proposed in H.R. 6063. (See sec. V, infra.) All indications are that radio and television are growing and prosperous industries. Radio stations are worth more than ever, substantially attributable, we believe, to the audience attraction of programming based on sound recordings.

Moreover, radio offers advertising unique qualities, an enormous audience (encompassing almost the entire population of the United States), and extremely low rates. It comes as no surprise, therefore, that radio has a growing share of all advertising revenues. This means that if radio chose not to pass the cost on to advertisers, it would easily be able to absorb the small additional cost required to compensate the creators of the bulk of the programming material that radio uses to attract its audience, increase its profits, and increase its equity value.

The Value of Radio Stations Has Increased Enormously.—To hear the broadcasters' talk, one would think that the radio industry were on the verge of bankruptcy. Quite to the contrary, radio stations are now worth more than ever. Moreover, the overall trend of the value of radio stations has moved in only one direction—up.

The price at which existing radio stations are sold has skyrocketed.

" 'There are plenty of buyers, but we're running out of merchandise.' That comment by major station broker is echoed by others. Group owners want to upgrade, particularly those in newspaper cross-ownership. But prices are rising to deterrent levels. Sale of KBEQ (FM) Kansas City, Mo. for record $5.1 million (Broadcasting, May 30) was cited as a case in point * * *. Station this year will produce cash flow of $800,000." [52]

The average transaction price per trade of all radio stations rose from $188,829 in 1967 to $704,415 in 1976.[53] (See exhibit 5.) Thus, between 1967 and 1976 the average transaction price rose 273 percent while the Consumer Price Index rose 83 percent during those years. (See exhibit 6.) Apparently investors consider that radio has good future prospects, for just as they might accord a high price/earnings ratio to a desirable common stock, they are valuing radio stations far in advance of their actual revenue and earnings growth. In fact, if one invested in radio stations in 1967 one would have done better than in investing in short term treasury bills or the stock market. In addition, the value of that radio station would be well ahead of not only the increased costs of all items calculated in the Consumer Price Index, but also all service prices. (See exhibit 7.)

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[52] "Sellers Market". Broadcasting, June 6, 1977, p. 7.
[53] "Station Sales Rise With Curve of Air Billings," Broadcasting, January 31, 1977, p. 22.

EXHIBIT 5

AVERAGE VALUE OF TRADED RADIO STATIONS

Year	Dollar value of radio station trading transactions approved by FTC [1]	Radio stations changing hands	Average value of traded radio stations [2]
1967	$59,670,053	316	$188,829
1968	71,310,709	316	255,677
1969	108,866,538	343	317,395
1970	86,292,899	268	321,988
1971	125,501,514	270	464,820
1972	114,424,673	239	478,764
1973	160,933,557	352	457,198
1974	168,998,012	369	457,989
1975	131,065,860	363	361,063
1976	290,973,477	413	704,415

[1] "Station Sales Rise with Curve of Air Billings," Broadcasting, Jan. 31, 1977, p. 23.
[2] Average values calculated from source.

EXHIBIT 6

COMPARATIVE VALUES OF PRICES AND INVESTMENTS: C.P.I., STOCKS, TREASURY BILLS, RADIO STATIONS, 1967-7

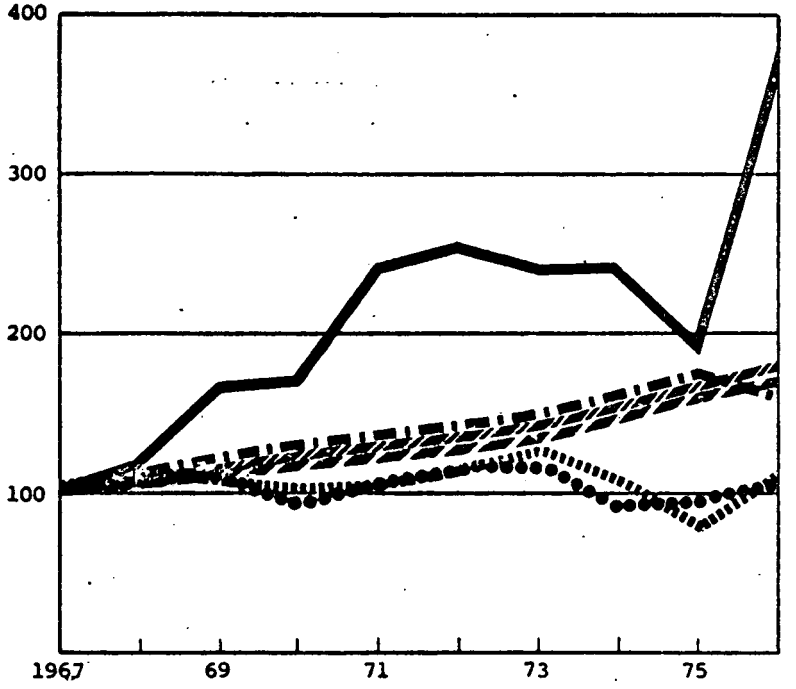
Year	C.P.I.[1 2]		Dow-Jones Industrial Averages [3]		Standard & Poor's 500 Stocks [4 5]		3-mo Treasury bills [1 2 6]		Average value of traded radio station	
	All items	Services	Average	Indexed	Value	Indexed	Interest rate	Indexed	Value	Indexed
1967	100	100	768.41	100	91.93	100	4.321	100	188,829	100
1968	104	105	906.84	115	98.69	107	5.339	104	225,667	119
1969	110	113	947.73	121	97.84	106	6.677	110	317,395	168
1970	116	122	809.30	103	83.22	91	6.458	117	321,988	171
1971	121	128	830.57	106	98.29	107	4.348	125	464,820	246
1972	125	133	889.30	113	109.20	119	4,071	130	478,764	254
1973	133	139	1,031.68	131	107.40	117	7.041	136	457,198	242
1974	148	152	855.32	109	82.85	90	7.886	147	457,989	242
1975	161	167	632.04	80	86.16	94	5.838	157	361,415	191
1976	171	180	858.71	109	102.02	111	4.989	166	704,415	373

[1] Economic Indicators, January 1977
[2] Economic Indicators, December 1974.
[3] Wall Street Journal, issues following each year's 1st day of trading, 1967-76.
[4] Standard & Poor's Statistical Service, Security Price Index Record, 1976 (data for 1967-75).
[5] Derived from Standard & Poor's Statistical Service, Current Statistics Combined with Basic Statistics, January 1977 (data for 1976).
[6] Economic Report of the President, February 1975.
[7] Derived from Broadcasting, Jan. 31, 1977, p. 23.

EXHIBIT 7

COMPARATIVE VALUES OF PRICES AND INVESTMENTS:
C.P.I., STOCKS, TREASURY BILLS, RADIO STATIONS
1967-1976

(1967 = 100)



Key:
- C.P.I. - All items[1,2]
- C.P.I. - Services[1,2]
- Dow-Jones Industrials[3]
- Standard & Poor's 500 Stocks[4,5]
- 3-month Treasury Bills[1,2,6]
- Radio station values[7]

[1] Economic Indicators, January 1977.
[2] Economic Indicators, December 1974.
[3] Wall Street Journal, issue following each year's first day of trading, 1967-1976.
[4] Standard & Poor's Statistical Service, Security Price Index Record, 1976 (data for 1967-1975).
[5] Derived from Standard & Poor's Statistical Service, Current Statistics Combined with Basic Statistics, January 1977 (data for 1976).
[6] Economic Report of the President, February 1975.
[7] Broadcasting, January 31, 1977, p. 23.

Radio's Revenues and Profits Are Increasing.—The increasing value of radio stations comes as no surprise, as radio is thriving. Between 1965 and 1975, radio broadcast revenues have risen steadily until they have more than doubled, increasing somewhat faster than TV broadcast revenues [54] which also climbed rapidly. (See exhibit 8.) During these years, radio pre-tax profits have fluctuated tremendously, reflecting the impacts of inflation and recession. (See exhibit 9.) Although in 1972 pre-tax radio profits were 73 percent higher than in 1965, in 1975 they were only 17 percent higher. A good way to judge the quality of these profits is to look at what the National Association of Broadcasters is portending for the future.

EXHIBIT 8

RADIO REVENUES AND PRETAX PROFITS

	Amount (millions)		Index 1967=100		
	Radio broadcast revenues	Radio net income before Federal income tax	Radio broadcast revenues	Radio net income before Federal income tax	Pretax income as percent of revenues
1965	$792.5	$77.8	87	96	9.8
1966	872.1	97.3	96	120	11.2
1967	907.3	80.8	100	100	8.9
1968	1,023.0	113.4	113	140	11.1
1969	1,085.8	100.9	120	125	9.3
1970	1,136.9	92.9	125	115	8.2
1971	1,258.0	102.8	139	127	8.2
1972	1,407.0	134.3	155	166	9.5
1973	1,501.9	110.1	166	136	7.3
1974	1,603.1	84.1	177	104	5.2
1975	1,725.0	90.7	190	112	5.3

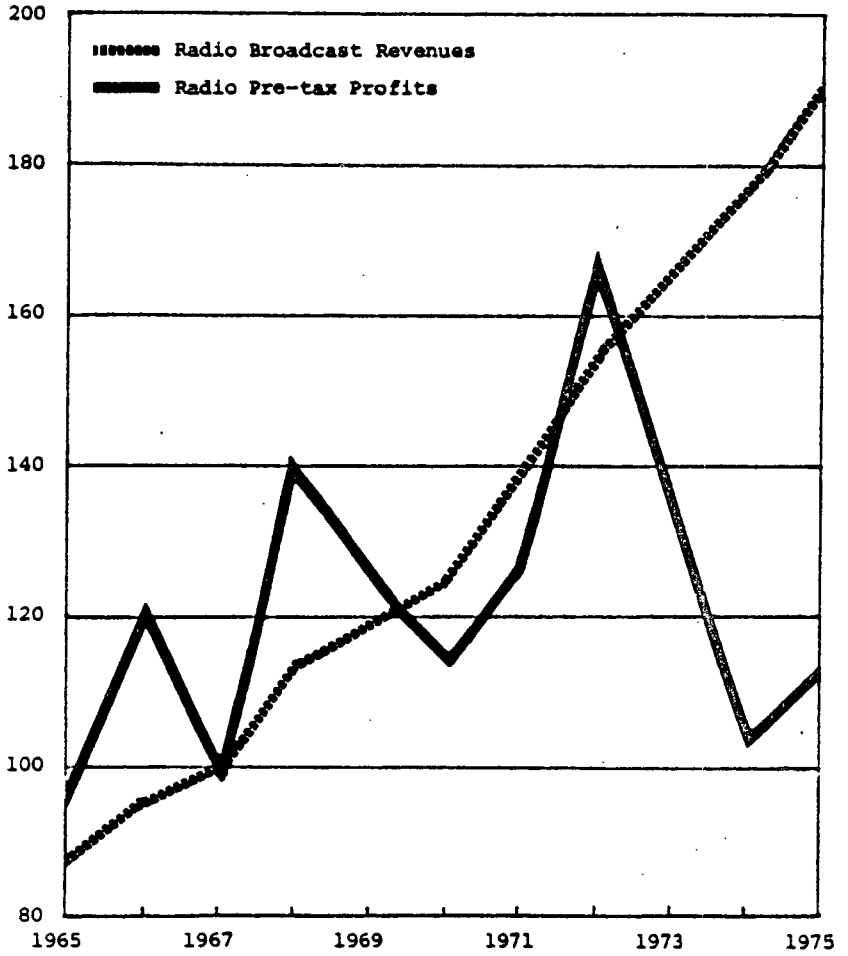
Source: Federal Communications Commission, AM and FM Broadcast Financial Data, 1975.

[54] See pp. 78–79, infra.

EXHIBIT 9

RADIO REVENUES AND PRE-TAX PROFITS:

Index with 1967 = 100 as Base



Source: FCC, "AM and FM Broadcast Financial Data, 1975".

A recent report, Radio in 1985, prepared for the NAB, predicts "a return to historic profit margin levels established over a long period (but affected for a brief time during the mid-seventies by extraordinary inflation). Put simply, radio will make a good recovery after a period during which expenses grew faster than revenues." [55] Moreover, the NAB Report concluded: "Every analysis shows not only continued good health, but improving health within the industry. This is true across the board, in every section of the country, in every size market." [56]

Although it is true that radio pre-tax profits have generally declined as a percentage of radio broadcast revenues, the industry's profit to sales ratio has remained higher than that for U.S. industry as a whole. In 1973, the figure for U.S. industry was 5.9 percent of sales while that for radio was 7.3 percent.[57] (1973 is the most recent year for which statistics are given in the 1976 Statistical Abstract.)

The broadcasters have argued that a large proportion of radio stations lose money. What they have not mentioned is that the profit performance of a station can be influenced or even controlled by a variety of factors: excessive payments to proprietors; excessive depreciation deductions; ownership links with other AM, FM or TV stations; the peaking of losses or profits in one unit of multi-owned stations because of tax considerations; the nonprofit nature of radio stations operated by schools and other educational institutions; and so on. The profit/loss picture painted by the broadcasters, therefore, cannot be accepted at face value.[58]

Moreover, the outlook for future profitable growth of radio is so bright that the new stations are continually being created. The number of radio stations grew 28 percent in just the ten years between 1966 and 1975.[59]

EXHIBIT 10

TV REVENUES AND PRETAX PROFITS

	Amount (millions)		Index 1967=100		
	TV broadcast revenues	TV income before Federal income tax	TV broadcast revenues	TV income before Federal income tax	Pretax income as percent of revenues
1965	$1,964.8	$447.9	86	108	22.8
1966	2,203.0	492.9	97	119	22.4
1967	2,275.4	414.6	100	100	18.2
1968	2,520.9	494.8	111	119	19.6
1969	2,796.2	553.6	123	134	19.8
1970	2,808.2	453.8	123	109	16.2
1971	2,750.3	389.2	121	94	14.2
1972	3,179.4	552.2	140	133	17.4
1973	3,464.8	653.1	152	158	18.8
1974	3,781.5	738.3	166	178	19.5
1975	4,094.1	780.3	180	188	19.1

Source: Federal Communications Commission, TV Broadcast Financial Data, 1975.

[55] Frazier, Gross & Clay, Inc., Radio in 1985 (Washington, D.C.: National Association of Broadcasters), 1977, p. 19.

[56] Ibid., p. 26.

[57] U.S. Bureau of the Census, Statistical Abstract of the United States: 1976 (Washington, D.C.: U.S. Government Printing Office, 1976), p. 507.

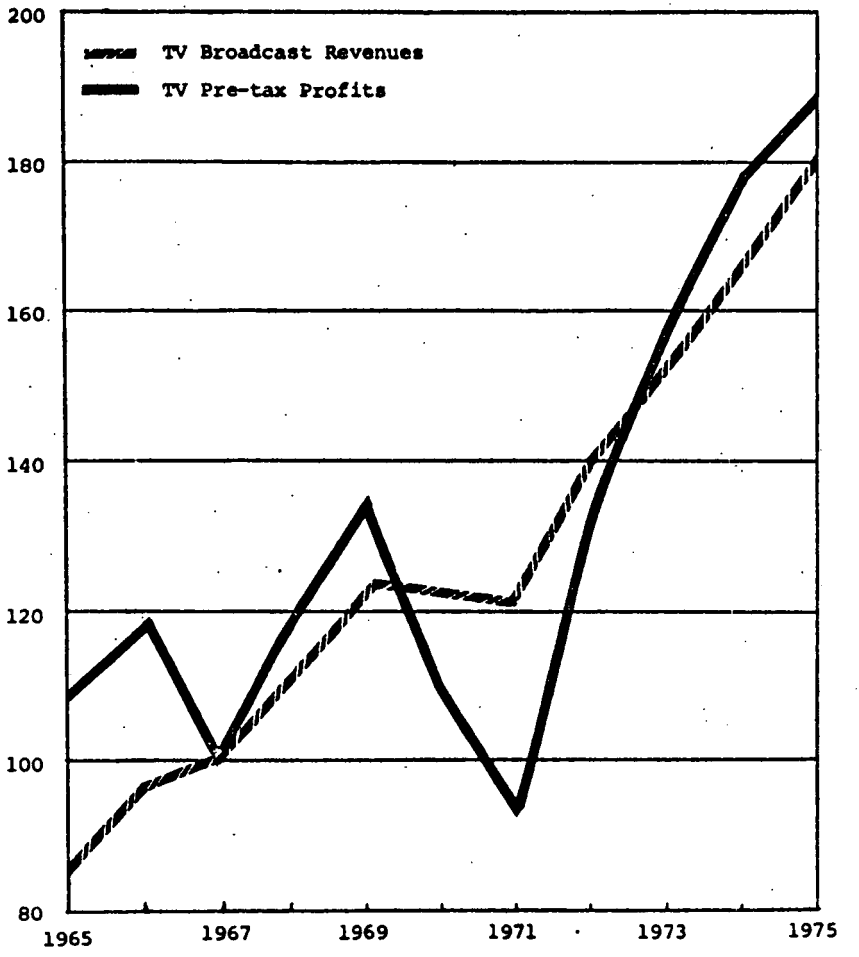
[58] An interesting example of such financial reporting by radio stations comes from the most recent FCC data: In 1975, each of six radio stations reporting revenues of between $250,000 and $500,000 reported losses of over $500,000. (Federal Communications Commission, "AM and FM Broadcast Financial Data, 1975".)

[59] Federal Communications Commission, "AM and FM Broadcast Financial Data", 1966. 1975. There were 5,605 stations in 1966 and 7,158 in 1975.

EXHIBIT 11

TV REVENUES AND PRE-TAX PROFITS:

Index with 1967 = 100 as Base



Source: Federal Communications Commission, "TV Broadcast Financial Data, 1975."

Television Revenues and Profits Are Increasing.—Between 1965 and 1975, TV broadcast revenues more than doubled, and pre-tax profits grew 74 percent. (See exhibits 10 and 11.) TV pre-tax profits as a percentage of revenues are far higher than for most industries. For U.S. industry as a whole, pre-tax profits were 5.9 percent of receipts in 1973[60] while they were 18.8 percent for TV that year. (1973 is the most recent year for which statistics are given in the 1976 Statistical Abstract.)

Radio Offers Low Advertising Rates and an Enormous Audience.—The audience for radio encompasses almost the entire population of the United States.[61] The audience for radio is not only large, but it is growing more rapidly than for other media. Between 1968 and 1977, the audience for spot radio increased 41 percent and that for network radio 21 percent.[62] The increase for spot radio was greater than for any other medium, and that for network radio was greater than for every other medium except TV day network (which rose 29 percent).[63]

While the growth of radio's audience has outpaced audience growth for other media, the rise in radio advertising rates has been less than that for most other media.[64] (See exhibit 12.) Thus, radio ads have remained a bargain for advertisers.

EXHIBIT 12

TRENDS IN RADIO AND ADVERTISING RATES AND AUDIENCES

[Index figures based on 1968—100]

Year	Size of audience		Advertising rate: Cost per 60 seconds		Advertising rate: Cost per 1,000 audience	
	Spot	Network	Spot	Network	Spot	Network
1968	100	100	100	100	100	100
1969	121	95	110	95	91	100
1970	120	92	119	94	99	102
1971	124	103	125	105	101	101
1972	124	121	132	110	106	91
1973	132	123	141	112	106	91
1974	136	122	147	110	108	91
1975	137	125	157	116	114	92
1976	140	119	166	122	118	102
1977	[1] 141	[1] 121	[1] 176	[1] 135	[1] 124	[1] 111

[1] Estimate.

Source: Ted Bates & Co. statistics in "Bates reckoning of media C-P-M fingers TV for 'unconscionable' rate increases," Broadcasting, Jan. 31, 1977, p. 38.

The bargain prices at which radio ads are available is even more apparent when a comparison is made of advertising costs per thousand audience, which is is an even more meaningful measure of cost than the rate per minute of time. (See exhibit 13.) Because of the rapid growth in radio audiences, radio costs per thousand audience grew more slowly than similar costs in all other media.[65]

[60] U.S. Bureau of the Census, Statistical Abstract of the United States: 1976 (Washington, D.C.: U.S. Government Printing Office, 1976), p. 507.

[61] Every week, radio reaches 95.4 percent of all Americans age 12+, and radio's reach is even higher (97.4 percent) in households with incomes of $20,000 and up. On the average day, adults aged 18+ listen to the radio three hours 21 minutes per day—a dramatic increase from the two hours 31 minutes the average adult devoted to radio in 1969. The average time adults listen to radio in 1977 is only slightly less than the comparable television figure: three hours 58 minutes, and television had only a 13 minute increase between 1969 and 1977. Of all U.S. homes, 97.6 percent have at least one radio in working order, and 95 percent of cars are equipped with a radio. (Radio Advertising Bureau, Inc., Radio Facts, 1977.)

[62] Radio spot advertising is national advertising which permits the advertiser to select the radio markets to which his message will be beamed. Spot advertising is distinguished from network advertising, which is also national advertising, but which restricts the advertiser to network-affiliated stations.

[63] "Up with Media: The Ted Bates Version," Broadcasting, January 31, 1977, p. 38.

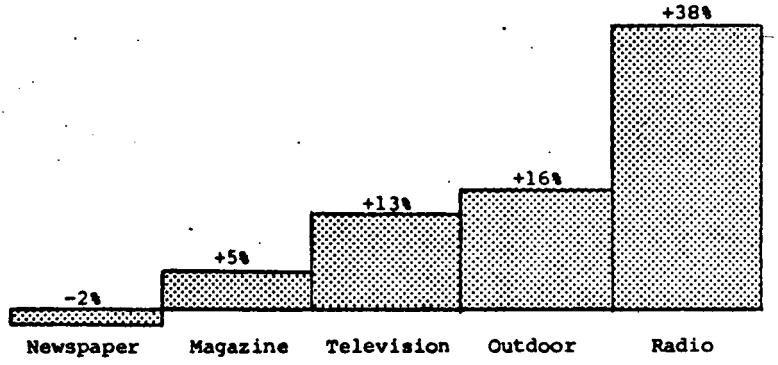
[64] Between 1968 and 1977 the cost of a 60-second ad rose 76 percent on spot radio but only 35 percent on network radio. The increase in spot radio prices was slightly higher than that for consumer prices generally (which rose 72 percent during those years), but the increase for network radio was less than half the rate of increase for consumer prices. Even the increase in spot radio prices, however, was less than that for TV day network (144 percent), TV evening network (113 percent), newspapers (87 percent), and outdoor advertising (93 percent). ("Up with Media: * * *", op. cit., p. 38.)

[65] Between 1968 and 1977, costs per thousand audience rose 11 percent for network radio and 24 percent for spot radio; the comparable figure for TV day network was 89 percent, TV evening network 84 percent, newspapers 90 percent, and 67 percent for outdoor advertising. Unit costs for magazine advertisements have risen less than unit costs in every other medium except network radio, yet cost per thousand audience rose 31 percent for magazines, considerably more than the 24 percent increase for spot radio and the 11 percent increase for network radio. ("Up with Media: * * *", op. cit., p. 38.)

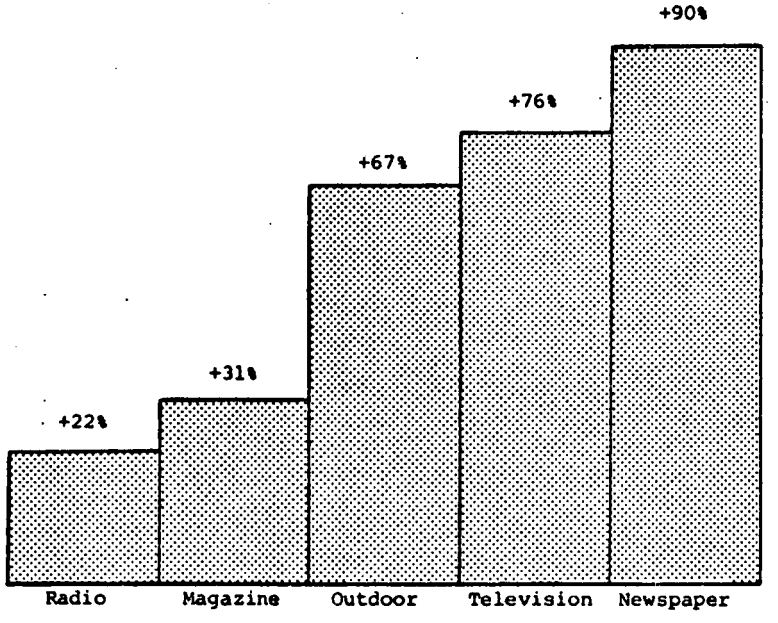
EXHIBIT 13

TRENDS IN MEDIA ADVERTISING RATES AND AUDIENCES:
Graph of Changes in Radio Versus Other Media

Audience Growth of Various Media 1968-77



Various Media Advertising Cost-Per-Thousand Increase 1968-77



Source: Radio Advertising Bureau, Inc., Radio Facts, 1977, p. 13.

A look at actual dollar figures also suggests that radio is a bargain for advertisers. A 60-second ad on spot radio during driving time (6:00 a.m.–10:00 a.m. and 3:00 p.m.–7:00 p.m., the most expensive periods) costs $1.20 per thousand adults reached. In contrast, the equivalent figure for a 30-second ad on spot TV during prime time is $3.50 and for 1,000 lines in newspapers is $2.75.[66]

Radio's low rates and large audience make it so attractive to advertisers that the small increase in rates that would occur if the proposed performance royalty was enacted would have no impact on an advertiser's determination of what media to use.

Radio Has a Growing Share of All Advertising Revenues.—Radio's share climbed steadily from 6.2 percent in 1967 to 7.2 percent in 1975. Radio's share of local advertising revenues has mounted even more rapidly, rising from 10.1 percent in 1967 to 11.7 percent in 1975. (See exhibit 14.)

Advertisers are increasingly selecting local advertising as the most effective means of reaching target groups of consumers.[67] Hence, radio's cornering a growing percentage of the local advertising market means that radio has hitched itself to a rising star. This is a key reason that radio advertising revenues rose 93 percent between 1967 and 1975—a far more rapid rate of growth than that enjoyed by advertising revenues generally, which only grew 68 percent during that decade. (See exhibit 15.)

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[66] Radio Advertising Bureau, Inc., op. cit.

[67] Local (all media) advertising revenues rose from 39 percent of all media advertising revenues in 1967 to 46 percent in 1975.

EXHIBIT 14

RADIO'S SHARE OF ALL ADVERTISING REVENUES

[Dollar amounts in millions]

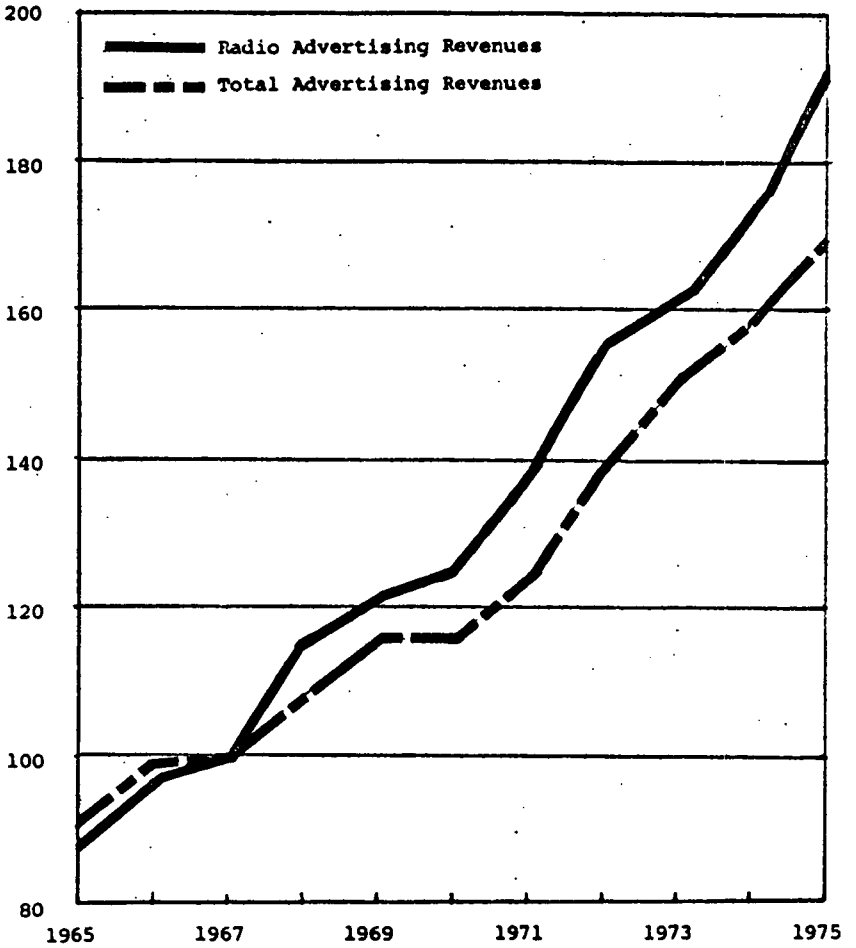
	Radio revenues					Other media revenues				Radio versus other media							
Year	Network	Spot	Local	Total	Index (1967 =100)	TV	Newspapers	Magazines	Outdoor	Total local ad revenues [1]	Radio's percent of total local	Total national ad revenues [1]	Radio's percent of total national	Ratio of local ad revenues to all ad revenues (percent)	Grand total ad revenues [1]	Index (1967 =100)	Radio's percent of grand total
1965	$60	$275	$582	$917	87	$2,515	$4,456	$1,999	$180	$5,857	9.9	$9,398	3.6	38	$15,255	90	6.0
1966	63	308	639	1,010	96	2,823	4,895	1,291	178	6,457	9.9	10,213	3.6	39	16,670	99	6.1
1967	64	314	671	1,048	100	2,909	4,942	1,280	191	6,616	10.1	10,250	3.7	39	16,866	100	6.2
1968	63	360	767	1,190	114	3,231	5,265	1,318	208	7,244	10.6	10,883	3.9	40	18,127	107	6.6
1969	59	368	837	1,264	121	3,585	5,753	1,376	213	7,964	10.5	11,518	3.7	41	19,482	116	6.5
1970	56	371	881	1,308	125	3,596	5,745	1,323	234	8,140	10.8	11,460	3.7	42	19,600	116	6.7
1971	63	395	987	1,445	138	3,534	6,198	1,370	261	8,965	11.0	11,775	3.9	43	20,740	123	7.0
1972	74	402	1,136	1,612	154	4,091	7,008	1,440	292	10,270	11.1	13,030	3.7	44	23,300	138	6.9
1973	70	380	1,240	1,690	161	4,493	7,595	1,448	308	11,275	11.0	13,845	3.3	45	25,120	149	6.7
1974	69	405	1,363	1,837	175	4,851	8,001	1,504	309	12,005	11.4	14,725	3.2	45	26,730	158	6.9
1975	85	440	1,500	2,025	193	5,272	8,442	1,465	335	12,870	11.7	15,400	3.4	46	28,270	168	7.2

[1] Statistics on total advertising revenues include figures for some media not listed here. Totals do not always add precisely due to rounding.

Source: Advertising Age, July 5, 1976, Aug. 12, 1974, and Advertising Age Research Department.

EXHIBIT 15

RADIO'S SHARE OF ALL ADVERTISING REVENUES:
RADIO VS. ALL MEDIA AD GROWTH
Index with 1967 = 100 as Base



Source: Advertising Age, July 5, 1976, August 12, 1974 and Advertising Age Research Department.

In short, radio is not only in a growing industry—advertising—but also, within the industry, radio is one of the faster growing segments. This represents the picture of a very healthy radio broadcasting industry.

Broadcasting Companies Will Be Able to Pass Forward the Costs of a Performance Royalty

Summary.—Although broadcasting companies may chose to absorb the cost of a performance royalty, the stations could, if they so elected, pass this new expense forward just as other cost increases have been successfully passed on in the form of higher advertising rates. Because of its distinct advantages to advertisers, radio has in the past been able to raise its advertising rates without losing its advertisers to different media. In fact the competition that radio faces is from other radio stations, more so than other advertising media. Since a performance royalty for sound recordings would affect all radio stations of a similar size equally, it will not substantially affect inter-station competition. What will be effected is a slight increase in the cost of radio as a medium relative to all other media. But the distinct advantages that radio offers advertisers will more than outweigh the modest cost of a performance royalty, thus assuring that radio will retain its competitive advantage unimpaired. It follows that radio would certainly be able to pass along to advertisers the cost of the royalty proposed in H.R. 6063. Indeed, it would be equitable for the stations to pass along such costs, because radio advertisers benefit directly from the audiences that sound recordings attract.

Radio has distinct advertising advantages.—As was pointed out in a recent magazine article by the Vice-President/Director of media services at Lewis & Gilman, radio advertising "has many advantages:

"Comparatively low rates;

"Lower production costs than many other media are normally able to offer;

"Excellent flexibility;

"Opportunity to test investments against the pulling power of different types of station audiences;

"Opportunity to escape some of the escalation in media costs." [68]

Radio enables advertisers to reach specific local markets such as teenagers, ethnic groups, and commuters. Radio also reaches important segments of local markets that are not inclined to read newspapers.

One of the most promising advantages of radio over other media is that advertisers are using more local advertising, as opposed to national advertising.[69] Radio, by its nature, is a very good medium for local advertising.[70] This trend to local advertising will continue to fuel the demand of advertisers for radio ad time.

Another advantage of radio advertising is that ads can be prepared on short notice and with a minimum expenditure of time and money. This makes radio a particularly appealing medium to advertisers during a recessionary period when there is continuous management uncertainty about markets, the size of companies' advertising budgets, etc.

Thus, as can be seen, radio is in a strong position.

Radio's strong competitive position has enabled it to raise its advertising rates repeatedly over the years.—For example, between 1974 and 1975, radio spot advertising rates rose 6.8 percent,[71] far more than the one percent increase that would be necessary if, *e.g.*, Congressman Danielson's proposed bill, H.R. 6063, were to be enacted and radio were to pass forward fully the new performance royalty. Radio's 6.8 percent increase in its spot radio prices apparently did not cause it to lose any advertising business, for between those two years spot radio revenues rose 8.6 percent[72]—nearly two percentage points more than the increase in rates. Radio gained additional advertising business despite the increase in its prices.

The figures for network radio advertising are even more impressive. Between 1974 and 1975, network ad prices rose 5.4 percent, while network revenues rose 23 percent.

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[68] Frank Carvel, "Radio," Media Decisions, February 1977, p. 92.

[69] Local advertising in all media grew 78 percent between 1968 and 1975, while national advertising grew only 42 percent.

[70] In fact, between 1968 and 1975, local advertising rose from 64 percent to 74 percent of all radio advertising.

[71] See exhibit 12.

[72] See exhibit 14.

To look at the longer term picture, between 1968 and 1975, network advertising rates rose 16 percent while network revenues rose 35 percent. These data show that radio was able to increase its ad sales despite the rise in its prices.[73]

The broadcasters have maintained that, because their advertising rates are dependent more on audience size than on operating costs, they would be unable to pass on the small costs of the proposed royalty. As a result, they argue, a performance royalty would impact on their profitability.

This line of reasoning is specious, it suffers from confusion over inter-station competition and inter-media competition. In the former instance, differential rates among stations in a given geographic area would indeed depend on audience share. An increase in one station's operating costs might well produce concern over that station's operating profitability. But a performance royalty for sound recordings would affect all stations of a given revenue class equally. Thus, like a minimum wage, a performance royalty will not substantially affect interstation competition. What will be effected is a slight increase in the cost of radio as a medium relative to all other media. But as the foregoing analysis makes clear, radio's distinct and increasing competitive advantages more than offset the slight cost of a performance right for sound recordings.[74]

In short, radio does not appear to have encountered any serious resistance when it instituted price increases considerably greater than the one percent increase that would be necessary if broadcasters passed forward fully the performance royalty for performers and recording companies proposed by Congressman Danielson. It follows that a small increase in radio advertising rates to cover a performance royalty is not likely to have an appreciable effect on radio advertising sales, and is equally unlikely to promote substitution of other media for radio. Radio broadcasters, if they elect to pass on the performance fee, could become a conduit for placing the cost upon the advertisers. The cost of the fee would, in effect, be paid by advertisers who are currently benefiting at no cost to themselves from the talent and money invested in recordings by performers and recording companies.

It is quite appropriate that advertisers pay in some manner for the use of artists' and recording companies' creativity that attracts the large audiences for their commercials. Artists and recording companies deserve compensation for the indispensable contribution they make to the selling of cars, cosmetics, and the host of other products advertised on radio.

The impact of a performance royalty on consumers would be minimal

If broadcasting companies raised their advertising rates to cover a performance fee paid to artists and recording companies, the impact on advertisers' budgets and, ultimately, on product costs would be negligible.

Let us take as an example a typical heavy advertiser: The Ford Motor Company, one of the top ten radio advertisers in the country, spent $13.5 million on network and spot radio ads in 1975.[75] Suppose, for lack of better information, Ford had spent an equal, additional amount on local radio ads. Then its total expenditures for radio advertising in 1975 would have been around $27 million. Assuming that (a) Ford had advertised exclusively on the radio stations paying the highest royalty rate proposed in H.R. 6063, (b) Ford's advertising budget had had to be increased by one percent ($270,000) to cover a pass-through of the performance fee from radio broadcasters, and (c) Ford had passed these costs on to the consumer, then the impact on one of the roughly 2 million vehicles Ford produces every year would have been minuscule. Even if allowance is made for mark-ups by broadcasters and by Ford and its dealers, the increase in the cost of a Ford car would not be much greater. With sales of over $24 billion (in 1975),

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[73] The longer term picture for spot radio advertising does not seem to be so rosy. While spot radio advertising rates rose 57 percent between 1968 and 1975, (see exhibit 12), spot advertising revenues rose only 22 percent during those years. (See exhibit 14.) On the other hand, while radio spot advertising revenues rose only 22 percent between 1968 and 1975, local radio advertising revenues shot up 96 percent during those years. (See exhibit 14.) Local radio advertising rates tend to be similar to spot radio ad rates and both rose approximately an estimated 50 percent during this period. Therefore, while radio spot advertising was losing volume, local radio advertising was gaining volume. In fact, if spot and local radio advertising revenues are combined, the 1968–1975 increase is 72 percent, far more than the increase in the per minute spot and local radio ad prices.

[74] The slight decrease in the relative attractiveness of broadcasting recorded music, due to a token performance royalty, would not induce substitution of other programming, such as talk shows, because of their already high cost relative to recorded music.

[75] "100 Leaders' Media Expenditures Compared in 1975," Advertising Age, August 23, 1976.

Ford would probably not even pass on this trivial increase in its costs (amounting to only 0.001 percent of its sales); Ford probably would have absorbed the increase in its operating budget, more specifically in its aggregate advertising budget, since this increase would have been relatively minor compared to other cost increases during a period of inflation.

Bristol-Myers, another major radio advertiser, spent $6 million on national network and national spot radio ads in 1975.[76] If Bristol-Myers spent an equal, additional amount on local radio ads, its total radio advertising expenses might approximate $12 million. A one percent increase [77] in these costs would be $120,000. Again, it is most likely that this sum would be lost in the costs of Bristol-Myers' doing nearly two billion dollars worth of business. However, if this increase due to a performance royalty were passed forward to the consumer in a general price increase, the performance rights' share would represent a minute 0.007 percent increase in prices ($120,000 divided by Bristol-Myers' 1975 sales of $1.8 billion). Even if this sum were doubled to allow for the effects of markups along the line, the total spread out, over billions of units of products, would be imperceptible to consumers and wholesalers alike.

In short, the impact on consumer product costs of the proposed performance fee for performers and recording companies would scarcely be perceptible either to advertisers or to consumers, even if the new fee were passed forward fully. No appreciable effect would be felt on consumer prices.

A Performance Royalty Will Not Affect Composers and Publishing Companies

Granting a performance right in sound recordings need have no effect on broadcaster payments to composers and publishing companies. The "pie-share" theory is not valid; composers and publishers need not suffer income loss any more than construction carpenters are hurt when electricians get a raise. The new performance fee would simply increase the total payments that stations presently make for the use of recordings. Moreover, the new fees could reduce collection costs to the composer/publisher, if their collection system is utilized to collect royalties for sound recordings.

Bard and Kurlantzick's Arguments Against a Performance Right Are Based on Erroneous Assumptions of Fact

Several of the comments filed with the Copyright Office [78] have cited an article [79] by Professors Bard and Kurlantzick which is critical of a public performance right in sound recordings. Unfortunately, any reliance on that article is wholly misplaced. The Bard and Kurlantzick analysis is little more than an abstract academic exercise based on theoretical notions of how the various parties affected by a performance right might react. The authors unabashedly make bold predictions on the basis of their assumptions, all the while totally ignoring the realities of the marketplace, and presenting not a shred of supporting data.

Professors Bard and Kurlantzick have developed a theoretical model as the basis for their predictive analysis of the effects of a performance right in sound recordings. Their model is reminiscent of a Rube Goldberg invention; each segment of the invention, based on some outlandish and wholly impractical cause and effect relationship, is dependent upon some other, equally bizarre, segment of the invention. If any one of the segments should not operate in accordance with the predicted behavior, then the entire scheme fails. So here, Bard and Kurlantzick proceed on the basis of a series of illogical assumptions. If any one of them is proven wrong, then their entire theoretical construction must collapse, like a flimsy house of cards. As we shall demonstrate below, not just one, but virtually all of the assumptions underlying the Bard and Kurlantzick model are erroneous, based on a gross misconception about how the music, recording, and broadcasting industries operate.

To understand these defects, it is necessary to summarize the chain of reasoning underlying the analysis. Briefly, it is as follows:

1. The creation of a public performance right in sound recordings will require radio stations to pay additional royalty fees for the music they presently use.

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[76] "100 Leaders' * * *," op. cit.

[77] See H.R. 6063.

[78] See, e.g., Comment Letters 6 and 8, Copyright Office Docket No. S 77-6, on behalf of North Carolina Association of Broadcasters (May 27, 1977) and American Broadcasting Companies, Inc. (May 31, 1977), respectively.

[79] "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It," 43 Geo. Wash. L. Rev. 152 (1974).

Because their demand for sound recordings is relatively inelastic, broadcasters are likely to pay the additional royalties rather than reduce their use of the product. Because the additional cost is so slight, broadcasters are unlikely to pass it along to advertisers.

2. Having absorbed these costs, broadcasters will attempt to reduce the royalties they presently pay to composers and publishers for the use of their musical compositions.

3. Faced with this reduction in their royalties, publishers and composers will attempt to recapture some of their lost revenues by negotiating higher mechanical fees from record companies.

4. Faced with increases in mechanical royalty fees, recording companies will attempt to recoup their increased costs from their recording artists by negotiating lower royalties on the sale of sound recordings.

The result, according to Bard and Kurlantzick, would be simply a redistribution of revenues with no increase in benefits accruing to performers and record companies as Congress may have intended.

The interdependence of these predictions is apparent. Equally apparent are the misconceptions about industry practices that are contained in the underlying assumptions:

First, while broadcasters may be prone to absorb the increased royalty costs in the short run, they certainly will not do so in the long run. They, just like any other business, must maintain their operating margains, which means raising advertising rates when faced with an increase in costs. (As we have previously demonstrated, this pass-through will not disadvantage broadcasters in any way.)

Second, given the inevitable pass-through of these costs, broadcasters are not likely to attempt to negotiate lower royalty rates from ASCAP, BMI and SESAC. Indeed, it is far simpler for a radio station to pass along a small increase in its costs rather than attempt—in arduous and prolonged rate negotiations—to reduce the royalty rate arrived at by collective bargaining.[80]

Third, given the likelihood that composer/publisher royalties would remain the same, composers would not have the incentive presumed by Bard and Kurlantzick to recapture their lost revenues through the negotiation of higher mechanical rates. Most important, composers and publishers have already succeeded in obtaining the maximum statutory rate for most recordings,[81] and with the compulsory licensing provision, recording companies just do not pay royalties far in excess of the statutory rate. Indeed, Bard and Kurlantzick concede[82] that it is exceedingly rare for an initial mechanical royalty to exceed the statutory rate. How, then, do Bard and Kurlantzick conclude that the composer will be able to capture the record company's share of the new performance income?

Fourth, given the fact that mechanical royalty payments would not be increased, there is no reason to presume that record companies would attempt to force their recording artists to accept lower royalties on sales of their records.

More important, Bard and Kurlantzick have overlooked a critical fact: Performers will be earning performance royalties under the new performance right who never before earned royalties on the sale of records. That is, background musicians and vocalists hired for recording sessions will receive performance royalties in addition to their flat hourly rates. Record companies will thus be unable to hold down artists' royalties on sales, since a major portion of the artists that would earn performance royalties don't even earn royalties on sales in the first place.

Moreover, with respect to the few artists who do earn royalties on sales, it is highly doubtful that record companies would have the power to lower their royalty fees. Indeed, artists' share of sales increased from 7½ percent in 1957 to an estimated 20 percent in 1977.[83] This suggests that the bargaining power is with the artist, not the record company. Moreover, contracted royalty levels usually span several years, so adjustments are not readily made.

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[80] Whereas all radio stations are in a common position with respect to ASCAP, BMI and SESAC, radio stations would be affected by a performance royalty for sound recordings differently. Some might be wholly exempt, and others might pay nominal fees.

[81] Those for which lower mechanical rates are charged are largely for secondary uses, such as budget albums, record club albums, and so on.

[82] 43 Geo. Wash. L. Rev. at 229, n. 177.

[83] Estimate based on preliminary results of survey conducted by CRI in 1977 of 12 major recording companies.

Thus, the assumptions made by Bard and Kurlantzick are not only erroneous, but also fatally defective to the predictive analysis. Performers and record companies will enjoy increased income as a result of the creation of a performance right in sound recordings. Composers and publishers will be unaffected by such legislation.[84] Broadcasters will pay the costs imposed by performance royalties in the first instance, but will ultimately pass them along to the advertisers who ought to bear those costs. By the time those costs reach the consumer, they will be barely perceptible.

V. PROCEDURES FOR IMPLEMENTING A PERFORMANCE RIGHT IN SOUND RECORDINGS CAN BE DEVELOPED

Separate and apart from the principle of a performance right in sound recordings is the issue of implementation. In countries all over the world, a performance right in sound recordings is implemented every day. Any questions regarding implementation cannot be allowed to dilute the merit or justification for a performance right. We know how to charge and collect an income tax, telephone bills, pension payments and composer revenues. It seems quite apparent that, collectively, we can conceive a fair and workable scheme for performance royalties, too.

Implementation and Distribution; Identification of Beneficiaries

There are two alternatives for the successful administration, collection and distribution of performance royalties for sound recordings. One is to use existing mechanisms. The other is to create a new entity.

ASCAP, BMI and SESAC now administer, collect and distribute royalties for music copyright owners under equitable systems. They use statistically valid sampling techniques to monitor airplay. Many of the sources they currently monitor in connection with the existing performance right for composers and publishers would be identical to the sources to be monitored for a new performance right for record companies and performers. Accordingly, these entities might be willing to take on all or part of the administrative functions required for a performance right in sound recordings.

This could be advantageous to all parties, because the sharing of administrative costs should result in greater net income to the holders of the music copyright, as well as to those who would receive royalties from sound recordings.

If for some reason those organizations are not involved, an independent agency could be set up by the various participants, just as it was possible once to establish an ASCAP or BMI. Alternatively, an existing research and computer-oriented commercial enterprise could undertake the task.

As regards distribution of the royalty proceeds, the information is readily at hand. The identity of the proposed recipients will not be in doubt. Every recording company is clearly identified on the label of each recording subject to performance. The identification of the musicians and vocalists—whether stars or background performers—is routinely included in listings on recording session forms contractually required by both AFM and AFTRA. Of course, the techniques for making distributions are based on well-established statistical sampling methods.

As for distributions to vocalists and musicians, representatives of those groups can best speak to alternatives (e.g., whether payments should be made directly to individual recipients by the collecting organization, or whether this can be accomplished more efficiently and economically by the unions themselves).

It would be appropriate for the Copyright Office to establish or approve implementing regulations. These should include procedures for appeals and settlement of grievances, which we recommend be adjudicated by the Royalty Tribunal.

Compulsory Licensing

We favor a compulsory licensing system. It would assure broad availability of sound recordings for all who wish to use them, and it would simplify procedures.

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[84] It should be noted, however, that if record production increases as a result of the creation of a performance right, as Bard and Kurlantzick predict, the income of composers and publishers might well increase.

Rate Setting

Under a compulsory licensing system, rates could be set as the result of negotiation between the parties, in a proceeding before the Copyright Tribunal, or by Congressional action. On balance, we believe the preferable approach is for the Tribunal to consider and adjudicate the complex technical and economic factors involved. Congress created the Tribunal for just this type of function.

We would, of course, be willing to attempt negotiations to set the rate. The RIAA has previously suggested to the National Association of Broadcasters that the matter be negotiated. These efforts were unsuccessful. Obviously, if there are such negotiations, there must be a mechanism established in case there is no agreement. The Royalty Tribunal is the logical entity to make a final determination, if necessary.

Congress has already enacted legislation implementing precisely such a scheme—voluntary negotiations under a compulsory licensing system, with referral to the Copyright Royalty Tribunal if necessary—in connection with noncommercial broadcasting under Section 118 of the Copyright Revision Act.

H.R. 6063

Pending in Congress at the present time is H.R. 6063, a bill introduced by Congressman George Danielson (D. Calif.) to amend Section 114 of the Copyright Revision Act by creating a performance right in sound recordings. Of course, the Danielson bill is not technically part of the Copyright Office study. Nevertheless, H.R. 6063 has received considerable attention. Certainly, the rate structure proposed in the bill has been the subject of extensive testimony, economic calculations, and debate.

RIAA, of course, strongly endorses the performance right principle contained in H.R. 6063; however, RIAA does not necessarily endorse all of the components of that bill. For example, that bill would apparently extempt from performance royalties jukebox operators and cable TV systems. At the present time, we do not see any justification for relieving these users of the same obligation to compensate the creators of sound recordings that is imposed on other users. If there is a question about the economic ability of these users to pay, that issue is best addressed in the context not of the *principle*, but of the appropriate *rate*—either in voluntary negotiations among the affected parties, or by the Royalty Tribunal in the event that voluntary negotiations do not produce agreement.

Similarly, RIAA is not wedded to the royalty rate structure proposed in that bill. When legislation was introduced eight years ago in which a royalty rate structure was established,[85] the rate proposed was 3.5 percent of a broadcast station's revenues, a rate which then reflected parity with the royalties earned by composers and publishers through ASCAP and BMI. That rate has slowly but inexorably been whittled down to the rate structure contained in the Danielson bill in a continuing series of political compromises.

We believe that the rate structure should be developed on the basis of an informed and in-depth economic analysis, not on the basis of politics. We would therefore recommend that the parties first attempt to negotiate a rate among themselves voluntarily. Should such negotiations fail, the matter should be remitted to the Royalty Tribunal for an in-depth economic analysis and resolution.

As it presently stands, the royalty structure proposed in the bill is an incredible bargain for all users, radio and television broadcasters[86] in particular. The formula for radio stations is as follows:

Revenues	*Annual Fee*
More than $200,000	1 percent of net advertising
$100,000–$200,000	$750.00
$25,000–$100,000	$250.00
$25,000 and under	*None*

[85] Amendment No. 9 (by Senator Williams) to S. 543, 91st Con., 1st sess. (115 Congressional Record 8613, 8616 (April 3, 1969)).

[86] The formula for television stations is set out in exhibit 17.

Further, all-news stations or others which do not rely heavily on recorded music would pay only a pro rata share of the performance royalty percentage.

These proposed royalty fees are not at all burdensome. About one-third of the nation's radio stations would pay *68 cents per day.* Another third would pay *$2.05 per day.* The remaining third of the stations—large stations with more than $200,000 in annual advertising revenues—would make a modest payment of one percent of net advertising revenue. Thus, even a station earning revenues of *$1 million* annually would pay only $27.40 daily, or $1.14 per hour to compensate the vocalists, musicians and record companies for the exploitation of their creative efforts.

According to an anlysis by the Cambridge Research Institute, the total royalties that radio broadcasters would have paid in 1975 for their use of all copyrighted sound recordings would have been between $10.6 and $14.4 million. (The derivation of these figures is set out in Exhibit 16.) The total performance royalties paid by television stations would have amounted to $483,000. (*See* Exhibit 17.) Clearly, the performance royalties proposed in H.R. 6063 are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces. If anything, the fees are too reasonable.

EXHIBIT 16

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER H.R. 6063
(HIGHEST FEE ESTIMATED)

Revenue category of radio stations	Number of AM, AM/FM stations in this category in 1975[1]	AM, AM/FM estimated performance royalty (based on 1975 revenues)[2] (thousands)	Estimated number of FM stations in this revenue category in 1975[3]	Estimated number of stations of all types in this revenue category in 1975	All stations estimated performance royalty (based on 1975 revenues)[2] (thousands)
Less than $25,000	36	----------	71	107	----------
$25,000 to $100,000	860	$215	361	1,221	$305
$100,000 to $200,000	1,440	1,080	331	1,771	1,328
Over $200,000	1,966	11,299	349	2,315	12,721
Total	4,302	----------	1,112	5,414	----------
Total for stations with revenues of $25,000 or more	4,266	12,594	1,041	5,307	14,354

[1] This is the number of stations whose revenue category was indicated in the Federal Communications Commission report. Except for stations with revenues under $25,000, the number of stations actually in operation is somewhat larger than the figures here.

[2] The formula for the performance royalty in H.R. 6063 introduced in April 1977 is:
Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250 per year.
Stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750 per year.
Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts."
AM, AM/FM stations in this revenue category had 79 percent of all AM, AM/FM stations' expenses in 1975, and thus, we estimate, earned 79 percent of the $1,430,203,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1975. No data are available on total net revenues earned by FM stations with revenues above $200,000. We estimate that 34 percent of the FM stations with revenues above $25,000 fall in this category, while 46 percent of of AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues of over $200,000 earn 79 percent of total AM, AM/FM revenues. We therefore estimate that FM stations with revenues over $200,000 earned 58 percent of all FM revenues (13 percent + 46 percent × 79 percent) or $142,295,000 in 1975.

[3] 1975 Federal Communications Commission data indicate the distribution among various revenue categories of independent FM stations, but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations (of both types) with revenues under $25,000 was reported to be 71 in 1975. Therefore, in this revenue category the number of stations is correct and not an estimate.

Source: Analysis made by Cambridge Research Institute based on the Federal Communications Commission's AM-FM Broadcasting Financial Data, 1975, issued Nov. 30, 1976.

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER H.R. 6063 (LOWEST FEE ESTIMATED)

Revenue category of radio stations	Number of AM, AM/FM stations in this category in 1975[1]	AM, AM/FM estimated performance royalty (based on 1975 revenues)[2] (thousands)	Estimated number of FM stations in this revenue category in 1975[3]	Estimated number of stations of all types in this revenue category in 1975	All stations, estimated performance royalty (based on 1975 revenues)[2] (thousands)
Less than $25,000	36	----------	71	107	----------
$25,000 to $100,000	860	$159	361	1,221	$226
$100,000 to $200,000	1,440	799	331	1,771	983
Over $200,000	1,966	8,361	349	2,315	9,414
Total	4,302	----------	1,112	5,414	----------
Total for stations with revenues of $25,000 or more	4,266	9,319	1,041	5,307	10,623

[1] This is the number of stations whose revenue category was indicated in the Federal Communications Commission report. Except for stations with revenues under $25,000, the number of stations actually in operation is somewhat larger than the figures here.

[2] The formula for the performance royalty in H.R. 6063 introduced in April 1977 is:

Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250 per year, but the fees would average only about 74 percent[4] of this amount.

Stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750 per year, but the fees would average only about 74 percent[4] of this amount.

Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts." If allowance is made for stations devoting less than the average air play to recorded music, the performance royalty would average perhaps 74 percent[4] of "net sponsor receipts." AM, AM/FM stations in this revenue category had 79 percent of all AM, AM/FM stations' expenses in 1975, and thus, we estimate, earned 79 percent of the $1,430,203,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1975. No data are available on total net revenues earned by FM stations with revenues above $200,000. We estimate that 34 percent of the FM stations with revenues above $25,000 fall in this category, while 46 percent of AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over $300,000 earn 79 percent of total AM, AM/FM revenues. We therefore estimate that FM stations with revenues over $200,000 earned 54 percent of all FM revenues (31 percent+46 percent ×79 percent) or $142,295,000 in 1975.

[3] 1975 Federal Communications Commission data indicate the distribution among various revenue categories of independent FM stations, but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the types of FM stations have the same distribution among the revenue categories. The number of FM stations (of both types) with revenues under $25,000 was reported to be 71 in 1975. Therefore, in this revenue category the number of stations is correct and not an estimate.

[4] See the following table.

Station revenue class [a]	1975 median station revenue [a]	Number of stations sampled [a]	1975 median music license fee [a]	Estimated aggregate music fee actually paid (col. 3× col. 4)	Estimated pro forma aggregate blanket music fee (col. 2× col. 3× 3.425 percent) [b]
(1)	(2)	(3)	(4)	(5)	(6)
$2,000,000 plus	$3,078,600	31	$78,700	$2,439,700	$3,268,703
$1,000,000 to $2,000,000	1,326,700	84	33,100	2,780,400	4,816,916
$500,000 to $1,000,000	661,300	162	16,100	2,608,200	3,669,223
$300,000 to $500,000	372,300	263	9,500	2,498,500	3,353,585
$250,000 to $300,000	273,600	153	7,100	1,086,300	1,433,732
$200,000 to $250,000	222,700	187	5,700	1,031,700	1,426,338
$150,000 to $200,000	172,600	218	4,600	1,002,800	1,288,718
$125,000 to $150,000	136,000	150	3,700	555,000	698,700
$100,000 to $125,000	111,400	147	3,000	441,000	560,871
$75,000 to $100,000	86,900	126	2,200	277,200	375,017
$50,000 to $75,000	63,400	97	1,600	155,200	210,631
Less than $50,000	39,400	71	900	63,900	95,811
Total				14,939,900	20,198,245

Estimated aggregate music fee actually paid ÷ Estimated pro forma aggregate blanket music fee = 74 percent

[a] Source: National Association of Broadcasters, NAB Radio Financial Report, 1976.
[b] Assumes all stations would pay the ASCAP license fee of 1.725 percent plus BMI license fee of 1.7 percent.

Source: Analysis made by Cambridge Research Institute based on the Federal Communications Commission's AM-FM Broadcasting Financial Data, 1975, issued Nov. 30, 1976.

EXHIBIT 17

PERFORMANCE ROYALTY TV STATIONS WOULD PAY RECORDING COMPANIES AND ARTISTS UNDER H.R. 6063

Revenue category of TV stations	Number of stations	Annual performance royalty per station	Total performance royalty paid per year
$1,000,000 to $4,000,000	312	$750	$234,000
More than $4,000,000	166	$1,500	249,000
Total	478		483,000

Source: Federal Communications Commission, TV Broadcast Financial Data, 1975, issued Aug. 2, 1976.

VI. RECOMMENDATIONS TO THE COPYRIGHT OFFICE

RIAA urges that the Copyright Office make the following recommendations to the Congress:

1. That Congress enact a performance right in sound recordings for the benefit of musicians, vocalists, and recording companies.
2. That the parties be allowed four months to negotiate fair and equitable performance royalties on a voluntary basis.
3. That antitrust exemptions be created where necessary to facilitate voluntary negotiations and collection and distribution functions.
4. If negotiation produces no agreement, that the Copyright Royalty Tribunal be empowered to establish performance royalties, after an in-depth analysis of the economic and equitable issues.
5. That the Royalty Tribunal review the royalty rate established three years after commencement and every five years thereafter.
6. That the legislation codify the 50/50 sharing of performance royalties (50 percent to performers, 50 percent to recording companies) agreed upon by principal representatives of the proposed recipients.
7. That the Copyright Office be empowered to adopt necessary regulations to implement administration, collection, and distribution of performance royalties.
8. That recipients of performance royalties be required to establish an equitable system for administration, collection, and distribution of such royalties, the system to be approved by the Copyright Office; in the event that the recipients are unable to establish acceptable procedures, that the Copyright Office be empowered to establish an equitable system.

9. That the Royalty Tribunal be empowered to adjudicate disputes over collection and distribution.

APPENDIX A. MEMBERS AND ASSOCIATE MEMBERS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

ABC Records, Los Angeles, Calif.
Alshire International, Inc., Burbank, Calif.
A & M Records, Inc., Hollywood, Calif.
Ansonia Records, New York, N.Y.
Arista Records, New York, N.Y.
Atlantic Recording Corp., New York, N.Y.
Bee Gee Records, Los Angeles, Calif.
Buddah Records, New York, N.Y.
Capital Records, Inc., Hollywood, Calif.
Capricorn Records, Macon, Ga.
Casablanca Records, Los Angeles, Calif.
Casino Records, Memphis, Tenn.
CBS/Records Group, New York, N.Y.
Chrysalis Records, Los Angeles, Calif.
Curtom Records (Gemigo), Chicago, Ill.
Discreet Records, Inc., Hollywood, Calif.
Dobre Records, Studio City, Calif.
Elektra/Asylum/Nonesuch Records, Los Angeles, Calif.
Folkways Records, New York, N.Y.
Forte Record Co., Kansas City, Mo.
GNP-Crescendo Records, Los Angeles, Calif.
Goldband Recording Corp., Lake Charles, La.
GRT Corp., Sunnyvale, Calif.
Icka-Delick-Music & Records Corp., Chicago Ridge, Ill.
Indian House, Taos, N. Mex.
Jamie Records, Philadelphia, Pa.
Kelit-Aurora Record Corp., New York, N.Y.
Lifesong Records, New York, N.Y.
Little David Record Co., Inc., Los Angeles, Calif.
London Records, New York, N.Y.
MCA Records, University City, Calif.
Michele Audio Corp. of America, Massena, N.Y.
Mill City Records, Minneapolis, Minn.
Charles Michelson, Inc., Beverly Hills, Calif.
Minority-Owned Enterprise, Albuquerque, N. Mex.
Monitor Records, New York, N.Y.
Nashboro Record Co., Nashville, Tenn.
Ovation Records, Glenview, Ill.
Peters International Inc., New York, N.Y.
Phonogram, Inc., Chicago, Ill.
Pickwick International, Inc., Woodbury, Long Island, N.Y.
Platinum Records (the Music Factory), Miami, Fla.
Playboy Records, Los Angeles, Calif.
Polydor, Inc., New York, N.Y.
Private Stock Records, Ltd., New York, N.Y.
RCA Records, New York, N.Y.
Rocket Music Co., Inc., Beverly Hills, Calif.
Rocky Coast Records, Reading Mass.
RSO Records, Los Angeles, Calif.
Salsoul Records Corp., New York, N.Y.
Tabu Records, Hollywood, Calif.
Takoma Records, Santa Monica, Calif.
Tom Cat Records, Los Angeles, Calif.
20th Century Records, Los Angeles, Calif.
United Artists Music & Records Group, Los Angeles, Calif.
Thomas J. Valentino, Inc., New York, N.Y.
Vanguard Recording Society, Inc., New York, N.Y.
Vantage Recording Co., Princeton, N.J.
Warner Bros. Records, Burbank, Calif.
Word Records, Waco, Tex.

APPENDIX B

ARNOLD & PORTER,
Washington, D.C., July 18, 1977.

Re Constitutionality of Legislation Creating a Performance Copyright for Sound Recordings.

MS. BARBARA RINGER,
Copyright Office, Library of Congress
Washington, D.C.

DEAR MS. RINGER: Enclosed is a memorandum of law dealing with the various constitutional challenges that have been raised to legislation granting a performance right in sound recordings. As we conclude in that memorandum, there will be no constitutional problems whatever created by such legislation.

I would appreciate your including this letter and memorandum in the Copyright Office docket dealing with the performance rights issue.

Sincerely yours,

JAMES F. FITZPATRICK.

Enclosure.

Memorandum of Law

For: Copyright Office.
From: James F. Fitzpatrick.
Re Constitutionality of Legislation Creating a Performance Copyright for Sound Recordings.

In connection with the pending inquiry by the Copyright Office, on behalf of our client, the Recording Industry Association of America, Inc., we have examined the various Constitutional arguments advanced by opponents of legislation intended to extend performance rights to sound recordings under the Copyright Laws, 17 U.S.C. §§ 1, et seq. We have concluded that such legislation would, upon enactment, present no constitutional problems whatsoever. Complaints to the contrary either misconstrue copyright decisional law or mistake as arguments of constitutional principle the controversy over the merits of the provision.

Three constitutional claims are typically asserted by opponents of performance rights in sound recordings. First, it is urged that sound recordings are not the "writings" of "authors" and hence are unprotectable under the Copyright Clause—Article I, Section 8, cl. 8 of the Constitution. Second, a performance right is alleged to be unnecessary to promote the Progress of Science and Useful Arts,'" and thus beyond the power of Congress to grant. Finally, some have claimed in passing that the First Amendment proscribes the extension of performance rights in sound recordings. In connection with these constitutional arguments, we have considered the following four questions:

1. What are the general requirements of the Copyright Clause—Article I, Section 8, cl. 8 of the Constitution—for valid copyright protection?
2. Do sound recordings satisfy these general requirements?
3. Even if sound recordings may be constitutionally protected against piracy, does the grant of a performance right raise distinguishable constitutional problems?
4. Does the constitutional reference that copyright protection is intended "To promote the Progress of Science and Useful Arts" vest courts with the power to reject as unconstitutional those Congressional copyright grants which courts may view as unnecessary incentives for the artistic area under consideration?[1]

At the outset, one should note that it is quite late in the day to pose bona fide constitutional questions about performance rights for sound recordings. As we discuss below, both the courts[2] and the Congress[3] have expressly considered constitutional challenges to copyright protection afforded sound recordings and found them wanting. The relevant case law, legislative material, and scholarly publications, taken as a whole, strongly compel the conclusion that performance rights for sound recordings are wholly consistent with the constitutional mandate of the Copyright Clause.

I. THE REQUIREMENTS OF THE COPYRIGHT CLAUSE

The Copyright Clause of the Constitution endows Congress with the power "* * * To promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, section 8, cl. 8.

The purpose of the Clause, the Supreme Court declared in *Goldstein* v. *California*, 412 U.S. 546 (1973), is "to encourage people to devote themselves to intellectual and artistic creation." 412 U.S. at 555 Toward that end "Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works." Id.

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[1] There is no need for detailed consideration of opponents' wholly insupportable claims under the First Amendment. See Statement of the National Association of Broadcasters Before the Copyright Office. Library of Congress, S–77–6 at 4. In its recent decision in *Zacchini* v. *Scripps-Howard Broadcasting Company*, 45 U.S.L.W. 4954 (June 28, 1977), the Supreme Court expressly rejected a First Amendment challenge to a state law protecting a performer's right to control the publicity emanating from his performance. The Court analogized the state law to "the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors * * *." Id. at 4957. The Court also noted that district courts had repeatedly rejected First Amendment challenges to the federal copyright laws. Id. at 4958 n.13.

[2] See, e.g., *Shaab* v. *Kleindienst*. 345 F. Supp. 589 (D.D.C. 1972) (three-judge court).

[3] See. e.g., H.R. Rept. No. 92–487, 92d Cong., 1st Sess. (1971); S. Rept. No 93–983, 93d Cong., 2d Sess. (1974).

As the Clause suggests, copyright protection is limited to "the writings of an author." *Taylor Instrument Cos.* v. *Fawley-Brost Co.*, 139 F.2d 98, 100 (7th Cir. 1943), cert. denied, 321 U.S. 785 (1944). Thus, in determining the scope of Congressional power under the Clause, the chief inquiry has been the appropriate reach of "writings" of an "author." An extensive history of legislative and judicial development has delineated the contours of this phrase; emerging from that history is a remarkably broad standard for judging the constitutionality of a Congressional grant of copyright protection.

A. *The Need for a "Writing"*

It has been clear from the earliest days of the Republic that the reference in the Clause to "writings" was meant to apply to items well beyond the exclusive purview of books and papers—literally written material. Congressional legislation, promulgated soon after the Clause itself, confirmed that the framers intended that copyright protection be accorded to a much wider range of creative products. Thus, the Copyright Act of 1790, Act of May 31, 1790, c. 15, 1 Stat. 124, enacted only one year after the adoption of the Constitution by a Congress whose membership included many of those present at the Constitutional Convention, extended copyright protection, inter alia, to maps and charts. The expansive meaning of "writings" necessarily entailed by the Act has been similarly reflected in subsequent legislation. Prints, engravings, and etchings, Act of April 29, 1802, c. 36, 2 Stat. 171; musical compositions, Act of February 3, 1831, c. 16, 4 Stat. 436; photographs and negatives, Act of March 3, 1865, c. 123, 13 Stat. 540; paintings, drawings, chromos, statuettes, statutory, and models or designs intended as works of fine art, Act of July 8, 1870, c. 230, 16 Stat. 198; motion pictures, Act of August 24, 1912, c. 356, 37 Stat. 488; and tapes of live television telecasts, Public Law 94–553, have all been accorded copyright protection.

Students of the history of the Copyright Clause have understandably concluded from these and other Acts that the Clause was intended to be given "a construction other than literal." [4] In time, "it became more apparent than ever before that Congress did not consider the Constitutionality of its copyright enactments to be a problem, but assumed that the scope of protection was as broad as it wished to make it." Id. at 73.

The courts, in resolving disputes arising under the Copyright Clause and its various accompanying Acts, have developed broad doctrinal categories, consistent with the intended scope of the copyright provisions. Professor Nimmer notes two requirements that must be satisfied for a given item to be properly considered a "writing." First the item must represent "intellectual labor" on the orignator's part. 1 NIMMER, COPYRIGHT § 8.3 (1963). As Nimmer justly observes, "a very slight degree of such labor will be sufficient to qualify the work as a writing in the constitutional sense. Thus, almost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient to render the work a writing." *Id.* at § 8.31.

Second, the item must be embodied in tangible form. Nimmer argues that, "[i]f the word 'writings' is to be given any meaning whatsoever, it must, at the very least, denote 'some material form, capable of identification and having a more or less permanent endurance.' A work is not written if it is not recorded in some manner, and a record even in a broad generic sense, necessarily importsa tangible, as opposed to an evanescent, form." Id. at § 8.32 (quoting *Canadian Admiral Corp.* v. *Rediffusion Inc.* (1954) Can. Exch. 382, 383).

Several courts have acknowledged the "tangible form" requirement. Thus, the Supreme Court described "writings" as "any physical rendering of the fruits of creative intellectual or aesthetic labor." *Goldstein* v. *California*, 412 U.S. 546, 561 (1973). Similarly, the three-judge district court in *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972), referred to the Copyright Clause as protecting methods of "fixing creative works in tangible form." 345 F. Supp. at 590.[5]

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[4] Staff Members of the N.Y.U. Law Review, The Meaning of "Writings" in the Copyright Clause of the Constitution. 2 General Revision of the Copyright Law, Study No. 3 (1956) at 72 [hereinafter Study No. 3].

[5] See also *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 16 (1908) (Copyright Act said to concern "the tangible thing.") ; Nimmer, Copyright Publication, 56 Colum. L. Rev. 185, 196 n.98 (1956) ; cf. also *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 19 (Holmes, J., concurring specially) ("The notion of property starts * * * from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills").

As a result of the minimal requirements reflected in the "intellectual labor" and "tangible form" standards, the scope of the "writings" doctrine has been extremely broad. The Supreme Court took express notice of this in *Sarony* v. *Burrow-Giles Litrographic Co.*, 111 U.S. 53 (1884), aff'g, *Sarony* v. *Burrow-Giles Lithigraphic Co.*, 17 F. 591 (C.C.S.D.N.Y. 1883). There, plaintiff brought suit for a violation of his copyright in a photograph of Oscar Wilde. Defendant claimed, inter alia, in an argument strikingly reminiscent of the broadcasters' claims, that the act which secured copyright protection to photographs was unconstitutional because "a photographer is not an author, and a photograph is not a writing." 17 F. at 592. In affirming a lower court ruling for the plaintiff, Mr. Justice Miller, speaking for the Supreme Court majority, explicitly rejected this constitutional challenge. He surveyed early copyright legislation, noting the wide range of items which were granted protection. Unless, he concluded, "photographs can be distinguished" from these other items in terms of some "writing-like" quality, "it is difficult to see why Congress canot make them the subject of copyright as well as the others." 111 U.S. at 57.

In upholding plaintiff's copyright, the Court underlined the broadness of the "writing" standard:

"By writings in the Clause [Copyright Clause] is meant the literary productions of these authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., *by which the ideas in the mind of the author are given visible expression.* The only reason why photographs were not included in the extended list in the Act of 1802 is probably that they did not exist, as photography as an art was then unknown * * *." Id at 58. [Emphasis added.]

Opponents of granting a copyright to sound recordings have cited the *Trade-Mark Cases*, 100 U.S. 82 (1879), in support of their claim.[6] In fact, Mr. Justice Miller's opinion in the *Trade-Mark* Cases underscores quite plainly the liberal standard represented by the 'writings' clause. Thus, although the Court sustained a constitutional attack on the protection for trademarks, it nonetheless announced a standard flexible enough to support nearly all future copyright claims. "Writings," the Court observed, implies only such products "as are *original*, and are founded in the creative powers of the mind." 100 U.S. at 94. They consist simply in tangible items representing "the fruits of intellectual labor." *Id.* at 94.

The broad doctrine that has emerged since these early cases has been faithful to Justice Miller's injunction that the concept of "writings" should change with the times. Lighting fixtures for parking lights, *Esquire, Inc.* v. *Ringer*, 414 F. Supp. 939 (D.D.C. 1976); statuettes to be used as lamp bases, *Mazer* v. *Stein*, 347 U.S. 201 (1954); floral designs, *Covington Fabrics Corp.* v. *Artel Products, Inc.*, 328 F. Supp. 202 (S.D.N.Y. 1971); motion pictures, *Edison* v. *Lubin*, 122 F. 240 (3d Cir. 1903); pictorial illustrations of women's dresses, *National Cloak and Suit Co.* v. *Kaufman*, 189 F. 215 (C.C.N.D. Pa. 1911); code words for cable correspondence, *Reiss* v. *Nat'l Quotation Bureau, Inc.*, 276 F. 717 (S.D.N.Y. 1921); charts for analyzing handwriting, *Deutsch* v. *Arnold*, 98 F.2d 686 (2d Cir. 1938); costume jewelry, *Trifari, Krussman & Fishel, Inc.* v. *Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955); and countless other items have been held constitutionally protectable as "writings" despite the absence of even a slight resemblance to anything which is literally "written." Significantly, since the Supreme Court's definition of the controlling standards in *Sarony*, *supra*, to our knowledge the courts have never held unconstitutional a class of copyrightable works so designated by Congress.

B. *The Requirements of "Authorship"*

The judicially-created standard for "authorship" is as flexible as the "writings" requirement. Where the "writings" doctrine simply requires a tangible form embodying intellectual labor, "authorship" demands only that some individual "by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself." *Sarony* v. *Burrow-Giles Lithographic Co.*, 17 F. 591, 593–94 (C.C.S.D.N.Y. 1883), aff'd, 111 U.S.

[6] Memorandum Brief in Support of Plaintiffs' Motion for Summary Judgment and Reply to Defendants' Motions for Judgment on the Pleadings at 3, *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).

53. An author is "he to whom anything owes its origin; originator; maker." 111 U.S. at 58. This "originality" standard imposes a slight, but distinguishable requirement on prospective copyright grants apart from the requirement imposed by the "writing" clause's "intellectual labor" component. NIMMER § 8.31. Nonetheless, the "originality" threshold is easily satisfied. It is, in fact, "little more than a prohibition against copying." *Covington Fabrics Corp* v. *Artel Products Inc.*, 328 F. Supp. 202, 204 (S.D.N.Y. 1971). The material in question "need not be strikingly unique or novel to be copyrightable. All that is necessary is that the author do something on his own which is more than a trivial variation." Id. See also *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Peter Pan Fabrics, Inc.* v. *Dan River Mills, Inc.*, 295 F. Supp. 1366 (S.D.N.Y.), aff'd, 415 F.2d 1007 (2d Cir. 1969).

Thus, for example, the court in *Gardenia Flowers, Inc.* v. *Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968), equated the "authorship" and originality" standards. See also *Rushton* v. *Vitale*, 218 F.2d 434, 435 (2d Cir. 1955) (holding that "originality" demands "little more than a prohibition of actual copying"). The author's role cannot be purely mechanical; rather, it must embody, as the "writings" clause also required, "the product of mental activity." * * * *Oxford University Press, N.Y., Inc.* v. *United States*, 33 C.C.P.A. 11 (1945).

Thus, authorship demands an original idea, some essential creative impulse. Still, like the "writings" standard, the requirement of "authorship" is a minimal threshold. It precludes no particular creative product, eliminating solely those items which lack the requisite degree of originality. It has been argued that the terms, " 'writings' and 'authors' require that subjects must conform to certain principles, such as originality, creativity, and intellectual thought, before they are entitled to protection. In no instance is the particular form in which the object may exist the controlling principle." Study No. 3 at 83.

In sum, "writings of an author" is the most flexible of standards for judging the constitutionality of a given copyright.[7] It requires some minimal threshold of intellectual originality embodied in a fixed, tangible form. The threshold, however, is satisfied whenever it may fairly be said that the item in question represents some nontrivial degree of creativity beyond the mere copying of another's work. The form that the product in question takes is unimportant as long as there is some object in which the creative product is captured. To sustain the constitutional legitimacy of a given copyright, the courts ask only for a degree of original intellectual labor.

II. SOUND RECORDINGS AND THE COPYRIGHT CLAUSE

Despite the minimal requirements of the Copyright Clause, record pirates in the past, and both the National Association of Broadcasters[8] and the Music Operators of America[9] have urged that sound recordings fail the "writings of an author" test. Plainly, this is not the case. Even had the courts never addressed the issue as such, the presumption of constitutionality in these matters would entail the upholding of sound recording copyrights. See, e.g., *Sarony* v. *Burrow-Giles Lithographic Co.*, 17 F. 591, 592–93 (C.C.S.D.N.Y. 1883), aff'd, 111 U.S. 53 (1884) ("The court should hesitate long and be convinced beyond a reasonable doubt before pronouncing the invalidity of an act of Congress"). Further, copyright decisional law, briefly surveyed above, clearly confirms that sound recordings would present no constitutional difficulties. Thus, it was concluded well before any direct court holding on the matter, that,

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[7] Thus, the strictly literal interpretation imposed on "writings of an author" by former Senator Ervin and others, see, e.g., Comments of American Broadcasting Companies, Inc., In the Matter of Performance Rights in Copyrighted Sound Recordings, Before the Copyright Office, Library of Congress, S–77–6 at 5 n.1, wholly ignores the history of copyright decisions and Congress' expansive use of the copyright power since the nation was founded. The broad reading of the clause rendered in these cases and legislation clearly belies Senator Ervin's opinion.

[8] See Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) (hereinafter 1975 Hearings) (Testimony of Vincent T. Wasilewski) at 1367; Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) (hereinafter 1967 Hearings) (Statement of Douglas A. Anello) at 1086.

[9] See 1967 Hearings (Statement of Nicholas E. Allen) at 1089.

"It seems reasonable to assume that no Copyright statute passed by Congress allowing copyright to new forms of expressions will be declared unconstitutional * * *. Congress seems to be free to include in a copyright statute any object, conforming to the requirements of originality and creativity, without fear of judicial interference." Study No. 3 at 108.

In 1971, Congress passed the first measure extending a degree of copyright protection to sound recordings. The Sound Recordings Copyright Act of 1971, P.L. 92–140, 17 U.S.C. section 1(f), 85 Stat. 391, granted to producers a copyright against unauthorized duplication of their recordings. At that time, Congress considered—and rejected—arguments assailing on constitutional grounds this copyright grant. The House Judiciary Committee expressly concluded that "as a class of subject matter, sound recordings are clearly within the scope of the 'writings of an author' capable of protection under the Constitution * * *." H.R. Rep. No. 92–487, 92d Cong., 1st Sess. (1971), reprinted in [1971] U.S. Code Cong. & Adm. News 1566, 1570. Abraham L. Kaminstein, Register of Copyrights at the time, concurred,

"[T]here is no doubt in my mind that recorded performances represent the 'writings of an author' in the constitutional sense, and are as fully creative and worthy of copyright protection as translations, arrangements, or any other class of derivative works. I also believe that the contributions of the record producer to a great many sound recordings also represent true 'authorship' and are just as entitled to protection as motion pictures and photographs. No one should be misled by the fact that in these cases the author expresses himself through sounds rather than words, pictures or movements of the body." Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. Ser. 8 at 1863 (Statement of Hon. Abraham L. Kaminstein).

Any remaining doubts concerning the constitutionality of copyright protection for sound recordings were finally put to rest by the courts. In *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972), plaintiff sought to enjoin the enforcement of the criminal provisions of the new Sound Recordings Copyright Act on constitutional grounds. A three-judge court rejected the plaintiff's claim.[10] As a result of "[t]echnical advances, unknown and unanticipated in the time of our founding fathers," the court concluded that "[t]he copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form." 345 F. Supp. at 590. The court expressly held that, "sound recording firms provide the equipment and organize the diverse talents of arrangers, performers and technicians. These activities satisfy the requirements of authorship found in the copyright clause * * *." Id.

Although the Supreme Court has yet to address the Sound Recordings Act as such, it has clearly signalled its prospective support of the copyright granted therein. In *Goldstein* v. *California*, 412 U.S. 546 (1973), the Court rejected a constitutional attack on a California state piracy statute. The Court specifically noted the historical breadth of the "writings" and "author" standards, 412 U.S. at 561, and cited, without criticism, Congressional findings which recognized sound recordings as protectable items. Id. at 568.[11]

In fact, courts have recognized the protectable status of sound recordings since as early as 1955. In *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955), the Court of Appeals concluded that, "there can be no doubt that, under the Constitution, Congress could give to one who performs a * * * musical composition the exclusive right to make and vend phonograph records of that rendition. Id. at 660.

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[10] See also *United States* v. *Taxe*, 540 F.2d 961 (9th Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (Jan. 11, 1977) (rejecting a challenge to the Sound Recordings Act which had charged it with unconstitutional vagueness and overbreadth); *United States* v. *Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974) (upholding the constitutionality of the Sound Recordings Act against First Amendment and due process challenges); *Heilman* v. *Levi*, 391 F. Supp. 1106 (E.D. Wis. 1975) (rejecting a constitutional void-for-vagueness challenge to the Sound Recordings Act).

[11] Even the Court's dissenters said nothing about the measure's unconstitutionality; they rested their argument instead on the asserted preemption by Congress of the copyright field. 412 U.S. at 572–73, 576–79.

Significantly, Judge Learned Hand, a dissenter in Capitol Records, agreed that sound recordings were constitutionally protectable. His logic is worth quoting in detail:

"[T]he performance or rendition of a 'musical composition' is a 'writing' under Article I, Sec. 8, cl. 8 of the Constitution separate from, and additional to, the 'composition' itself. It follows that Congress could grant the performer a copyright upon it, provided it was embodied in a physical form capable of being copied. The propriety of this appears when we reflect that a musical score in ordinary notation does not determine the entire performance * * * . [T]he performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaption' of the score itself which * * * [is] copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution." Id. at 664.

Judge Hand's suggestions have, as noted above, been firmly captured in legislation and subsequent court decisions.

Nonetheless, complaints concerning the constitutionality of sound recording copyrights periodically arise. The most popular of these was raised by plaintiff's counsel in a memorandum during the *Shaab* proceedings. Counsel observed that the House Report accompanying the Sound Recordings bill, H.R. Rep. No. 92–487, had speculated that "[t]here may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work." [12] Plaintiff concluded from this suggestion that Congress thus "acknowledged" that recording companies lack the requisite "authorship" for a constitutional copyright privilege.

This is an argument that stands copyright law on its head. First, in no sense has Congress "acknowledged" anything of the sort; indeed, as noted above, Congress has expressly recognized the presence of authorship in the case of sound recordings. H.R. Rep. No. 92–487, 92d Cong., 1st Sess. (1971), reprinted in [1971] U.S. Code Cong. & Adm. News 1566, 1570. More critically, plaintiff's argument in *Shaab* betrays a fundamental confusion about Constitutional cases arising under the Copyright Clause. Courts do not demand that a particular author be identified before an item can be copyrighted. Though authorship is required, this means only that the product represent original intellectual effort. Who may qualify as an author, and thus hold the copyright, is a matter for contractual, not Constitutional disposition.[13]

III. PERFORMANCE RIGHT AND COPYRIGHT CLAUSE

Although Congress and the courts have expressly determined that sound recordings themselves may lawfully be granted copyright protection, it is nonetheless urged by some that the grant of a performance right creates special constitutional difficulties. See e.g., 1975 Hearings (Statement of Vincent T. Wasilewski) at 1367; 1967 Hearings (Statement of Douglas A. Anello) at 1086; 1967 Hearings (Statement of Nicholas E. Allen) at 1089.

In reiterating the claim that performers are not "authors," opponents of performance rights merely restate an argument long since laid to rest by the courts. A performance right is simply an additional copyright privilege whose validity is measured solely in terms of the underlying product. Thus, if a sound

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[12] Memorandum Brief in Support of Plaintiffs' Motion for Summary Judgment and Reply to Defendants' Motions for Judgment on the Pleadings at 3–4.

[13] Thus, the court in *Yuengling* v. *Schile*, 12 F. 97 (C.C.S.D.N.Y.) 1882), observed that nonauthor claimants to copyrights "must show an exclusive right lawfully derived from the author or inventor * * *." Id. at 100–01. Hence, courts may properly consider the legitimacy of a party's copyright claim. They may regard the party as a rightful holder because of his "author" status or because he has so contracted for the fruits of that status. They may, on the other hand, find the contrary to be true. But it is altogether another matter to exclude the entire class of sound recordings from protection. Such an exclusion is tantamount to the assertion that sound recordings can never be the fixed, tangible product of cognizable authorship. But this is plainly false, as the *Shaab*, *Goldstein* and *Capitol Records* courts have indicated.

recording itself is constitutionally protectable—because it is the "writing" of an "author"—then any element of copyright protection granted to the owner of the recording is permissible under Copyright Clause. Adding performance rights merely includes one more of the traditional attributes of copyright. The framers of the Copyright Acts recognized this when they elaborated a broad set of rights available to holders of copyrights. The most recent statement of this bundle of rights is set forth in Section 106 of the Copyright Revision Law:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perfrom the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." Public Law 94–553, 90 Stat. 254.

Since the Record Piracy cases dispelled any notion that sound recording protection is unconstitutional, there can be no real question that performance rights may additionally be extended.

Thus, in its debate over possible performance rights for sound recordings, the Senate Judiciary Committee noted the possible Copyright Clause criticisms involved, but [did] not find the constitutional objection persuasive." The Copyright Office, it observed, "has advised that the granting of copyright protection to performance rights in sound recordings is within the power conferred on the Congress by the Constitution." S. Rep. No. 93–983, 93d Cong., 2d Sess. at 139 (1974). See, letter from the Register of Copyrights to Senator Hugh Scott, 120 Congressional Record 27340, 27341 (1974).

To extend performance rights to owners of copyrights in sound recordings is only to recognize, as a matter of policy, that it is equitable to do so. "Performing artists," the Register has observed, "contribute original creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers," she continued, "similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel." Letter from the Register of Copyrights to Senator Hugh Scott, 120 Congressional Record 27340, 27341 (1974).

In the case of motion picture copyrights, courts have long acknowledged the importance of securing a distinct right against unlicensed performances. *Walt Disney Productions* v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969); *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939).[14] Owners of sound recording copyrights legitimately make the same claim. Objections to that claim appeal only to issues of legislative policy, not to constitutional prerogative. The cases involving the Sound Recordings Act have disposed entirely of the constitutional issue; only debate over the wisdom of the grant of a performance right remains.[15]

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[14] Indeed, the recent Court decision in *Zacchini* v. *Scripps-Howard Broadcasting Company*, 45 U.S.L.W. 4954 (June 28, 1977), has further underscored the importance of a performance right to the individual performer. In holding that the public interest in viewing a broadcast of petitioner's "human cannonball" act was outweighed by petitioner's right of publicity, the Court explicitly acknowledged the crucial place that performance rights have in the lives of performers in general.

[15] It is important to note that cases such as *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975) (holding that respondent's public playing of a radio broadcast of petitioner's copyrighted songs was not a "performance" under the Copyright Laws and thus infringed no right of petitioner) and *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1967) (community antenna television system which received, amplified and modulated copyrighted films from television stations to viewers held not to be a copyright infringement) are simply matters of statutory interpretation of the 1909 Copyright Act and in no way involve the constitutionality of performance rights in sound recordings.

IV. THE EFFECT OF THE "TO PROMOTE" CLAUSE

Those opposing the extension of performance rights to sound recordings have suggested one final "Constitutional" basis for their complaint. Because, it is alleged, a performance right "is not necessary to 'promote the progress of science and the useful arts' ", the grant of such a right would be beyond the purview of the Copyright Clause. See, e.g., Comments of the National Association of Broadcasters, Before the Copyright Office, Library of Congress, In the Matter of Performance Rights in Sound Recordings, S–77–6 at 3; Comments of American Broadcasting Co., Inc., Before the Copyright Office, Library of Congress, In the Matter of Performance Rights in Sound Recordings, S–77–6 at 3–4. The "To promote" clause is thus urged as a limitation on Congressional copyright actions. As a corollary, it is suggested, courts are empowered to measure all Congressional copyright grants against a judicial determination as to whether such incentives are actually required to foster artistic development in the area in question. Because the recording industry needs no such incentives, the opponents argue, a new performance right would violate the limits prescribed by the opening words of the Copyright Clause.

This argument, however novel in its thrust, is wholly at odds with the history of copyright decisional law. The "To promote" clause has traditionally been the basis for the ever-broadening application of copyright protection, not a limitation on such protection. See, e.g., 1 NIMMER § 3.2. Thus, when the Third Circuit was asked to decide if the statutory grant of copyright privileges to photographs could also apply to movies, the court relied upon the "To promote" purpose of Copyright Clause to answer affirmatively. *Edison* v. *Lubin*, 122 F. 240 (3d Cir. 1903), appeal dismissed, 195 U.S. 625 (1904). Similarly, in *National Cloak & Suit Co.* v. *Kaufman*, 189 F. 215 (C.C.M.D. Pa. 1911), a court upheld a copyright in a publication illustrating plaintiff's dress designs. It based its decision, inter alia, on the fact that the Copyright Act "should be liberally construed to give effect to its tenor and true intent," to wit, "the promotion of science and the useful arts." Id. at 217. See also *Fargo Mercantile Co.* v. *Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1924) (fruit nectar label containing recipes held legitimately copyrighted).

Additionally, where decisions about the conduciveness of a given copyright to the arts and sciences *have* been made, courts have always exercised substantial deference to legislative judgment. Thus, in upholding a copyright on an advertisement, Justice Holmes explicitly endorsed a policy of judicial restraint. Holmes observed that:

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and more obvious limits. At one extreme some works of genius would be sure to miss appreciation * * *. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge." *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903). *Accord, Esquire, Inc.* v. *Ringer*, 414 F. Supp. 939, 941 (D.D.C. 1976) ("There cannot be and there should not be any national standard of what constitutes art and the pleasing forms of the Esquire fixtures are entitled to the same recognition afforded more traditional sculpture").

Thus, courts which have considered the "To promote" clause have used it as a basis for construing the copyright power expansively. Not one court has ventured the slightest inquiry into the economic necessity for incentives in the artistic area in question. Reliance on such a consideration by opponents of performance rights is utterly fanciful.

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There is, then, no legitimate room for constitutional objection to a performance right for sound recordings. Sound recordings are plainly the "writings" of "authors" and thus protectable under the Copyright Clause. As such, Congress has the constitutional power to protect them against unauthorized public performance as well as against unauthorized duplication. Neither the "To Promote"

clause nor the First Amendment in any way undermines the unassailable constitutionality of performance rights. Thus, future debate must proceed exclusively on the plane of conflicting policy judgments. The requirements of the Constitution impose no obstacles whatsoever to the grant of a performance right.

Appendix C. Analysis of Objections to Performance Rights/Royalties Filed by Broadcasters With Copyright Office

The following objections have been excerpted from 91 broadcaster submissions representing over 1,500 stations:

Nature of Objections	*Repetitions*
1. Royalty would constitute an unfair burdensome extra for a service already compensated by broadcasters through payments to ASCAP, BMI, SESAC	62
2. Airplay exposure is essential to recordings and performers and to stimulate sales of recordings	57
3. Royalty would impose undue financial burden stations cannot afford	52
4. Performers are very well paid now without additional broadcaster revenue	40
5. Record companies and performers should pay for airplay	18
6. Record companies are adequately compensated from other income sources	13
7. Performance royalties would heighten payola temptations	8
8. Royalties would reduce radio's community/ public services	8
9. Airplay helps performers' personal appearances, which is compensation enough	7
10. Requirement to pay would hurt new, less-known performers	4
11. Royalties would cause advertising rate increases	4
12. Royalties would cause undue administrative problems	4
13. Royalties would curtail employee hiring	4
14. Unconstitutional	4
15. Royalties would reduce amount of music airplayed	3
16. Royalties would add to consumer costs	3
17. Recorded works are not copyrightable	3
18. Performers make no unique contribution not already compensated	2
19. Inflationary	2
20. Royalties would impair radio's ability to compete with other media	2
21. Greed	2
22. Broadcasters must absorb costs and cannot pass on	2
23. Would hurt advertisers	2
24. Extra income would be poorly used by recipients	1
25. The "good music" artists are few and appreciate airplay	1
26. Recording artists do not approve of performance royalties	1
27. Royalties would help the wealth performers, not others	1
28. Royalties too difficult to apportion	1
29. Payments counter to free enterprise	1
30. Royalties would curtail stations' purchase of new equipment	1
31. Royalties could injure classical/cultural programming	1
32. Royalty formula unfair	1
33. Not needed for marketing forces interplay	1

Appendix D. Methodology of 1977 Radio Station Survey

In 1977, the Cambridge Research Institute conducted a telephone survey of program directors[1] of all radio stations in seven major markets—Baltimore, Chicago, Houston, Los Angeles, New York City, Salt Lake City, and Washington, D.C. These cities were selected because they had been used in previous surveys (all but Chicago) and because they were geographically representative of major advertising markets across the United States. Two hundred sixty-seven stations were surveyed in total, which stations comprise approximately five percent of all radio stations in the country.

[1] If a program director was unavailable, some other qualified spokesperson, such as a music director, was interviewed.

Each station was asked to provide information concerning format, hours of total air time, share of air time devoted to recorded music, share of music air-time devoted to oldies, and the number of advertising minutes per hour of music programming.[2]

The latter item, advertising minutes per hour, was needed in order to arrive at a weighted average of oldies played. Clearly, airplay over a station with a "large" audience should "count more" than equal air time over a station with a "small" audience. In order to take relative size into account, air time shares were weighted by advertising minute rates, which CRI assumed provided a reasonable estimate of relative audience size. To keep weightings consistent, the AM drive time advertising rate, as reported in Standard Rate and Data Survey, was used for each station whenever available.

Thus for each station, base units of total daily programming dollars were constructed by multiplying: hours of air time per day × minutes of advertising per hour × the minute rate.

For each station the base unit of total daily programming dollars was multiplied by that station's percentage of programming devoted to recorded music. This figure, in turn, was multiplied by the station's reported percentage of music programming devoted to oldies.

The figures for the individual stations were then added for each major market and for the sample as a whole. The totals for "daily programming dollars," "music programming dollars," and "oldie programming dollars" were then used to calculate a weighted percentage of programming due to recorded music generally and a weighted percentage of music programming due to oldies. The results are displayed in Exhibit 3.

RESULTS

According to the survey results, 75 percent of radio programming is devoted to recorded music. Fifty-three percent of the music played is "oldies." These results confirm those of an earlier survey performed by CRI in 1975, which found that 56 percent of music programming was "oldies."

Thus, as Exhibit 3 demonstrates, a major share of radio station revenues comes from the broadcasting of "oldies," which bring to radio stations audiences, revenues, and profits without providing any appreciable benefit to the recording companies and artists that created these "oldies."

COMMENTS OF THE AMERICAN FEDERATION (AFL–CIO) BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS, LOS ANGELES, CALIF., JULY 26, 1977

Ms. Ringer, members of the panel, my name is Hal C. Davis. I am the president of the American Federation of Musicians (AFL–CIO) whose 335,000 members are the instrumental musicians who provide much of the music heard in our great country and around the world. With me today is Mr. Henry Kaiser, general counsel of the Federation. With your permission, I would like to read our statement for the record, then make myself and Mr. Kaiser available for any questions you might have. We have filed our preliminary statement with you earlier, of course, and we testified before the Senate and House subcommittees in 1975, when performance rights was last considered by the Congress.

Indeed, the question of a performance right has been considered seemingly forever, some 40 years in fact. The painful history of efforts to win for the performing artists some measure of economic security in the face of technological changes that have robbed them of employment and even compensation for their work has been described in our previous testimony before congressional committees. It is fully documented and, frankly, it is shameful. I submit that

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[2] More specifically, each station was asked the following questions:
(1) What is your format?
(2) How many hours a day are you on the air?
(3) During music programming, how many minutes of advertising are there per hour on the average?
(4) How many hours a day do you program for record music?
(5) Of the recorded music, what percent are releases no longer on the charts or which have been out for more than six months?

any fair-minded person would agree that there is no justification for broadcasters and others to enrich themselves by exploiting our talents without asking, pay us nothing, often truncate our careers, and misrepresent this injustice as beneficial to us. I will not belabor today the justice of our cause, which fills the record and is apparent on its face. Instead, I would like to touch on points which I understand the people who profit from the free use of our talents have raised, and which should be answered.

First, opponents of performance rights have talked about a "quid pro quo"; they say we are amply compensated for their exploitation of us because they are, in their words, "promoting" our talents and the products of the record manufacturers who employ us. They have even clouded the issue by citing examples of alleged "payola," payments designed to get a particular station to play a particular record or promote a particular group.

They do not tell you that over half of the recordings played on radio are those with no meaningful sales life remaining. They do not tell you about the retired musician who sits home with his social security check to support him and listens to himself on the radio, while the station broadcasting his work for nothing may charge as much as $150 a minute for commercial time. They do not tell you that exhaustive investigations of "payola" have produced very few examples of current practice; and that the people whose records are involved in this infrequent but unhappy practice are young, unknown artists. No one pays to get stars' records played. It is because broadcasters have no interest in promoting new talent that recordings by new talent are most often involved in being bribed onto the air. This lays bare the specious argument that promotion of the talent is ample compensation for its use.

Even if such use of our talents did promote our interests, haven't we the right to say anything about it? What has happened to the concept of free choice? If you want to borrow my lawn mower on the questionable theory that the extra use will sharpen it, you should ask me—don't just steal it.

Another thing our exploiters haven't told you: All background music and most broadcast music doesn't really promote anybody, because the talent is seldom given credit. The background, anonymous musician playing behind a star finds little comfort in listening to his records sandwiched in between commercials on the radio. What good does that do him—or her?

But perhaps the most important point is this: Whatever good was derived by the music profession for the playing of records by commercial entrepreneurs was long ago undone because of all the musicians displaced in cafes, restaurants and especially station staff orchestras. Before the LEA Act was enacted at the behest of these same broadcasters there were thousands of musicians employed by radio stations throughout the country. Now there are none. The broadcasters have told you they play free recorded music for our benefit. We say, "Fine, let's test your claim. Stop doing it. We don't want your charity. Don't play our music any more."

The NAB with its characteristic brazon audacity has told you and Congress that radio stations cannot afford to pay any royalties at all, even those so modestly proposed in the Danielson bill. But its own study, conducted for the National Association of Broadcasters by the broadcast consulting firm of Frazier Gross and Clay (and reported in the May 23, 1977 issue of Television Radio Age Magazine) projected and 85.9 growth in radio station revenues between 1975–1985; going from $1.7 billion (in 1975) to $3.2 billion (in 1985).

Opponents of performance rights would have you believe that creation of these rights would only serve to make the "fat cats" richer, but that they won't help anybody else. Let's examine that.

In 1976, recording companies paid scale wages (excluding royalties) of $28,678,467 to 25,452 musicians. These were session fees, and included symphony recordings as well as others. (Symphony recording, as a point of interest, accounted for $890,157 of that total.) That means that the average amount earned by each of those 25,452 musicians was $1,072.11 from recording session fees in 1976. I ask you: How fat are these cats?

In addition, recording musicians, as a result of union-negotiated contracts, will receive payments totaling $11,129,129 this year, through the record manufacturers special payments fund. This payment is divided among approximately 40,000 musicians, and will provide them with an average of $278 each. While these extra earnings are most certainly welcome, they hardly qualify the recipients as "fat cats."

Although the special payments fund is entirely apart from any of the matters now before us, and has no bearing whatsoever on the subject of performance rights, let me, in the interests of clarity and for the record—and to dispel once and for all the notion that recording musicians are "fat cats"—tell you how it works.

The fund has been in existence now for 13 years. Under the terms of AFM contracts, each record manufacturer makes payments to the fund based on its sale of records. Each union member who made phonograph records receives individual payment based on the relationship of his scale earnings from phonograph record sessions he played to the total scale earnings of all union musicians engaged on such sessions. Payments are made annually to musicians who made records during the past five years. Thus, musicians who will receive checks next month (based on last year's contributions) have made recordings from January, 1972 through December, 1976. Administration of the special payments fund is entirely independent of the union, and its proven success during its 13-year history demonstrates that the mechanism for independent, efficient and economical distribution of royalties already exists.

We do not suggest that the special payments fund should administer a royalty distribution. We merely cite it as one viable solution only because of its success as an economical and independent instrument for doing so. We would be satisfied to rest on the experience that the copyright office will have after investigating the European experience and your study of how ASCAP and BMI have successfully accomplished this. We do suggest that by utilizing the facilities of ASCAP or BMI both composers and musicians would benefit by sharing administrative costs. Indeed, an entirely new and independent organization could be established if your office and the Congress felt the need. What is important is that whatever system is adopted or devised, it should be independent of the unions involved, economical and efficient.

I would like briefly to describe the music performance trust funds, since they have been mentioned during previous testimony. I believe the question was asked why MPTF doesn't answer the problem we are discussing here today.

MPTF is an independent organization administered by a trustee appointed by the U.S. Secretary of Labor. It is financed by the recording industry under agreements with the American Federation of Musicians. Its sole purpose is to provide performances of free, live instrumental musical programs on occasions which contribute to the public knowledge and appreciation of music. In many areas of the United States and Canada, MPTF-supported programs are the only source of live music.

Since its inception, MPTF has spent over $130,000,000 to present approximately 1,000,000 live, free public performances on occasions when no political or commercial advantage is served. You have all enjoyed music played in schools, in parks, on the fourth of July, at parades by marching bands, at neighborhood block parties by rock groups. You know someone who has enjoyed a strolling musician in a nursing home. These are the kinds of programs that MPTF makes possible. In addition, it supports literally hundreds of community orchestras, and enlists the co-sponsorship of business and community groups to provide even more programs. These activities are made possible because the American Federation of Musicians and the recording industry—after some struggle, admittedly—agreed that creation of this independent organization, devoted to bringing live music to the public, was a positive solution in the public interest to the problem of people being displaced by technology.

While the MPTF is worthy, independent, and operates with superb efficiency, it bears no relationship to the question of performance rights, and the two ought not to be confused. The trust funds have nothing to do with background music or with broadcasters. On the contrary, the money to support it comes from the recording industry.

We are not here to talk about the recording industry and what we need from them. We can negotiate with them. But we cannot, under the repressive Lea Act, negotiate with radio stations who use our records against our wishes. We are here to argue our moral and legal rights and to have a say in what the broadcast industry is doing with our records. The distinction is clear, and easily understood.

The bill introduced by Representative Danielson to establish a performance right was written as a compromise, to get legislation on the books. It is a sad comment that even its modest fee proposals failed by one vote to be reported by Chairman Kastenmeier's committee.

It is our belief that the precise royalty should not be prescribed by Congress, but, by a proper commission after full investigation of all the relative data.

If it were not intended to perpetuate an outrageous injustice, we would find laughable the repeated allegation in the statement of the NAB that radio stations "perform sound recordings." Do they also allege that a magazine that prints a painting by Rembrandt created the work of art? It is bad enough to have our works taken without our being compensated: Must we also welcome to the creative fold as follow artists the very people who rob us of the only means we have to earn a living, and who themselves grow rich on that denial of our rights?

The days of the robber baron in this nation are supposed to be over. The rape of our resources is now, thank God, the Government's legitimate concern. The talents of American artists, too, are a legitimate and vital national resource, and no one has a right to steal them.

In summary, ladies and gentlemen, the American Federation of Musicians strongly urges establishment of a performance right for sound recordings. We believe that if you're going to milk the cow, you'd better feed it once in a while.

STATEMENT OF ALAN W. LIVINGSTON BEFORE THE COPYRIGHT OFFICE, LOS ANGELES, CALIF., JULY 26, 1977

My name is Alan W. Livingston and I am a resident of Beverly Hills, California. I have been in the entertainment business for over thirty years as a musician, song writer, record producer and record company and television executive. I have held the position of President and Chairman of the Board of Capitol Records, Inc., Vice President in charge of television programming for the National Broadcasting Company, and have been an independent producer of records and motion pictures. I am currently President of the Entertainment Group of Twentieth Century-Fox Film Corporation.

I would like to point out that neither I personally nor Twentieth Century-Fox would benefit, under our current mix of business, by a performance royalty in records. Our Record Company is quite small, and its catalog of records available for air play is minimal. On the other hand, we own three television stations, and are actively seeking additional ones, so that it might seem, on the surface, that it were to our disadvantage to promote the issue at hand. Nevertheless, speaking as an individual and with the blessing of the management of Twentieth Century-Fox Film Corporation, I strongly support the creation of a performance right in sound recordings for artists and record manufacturers.

Some twelve years ago I was the original proponent of this right, and introduced the subject before a House Committee in 1965, and again before a Senate Committee in 1967. So much has been said and written on the subject since then that I wish to do little more than reiterate my position and make a brief statement of my views and strong commitments on this issue.

A phonograph record is nothing more than a delayed performance. It was created to be sold for home use. It was not created to be performed publicly for profit beyond the control of the recording artist and record manufacturer. The writers of the original copyright law could not possibly have envisioned radio, juke boxes, wired music services, discotheques, television, and all of the other commercial enterprises that sell time or service for a fee. It is simply improper on the face of it that programming which is sold to advertisers along with time is not being paid for, either by the radio stations, the advertiser, the wired music services, the commercial discotheques or others. This in itself should be sufficient argument for revision of the copyright law to protect the creator and owner of his own voice and musical performance, and the manufacturer who financed it.

Those who oppose the performance right in sound recordings are those who now program their businesses free of charge. The fact that this inequity has existed for so many years does not make it right, and whatever economic adjustment must be made is no reason to continue the exploitation of other people's property.

As to the arguments of those who oppose a performance right, I would like to make some brief comments. First, consider the position taken by radio stations that they provide free promotion for sound recordings through air play. The same position might as well be taken that they provide free promotion for the underlying copyright. The song writer and music publisher benefit by radio play.

In fact, most music publishers employ record promotion men to encourage as much air play as possible. They recognize that air play creates demand for sale of records and sheet music and other use of their product, and therefore enhances its value. But radio stations have accepted the fact that they must pay for the use of this underlying copyright. Therefore, the promotion value to the record is no different from the promotion value to the song itself, and there is no reason why that argument should be used against the performance copyright any more than it should be used against the copyright of the original work.

One opponent of this performance copyright is a "beautiful music" station manager, with the complaint of product shortage of such music. Supposedly, he argues, American record companies refuse to distribute music that doesn't receive plugs by name artists on radio stations. Just the opposite is the case. If there were performance compensation for the "beautiful music" that is played by radio, it would encourage record manufacturers to produce it. This music does not sell to any extent in stores, and its use is mostly without compensation. If radio stations want a greater variety of music, they had best pay for its use.

Regarding all of the economic implications of a performance royalty which have been raised, whether for juke box operators, radio stations, wired music services or whatever, the free market will certainly make a proper and fair adjustment. An economic burden to radio at the expense of the exploitation of someone else's rights is not a proper complaint.

Another claim is that the copyright clause of the constitution was not designed to reallocate profits from one industry to another but rather to promote the progress of science and the useful arts. This is a rather naive thought. All of the arts, whether motion pictures, television, the theatre or the performance of music are supported by those who pay for the privilege of being entertained. The commercial use of sound recordings must be paid for in the same manner as someone who must buy a ticket to a theatre.

As to the claim that the performance royalty would force broadcasters to reduce public service programming, this is contrary to the fact. It is my opinion that more symphonic and classical works would be supported by such a situation, and although I make no distinction between one kind of music and another, certainly I do advocate that radio be encouraged to satisfy all tastes. If the performance royalty should result in a lessening of music performed on radio, and an increase in dramatics, news or other broadcasts, there is nothing wrong with that either.

In summary, I can find nothing in the broadcaster's claims which follow any logic, or is in any way in the public's interests. Radio does not promote the sale of recordings. It merely programs their performance, and thus exposes it. People buy what they want to own, whether they hear it first on radio, on a juke box, in a discotheque or elsewhere.

Actually, only a small percentage of what is programmed by these enterprises is purchased by the record-consuming public. Much of the programming is provided by records that are bought in very small quantities, if at all, and in many cases are not even available for sale any longer.

I repeat that I am an entertainment executive with many years in almost all aspects of the entertainment industry. I personally have nothing to gain currently or in the foreseeable future by the enactment of legislation which would provide a performance fee, and I consider myself unbiased in this regard. I leave to the Record Industry Association the details and statistics to back up the points made here, but it seems to me that the case under consideration is very clear. Radio simply does not want to pay for something they have had for free these many years. That does not alter the fact that they have no right to the commercial use of another person's performance or creation, without a proper license and compensation.

Thank you.

STATEMENT BY PETER C. NEWELL, VICE PRESIDENT AND GENERAL MANAGER, KPOL AM/FM, LOS ANGELES

Madame Register, my name is Peter C. Newell. I am Vice President and General Manager of radio station KPOL in Los Angeles. In addition, I am currently chairman of the Board of Directors of the Southern California Broadcasters Association, a trade organization consisting of 133 broadcasting stations in the Southern California area.

I wish to make clear the strong opposition of the Southern California Broadcasters to any performers' royalty for recordings. Such payments are totally inequitable—completely unfair. You might ask how I can say this when previous testimony by union officials and record company executives has labelled our failure to pay royalties as inequitable and unfair. We've been accused of the following: (1) accepting a "free ride" on the recordings we play, (2) stealing the music. (3) taking no risks at all, and (4) not paying the performers a dime. I am here to say that those contentions are at the very least uninformed, and at the worst, absolute balderdash.

While it's true that we don't pay for most of the records we play, it certainly does cost us money to play records. Radio stations have investments in plant, equipment, personnel, and most of the costs that other businesses incur. We cannot play records unless we incur these operating costs. Later, I'll talk about the benefits the record industry and performers get because we do make these expenditures.

Second, let's talk about the charge that we are "stealing the music". This one is so ludicrous that it's almost funny. Do you know that radio stations have so many record promotion men visiting them that they have to set aside special days of the week for seeing them? The 4th quarter, 1976 issue of Radio Quarterly Report listed 185 promotion people in Los Angeles alone. It lists 52 record companies with a total of 684 promotion people. Now, let's face it. The record industry would not employ 684 people to call on radio stations if there were not substantial monetary benefits to flow out of these visits.

Another example: A&M Records recently released a single record from the latest album by a group called "Supertramp." It wasn't selling as well as they thought it should, and the company took out a full-page ad in Billboard magazine. Permit me to quote it:

"A message to all radio programmers and D.J.'s: Give a Little Bit. A few weeks ago we released "Give a Little Bit" from the new Supertramp album for a number of very strong reasons. In spite of them, "Give a Little Bit" is not getting the amount of adds or picks or plays it deserves. Listen to it again. This is a Major Hit Record from a Superstar Group. Don't let it get away. Give a little bit."

Record companies spend millions in trade magazines. In fact, they are virtually the sole support of magazines like Billboard, Record World, and Radio & Records. They spend these advertising dollars primarily to influence radio programmers to play their products. Record companies also give away millions of dollars worth of free records to radio stations. They entertain programmers and D.J.'s lavishly. Now, how in the name of heaven can an industry which spends that kind of money for promotion people, advertising, and entertainment accuse radio of "stealing" its product? This could be the first case in history of the victim aiding and abetting the crime.

Next, we are accused of taking no risks at all. First of all, I can tell you that just being in the radio business, which is far too overcrowded with stations, is a risk in itself. About 45 percent of all commercial radio stations operating in the United States in 1975 were unprofitable.

Playing new records is quite a risk. Any programmer will tell you that if you play enough of the wrong records you will lose your audience. The old records are not so risky. We have already established their popularity, and we should have the right to play them without recompense, whether they are still selling or not. In fact, many stronger albums continue to sell years after their introduction. In addition, record companies regularly compile "greatest hits" albums which sell because of continued radio exposure of those older songs. But it is the new records, those which are so important to the continued success of the record industry and the performers, that provide a high degree of risk to a radio station—and the record companies are doing very little research to minimize our risks. So, we risk a great deal when we go on a new record. When record companies have no research showing public acceptance for a new artist, how can they accuse us of not giving new artists a break? We take a risk every time we add a new record, and record companies and performers benefit from our taking that risk.

Finally, the statement that "radio doesn't pay performers a dime." Here's where we get to the balderdash. If it were not for radio, most recording artists wouldn't make a dime to begin with. The money they derive from recording

work is the direct outgrowth of record sales, and record sales are mainly a function of radio station airplay. If radio stations stopped introducing new records to their audiences tomorrow, the record industry as we know it would cease to exist, and most performers would be on welfare. Every union and record company executive knows this, and I defy anyone testifying before this committee to deny it. I could develop a long list of quotations from record industry executives who have testified to this, but I will present only two.

John Houghton, General Manager of Licorice Pizza Record Stores in Los Angeles: "There is very definitely a correlation between record play and record sales. Radio station airplay is, at this point, the most important factor in the sale of records."

Bob Sherwood, the new vice-president of promotion for Columbia Records: "If it doesn't get on the radio, it doesn't sell."

I want to give you a typical example of how radio play sells records. I mentioned the group "Supertramp" earlier in my testimony. Their first album was released in October of 1974. Nothing happened. In January, 1975, one Los Angeles radio station started playing the album. By February, sales were up to 12,000 copies. The sales action stimulated two other stations to begin playing it. Total sales in the city of Los Angeles alone presently stand at 65,000 copies. That's a new group of performers whose careers were literally made by radio. Ask them whether radio ever put any money in their pockets.

So let's not hear that radio doesn't pay performers a dime. Without radio, performers wouldn't make anything approaching their incomes today, and most of them wouldn't even be in the profession.

If it is unfair for radio to play recordings without payment, then it is equally unfair for record companies and performers to receive all that free airplay for their product. The fact is that the present system benefits all parties, the broadcaster, the record companies, and the performers. Everybody is benefiting from everybody else. To disturb the balance of these benefits in favor of record companies and performers is unfair to broadcasters. It is also unnecessary.

Let's say for a moment that a performer's royalty is enacted and radio and TV stations are forced to pay a portion of their revenues into a fund. What happens? The stations' profits decline. In order to maintain profit levels, I will either have to cut operating costs or increase prices. Cutting operating costs usually means reduction in personnel, because people represent 50 percent of a station's operating costs. Not only does this mean lost jobs, but lost services to the public, since fewer people invariably means fewer locally produced programs or poorly produced local programming. Since I'm in business to serve my community and not just to make a profit, I'll only cut these costs if I have to. If I'm running one of the 45 percent of the stations which lose money, I probably can't cut costs any further. I may have to sell the station, possibly at a large financial loss. The heaviest burden therefore falls on the stations which cannot afford it. If I'm running a profitable station, I will raise prices to my advertisers to cover the cost of the royalties. And I probably can raise prices if I'm profitable, because my successful competitors will all be faced with the same cost increases and they'll be raising theirs. My advertisers are then in the same dilemma. Cut their costs or raise prices to protect their profits. They too will usually opt for price increases, as history has shown. So what has happened? The radio and TV stations haven't paid the performers and record companies—the public has.

The public who buys the hamburgers and soft drinks, the toothpaste and automobiles ends up paying the royalties through higher prices in their goods and services. In other words, increases in prices which are not accompanied by increased efficiencies in production are inflationary. You might ask why should I be worried about inflation and the consumer if I can pass this cost along? Simply because, as a broadcaster, I have a strong interest in the welfare of the public I serve. I will do everything I can, through my station, to minimize the continuing inflation which is still going unchecked in this country. Through this testimony, I hope to get the United States Congress to recognize that this problem will be exacerbated by a performer's royalty.

On the other hand, performers, if they can indeed justify being more highly compensated for their work, have the means to get that increase. They can negotiate, individually or collectively, with the record companies. If they succeed in making their case, you can be assured that the record companies will raise prices to cover the increased cost, so that their profits won't be eroded. Evidence of this

willingess to raise prices to cover higher costs can be seen in any record store. Just go in and look at the single record albums that are listed at $7.98 that two or three years ago would have been selling at $3.98. Record company executives have been telling you that they pay the performers. That's not quite correct. The record company just serves as a conduit. When performers' rates go up, record prices go up.

So, whether we have performers royalties or negotiations, the performers' increases will have been paid by the consumer. But with negotiation there's a difference. The record buyer who pays the increased price can see the cost increase and relate it to whether he wants the product at a higher price. If the consumer has to pay, let it be the one who buys the product . . . not the hamburger buyer who never heard of the record and gets no benefit from the performance. The record buyer is keenly aware of record prices, and records are a discretionary purchase. He can avoid the price increase by not buying the record. Of course, if he does this, he's saying that the performers really shouldn't be getting that additional compensation—and that, ladies and gentlemen, is the law of supply and demand, and that is how a performer's value should be determined.

There is another reason that negotiation is the best way to go. It will result in all the dollars realized going to the performers. Our experience with ASCAP, BMI, and Sesac shows us that performers' royalties would require an enormous organization to administer the program. Stations would have to be assessed, amounts calculated and billed. Distribution of monies would be a complex procedure. Such an organization would syphon off substantial sums which would have gone directly to the performers. Once again, if performers really should have more money, they should get all of it, and direct negotiation with record companies will accomplish this.

In summary, I hope I have been successful in showing you that radio stations do not get a free ride. It costs us money to operate and to play records. I hope you've seen that we don't steal the product we play—that it is practically forced on us. I hope I've shown you that we do pay performers—or at least make it possible for them to be paid. We are the major means of promotion for record companies and performers. They know, but will certainly not admit to you, that we give them plenty—we give them the means to exist. To ask us to give them more is unfair to us. It also puts the cost of royalties on the heads of stations who are losing money, or on the general consumer who receives no direct benefits.

So let economics and the laws of supply and demand determine the value of performers and the profits of record companies. That's the only fair way.

Thank you for your time and attention.

THE LIBRARY OF CONGRESS COPYRIGHT SECTION—PERFORMANCE RIGHTS IN SOUND RECORDINGS, DOCKET 77–6, CRYSTAL CITY, VA., JULY 6 AND 7, 1977

HEARINGS I

MS. RINGER. Let me introduce our hearing this morning.

This is the third of a series of hearings that the Copyright Office is holding as a result of the passage of the Copyright Revision Act of 1976.

This is the first hearing that is not directly related to the implementation of a particular provision. It is, in fact, a more exploratory hearing, based on a mandate that is in the Statute in Section 114, and is docketed in our Docket Series as 77–6. The subject is: Performance Rights in Sound Recordings.

We are planning a two-part hearing: the first in Washington today, and, if necessary, tomorrow; and a second series of hearings in Los Angeles in Beverly Hills later on this month. So that we cannot expect that this will exhaust the subject this morning, but I think that we should try to adopt as informal and "exploring" an attitude as possible and, for this purpose, we have convened a panel up here that, I think, is prepared to ask a lot of questions when we get into the subject.

The project for the examination of Performance Rights in Sound Recordings has been made the focus of a team of attorneys in the Copyright Office, under the leadership of Harriet Oler, and the other members of the team are the two people at the far left of the panel—on my left—Richard Katz and Charlotte Bostick. To my left is the Assistant Register of Copyrights for Registration,

Waldo Moore. To my right is Harriet Oler, the head of the team; and to my far right is Richard Glasgow, the Assistant General Counsel.

We will be joined later by Jon Baumgarten.

I will make a few technical announcements in a minute but, before I do, I would like to call on Harriet Oler to discuss the project a little bit and to tell us what has been accomplished, and what the plans for the future are.

Ms. OLER. The plans for the future are two-fold. On the important question of the domestic economic effect, or potential economic effect, that legislation such as the April Danielson Bill might have, the Office is in the process of hiring an independent economic consultant firm to study the question of the economic impact; and that contract is being processed through the Library at the moment. The firm will be announced later this week.

The new Copyright law also asked us to consult with foreign representatives in this field and, since most of the major Western European Countries have some form of performance royalty—whether voluntary, or legally demanded—we have set up an extensive schedule of interviews to follow up on previous correspondence, and we hope, from that, to be able to make some kind of an analysis of the rights in foreign countries and, also, of the mechanisms for distribution and collection of performance royalties. So that will occur later on.

Ms. RINGER. Thank you.

Just to get the housekeeping details out of the way, we have made 50 copies of the statements that have been filed, and they have been handed out to the witnesses that are here today; and I think that there will be ample copies for everyone who will be coming to this hearing—or so it would appear.

I am a little bit surprised that there aren't more people in the room but, perhaps, they expect this to be a pro forma hearing. I hope that won't prove to be the case.

The possibility, of course, exists that we will run out of the fifty copies and, if you want additional ones, you can obtain them from our Public Information Office for 25 cents a page. Needless to say, if you can get them from the witnesses, themselves, it might save you some money.

We had not really made a decision as to whether or not to treat the two hearings—the one in Washington and the one in Los Angeles—as being part of the same thing, and to hand out comments at both. Obviously, we cannot hand out, here, the comments that will be made in Los Angeles, but I think the best plan is to treat it all as one hearing. We will try to take the comments that are made here out to Los Angeles and hand them out there.

You can, obviously, obtain the Los Angeles comments from us. If we have extra copies, we will give them to you. If we need to order additional copies, we will make them for you.

The transcript—as we have in the case of the other hearings—will be available in about ten days from tomorrow.

The transcript will, of course, be raw and un-edited and it will be available from the reporting service, Miller-Columbian Reporting Service, for 15 cents a page. It will not be, of course, the official transcript. We will eventually—after we have done some editing—issue a final transcript as an historical record of these hearings. In this particular instance, it may be more than that.

The question arises, again, as to how to handle the two hearings—the Washington and the Coast hearings—but I think, again, we can probably handle them as a single hearing, and finally issue an edited transcript of both, together.

We have not made a decision as to whether to send out the testimony to the individual witnesses for full editing. If you are a witness and wish to make editorial changes in the transcript, we invite you to send them in to us voluntarily—don't wait for us to ask whether you want to change your testimony in an editorial—as distinguished from a substantive way.

I think that takes care of most of the introduction.

We are now being joined by Jon Baumgarten, the General Counsel.

I would like to say a word or two, in opening these hearings, as to the substantive questions.

This, of course, is an extraordinarily difficult and important question. It is one that has been an issue in Copyright revision since the Fifties and, in fact, in one form or another, it has been an issue since the early part of the century.

The basic question, of course, is whether or not the contributors to recorded sound—recorded sound recordings, if you will—should be entitled to rights,

or royalties, or both, with respect to the performance of their recordings. There are a whole range of subsidiary questions that arise from this.

There are questions of principle;

There are questions of law;

There are questions of practice.

Our aim in this hearing, and in the entire endeavor, is to approach the problem as objectively and as much without preconceptions as it is possible to do.

I am perfectly well aware—as I think many of you are—that as Register of Copyrights, I have taken a position on the basic question of principle involved here. I have done it in the context of on-going legislation and I think this is troubling to many people, and it troubles me in many respects. I did not invite this assignment for myself, or for the Copyright Office. I was asked very importunately by the Chairman of the House Judiciary Subcommittee if I would take it on, in 1976. The question was asked in 1976 and, of course, I really had to do it.

On the other hand, I am not unaware that there are those who will throw aside any recommendations we make on the theory that what we have done is simply a confirmation of positions that we have already taken.

I will try my very best to avoid that result. It may not be avoidable but, in setting up a team in the Office—to which I have given complete carte blanche—I have tried, as best I could, to impose no ground rules or limitations on what they do; or what they come up with.

The ultimate recommendations that we make to Congress will, naturally, have to have my endorsement, but I have tried to set up a framework that will be as objective and without preconceptions as possible, and I hope that this hearing will tend to confirm this.

We are trying to explore, in this hearing, in depth as much as possible, and there is a great deal, I think, that has never been brought out in the hearings, and in the consideration of this question in this Country, of this very, very important and difficult problem.

Unfortunately, our first witness is not here and, so, we will simply have to reschedule him. He was to have been Thomas A. Gramuglia, Vice President of the Independent Record & Tape Association.

The second witness, with whom I think we should go ahead—if he is here—is Theodore R. Dorf, General Manager of Station WGAY, representing Greater Media, Inc.

Mr. Dorf represents the FCC Licensee of radio broadcast stations WGAY AM-FM, which are known as the "Beautiful Music Stations".

I believe Mr. Dorf has filed a statement.

Is Mr. Dorf here?

Welcome to the hearings, Mr. Dorf. I am sorry that you got run in as first witness without any warning

Mr. DORF. That is quite all right, Ms. Ringer.

STATEMENT OF THEODORE R. DORF, GENERAL MANAGER, STATION WGAY

Mr. DORF. My name is Theodore R. Dorf. I am a resident of Potomac, Maryland. I am presently the General Manager of WGAY–FM and WGAY–AM. WGAY–FM is licensed in Washington, D.C., and WGAY–AM is licensed in Silver Spring, Maryland.

I am also currently the Vice Chairman of the Washington Area Broadcasters Association; Past President of the Delaware-Maryland-Virginia-District of Columbia Broadcasters Association; a Member of the Board of the Radio Broadcasters Council, and have been very active in the broadcasting industry throughout the United States.

Greater Media are the owners of five AM and five FM radio stations; with various types of formats. They are not all "Beautiful Music Stations".

I am addressing myself as a Beautiful Music Station operator.

For the record, one of the call letters was inadvertently given incorrectly. That was WHNE, which is in Birmingham. It is WNJC.

WGAY–AM is a daytime operation, with 10,000 watts, 1050 on the dial. WGAY–FM operates with 17 Kilowatts power.

We simulcast about 25 percent of the time and separate the balance of the broadcast day; and we conform to present FCC regulations. The stations naturally do pay the effective percentage rates for ASCAP, BMI, SESAC.

At the beginning, I would like to note that I am in complete agreement with most of the statements that have been made by broadcasters concerning the fact that an additional performance right in sound recordings goes beyond the Constitution's copyright clause. It is unnecessary from the standpoint of the public, as well as the record companies, and is a burden on the broadcast station.

I am trying to highlight my statement. I am sure you have had it said plenty times. There is no necessity of my reading through it.

I would like to get to the thrust of why I am here: to talk specifically about Beautiful Music Stations and their problems.

To familiarize yourself with Beautiful Music, this is a lush type format. We play standard; contemporary; full string; and lush. There is an absence of beautiful music available to Beautiful Music operators. There just is not very much around today; and I would like to address myself to that.

Basically, because of the lack of beautiful music in this country, we have had to go outside of this country to secure beautiful music products. Approximately 30 percent of what we play on WGAY-AM and FM, today, is not produced here in his country. Seventy percent of it is, but it is music that was recorded back in the Sixties. There are very little of the current popular selections that are recorded.

Approximately three years ago, there was a movement afoot in our particular industry. A couple of the cooperatives performed to secure additional product of contemporary songs of today's vintage.

This was done through a gentleman called George Greeley, from the West Coast. It was another company called Good Music Company, that was formed, and developed this type of product. Some of the broadcasters have gone out on their own and recorded some of the contemporary songs. I believe Capital City is one. Susquehanna Broadcasting is another.

We have even entered into this end of the business—and we are broadcasters—but we have been forced to, because of the lack of a particular product.

Well, at the outset this might seem: "Well, gee, if copyright royalties were in effect, there might be more Beautiful Music product available!"

I don't believe that this would be the case, simply because of the nature of the format and this, I think, is what I would like to address myself to.

I have to give you a little history of Beautiful Music, and how it operates, to arrive at the point that I am going to bring out.

Beautiful Music station operators, specifically, are there to develop a musical pattern that weaves a thread throughout the broadcast day. There are certain things that are done to achieve this.

We program our music in clusters, rather than breaking it with conversation between selections. We eliminate as much talk as possible.

Our newscasts adjust strictly, to small bits of time. There are various breaks throughout the broadcast day. At the end of each cluster of music, a couple of commercials are delivered, and we then return to music. WGAY is an example of this.

To break a cluster, we give the name of the selection and the artist.

We started years ago: We went to music companies and record companies and we said. "Hey, why don't you give us more product in terms of popularity? If you check around the United States, you will find that in every major metropolitan area and in lesser areas, Beautiful Music Stations are popular stations. They are stations that, generally, a lot of people listen to."

Their reply, to the man, was that, "You don't offer us the right kind of platform."

What is the right kind of platform?

Well, we don't announce the names of the selections. We don't promote the music. Music is played, in most cases, and the station moves on, and there is no announcement as to the artist, title, discussions as to content, and so forth.

I believe that this is the main cause of the lack of Beautiful Music in the United States today; and this amplifies the value of a radio station—as far as the record companies are concerned.

They maintain that their product makes the stations. I think it is a quid pro quo. I think that the development of the product in the radio station is the platform that announces this product to the world and, if it is popular enough, and interesting enough, why, the records will sell. In this way, they will reap their reward.

As far as the economics of the broadcasting industry are concerned, I am not here to plead poverty. I am not here representing a station that is in poverty.

However, as an industry—the FM side of the industry—there are 60 percent of the stations that are still in the red; that have not made it to the black side of the ledger, as far as accounting is concerned.

Although the volume of our industry in terms of dollars has gone up, the collective operation like in every other business, has followed suit and the net profit has declined to the point that, in each succeeding year, it has moved down. Still, there is plenty of net profit there.

I would also like to summarize my statement by reading the last paragraph of my report.

"My layman's understanding of the Copyright law is that it is first and foremost intended to provide an incentive for creativity and production, so that the general public will benefit from it. However, this fundamental purpose will not be served in this case. Consequently, I am taking this opportunity to urge the Register of Copyrights to recommend to Congress that a record public performance right not be established. A performance royalty will not serve the fundamental purpose intended by traditional notions of copyright; on the contrary, it will only serve as a further tax on broadcasters for the benefit of a few who are already well compensated for whatever creative efforts they put forth.

That is the end of my statement; and I thank you.

Ms. RINGER. Thank you, Mr. Dorf.

Let me start with Harriet Oler and ask her if she has any questions.

Ms. OLER. Well, I have enjoyed many of your broadcasts.

Mr. DORF. Thank you.

Ms. OLER. I have a couple of questions.

First, your statement alluded to the dearth of music available to you for your particular format and the necessity of obtaining good music from Europe. I wonder whether there might be any correlation with its availability in Europe and the fact that they have performer royalties.

Second: Do you now think that if record companies, for example, received royalties, there would be more music of this type produced—even though you do not give them advertising credits on your program?

Mr. DORF. Well, let me answer the second point first, because it is precious in my mind!

I don't feel that a royalty credit would be in any way sufficient to produce the kind of music that Beautiful Music Stations require. The reason I say that is that there are only approximately 200 Beautiful Music Stations in the country, and the number of people—this is what the record companies tell me, now—the number of people who are interested in Beautiful Music, they say, don't seem to patronize the record stores.

I don't feel that—because they are, basically, a profit-making institution—that they would feel that there is sufficient volume there to get involved more deeply. I am paraphrasing statements that were made to me.

So I don't think this would encourage them to record in this area. I think that they would, more likely, want to record where they maintain the popularity is.

As far as the first part of your question is concerned, I am not too familiar. I know that there are royalty rights in Europe. I will be honest with you. I am not familiar with the rudiments of those performance royalties.

However, I think that—having been over there and talked to some of the broadcasters over there—and the record people from whom we purchase—there is a popularity over there, and that probably is a more important reason why they are still producing this kind of music.

They call it "dance music" over there. They still have ballroom dancing and that kind of thing.

This may well be a strong reason why the popularity is there.

Ms. OLER. I have one other business-oriented question. I don't know whether it is proper to ask you this; but I will ask you, anyway.

Do you have any idea how many owners of FM stations also own record companies, or own interest in record companies?

Mr. DORF. I cannot quote you a specific figure on that, but I think it is very miniscule.

Did you say "FM"; or just broadcasting stations?

Ms. OLER. No. FM, in particular.

Mr. DORF. To my knowledge, I don't know of an FM broadcaster that owns a record company.

Mr. OLER. So there is not that much dovetailing between interests there?

Mr. DORF. No. No.

Ms. OLER. Thank you.

Ms. RINGER. I think I will go down to the other members of the team, and then we will have some clean-up questions from the "brass".

Richard Katz:

Mr. KATZ. I just have one question that is really a follow-up to what Ms. Oler was getting into. You may have covered this in your statement, but I am curious to know if you have any suggestions about what record manufacturers can do to increase their production of the kind of product that you utilize.

What incentives do they have?

In what ways will they be able to recover their investments, if there really is a market for the record sales?

Mr. DORF. This is what they maintain. I don't maintain that there is a lack of market. I think there is a market. I can state from my own experience with WGAY, that we get numerous telephone calls, on a daily basis, from people calling in and asking us the name of the artist, and the selection. We are very cooperative in this matter. We will give them the album cover title, the coded number, the record company. We will do everything in our power to help them to get the information.

They, in turn, go out and shop at the various stores and call us to say that it is not even available. If you are asking me about my feelings—I feel it is slow in this country because the record companies don't produce it and put it on the market. If you don't put it on the counter; if you don't make it available; how are you going to move it?

Mr. KATZ. Do you think the fact that there is not a correlated—I don't want to use the world "plug"—that there is a sequence, you know—a sequence of music, and then the title and the artist—that it is difficult for the listeners to determine who it is that they are hearing?

In other words, as you mentioned, you have to get numerous phone calls from listeners to find out what it is that is on the record, so, therefore: It is possible that the record companies feel that it is too difficult for them to have their product known, anyway?

Mr. DORF. Well, I am not here to plead for the plight of the Beautiful Music operator. What you stated is one of the reasons why I don't feel copyright royalties are necessary. This is what illustrates the power of the radio stations in moving the product.

This is why I am here.

In other words, when an industry—let me use quotes—"industry" is a generic term and it is not I, as a Beautiful Music operator, at the moment. It is a quid pro quo, as I said before.

They create the product. We expose the product. If it is good, it will move; and the more we expose it, the more it will move and the more they will reap for it, particularly in Beautiful Music, because that is a marketable thing. I feel that if they made the Beautiful Music available, it would move. It may not move as quickly as a Carpenters selection, or "Hey, Jude," or something of that nature, but there are degrees of merchandising, and degrees of marketability.

Mr. KATZ. Just to make sure: Your feeling is that a market presently exists.

Mr. DORF. A market presently exists that they are not making the product available to. They maintain that it is not economically feasible for them to do it.

In fact, we have been forced, because of lack of product—as I stated in my testimony, we play a lot of music from the Sixties—we were forced to go to tape.

Let me dwell a little further on Beautiful Music.

There are independent operators of Beautiful Music, and there are syndicated operators. The syndicators program their music on tape, and sell it as a service. A station buys it, and plays it.

I am a rogue. I don't want to buy a service. I think I can program Beautiful Music as well as anybody else in the country, so I do it myself. When I say "myself", I am talking about the station; not myself, personally. I am not a musical expert in terms of programming music.

The reason I do not want to go to tape is that it eliminates certain flexibilities. There are times, for example—we just experienced this on the July 4th holiday—a "syndicated" would have had the music programmed. Somebody who has a syndication would not be able to play any patriotic music—because of the logistics of developing the tapes.

If you have it on discs, rather than tape, you can then get involved and bring in the most current types of things that would be in keeping and in tune with the times. You don't want to play patriotic music on a hot day like today. You want to play something cool!

So I fought going to tape. I saw my product disappearing. The more times I played the records, the more inferior they got. So I was forced to go to tape—to preserve a library.

Mr. KATZ. Thank you. That is all.

Ms. RINGER. Ms. Bostick?

Ms. BOSTICK. I have no questions.

Ms. RINGER. Let me go down to the end of the road, then.

Dick Glasgow.

Mr. GLASGOW. Yes.

Mr. Dorf, you said that you estimate that 60 percent of the broadcasters operated in the red.

Mr. DORF. I said 60 percent of the FM operators.

Mr. GLASGOW. The FM operators.

Do you feel that if this legislation were enacted, it would force them out of business?

Would this be the straw that would break their back?

Mr. DORF. I don't want to be a prognosticator of doom. I would say it would be an added burden. You know, it would be another serious problem for them—and probably it would cause some of them to fall by the wayside.

Mr. GLASGOW. But you don't know how many of them it would affect?

Mr. DORF. I have no way of telling that.

Mr. GLASGOW. Thank you.

Ms. RINGER. Do you have any questions, Waldo?

Mr. MOORE. No questions.

Ms. RINGER. Jon?

Mr. BAUMGARTEN. Are there any significant differences in the way a Beautiful Music station markets its time—as opposed to other music stations?

Are there any differences in the rate cards, or the practices?

Mr. DORF. Yes, there are some significant differences in the way a beautiful music station markets its product.

First of all, a beautiful music station restricts the amount of commercials that are heard. For example, the commercial load of the beautiful music station is considerably under the commercial load of an average, regular station.

A Beautiful Music station is more stringent in its copy controls, and there are a lot of things that we turn back that are heard on other radio stations; to make it compatible with the sound of the station. So we are talking, now, about marketing strategies, which is what you are asking me.

So there is a lower commercial load; tighter copy control; and, as far as the rate structure is concerned, the rate structure has to match the market place. Because you have fewer commercials, doesn't mean that you can charge more money. You are in the marketplace, where you are competing on a competitive basis, and the buyer does not want to know this. He just wants to know—to use technical terms—what your frequencies are; what your efficiencies are.

Mr. BAUMGARTEN. OK.

Is it possible that, in the case of Beautiful Music, that it is just those performers who produce Beautiful Music that are more in need of performance royalties than the rock performers, or the country music performers?

We have received numerous letters from broadcasting stations, the crux of which was, "My heart bleeds for Frank Sinatra".

On the other hand, we got one letter from Bennie Goodman, who produces some of the older records such as Beautiful Music plays. He pointed out that, because of the old contract practices in the older recordings and the like, he is not getting adequately compensated.

So, again, is it possible that the performances that you are involved with are really the ones who deserve royalties, more than the rock performers and others, who, we are told, don't really need it?

Mr. DORF. Well, I am an advocate of everybody making a fair wage and a good living, but I cannot follow the thrust of that because, from the point of that one angle that you are talking about, if a performer performs, or a musician records the music, he is going to be paid for it, is he not?

Mr. BAUMGARTEN. In some respects, yes.

Mr. DORF. I don't think that it is the broadcaster's burden to carry this load. I think it is more for the record companies to carry it.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. Mr. Dorf, what do you regard as your function as a broadcaster in the beautiful music area?

Aside from the fact that you are a commercial broadcaster, with an FCC license; in terms of the public interest, what function are you serving in society?

How would you look upon yourself?

Mr. DORF. I look upon myself as being in the entertainment media.

Are you talking about the cultural aspects?

Mr. RINGER. Let's philosophize for a moment.

Mr. DORF. All right. A broadcaster is, fundamentally, a businessman. He gets a license from the Federal Communications Commission—from the Federal government—to service a community. He is mandated by certain regulations as to the things he has to do to serve that community.

By the very nature of getting into broadcasting, you become a public servant of a sort. It is the kind of business that attracts you to various things: charities; cultural events; being involved in government; people; saying how the community is developing.

Just yesterday, I was involved in an ascertainment, and this is an ongoing thing—which is quite interesting, by the way. We had to ascertain counter-executive policy, and we talked about a cross section in this field. We talked about a cross section of the whole community—the business community, the cultural community; and the like.

So a broadcaster is a many faceted individual, and I think that you will find, in any community—especially in the smaller communities—that broadcasters are very active citizens in the community in many, many events.

But to function, and to do all of these things, you have to make a profit. You have to turn a dollar, to use a phrase, because you won't be able to get involved in all of these things if you don't; and I think that most broadcasters are—if I may exercise my own judgment, since you asked me—most broadcasters are outstanding citizens in their respective communities.

Ms. RINGER. What I was really trying to get at, though, was the particular function that Beautiful Music provides in the overall scheme of broadcast programs.

Essentially, I will give you my impression.

I listen to your station, mostly in my beauty parlor, and it is, I think, very definitely used as background music there. It is rather anonymous music. It does not have much personality. You tend to tune out the commercials and the news, because it is kind of an irritation. You just have this music—this rather homogeneous music—going on in the background.

This is my impression, frankly.

Mr. DORF. I am glad you brought that up.

I fight that battle every day of the week. On the commercials, I go by competition—not by my clients, because they swear by me. We do move merchandise. Our commercials are heard. We are very happy to be able to move products. We are a commercial vehicle.

Now, this is the way we have decided to market our product. We set a platform. If I may use an analyogy, we build a package with a nice wrapping and pretty ribbon on it; but the product is inside.

You probably think that you are not aware of the commercials, but I think, in fact, you are [Laughter].

You would not have mentioned it if you had not heard the commercials; so the commercials are there.

Now, what we try to do is make the commercials compatible. That is the differential between a Beautiful Music operator, and another type of operator. We make the commercials compatible with the balance of the sound of the station, and they then blend with the station; but they are not the background.

If this was strictly background, we could not be commercially viable. I might change it tomorrow. I might play Chinese gong music tomorrow, if that were the commercial that I wanted to have.

Ms. RINGER. You are saying that there is a market.

Mr. DORF. There definitely is a market. There definitely is a market.

Ms. RINGER. And, essentially, in addition to supporting the basic broadcaster's position on this question, you are here because you do not have enough of the kind of recorded sound—recently recorded sound—that you want?

Mr. DORF. Right!

Ms. RINGER. And you really are making, in effect, a pitch to the record industry to supply this.

Do you look on your function, at all, as a promoter of this kind of music? In other words, someone who is actually seeking to enhance this kind of lush—Beautiful Music, if you will?

Mr. DORF. I would say so. Yes!

Ms. RINGER. And, in a way, you regard yourself as a promoter, as well as an exploiter of the composers of this kind of music, and the performance of this kind of music. And you would like, also, to be able to promote more recent recordings, and products, of the record industry?

Mr. DORF. I would love dearly to do that.

Ms. RINGER. What are your relations—cultural or otherwise—with the Performing Rights societies—the copyright owners, as such?

Mr. DORF. Well, as I have reiterated, we are involved only with ASCAP and BMI and SESAC.

Ms. RINGER. And, in the Beautiful Music station, are your licensing arrangements different from those, say, of the Pop Top 40?

Mr. DORF. No. There is no difference.

Ms. RINGER. In other words, the bases for your payments vary, depending on the performing rights. They follow the same pattern.

Mr. DORF. They follow the same pattern.

Ms. RINGER. Based on advertising growths, or listenership, or whatever.

Mr. DORF. Yes.

Ms. RINGER. And you do pay royalties?

Mr. DORF. All of the royalties!

Ms. RINGER. In that area.

Mr. DORF. Right!

Ms. RINGER. Do you have any dealings with the performers' unions at all?

Mr. DORF. No.

Ms. RINGER. In your own experience, you have not gone out and arranged for tapings?

I did not quite get this from your statement.

There is, in the beautiful music area, the need to go to Europe and maybe, to some extent, in this country.

Mr. DORF. We have explored it.

Ms. RINGER. You have explored it. You haven't done it. Is that right?

Mr. DORF. We have explored it. We have recorded six selections, yes, for our own testing purposes over here.

Ms. RINGER. In Europe?

Mr. DORF. In Europe.

Ms. RINGER. What were your dealings with the performance representatives over there?

Mr. DORF. I did not directly handle the deal. We sent a representative over there. But we conformed with whatever the regulations were. We recorded them in London.

Ms. RINGER. Yes. Picking up the point that Ms. Oler was trying to get at, I have been told—and you can confirm or deny—that the reason people in your situation—background music, and beautiful music, and what-have-you—go to Europe, is that the labor is cheaper; that the unions don't ask as much.

Is this true?

Mr. DORF. It is a fact of life.

Ms. RINGER. In other words, you agree.

Mr. DORF. That it is a fact of life? I cannot deny that.

Ms. RINGER. Even though there are royalties.

Mr. DORF. Yes.

Still, we found through our small—and this is one area that we don't want to get into, but we may be forced by necessity to explore it. We have found that, in checking it out, we could have the music produced in Europe for less money than you can in the States. And this is Union music, done in Western Europe.

Ms. RINGER. To what extent are your operations automated?

Mr. DORF. We are not automated at all. There are beautiful music operators who are automated. I am one of those who believe that it should not be automated.

Ms. RINGER. In other words, whoever is the equivalent of a disc jockey in the beautiful music context actually puts the records on?

Mr. DORF. We don't have records. We were forced to go to tape. We have what we feel are music-casters and they operate a board—a regular broadcast board—and the music is made on 15-inch tapes, and it is played in 15-minute cycles. They then come in, and give the title, the selections; give you the name and the artist after the 15-minute cluster has been consummated; and they do their commercials and get back to the music on the hour. They do news on the half hour. They do these things; but they are actually there. But to a very lesser degree because it is not part of the beautiful music, we do allow them to talk, a little bit. This is my own philosophy. They talk a little bit. In many cases, they are required—at some stations—not to talk at all.

There are beautiful music operators who are automated. There is no question about that, in the smaller markets.

Ms. RINGER. You are a little bit automated in the sense that you are dubbing discs onto tape.

Mr. DORF. I don't call that automation. In no way, shape, or form! In fact if you want to get into the philosophy of that, it is quite an art. We do the match-flow technique of broadcasting. We call it "match-flow." What happens is that it is just not thrown together.

My programmer picks individual selections, by tempo, by styling, by instrumentation, and tries to make each one become compatible with the other, so that, in a 15-minute cluster of music, that one selection follows the other one and enhances it. It is not just thrown together. So there is an art to that.

Ms. RINGER. I am not trying to be contentious. I really want to know.

Mr. DORF. Yes. We even edit some music.

Ms. RINGER. Okay. You are getting into kind of a dangerous ground because you are doing, in many cases, what a record producer does.

What I would like to get to, now, is how much you re-use these tapes. You cannot duplicate—I am thinking of WGAY, which I am a little familiar with—you cannot duplicate more than 25 percent, between AM and FM, simultaneously?

Mr. DORF. Right!

Ms. RINGER. But you do play the same tapes over at different times.

Mr. DORF. On both stations.

Ms. RINGER. How much do you play over the same tapes?

Mr. DORF. This new rule just went into effect June first.

Ms. RINGER. The 25-percent rule?

Mr. DORF. Yes.

Ms. RINGER. What was it before?

Mr. DORF. 50 percent.

Ms. RINGER. 50 percent.

Mr. DORF. And it amounted to 100 percent of the day time, in an AM operation. We feel that, approximately, after 100 plays, we re-do the tape. We just re-do the tape.

This is the kind of answer you are looking for?

Ms. RINGER. Yes, sort of.

Mr. DORF. Because of the new regulations, we have to have a separation of at least 24 hours between the music we play on the AM, versus the FM.

We try to broaden that so that there is more of a separation than that.

Does that answer your question?

Ms. RINGER. Yes, more or less.

I guess I am trying to draw out a point, which is that you do pretty well duplicate back and forth over a period of time. Both the AM and the FM have pretty much the same programs. They are in different sequence.

Mr. DORF. It is in a different sequence. The formula for both stations is identical, as far as the format is concerned. One is an AM station; the other is an FM station.

On the AM side, it is the only beautiful music station in the Washington area. There are no other stations programming on the AM side.

On the FM side, there are a couple of other FM operators who program beautiful music. Our decision contained the same format on both. It was predicated on the fact that, on the AM side, there was no reason to make a change because there was nobody else doing it. It would be kind of foolish.

On the FM side, we happen to be very popular, so I was not going to throw that out of the window.

Ms. RINGER. I see. Why do you re-do the tapes?

Is it because your listeners are going to get tired of hearing the same things?

Mr. DORF. No. The tapes get tired!

Ms. RINGER. The tapes get tired!

In other words, you could, theoretically go on and use them over and over?

Mr. DORF. Well, you can, theoretically, but you want to make some change. Now you are getting into an area where the broadcaster is enhancing the music.

Ms. RINGER. Yes.

Mr. DORF. And this, I could use another reason, why the broadcaster is an asset to the record company and the arts. The way we use this match-flow system is by helping each selection. I don't know that we are treading on copyright grounds, since we don't alter the music. We don't do anything to alter the music.

We may select "A" and "Y" and put them together, rather than "B" and "Z", because "A" and "Y" enhance each other and "B" and "Z" don't. We try to set a pattern, so that this is what you try to achieve.

Of course, we are looking for audience popularity. We try to make the sound sound better. Now, in this, you are getting into a field where the broadcaster is the expert. This is why, in a market of three beautiful music stations in Washington—I guess I have to pat myself on the back once in awhile—we happen to be the No. 1 beautiful music Station as against syndicators and the like.

That is a whole different world; but it is the technique of the broadcaster—the art of the broadcaster.

Ms. RINGER. I would like to get just some feel for your reaction to a couple of controversial things in radio broadcasting, generally, and then, maybe, go into a little more philosophical area. But from your own vantage point as a broadcaster, how do you view the top 40 phenomena?

Mr. DORF. Well, in terms of the area that I am in, I have not invaded any contact with it.

However, as an industry——

Ms. RINGER. That is what I am asking.

Mr. DORF [continuing]. I do see the popularity of it. I see it from the charts; I see it from the rating service; I see it from the very fact that in our own cluster or group of stations that we own, we have a middle-of-the road operation. One of our operators—we have a couple of Beautiful Music operators. They are not similar to mine. They are different.

When you use the term, "Top 40", are you all inclusive, because today, there are so many fractionalizations of this. There is an A.O.R. now—an Adult Oriented Rock—which is a soft sound, which has now become a very hot format.

I think that the music is moving in many directions, and it is not static; or, it is not staying in one area.

I think the softer lyrics are more popular today; the softer sounds are more popular. The older rock, which seems harsh and hard, seems not to be as popular.

The age characteristics now divide themselves. There is "bubble gum" rock. There is "adult" rock. There is disco. What we are having is an interesting phenomena—that I think you have today. A person has an awfully good variety menu to choose from when he turns on the radio station. He has disco in this market. He has soul; he has country; he has middle-of-the-road; he has adult oriented rock, as we talked about it; he has the old rock-and-roll. He has this bubble gum set. He has beautiful music. He has classical music. If he doesn't want music, he has news. He has talk.

Ms. RINGER. That is interesting! You did not mention one of my favorites, which is jazz!

Mr. DORF. We have jazz too. There is not an all jazz station. I am thinking of stations whose basic format is committed to one type of music.

I play jazz, too.

Ms. RINGER. Isn't what you are saying, to some extent, an answer to your basic plea?

You say that, obviously, music does not stay the same. We have all gone through enormous changes in the last 20 years in terms of what we listen to, and what we have available to us.

Don't you think that, eventually, if there is a market for this, the record companies—in answer to the commercial need, will come back and provide you with the kind of program material that you think you need?

Mr. DORF. I am glad you brought that out!

Ms. RINGER. OK.

Mr. DORF. Many of the formats that I have mentioned are very contemporary in time. Some of them are only one or two years old. We have a format in Philadelphia called Magic. That is the term of the format, and it is a very modern, contemporary sound that is doing very, very well. Many of the components of the format were copied from what I am doing here, in Washington. It is only a couple of years old, and it has come on the scene, and it has become a phenomenon.

Beautiful music has been around for a long, long time. I have been the No. 1 beautiful music station in Washington for over 12 years. I have been in the top—popularity-wise in the top three or four stations—adult-wise—for almost as long a period of time. I am not an island unto myself. You will find this in Washington. You will find it in Baltimore. You will find it in New York, Cleveland, Los Angeles. I operate a station in Los Angeles,—a beautiful music station, KBIG.

If our popularity is such, and our audience is such—and this has been for a while—why haven't the record companies come around and put the product out?

Ms. RINGER. Well, I guess it is not commercially viable for them.

Mr. DORF. That is what they maintain.

Ms. RINGER. Well, it is within their province to make these business decisions.

Mr. DORF. True.

Ms. RINGER. What I am really trying to get at, I guess, is, in part, whether or not the distortions in the rights, royalties, licensing, copyright, if you will, area, throughout the whole broadcasting industry have resulted in distortions in programming which you are now feeling the brunt of because, in the concentration on the charts, and in radio programming generally, there is an enormous amount of records sold, but they are rather confined, and there is a distinct reluctance to experiment to provide programming for rather small segments of the population who would be only too happy to buy the records if they were available.

Is this at all a valid hypothesis?

Mr. DORF. Yes. Let me return to my original premise that beautiful music does not represent a small segment. If you were to use popularity polls, for example, in terms of counting people that listen to beautiful music, they represent a very large segment of the population.

I think that, basically, the reason that the record companies are producing this product—as a back-up to my original testimony—is that we don't promote the artist and the title of the selection on the air.

I am sure that if the beautiful music stations were to change their basic format and we to promote the records and the artist, you might have a turn-about in the record companies.

I don't advocate that.

I don't plan to do it in my station, but I am sure—I feel confident—that if that were to come to pass—they don't even bother to come around and call on us. They have promotion men who practically live at some radio stations, and constantly are promoting the albums and records. We never see anybody!

Ms. RINGER. You are now answering the second question I was going to ask. Let me pursue that a little bit. I think the word is "Payola".

Has there been any of this latter day phenomenon in the Good Music, Easy Listening, Beautiful Music area, that you know of?

Mr. DORF. Not to my knowledge.

Ms. RINGER. And I assume everybody knows that there has been in the hard rock, and that sort of station.

Do you have any explanation for that?

Mr. DORF. No. I have no comment on that.

Ms. RINGER. I think I do. In other words, I think you can figure out why that is true, if it is.

Mr. DORF. No. I guess, in a way, it is apparent. There must be economic factors brought to bear, too, for this thing to happen.

Ms. RINGER. You obviously, as a broadcaster, have some vision of what you are trying to do. It is not just tied up with next week's balance sheet.

I would think that, in your shoes, I would deplore what has happened to radio broadcasting in the last 10 or 15 years, or 20 years. And you are a little outpost in a vast sea, or something or other. You are, in many ways, a kind of victim of what has happened, and there is a hypothesis which I would like to test, without pre-judging it: that part of the reason for this is the fact that, in the Thirties when this could have gone one way or another, the individual

performers—not the stars; not particularly the superstars—but the vast army of performing musicians were not able to hold up their end against this technological monster.

This was not true in Europe, and the results have been different there.

Mr. DORF. That is possible.

Ms. RINGER. Programming is much more in your direction in Europe than it is here.

Mr. DORF. That is a possibility; but I would also like to bring a thought to bear here.

I don't feel that I am prejudiced, or that I am suffering. In fact, the proliferation of radio formats, I think, has enhanced the broadcasting industry, and it has also helped the record industry, and the artists.

At one time, prior to television, radio was the key to the family entertainment box. I remember when I was a child, I used to lay down on the rug, and put my hands up here (demonstrating), and listen to the radio—all of the old programs—and this was the center, and attracted all of the family, and everybody used to plug in the radio.

Then, after World War II, television became the Big Boy, and the prophets of doom said that the radio industry was going to suffer and disappear, and everybody was going to move over to the television.

In fact, maybe because of the necessity, we had to try to survive. In surviving, sometimes you come up with some new ideas.

I think that what happened is that the broadcaster, in order to survive, had determined that he had to become a specialist. He found that if he became a specialist, he became successful. Because of this, he now, today, gives more exposure to art and to music than ever before, because you now have every conceivable kind of formula available—which means every conceivable kind of music is available. You might not have had that in pre-World War II days, either. You may not have had any of a certain kind of music. No country music may have been played, because there weren't enough stations, and the station was a general, middle-of-the-road station. They might not have played any country music. They might not have played any classical music. Today, you have specialists; and you have exposure.

If you want to look at it from that point of view, we are really helping you, by giving this exposure—by having such a cross section—and, because the broadcast industry is so competitive, you cannot tell if tomorrow somebody is going to come up with a new format to expose anther form of music. If it becomes popular and successful—which means that the audience will like what they hear—it will become a very popular format.

If it becomes a very popular format, there are an awful lot of "copycats", I guess, and you will find one of its type in every city in the country. So that, maybe, a whole new world of music will open up. Maybe the oboe will become one of the most popular instruments.

Ms. RINGER. There are, obviously, differences between the top 50 cities, or the top 100 cities, and a small city like Fairmont, West Virginia, for example, where you are not going to have the broad range of programs that you have described.

Moreover, you say that everybody has all kinds of music, but it is all recorded! The one major area of music that is not on the radio at all, now, is "live" music. You can't find it if you look for it! Of course, this means that everything is canned. I am not saying that that is bad, but it is different from programming in Europe, where a great deal of live music is performed.

Mr. DORF. Just a moment: First of all, you have a different situation in Europe than you have here, as far as the broadcasting industry is concerned. They are not independent, as we are.

Ms. RINGER. Some of them are.

Mr. DORF. Free? Independent? There is mostly State-controlled broadcasting. The amount of independent broadcasters that you can find in Europe you can count on one hand.

Most radio—and television—in Europe is State controlled and State owned.

Ms. RINGER. Well, even assuming that you are correct—I think you are, basically, although there are commercial stations——

Mr. DORF [interposing]. I think there are two in England—three—some small figure.

There may be one or two on the Continent. But the average is more the other way.

Ms. RINGER. I don't mean to get into a hassle with you over this—I think there is a great deal in what you are saying. I would like to tie it down, now—my last question—I will go into some of this with the NAB witness, also—what would you do if you were able to make a decision that would decide the fate of individual performing musicians for the next two or three generations?

In other words, you say: "This is not the answer". What do you think the answer is?

Mr. DORF. Well, I don't think the answer is to ask the broadcaster to do more than he is doing, because I feel that he is doing a great deal right now. And, as I said, it is quid pro quo.

I think the particular industry which really profits the most on this is the recording industry. I think that that is where the answer lies—not to get it from the broadcaster, but to get it from the record companies.

Ms. RINGER. On what basis, though?

Obviously, they have collective bargaining arrangements with the Unions. Then they have individual contracts; and this is, presumably, as much as the present traffic will bear. You cannot, as a Government, say to the record industry, "Pay these people more because they deserve it."

You are, really, saying that there is no answer!

I was kind of trying to see if you were interested in subsidies and government grants, and free concerts, and that sort of thing, which is a very common answer to this question.

Mr. DORF. It may be a common answer, but it isn't [an acceptable solution for] a free enterprise type of individual. I don't strongly advocate a great deal of that kind of thing. Unfortunately, we are in the minority when it comes to something like that.

Ms. RINGER. Do you think there are enough performing musicians—instrumental and other musicians—now, to meet the kind of demand that this sort of society should provide?

In other words, is there enough incentive for a young person to go into this field?

Mr. DORF. Well, being a parent—I have two children who are now in college—I have seen the environment that they have been in. There has been hindrance—maybe I am a little different—to my children. Both of my children are involved in music, one way or another, for pleasure, or the like. I may have an aspiring music writer; but that is for the world to say at some later date, if that is an area that he wants to pursue.

I don't see that there is a lack of people in the field of music, or people who desire to get into the field of music.

I think, probably, there is a big disparity between those who are eminently successful, who are very high on the ladder in terms of what their earnings are, and those who are not as talented, or are run-of-the-mill. They may be sitting down here.

If you look at any industry, or if you look at any commercial setup in this country, isn't that the way it is all structured?

If you are good at what you do, you seem to be generally successful. If you are average in what you do, you get an average success. If you are mediocre, you get mediocrity.

Philosophically, I don't know whether I can be a judge as to whether that is right or wrong, but that is definitely the way our country has functioned. It has functioned successfully that way.

Getting back to my point about the record company, if somebody records a particular selection and it becomes popular, I assume that I would say, then, as the sales of those records, or music sheets, or whatever, increase, the return should be there for the person who created it. But I feel it falls in that area. We are the vehicle for the exposure.

I think that, in summation, probably—if we are throttled in some way—the reverse may happen. We may cause a reversal at the other end—at the artist end, or the recording end; because if we are in trouble, and we are the end product, we are where it is at. We expose it. If we are in trouble, then the whole chain of events is that everybody else will be in trouble.

Ms. RINGER. I fully grant that the situation is very complex, and a little change here can result in big changes over here.

At the same time, to pick up your point about free enterprise in our system, you are quite right, and there is this rather Darwinian system: "that the tal-

ented succeed," and if you hit a popular nerve then you will likely benefit from it. And even if you are talented, but you don't happen to hit the popular nerve, you are going to fail, and there is no one, really out there, very much, to help you.

But the fact is that our Founding Fathers did recognize the need to create property rights in this whole area of creative endeavor. The patent/copyright clause of the Constitution was intended to provide this very sort of protection for limited times, and under certain circumstances—which the Congress would decide.

The lack of this protection in an area where there has been a vast technological change has resulted in patterns that may be impossible to change now. Nevertheless, in many senses, you are saying: "This is a free enterprise system based on property," but here is an area in which most people would recognize that the property is justifiable. But it has not been granted, because Congress has to grant it under the Constitution and, as a result, certain things have happened.

I am sure you don't agree with me, but this is, I think, the philosophical answer to your question.

I am sure other witnesses will want to pursue this testimony. I appreciate your presentation very much, Mr. Dorf.

Mr. BAUMGARTEN. I would like to follow up on this.

Ms. RINGER. Yes. Please.

Mr. BAUMGARTEN. It has troubled me a little bit. I was going to leave it alone. Some of the answers to the Register have troubled me.

From some of the responses that we have gotten from broadcasters, we almost got the impression that broadcasting does not exist as an industry. It is an incident only to the record industry. It exists only to promote records. Broadcasting is not a self-contained, profit making industry.

That is taking it to extremes; but some of the letters almost read that way.

You told us that you don't perform that function. In fact, you told us that the record companies object to the fact that you don't—in their view, in any event,—give enough title identification, or author identification, to push to get the people out there to buy the record.

I am not a sociologist, but maybe beautiful music is the kind of music that people don't want to buy records of. They have a very excellent station in the Washington area. All they do is flip the dial. They don't have to invest thousands of dollars in this kind of equipment; and they don't have to go to the record store and be bombarded by long-haired teenagers. They don't have to buy the records.

So there you are. You are a profit-making enterprise, and you are making your profit on the basis of exploiting something that someone else has created: the record company and the performing artist.

I have a little bit of difficulty in knowing why these contributors, whose work you are exploiting to make your own profit, should not get paid! You do pay the composer; you pay the publisher; you pay for the tape equipment; you pay the salary of your announcer.

Earlier, you told me that it is the record company's problem; it is not the broadcaster's problem.

Why? Why shouldn't you pay for exploiting something that somebody else created?

Mr. DORF. Why should you think that we are the ones that reap the greatest benefit from this?

I have no answer in addition to what I have stated so far. I would just be repetitive; and I would be repeating myself.

I think it is a quid pro quo. I used that phrase many times here. I think we need each other. Without us, they are nowhere; and without them, we don't have the product. But we are at both ends of the spectrum. They are sitting at one end. They are sitting at the point of origination, and we are at the final end on this thing. And I don't see—you know, you take them away, and we are not there. You take us away, and they are not there.

As far as—in terms of profit—if that is the term—or in terms of paying, I don't think that we are beneficiaries of anything more if we are exposing it. Suppose we would stop playing music? Suppose we just started talking?

Mr. BAUMGARTEN. That kind of argument I have heard before.

Mr. DORF. I am not arguing.

Mr. BAUMGARTEN. Why pay the composer and the publisher, then?

Doesn't the same rationale apply?

Nick Allen was sitting out there representing the juke box people and they have made that argument for years. Congress finally said, "Well, they should pay a little bit."

The cable operators made that argument.

The broadcasters, for once, said, "No. That doesn't work. We should get paid. The cable operators are exploiting our product. They are not just 'building up' our market."

Mr. DORF. That is an area that I am not too expert in; and I stay out of it.

Mr. BAUMGARTEN. Some of the questions need some answers.

One is: What is the difference between paying the composer and the publisher, whom you do pay? Why should you pay them, and not pay the performers and record managers?

Mr. DORF. Well, there are arguments given for the reasons. I don't know whether you want me to rehash them here, but the composer and the arranger have one shot at it.

He composes the selection, and somebody picks it up and starts to perform it. He has no other recourse. They have no other recourse.

Whereas a performer, if [the recording] becomes successful, gets involved in personal performances at clubs, or at Carter Baron, or Wolf Trap, or gets on television. He has other areas of remuneration and return.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. Just one final question to tie that down.

It would never enter your mind to make part of your program live performances; hiring musicians and bringing them into your studios and putting them on?

Mr. DORF. It is just cost-prohibitive!

Ms. RINGER. The economics of the broadcasting industry have just ruled this out as any practical possibility for broadcasting in your situation.

If, by some miracle, you were induced to put on a live performance, would you think about doing it without clearing the rights of the performers?

Mr. DORF. If we were to do it?

Ms. RINGER. Yes.

Mr. DORF. I have never even entertained the idea.

Ms. RINGER. Suppose you did.

Suppose somebody said to you, "I want to sponsor this. I want to put on a 15-minute——"

Mr. DORF [interposing]. We would have to hire the musicians, and such?

Ms. RINGER. And you would, obviously, clear rights.

Mr. DORF. We would have to pay the rights, yes.

Ms. RINGER. Okay. What I am trying to adduce—I am not being contentious, at all, now—I am trying to draw this line. It is really the fact that the stuff is recorded; it is out in the public hands; it is available; and what you are doing is a secondary, not primary performance in broadcasting from records, and that justifies, in your own mind, not paying any royalties.

Is that essentially correct?

Mr. DORF. I would——

Ms. RINGER.

Ms. RINGER [Interposing]. I think this is what Jon was getting at. It is not that you consider the performer's contribution inferior to that of the composer?

Mr. DORF. No. No! No way!

Ms. RINGER. It is simply that, in this area, this is a secondary performance.

Mr. DORF. That is right!

Ms. RINGER. Different economic and ethical considerations apply?

Mr. DORF. Right.

Ms. RINGER. Thank you very much.

Mr. DORF. Thank you.

Ms. RINGER. The next witnesses—has Mr. Gramulgia come?

[No response.]

Ms. RINGER. No. The next witness is Robert Wade, General Counsel of the National Endowment for the Arts.

Welcome to the hearing, Mr. Wade.

STATEMENT BY ROBERT WADE, ESQ.

Mr. WADE. I appreciate this opportunity, very much, to set forth the Endowment's position.

Our position is contained in my letter to Mr. Moore; and a copy of the statement of Nancy Hanks before the Congress in 1975.

However, since I see this is not included in your packet, I will provide you with the proper cover page for the statement.

The National Endowment became aware of the seriousness of the concern about this problem a few years ago and, as a result, given our statutory role contained in our enabling legislation enacted by the Congress back in 1965, to be concerned with the material conditions affecting American creativity and encouragement and development of American creativity, we felt that it would be proper for us to look into this and to take a position—formulate a position—based on what we feel would be the equities, insofar as they do affect primarily the performing artists in the country. That is, primarily, the performing musicians, as it happens.

Of course, the immediate parties are the broadcasters and the recording industry; the unions; the musicians, themselves.

But we have, of late, been pressed on the part of all of the artistic constituencies to take more of an advocacy role with respect to what they feel are their rights generally in connection with the use and exploitation of their works.

You may be aware of the royalties for artists based on subsequent sales; and their payment is now becoming an issue. In particular, California has enacted a statute which is the subject of some controversy. We will all be hearing more about it, I suppose.

When we looked into this, we were struck with what we felt were inequities concerning the performing artist on records, which are—as has been stated many times—constantly used and exploited for the commercial gain of broadcasters.

We have heard horror stories of older musicians who are now living in the twilight of their lives in Old Folks' Homes, without much income; who perhaps had sat in on the recording session back in 1943 when Bing Crosby made "White Christmas"—which is sitll being played every year. Not that Bing needs the money, but there may be some others who helped make that record who could use a little share of the advertising revenues which the broadcasters are receiving as a result of the instant popularity of that recording.

We were also struck by the fact that Europe—as so often happens—seems to have led the way with respect to this kind of a problem. That is, in a way which does benefit the particular recording artists—the performing artists—themselves.

I personally am a little tired of having to hear how great Europe is for the artists, and would like to see the United States take more of a leadership role in this connection.

In fact, I think we have done some things recently in other fields that perhaps the Europeans will be copying; but I think, in this respect, we were struck by the fact that some 37 or 40 countries have already enacted similar legislation.

We were struck by the fact—as we understand it—that broadcast revenues from advertising are at an all time high.

We were similarly unimpressed—at least, I, personally, am unimpressed—by the argument that the broadcaster exposes the records and thereby benefits the makers of the records. Therefore, he does not feel that he should have to pay for that.

I think it is just how you look at that.

Overexposure can ruin a record in terms of sales. The fact that there is so much broadcasting is, obviously, eliminating live band touring to a large extent.

We all remember—even those of us who are not so old—the forties, and the big bands—Benny Goodman, and those people—touring the country. I don't believe there is much like that going on these days. It must have had an effect on the musician's ability to make a good living.

Also, when they broadcast records, I find that I have a problem with the argument, "We are doing them such a big favor, therefore, we need not pay for these creative works that we are using."

They are getting paid to broadcast these records—by advertising interests. Therefore, I cannot see any logic or equity in the conclusion that, therefore, "We need not share with the people who make it all possible."

That is, the artists themselves.

They are getting paid to broadcast these recordings, and they are getting paid quite well, as we understand it.

The National Endowment, of course, is concerned more with what is termed "fine art", or classical, folk, operatic—that kind of music, generally, than we are with the so-called "popular music."

However, we view all musicians as artists, in that sense, and want to encourage their success in their livelihood.

We do support this legislation, primarily for the benefit of the individual artists, although we appreciate the creative input, and acknowledge the position of the record industry that they, too, make a substantial contribution to records, and the creation of records.

The recording industry has indicated to us—and they are on record—as saying that they will—at least certain members of the recording industry; we don't have it all worked out—but we understand that, in the event such legislation is enacted, they would be willing to contribute, to the National Endowment, a certain percentage of royalties that they would receive from the enactment of the legislation. We think that that is a wonderful thing, for them to have voluntarily suggested, on their own—I might add—that those moneys, consistent with our legislation, which enables us to receive gifts for purposes consistent with the Enabling Act, would be used primarily for the stimulation and encouragement of classical recordings; folk recordings; perhaps poetry; narrations—the noncommercially viable recording which we would like to see more of.

I believe I have covered the major points. I don't want to go on at length.

I know you have a lot of witnesses, and you do have the major parties who really do have the main input into this proceeding.

Ms. RINGER. All right. Thank you very much.

I think we will have some questions for you, though.

Let me start with Ms. Oler.

Ms. OLER. Yes. I have two questions.

The first one is that you just testified that over-exposure can ruin a record.

Since the proposed legislation is now, and has been in the past, set up to encompass a compulsory licensing system, do you think that, in effect, could work to the detriment of performers, in that sense? That is, could over-expose?

That is certainly a possibility. It could not be helped, if compulsory licensing were employed.

Mr. WADE. Well, I don't think that it would be the result of the legislation, if that were to happen. I don't know that the legislation would do anything to correct the present problem of over-exposure. In other words, I think there is probably going to be over-exposure to some extent, whether you have the Bill or not.

But I think the broadcasters would probably continue to expose the records they feel the public wants to hear, and the public, I suppose, does make itself felt in that regard.

Ms. OLER. So it would not be any worse than it is now.

Mr. WADE. Right; I don't know that it would have any effect on that, in my opinion.

Ms. OLER. My second question is: In your testimony, you had two proposals, and the one that I question is that advocating a weighted distribution in favor of symphonic, folk, operatic and similar types of works.

There is a time-honored copyright principle—I think it is not exactly an analogous context; but, still, it is certainly in existence—that copyright does not make any qualitative appraisal of the works which are covered beyond a certain minimal level.

How do you figure weighted distribution would work?

Is this an essential part of your proposal?

Mr. WADE. Well, if you are at all familiar with our legislation, you know where we come from.

Ms. OLER. Right.

Mr. WADE. The formula that I mentioned—or at least, generally referenced in the statement, does indicate that the Endowment would tend to favor that kind

of distribution. But I think you will appreciate that that is a logical position for us to take. We do tend in that direction. We want to see symphonic, folk, and operatic music more readily stimulated. We want to see more production.

We make a value judgment at the national level. We think there are plenty of other kinds of music around—not that there is something wrong with it. We would like to see more of the kind that we are mandatorily required to support under our legislation, and the kind of music, with respect to the arts, that Congress has said it wants to foster and encourage.

As to the formula—and the actual wording of the formula—we are, at this point, staying out of that. That is up to the parties to decide. I had always assumed that some kind of ASCAP type of organization with respect to the performance royalty could be set up and worked out. I am a great optimist about human nature.

I think if we conceive the problem, you can work it out.

I would like to make one point while I am thinking of it. Previous testimony indicated a great belief in the American free enterprise system and, if you are successful, you made it. But we at the National Endowment see the economic problems of performance arts group every day in grant applications and—this is my personal opinion now; I am not an expert in the field—I can imagine a man would be an outstanding violinist, or an outstanding oboe player, if you will, and he may be the best in the world, but his income level is going to be limited by the economics of the performing arts. These groups just cannot pay their own way! No matter how much they raise their admission cost—as we all know, those of us who might want to go to Lincoln Center, or Kennedy Center, to see a show or a ballet, or a symphony; whatever—you know that those prices are already at a ceiling. And talking about elitism in the arts, if the Government were not supporting some of these programs with subsidies, you would not have the arts available to 90 percent of the American people. You would not have the American Ballet Theater out in Appalachia touring around. Those people, first of all, could never pay to see them, and there would be no way that you would have that kind of exposure.

With respect to the individual musician, I think no matter how good he is—no matter how "successful"—he is in an area where his income level is limited by the economics of the whole situation.

That is why I think the Endowment has taken the position that some kind of royalty benefit, based on the use of the works, is the equitable thing.

I want to get that point in before I forget it.

Ms. RINGER. Let me ask the other members of the team.

Mr. KATZ. I have a question.

Is this percentage contribution to the National Endowment, that you mentioned limited only to an expectation of receiving royalties from the record companies after they have already received them?

Or is this prior to that time?

Mr. WADE. No. This understanding is based on some informal discussion that, were the Bill enacted, the National Endowment would enter into some discussions concerning gifts to the National Endowment from the Recording Industry—for the purposes I have mentioned.

Mr. KATZ. In other words, you would not favor an amendment to proposed legislation requiring any previous contributions?

Mr. WADE. Requiring it?

I don't think so.

I have great faith in the word of the Recording Industry that they would be interested in making such a contribution, consistent with the Endowment's enabling legislation.

Ms. RINGER. Thank you.

Ms. Bostick?

Ms. BOSTICK. You said that you thought that the benefits of the royalty rights should be assured to particular performing artists, like symphony performers or other types of performers of cultural music.

Mr. WADE. Let me say that we are not saying that we only support legislation which is guaranteeing that those performers, only, receive it. We are merely talking about once legislation is enacted—I don't know to what length legislation is going to go into the distribution formula—we are just saying at this point, when we formulated our position, no one seemed to know how the money is going to be distributed, exactly. It seemed to be a little fuzzy; and we simply

wanted to make known our view that we would like to see musicians in these fine arts areas certainly receive consideration.

Ms. BOSTICK. Well, are you for a system like the performing rights systems now that weight the types of performances?

For example, you may get a certain assignation of a value of "2" for a symphony performance, where you might get "1" for a "pop" hit?

That sort of thing. Is that what you are after?

Mr. WADE. Well, classical music generally is not played as much on the airways, of course. If it appeared, based on the facts of actual playing time, that the symphonic musicians were not going to be receiving anything of substance, we might like to have considered some kind of a weighting formula which would, at least, assure them some kind of equitable return.

We are dealing, as we mentioned, with an area that is not as commercially viable as the other areas.

Ms. BOSTICK. What about a weighted formula that would encourage excellence? I don't know how that could be done. I don't know who would be the arbiters of this "excellence in performance".

How would you be encouraging an "excellent" performer—if you were going to assign a value just according to the type of music?

You could have a poor performance of a symphony, or you could have an excellent performance of a symphony.

Mr. WADE. Well, I think we would have to leave that to the marketplace to decide. I don't think the recording industry—those who are involved in the making of records—are going to want to have Beethovan's Fifth cut on a record by a less-than-excellent orchestra. I mean, if I were a recording executive, I certainly would go for the best. I think the marketplace, and the general consensus—the general knowledge—of who is good and who is not good—the experts in the field—I think they know this, and I think you do tend to get the best. I think you tend to get the best. I cannot categorically state that; but in the classical field, I think that you do tend to get the best.

I just think the marketplace would have to be the determining factor there. Otherwise, what would you have? The bureaucracy, or some kind of statutory formula? How could you decide?

Ms. BOSTICK. That would be hard.

Mr. WADE. As in all the arts, we have to make these decisions every day in our grant-making programs. There are many subjective factors that enter into the judgment as to who is the best. Our legislation requires, for example, that we support only high quality American cultural groups; and it is a subjective thing. It has to be decided by the peers in the field—people who know what is going on.

Ms. BOSTICK. I have one further question.

Is it my understanding that you would accept the formula the RIAA suggested about contributing part of their remuneration—say 5 percent—to the Endowment for these purposes. Instead of, say a weighted formula, which would give a certain value assigned to the type of music?

Is that an alternative?

Mr. WADE. No.

Ms. BOSTICK. Or is it just dreaming?

Mr WADE. No percentage figures were actually arrived at. Reasonable men would have to conclude that a sum that would make a difference which would be a meaningful sum, would be what we are talking about.

As far as the formula weighted in favor of symphonic performances: we have never discussed that with anyone in the field, particularly. We hope that they would see the equity of that, in the event that the marketplace just does not result in any kind of significant sums going to symphonic orchestra members.

Ms. BOSTICK. I think Broadcast News, Inc., weights their formulas that way. I heard that, anyway.

Mr. WADE. Incidently, on that point, as I recall the Bill, there was a question—and I have heard this question raised in other places—would this kind of legislation hurt good music stations—those that are in the red, or allegedly in the red, or close to the red. As I recall it, there is a formula going into the legislation where the royalties would not be paid until the broadcaster is making a certain amount of money—as I recall it—I don't have it in front of me.

I don't think it would hurt good music stations if they make a little bit of money. Sure!

Ms. OLER. Well, it is actually based on the amount of advertising receipts; insofar as there are marginal stations with higher advertising receipts, fees probably would not be correlated to profits.

Mr. WADE. It would not work that way.

If they are marginal, then they are not required to share.

Ms. OLER. If their advertising receipts were still above certain level——

Mr. WADE. Right, as I recall it.

Ms. RINGER. Mr. Moore?

Mr. MOORE. No questions.

Ms. RINGER. Mr. Glasgow?

Mr. GLASGOW. No questions—no other questions than those that have been asked.

Ms. RINGER. Mr. Baumgarten?

Mr. BAUMGARTEN. For the record, I believe you indicated that your testimony was based upon an earlier comment letter, which was No. 54. There is no need for you to submit a cover sheet—eliminate the paperwork.

Mr. WADE. Right! Right.

Mr. BAUMGARTEN. You mentioned earlier in your testimony that the Endowment—one of the things that seems to have considerable weight in your mind was the situation in Europe.

Taking advantage of the fact that you are the first lawyer to appear before us: the fact that it exists; is that enough?

Have you investigated it?

Does it work?

Are the artists getting the money; or are the record companies getting the money?

Why did Canada drop it?

Is the analogy persuasive?

Are there differences in the structure of broadcasting; or the way foreign artists get renumerated by the record companies?

You are familiar with all of the questions you would ask in cross examination if someone had raised the analogies.

Mr. WADE. We would hope that the Congressional mandates to the Register of Copyright would help answer some of those questions.

To be candid, we have not had the opportunity to go into great depth as to how it works in Europe. We have been doing this with respect to the royalties for artists—visual artists—on the re-sale of their paintings and, if this panel were concerned with that, I could sound a little more like an expert.

But on this particular Bill which has been, as you know, lying low, now, for about a year or so, we have not heard too much about it. We knew you were scheduling these hearings; but we did not look into it as to how it is working in Europe, so I cannot discuss that.

Maybe some of the other witnesses might have something to offer on that.

Mr. BAUMGARTEN. Is the Endowment troubled at all by the trend of the Copyright law towards compulsory licensing to which the performance rights, in Danielson Bill terms, add a fifth compulsory license which does take away from the creator the right to say, "Yes" or "No"?

Are you troubled by that?

Mr. WADE. I personally have trouble with compulsory licenses being included—but, not being a copyright expert—I tried to look into this a little last year. There are so many compulsory licenses already in the legislation that you get the argument "Well, the principle has been established and accepted."

I, personally, don't like the idea of a compulsory license. That is a personal opinion, and I leave it to the experts to determine whether these compulsory licenses really are inconsistent with our basic Constitutional and copyright law approach generally.

Mr. BAUMGARTEN. You may be the wrong one to ask this; but I will ask it, anyway.

Do you think a performance royalty could work on a voluntary license basis?

Mr. WADE. On a voluntary license basis?

I believe I would have to defer to the experts in the field—the Union people in the recording industry and the broadcasters, themselves, to answer that.

I would doubt it. But I would defer to their judgment.

Mr. BAUMGARTEN. Would you advocate a different split than a 50–50 split between the record company and the performers?

Would you prefer to see 75 percent in favor of the performers, and 25 percent in favor of the record company?

Or would you prefer to see 25 percent in favor of the performers, and 75 percent in favor of the record company?

Mr. WADE. You put me on the spot! Perhaps I should see how many artists are present!

Mr. BAUMGARTEN. The Unions are over there, and the record companies are over here! [Laughter.]

Mr. WADE. Well, I am going to be candid and say that if there were a difference in the split, I would favor it going to the artists—the performers, themselves. If there were, in the wisdom of this tribunal, that decision made, I would come down in favor of the artists getting a larger chunk.

That is not an Endowment position. That is a personal reaction.

Mr. BAUMGARTEN. Do you base that on any quality of judgment, that the work is deserving of such contribution; or just the finances of the respective recipients?

Mr. WADE. Both. Both.

I don't know the whole picture as to the finances of the recording industry. I do know—I saw the picture as to the finances of the performing arts groups, and the people who work to keep them going, and who make them up.

Also, I do feel that there is some difference in the creative contribution.

Mr. BAUMGARTEN. If there is a compulsory license, do you have any problems with either the Copyright Office or the Copyright Royalty Tribunal, when President Carter sees fit to appoint one, being involved; or, perhaps, a non-governmental agency?

Mr. WADE. I would favor a non-governmental agency. I don't know if that would be consistent with the creation of the Copyright Royalty Tribunal.

I am familiar, generally, with what their function will be; but I think I would always, myself, lean toward the marketplace and the parties who know what the problems are to work out their problems.

I tend to feel Government should not get involved until it becomes a necessity—a true necessity. I just think that that is the American way; and I do support it.

But how that would work with the new Copyright Royalty Tribunal—whether that would take away something that they are supposed to do—without having the provisions in front of me, I could not make a judgment.

I would ask you that question.

Mr. BAUMGARTEN. There are no prerogatives in this area, yet.

Well, thank you.

Ms. RINGER. I am a little curious about a couple of things; and I would like to explore a little bit—for the record—the Endowment's activities in support of substantive programs in the arts.

My question that is prompted by curiosity is the extent to which the endowments were involved in the planks in the two political Party platforms last summer endorsing this, specifically; and

Second, whether the Endowment had any role, or whether you could cast any light on the background of those, and the extent to which you can reflect the present Administration's thinking on this.

Mr. WADE. Well, I believe that, as to the Party planks, there may have been some—shall we say—Endowment encouragement to have an express statement relating to the support of the arts, and the humanities, for that matter, too.

I cannot say to what extent their involvement was, but I, personally, had no involvement in it.

As you know, Federal officials are prohibited from lobbying, but I do believe that the Congressional Liaison Office—the Chairman's Office—was concerned and interested in having a clearcut statement from both candidates.

There were many constituent groups that were urging us to try to help out. They also were urging this on the White House; and the major Democratic candidate.

The second question you raised?

Ms. RINGER. The present Administration——

Mr. WADE. The "present Administration," right! Well, I have been very pleasantly surprised. We have been working very closely with, particularly, the Office of the Vice President.

As everyone knows, Mrs. Mondale is keenly interested in the arts and is very supportive. She is very interested in artists' tax problems. She is interested in

all of their problems, as far as I can see; and, through that connection, the White House has become more involved than, perhaps, it might ordinarily have become.

Some of the statements that Mrs. Mondale has made reflect some of the things that the Endowment has been saying for a couple of years. We certainly appreciate that kind of help!

I know for a fact that those statements are discussed in the White House and do have clearance on the highest levels.

So we feel that there is not going to be any cutback in the Federal subsidy program. It certainly does not appear that the President is inclined that way.

We have some questions about re-organization, which we are interested in; but we feel there is strong support for the arts in the White House today—

Federal program support.

Ms. RINGER. Yes, I understand.

Well, a couple of things that come immediately to mind—things I have read or seen over the weekend, which tie in with what we are now discussing.

One was a piece by Allen Rich in the current issue of the "New Yorker" magazine about continuing labor troubles at the Metropolitan Opera.

He did make the comment in the article—which I thought was very interesting—that if the workers in a sewing machine plant, or something like that, go out and strike, nobody pays any attention, but let the artists go out on strike, and all hell breaks loose; that the very threat of a strike will bring down a very emotional wrath on people and, of course, in certain areas that we are now dealing with striking is prohibited out-of-hand.

Tied in with that, was the very good program last night on Public Broadcasting, about the Santa Fe Opera, and the fact that, obviously, it could not exist without Government support.

And Crosby, toward the end of the program, made this point, very dramatically: that "we are very far behind Europe in this whole area."

The two things rather tied together.

Would you want to comment on that?

Mr. WADE. Well, it is true, certainly, with respect to any problem area such as, perhaps, a labor dispute, even though they exist in all areas. Of course, the arts are so visible. We have complaints from our sisters down there, from time to time, that we get all the attention—the Arts Endowment—whereas they do very good work and they don't seem to read about it very often.

The performing arts, and the visual arts generally, are in a very visible field. There is a lot of public interest in the whole field.

From my own perspective, mail seems to have increased, in the last year or so, concerning the public's interest in the artists' rights questions, and the Federal program, generally.

We get requests—I mean, the program directors, and myself, occasionally—to speak to groups about the Federal program.

There is great interest in it, among lawyers, particularly. I think from what I have seen in the last year or two, we are going to have a lot of lawyers getting into arts law, and volunteer lawyers for the arts, and that sort of thing.

So I think that the Federal program is here to stay. The Congressional support is strong—if not stronger than ever.

A few years ago, Senator Proxmire could always count on a handful of votes—maybe 20 or 30—against our appropriation. Now he cannot muster more than one, or two, or three, if he even cares to, any more, I don't know!

So it would appear that the program is strong; and public interest in the arts is strong; and concern over artists' rights is strong; and I think the very thing we are talking about today is going to receive a lot of attention, too, and what you do here today will be long remembered.

Ms. RINGER. I guess my point about the Met. is a little bit off the subject—but we are considering the whole condition of a major art form, here—the performing arts.

Can you see a situation which, in addition to giving the Met. money—and Rich made a point, that they were, in effect asking for blood from a stone. . . . But, of course, there is a lot of blood here in Washington that has been pumped into the Met. and other performing associations of that time.

I think a lot of people would consider it unthinkable that it could go under.

Is there a role that the endowments—or the Endowment for the Arts, in this case, particularly—could play in this kind of a stand-off—which is likely? I would say that what happened last year is likely to be repeated—even worse.

Mr. WADE. Well, I would hate to see the Endowment get involved in these types of questions—labor questions.

Wet get complaints from time to time that the unions, perhaps, are asking what some of the performing arts groups feel is too much. For example, small dance companies: They can't afford to hire a lot of musicians. There are some questions about them going on the road and using canned music.

Well, we—under our statute—are required to support groups—only groups—that pay the applicable labor wage standards.

Frankly, we try to stay out of these areas, as long as we are satisfied that the applicable union agreements are being honored; and we do fully support the unions on that score.

There have been instances where the performing arts groups, because of their terribly pressing cash flow problems, have tried to work out different kinds of formulas—what they call "equivalencies to the union scale," and so forth.

In this case, we will defer to what the union feels is appropriate, because only the union, in our law, under the regulations, can interpret whether or not its scales are being met. So that generally, in response to your question, I don't know that it would be appropriate for the National Endowment of the Arts to get involved, at the request of both sides, to aid in any way that we could, and, if we them. Under the regulations, promulgated by the Department of Labor—which came out of our general laws—they are, really, the proper body to get involved in these disputes.

There is no statutory role for the National Labor Relations Board. The Labor Department has a role in investigating complaints in that connection.

I don't know if there is anything we really could add. We could certainly get invloved, at the request of both sides, to aid in any way that we could, and, if we felt that one side or another was unreasonable, we would certainly try to use moral persuasion to work out the problem.

Ms. RINGER. I guess my basic question is whether or not the aid you could offer would be to send money.

Mr. WADE. Money. We send a lot of it—particularly to the Metropolitan. They got a million dollar grant last year to help them over a hump.

The philosophy of the Endowment, of course, is to use our monies to stimulate private support to the greatest extent possible.

I think that particular grant resulted in 27,000 new subscribers—permanent subscribers—and there is a whole new challenge program now, which is designed to increase long term. private support. We don't feel—and I guess this does tie in with your question—we don't feel the Government subsidy should expand to the point where we are spending 100 percent of the project cost. Our law limits us to 50 percent—with some exceptions—but in terms of sending money to a hard pressed organization—we do that all the time.

But we don't hear that it is the labor standards, particularly, that cause these problems. It is the costs of putting on performing arts presentations. You can imagine an opera—to put on an opera is an incredibly expensive project—or a ballet company of 75 members touring. It is incredibly expensive. We do the best we can by them, but we have a limited amount of funds.

Ms. RINGER. The argument, of course, is that, in Europe—not that everything is perfect there—but at least there is some stability—the major performing arts organizations can be assured of a certain amount of Government money. They don't have to go hat-in-hand, or wait until there is some terrible crisis before they can do their budgeting or planning.

Mr. WADE. Well, the major groups in this country are assured to have a certain amount of funding.

The symphony orchestra, for example, can pretty much count every year on getting a $150 to $200 thousand grant from the National Government. They come back every year. It is pretty much accepted.

But the European analogy is a little faulty. You don't have—as you know, I am sure—the tremendous private philanthropic tradition that we have in this country, even though, when you take the tax support for the arts in Europe on a per capita basis and compare it with the United States support, the Europeans look better. Even the Canadians look better. But we are pouring in much more money, in a total sense; and the private sector—the Foundations: Rockefeller and Ford and other organizations—are putting millions of dollars into the arts; and even private business now—Exxon, Mobil—these large corporations—are being prodded. We are prodding them quite stiffly, I might say; but they are responding, and a lot of private business support is now going into the arts.

So, to look at the total picture, I think there is more money going into the arts in the United States than any European country could even begin to approach.

Ms. RINGER. I don't necessarily argue with that. It is handled entirely differently. There is a good deal of grantsmanship involved in it, apparently.

There is, of course, the school of thought that wonders about allowing these vast private endowments to perform this function—although this is in terms of individual charity—the kind of thing that the arts did rely on up to around the time of the depression. That seems to have gone out of the window. There just is not that much money out there. It has to be done through these big funded, private things; and one does wonder how long that can go on.

Mr. WADE. We are concerned, too, about the increase in the standard deduction, for example, which will cause more people to eliminate—perhaps—the charitable contributions in their general considerations because they won't have the deduction. Perhaps, unless they are really large contributors, they may affect the small man's contributions to charitable organizations.

We are also concerned about some of the talk we hear about the Administration's tax policies which might have adverse effects—on charitable contributions, particularly. Capital gains treatment—which seems to be in disfavor in the new Administration, and could have ramifications for contributions, because if they don't like the capital gains tax treatment, they may not like contributions being deducted at an appreciated market value.

We are worried about that. We are concerned about that!

Ms. RINGER. Well, you can see, if you look at the large picture, some rather large trends here; and one could envision a situation down the pike where the endowments in a vastly enlarged and changed form would be pretty well running all of this, one way or another.

Does this attract you or repel you; or how do you feel about a much more active and broad-based role of the Endowment Center?

Mr. WADE. Do you mean a Department of Culture?

Ms. RINGER. The Honored Artists of the United States of America—that type of thing.

Mr. WADE. Well, that is an interesting question! I don't know. I personally tend to—I have to identify a little bit with the gentleman proceeding me, in his remarks about those who are successful succeed. To some extent, I don't know that a vast Federal bureaucratically-administered program designed to support or to develop the arts is really all that sensible.

I think there is going to be art, regardless of whether there would be an endowment, or not. There are going to be artists. There are going to be musicians—creative persons. I don't think you could ever really stamp that out. Anything that you do is not going to stamp that out, or stamp out that drive in human nature. But I would not like to see a giant bureaucracy set up to administer monies through a sort of block grant or formula type approach to the arts, because I think that would be counterproductive—in the arts, particularly. You have to make those subjective judgments about quality, and you have to have that done by people in the field—private people; artists; people in the arts—not bureaucrats; not based on some formula.

Yes. Specifically, in answer to your question, that would upset me terribly! I don't think it would be productive. It would be a terrible waste of taxpayers' money. You will have all kinds of crazy projects getting support under the guise of, "this is art". You know, the March of Dimes; and we all know how these things expand. They need uniforms. You get into things that just boggle your mind—from what I have seen.

We, very strictly, try to control the quality aspect of the whole program. Anything that would weaken that would turn the Endowment into a formula type of mechanism; or a mechanism based on a formula, or a block-grant approach which I think, would be detrimental to Federal programs supporting the arts.

Ms. RINGER. Okay.

You were saying that this should be handled as a matter of private rights, of a sort of property nature—that is the only alternative. You have to recognize rights; then allowing them to be trafficked in, or licensed—either voluntarily or compulsorily.

Yet, what is emerging in this field, if anything, is what looks like a pittance on its face, and certainly is not enough to answer these massive social problems that you are addressing.

You are supporting it in principle, and I can see why—consistent with your philosophy. But do you honestly think that it is at all enough to accomplish—not necessarily the Danielson Bill, but the various proposals that have been floated; the kind of compulsory license that has been discussed.

Mr. WADE. Well, I don't know the answer to that question. I am sure the proponents of the legislation from the field can document the benefit to the performing arts in the country. I am sure they can do that! I have seen papers and statistics presented on how this will benefit, in terms of dollars and the economics.

I get the impression that it could be substantial.

Other than that, I am not qualified to say. I think it is a very good question.

Ms. RINGER. Well, you are not the witness to dig into this with. I am just observing this.

Mr. WADE. It is my understanding that it would make a difference—it would help people. I just don't like to think of that performing musician sitting in an old folks' home with no money coming in—especially if the records that he was sitting in on are still being played. I don't think that is right.

Ms. RINGER. I think that is enough on that point.

One last point, which I probably should have brought in a little earlier.

There is an international convention in this whole area which has been attracting a little more attention recently abroad. This is the Rome Convention for the Protection of Performers, Producers, and Broadcasters. The Government, through its representatives, diplomatically was very much involved in the development of that Convention—but it never went anywhere in this country.

I simply wanted to ask if the Endowment had ever considered this Convention as part of a program which is aimed at the general ends that you are intending to accomplish.

Mr. WADE. We have not gone into it in detail. We have touched on it from time to time, peripherally.

My general impression is that the United States should adhere to the Convention and fully support it, from what I know of it.

Ms. RINGER. I think that is enough.

Thank you very much.

Mr. WADE. Thank you for the opportunity.

Ms. RINGER. The other witnesses that were scheduled this morning were Thomas A. Gramulgia, who is still not here, as I gather; and Dr. Howard Marshall, representing Dr. Alan Jabbour of the American Folklore Center at the Library of Congress. They have concluded that they would best serve their interests by filing a written statement.

We have now run through our morning list and, since it is a quarter of 12, and since Mr. Golodner is the next scheduled witness—he will want, obviously, a longer time to testify and to be asked questions—I think we will adjourn. Let's resume at 1 o'clock, in this room.

[Whereupon, at 11:45 a.m., the meeting was recessed until 1 o'clock, on the same day.]

AFTERNOON SESSION

Ms. RINGER. Can I call the afternoon session of this hearing to order?

The next witness scheduled is Jack Golodner, Executive Secretary of the Council of AFL–CIO Unions for Professional Employees, speaking for Unions for Professional Employees.

He has suggested that, in the interest of time and continuity, he and Mr. Wolff—Sanford Wolff, Executive Secretary of the American Federation of Television and Radio Artists—testify together, and I will leave it to you gentlemen as to how you will proceed.

Welcome to the hearing.

Mr. GOLODNER. Thank you.

STATEMENT ON BEHALF OF THE UNIONS FOR PROFESSIONAL EMPLOYEES BY JACK GOLODNER; TOGETHER WITH STATEMENT ON BEHALF OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS BY SANFORD WOLFF

Mr. GOLODNER. I should, I guess, have learned something from our friends in the performing arts, never to sing on a full stomach! [Laughter.]

We had a good lunch, and we hope that you did as well!

Ms. RINGER. No comment!

Mr. GOLODNER. We are very grateful for this opportunity to appear before you and, indeed, we are very thankful for your continuing interest—you, Ms. Ringer, and the Copyright Office—indeed, on this problem that confronts us today on the issue of performance rights in copyrights sound recordings.

The people that I represent today—the Council for Professional Employees of the AFL–CIO—comprise some 19 AFL–CIO Unions, representing more than one million people employed in all of the major professions.

These people are not only performing artists—Mr. Wolff's organization is a member of the council—that is, musicians, actors, and singers—the co-creators, if you will, of sound recordings—but they are also nurses, writers, college professors, engineers, scientists, and so forth.

In short, the people represented in our Council are also among the consumers who purchase recordings for their own enjoyment, and the audience upon which commercial broadcasters and background music firms base their advertising rates.

In these remarks that I make today, I am joined by the AFL–CIO as a whole which, at its Eighth Constitutional Convention in'69, endorsed proposals which "would assure the right of the performing artist's compensation for the broadcast and commercial exploitation of his recorded work."

"We believe", the AFL–CIO Convention stated, "that this is fair and we believe this is just, and must not be denied."

I have already responded to the Register's Notice of Inquiry by addressing the questions which are again put to us at this hearing, and I ask that my earlier comments be made part of the record of this hearing, and I will try to review them briefly for you this afternoon.

Regarding the Constitutional problem of acknowledging the performance rights in sound recordings, we believe that both Court decisions and Congressional action in recent years have well established that sound recordings are, indeed, appropriate subjects for copyright protection. Furthermore, we believe all sides to this question are in agreement that the performers and record producers make a sufficiently creative contribution to the sound recording to justify calling them "authors" of such "writings".

And I believe, when I say "all parties", I am also including the major opponents to this proposal who, before Congressional committees, have stated that performing artists certainly create and contribute.

These positions, as I indicated, were thoroughly discussed in Congressional hearings that took place in 1975, and in opinions provided by this Office, by the Register of Copyrights, to both the House and Senate Committees.

Indeed, since a performance right currently attaches to every copyrighted item except sound recordings, the establishment of such a right would end an unjustified form of discrimination against the creators of sound recordings. It would also enhance the symmetry of U.S. copyright law and thus tend to resolve inconsistencies, rather than create problems in the law.

I would make additional arguments for such a rule.

Those who authored our Constitution saw a danger in permitting the exploitation of creative efforts by those who deny compensation to the creators. They knew from experience that if a new nation were to depend upon the creative wealth of its inventors, authors, and artists, they must be assured of just rewards for their creativeness.

Perhaps these thoughts were in the mind of one broadcast industry representative when he testified before a House subcommittee in 1975 and charged that the cable industry took the work of the broadcasters without making recompense. "It is unreasonable and unfair", he said, "to let (the cable) industry ride on our backs, as it were—to take our product, resell it and not pay us a dime. That offends my sense of the way things ought to work in America."

The broadcast, juke box and background music industries use the talents of America's performing artists—ride on their backs, as it were—as assuredly as if they directly employed them, but they do not pay them a dime! Just as the printing press enabled others to make use of the talents of writers without actually employing them, so does the sound recording make possible the exploitation of the work of the performer.

The early legislators of our country saw and understood the potential danger to the creator posed by the printing press. Similarly, in our own era, government must cope with the injustice perpetrated upon the performer by the unrestricted use of sound recordings by commercial interests which contribute nothing—not

even a dime—to those who make possible recorded performances that they exploit.

The users of sound recordings argue that they do compensate the originators, by popularizing their works. This same sophistry could have been used by the earliest printers with regard to the works of writers and artists. It could be used by these selfsame exploiters of sound recordings to deny performance royalties to composers, arrangers, and publishers. After all, isn't their fame being furthered, and sheet music sales enhanced, as well as sales of their recorded compositions?

In similar fashion, the cable TV industry could argue that by strengthening and improving the broadcasters' over-the-air signals they are providing the TV broadcaster with a larger audience for his programs; and the justification for charging advertisers a larger fee.

If all of these practices by the users of copyrighted material truly benefited the creators, would they—the authors, the composers, and, indeed, the broadcasters, themselves—have pressed so hard for protection and remuneration?

Would the recording industry and the recording artists today, bite a hand that feeds them?

Despite allegations by those who profit by postponing the development of performance rights for sound recordings, the performers have not, on balance, benefitted to the extent claimed.

First: The use of sound recordings by broadcast licensees serves to displace thousands of performing artists from employment in the broadcast media. Whereas the broadcast industry, at one time, employed and compensated on a regular basis, such fine artists as those who comprised the famed NBC Symphony, for example, today it provides employment for but a handful of musicians, and regularly sells to advertisers the recorded programs of the old NBC Symphony and others, without making any payment whatsoever to the artists.

I can speak from some first-hand experience to that!

We were told this morning, by one broadcaster—about his children who are interested in music.

Well, I am the son of a member of the NBC Symphony, and I will tell you a little bit about the parent, who was a member of that ensemble—contributed to it for some 14 years—and when NBC determined that records could do the job cheaper, the orchestra was disbanded with no pension, and very little severance pay.

My father then free-lanced; and he played for everybody, I think, and helped every artist of any major significance, from classical to jazz. He played with the Philharmonic in New York; he played with Percy Faith, with Perry Como, and I am sure you never heard of his name.

In his later years, what he had was his Social Security, and nothing much more, and he could sit at home—he died about three years ago—and still listen to himself being used on the radio and, even, on television—with no income coming in for his efforts.

I think that is a very bitter thing. It is one thing to be displayed by technological change; but to be displaced by your own creation is something else.

The iceman was never asked to contribute to the manufacture of the refrigerator but the musician was asked to play at his own funeral, and create records! This is an anomaly that our law has created.

Second: The use of sound recordings displaced many more thousands of musicians and vocalists formerly employed in restaurants, clubs, etc. Today their work is used in its recorded form to attract customers and help make a profit for the proprietors, juke box operators, and background music concerns.

Third: According to testimony given to Congressional committees, many promising artists—far from seeing their careers enhanced by exposure of their recordings on the air—saw them limited because of over-exposure. Whole careers were telescoped within a few months. I believe this was in the testimony that was given before Congressional committees.

Performing artists could say that, oh, 50, 60, 70 years ago, an artist could come on the scene and then look forward to many years of employment, touring the country, because the way to hear his work was to go and hear him "live."

Today, within a matter of weeks, his work is heard and dropped, and fades from view; from the public's interest.

Testimony was also received from artists and artists' representatives indicating that the commercial use of their recordings had little or no effect on their careers because they, themselves, were not identified.

In the case of my father, a very fine musician, who was probably with the best orchestra in the world; at that time, nobody knew about him. Most broadcasters would only announce the composition, the composer and lead artists. They rarely informed listeners of the majority of artists who made the recording possible.

As we heard this morning, some stations don't even announce the composition—except maybe once every half hour, or every 15 minutes.

Of course, in background music firms, the recording is not announced at all! It is "anonymous"—and intended to be so. So the argument that the record, somehow, and the artist, are being promoted, is a little obscure.

Fourth: The advent of inexpensive and easy-to-operate taping equipment—this is a fourth point that counters the argument that the use of recordings on the air and other means popularize or promote the record industry—by individuals, undermines what ever validity there may be to the broadcasters' argument of increasing record sales. The day is rapidly approaching when present individual purchasers of records will be able to tape record music and other performances from stereo or monaural broadcasts—thus obviating the need for purchasing records.

I submit: What will the broadcasters argue when this happens? And it will!

How can they argue, then, that they "promote sales"?

They will probably say it is the artist's fault or, as we heard this morning, "Too bad. Survival of the fittest," and so on.

Classical music has certainly not been promoted at all, even though most of it is in the public domain, and is free to the broadcasters—entirely free of royalties—because the broadcasters and other users are not in the business of promoting music, as they will have you believe, but they are in the business of selling advertisers' products.

Large audiences are sought, and not by young untried, esoteric artists who need help and promotion, but by those who are already established and have an established following.

So it is a chicken-and-egg situation, I imagine. Does the broadcaster use a particular performer's recordings—or a particular ensemble's recordings—because that performer or ensemble already has a following; or, as they are claiming, does the performer use them to help promote him and make him a following?

I submit the former is probably closer to the truth!

Fifth: In place of the insubstantial and undefined benefits now claimed by broadcasters and other users, a performance royalty in sound recordings would enable the creators of a sound recording to realize a real and direct benefit from the use of their efforts. This would end a long-standing inequity that denies the creators of sound recordings the rights enjoyed by other authors of copyrighted works. And it will provide a much needed incentive for the vast army of America's artists who are not millionaires—who are engaged in less-than-popular but most creative efforts—and would enable them to win a justified supplement to their meager incomes.

Now, the question was raised, I think: "How badly is this type of remuneration needed; and what difference would it make?" It is not going to solve all of the problems of our artists. But it is fair, and to the extent that it does make a contribution to their income, perhaps, it would alleviate the problem that now seems to be resting totally with our Government—State and Federal.

I have a letter which an artist whom you may know—Benny Goodman—wrote to Chairman Kastenmeier in January 1975 when legislation was before his Committee.

In his letter, he points out—as I have—that broadcasters used to pay performers when radio was "live." They paid for them and they made a good income—despite it all. Radio was growing, even when it did not have sound recordings.

But, as Mr. Goodman points out, these performers have long since been replaced by their own recordings, which are now broadcast around the clock, for profit, without any payment whatsoever to the musical artists concerned.

"The majority of artists," he goes on to say, "do not make a lot of money." If they are fortunate enough to participate in a 'hit' recording, the recording usually sells for only a short time span; yet the air play of those same records may continue for years; and, while they are played on the air, they no longer produce income from record sales—so that none of the artists involved derives any benefit whatsoever!

Broadcasters do derive substantial benefits from playing sound recordings; and it is a substantiated fact that recorded music accounts for a good three-quarters of all radio programming on commercially-available time.

In addition, the earning span of the professional performing artist is a relatively short one; and use of his own recordings, without his permission, and without any payment, puts him in a deplorable position of hopelessly competing with himself.

Broadcasters, juke box operators, background music people—all of those benefiting from the artist's work—should be required to share in the cost of maintaining the artist who is, after all, the creative source.

Certainly, a performance royalty is a fair way to do so!"

I would like to underscore what Mr. Goodman is saying. I believe the users of sound recordings today are being rather parasitic in their view of their relationship. Without a large labor pool—a pool of artists available to perform—they won't get the new programming that one spokesman indicated this morning "was drying up, and he had to go to Europe to get it."

Why can he get it from Europe?

Because musicians there are not only receiving greater help from their government, but they are also receiving a fair share of the return from the commercial exploitation of their works. So that they can afford to do and record the less-than-popular of the esoteric, the "beautiful music" that somebody was complaining is not available in America!

An American artist, sooner or later, has to realize that he can't make a living at music, so he must become a barber, or a lawyer, or an accountant, and he is not going to be around when the music industry says it needs creative help.

A question was raised about quality.

You cannot maintain quality on a part-time basis in the arts. The arts is a very serious profession. It requires the full time dedication of the individual practitioner. Today, better than 10 percent—according to the Department of Labor—of those who profess to make music a profession, are unemployed.

Among actors, it is 37 percent unemployed.

These are not your "amateurs"! These are not your vocational people! The Labor Department is only counting those who are committed to the work force—they have no other source of income.

That is a very high unemployment level, even compared to the high general rates that we have been undergoing in the last few years.

These people are being supported by unemployment insurance; and, as was indicated this morning, this situation will continue unless helped somewhat—by more and more grant-in-aid programs.

In other words, if we are to maintain a viable, creative corps in music and in performing today, we will have to depend more and more on Government largesse to support them.

Now, we have the choice of doing that more and more—or doing that plus insisting that those who benefit from the creator's work, also pay something. It is not an either or situation.

It is a little like our conservation programs at the turn of the century. The broadcasters and other users are saying, "What are you complaining about? The woods are full of trees! Let's go in and cut them down. Let's just take!"

But there comes a time when we have to reseed and replant; and somebody has to pay for that. You can't just keep taking without putting something back. And that is, I am afraid, what the users of sound recordings have gotten into the habit of doing, because it has been so easy—since the advent of the technological perfecting of the sound recording—to take a person's work, and just take it, without payment.

I think it is a little bit ironic today, talking about all of these musicians that are unemployed, and actors that are unemployed, and vocalists. They are not, in a sense unemployed—because we are listening to them every day. They work. They are being employed.

My father's work, even though he is dead, is being employed today: to sell advertisers, to sell programming to advertisers, and it is just as if he, himself, was sitting in that studio. The difference is, of course: he is not being compensated.

Furthermore, it is our belief that the individual consumer who purchases recordings for personal enjoyment would also benefit from the granting of a performance royalty. At present, the cost of bringing together performers, arrangers, composers and technicians, providing appropriate equipment for making sound recordings and then manufacturing and distributing them, is borne almost entirely by the men and women who buy records for their own pleasure and for non-commercial uses. Relative to the profit they realize on the use of these

same records, the broadcast industry and other commercial users return very little to the creative source.

If, through payment of royalties for performance, these beneficiaries were to share the costs of production in a manner commensurate with the benefits they realize, the burden on the individual record buyer should be lightened.

Incidentally, many of these buyers are members of our unions—as I have pointed out before. We do not speak just for the artists. We speak for those who enjoy the artist's work. And I guess we are a little tired of seeing the consumer always having to bear the increasing costs of the arts. It is time that some of those who exploit these works also share the burden.

Our Council in the AFL–CIO is deeply concerned because in this, as in other areas, there is evidence that our society is preoccupied with the mechanisms for distribution—to the point of ignoring the needs of the creative core. The broadcaster, the juke box operator, and the background music suppliers have made it possible for more Americans to hear and enjoy the work of performing artists. But they do not create these works and, because of what—we submit—is a "flaw" in our copyright laws, they are not required to assume any obligation whatever for assisting or supporting the creative process.

As new technological developments make it possible for sound recordings to be more easily transmitted and duplicated, the harm inflicted upon the creative core—because of the parasitic position enjoyed by those who profit from its efforts—will become even more severe.

A remedy, however, is at hand. We urge the Register of the Copyright Office to recommend to Congress that performers and the holders of copyright in sound recordings, like all other authors of copyrightable material, be allowed to enjoy the benefits of a performance right in their works.

Ms. RINGER. Thank you very much.

I would suggest that you go on with your testimony, Mr. Wolff, to the extent you want to.

Mr. WOLFF. Perhaps I can answer some questions before they are asked.

Ms. RINGER. Good!

Mr. WOLFF. I don't have a prepared statement. As a matter of fact, when I was asked to prepare one, my reaction was, "It has all been said. It has been said two or three times."

You, Ms. Ringer, I think, were present when I presented a dog-and-pony act to Representative Kastenmeier's Committee, and to Senator Scott's Committee. I brought two of those gentlemen to their hearings—as I recall, a violin player in Toscanini's orchestra, and a drummer, from Nashville, who had done over 5,000 recordings, of which at least 1,000 were played a million times, collectively, on radio stations across the country.

I brought, also, a young lady who was one of the original Supremes, whose name none of you ever knew, and none of you would ever know, unless I told you. And you know the number of records they have sold; and most important for these hearings, the number of times the records of the Supremes have been played on radio.

I also brought, that day, people who sang with Percy Faith's orchestra and a gentleman who played the percussion instruments with Toscanini with the NBC orchestra.

So, I was not, you know, very anxious to make a statement.

When I sat and I listened to Mr. Dorf—I am sorry he is not here now; I think he's left—and I heard that same old story that we get from all of the broadcasters—and you will get it again from the NAB—what does it mean?

All it says is, "We got ours, Jack, and don't bother us."

This stuff like, "If you are good, you will rise, like cream, to the top. . . ."

You know, tell that to the blacks, and tell that to the women, and tell that to all of the other people with talent, who had a hell of a time—until the Government stepped in.

Now, Ms. Bostick, I think you asked a question concerning the 50–50 split. Is that correct? One of you did. I have forgotten whose question it was.

I ought to identify myself, I guess. I am a union guy. I represent the American Federation of Television and Radio Artists. Today, I am authorized and empowered and directed to talk, also, for the Screen Actors Guild and the American Federation of Musicians.

I am an advocate.

Straight out—I will say it straight out! I am not going to talk to you about, you know, if you put this kind of thing on, it will raise employment, etc., etc. Or as Mr. Dorf said, "This is a terrible thing. The costs will be prohibitive." And he doesn't even know what the hell the costs are; because nobody has told him.

You talk about cost being prohibitive.

What would be prohibitive?

Ten cents an hour, when they get, like, $140 a minute?

Why doesn't somebody ask them, "Why don't you give the titles, and the composer, and where you can buy it, and the opus," you know, if it is a classical piece.

"Why don't you do it?"

Because that is dead time. You can't sell that kind of time. You just have the music. You know, it is like the old saying, "Does the cement keep the bricks apart, or keep them together?"

The music keeps the advertisements apart, or, maybe, together. It doesn't really matter. But the only reason the music is there is so that they will get somebody to listen to the commercials.

We know that.

And there is nothing wrong with that. There is not a thing wrong with that! That is the American way! You've got something, sell it; but own it, first! Don't steal it!

Now, they have not yet been stealing, but they don't want to be declared illegal. They have been "off-sides" a few times, but they have not been caught!

We think they are off-side. We are asking for this legislation on a purely ethical basis. It is not going to cure unemployment. It is not going to make any singers or musicians rich. But it is going to get them what they deserve.

I don't know of any logical argument against it.

Now, the broadcasters have, in several of their statements—I did not read their statements today because I hark back to Kastenmeier's and Scott's Committees, and I am sure they are going to say the same thing—talk about "constitutionality."

Well, you know, how many lawyers have you got, and I've got this many lawyers, and if you have six, I will get seven, and if you've got seven, I will get eight! And then we will decide the constitutionality on the very weight of the evidence, which are the names—the Sloanes and the Thatchers, and so forth—law firms that you can get down on Wall Street or in Washington.

I am not impressed with that; and I don't think you are.

They want to know about the constitutionality—and you will forgive me, Ms. Ringer—Ask Ms. Ringer about it. She knows more about it than anybody in the nation. And she has said that she considered it to be constitutional as well as desirable.

There was some question that I think Mr. Baumgarten asked about Canada.

Was that your question, sir?

Mr. BAUMGARTEN. Yes.

Mr. WOLFF. The Canadian situation was precisely this: I know what it is, because I deal almost on a weekly basis with my counterpart in Canada.

If Canada had continued—they felt that if they had continued their system of payment of performance royalties, they would be sending more money to the United States than they wanted to, because it is our recordings that they are playing.

Now, the Canadian broadcaster was using our recordings just as the American broadcaster is. He was using it free; except that he was not using it as free as the American broadcasters—who continue to believe that they have a birthright to it—because he paid a performance royalty.

They abandoned it because it sent money to the United States. That is where the companies were; that is where the singers were, in the main.

There was some talk about good music, although I think he said "beautiful music." I never listen to WGAY, unfortunately, but I do listen to QXR and I do listen to XRT in Chicago. I listened, yesterday, for two hours, to a man whose name some of you may know. His name is Norman Pellegrini. Norman was giving a review of the recording history of the Chicago Symphony Orchestra. There aren't too many New Yorkers in the room; and I did say Chicago. That doesn't mean anything. But he happens to be a fine artist.

The recording history of that orchestra goes back to 1916. I was listening to some of the 1916 records last night—or yesterday afternoon—over WNCN, which is a New York station of fine music. I don't know what "beautiful music" is.

In not one year, since 1916, has a major company failed to record the Chicago Symphony Orchestra, in truly classical, fine music. Not one year! That is the history.

I listened—well, it is a series that Pellegrini is doing, so I heard maybe a third of that—what—forty or sixty years. Whatever it was.

You know, you are talking about going back to Theodore Thomas, Frederick Stock, Sir George Solti, Fritz Reiner. And I don't even know who is there today. I have been gone from Chicago for eight years. There is another fine conductor there who is recording.

This year, strangely enough, it is Deutsche Gramophon that is recording the Chicago Symphony Orchestra in Chicago, at the Temple, because they built a platform in the auditorium, for sound purposes, to record that orchestra. The German company came over to record that orchestra. They are paying out in American dollars. They are paying whatever the going rate is; and the going rate in Chicago for symphonic players, fortunately, is fairly good. It is good.

There were some other things that came up that I want to comment on.

Mr. Dorf apparently has not been watching the scores very much because, in 1973, in answer to a question you gave, Ms. Ringer, concerning whether or not that station had a contract with any of the performing unions, his answer was in the négative. However, since 1973, there has been a collective bargaining agreement with both WGAY FM and AM, and I believe—I don't know—with the station in Philadelphia owned by that same group.

There was some concern expressed by Mr. Dorf—and I am sorry to pick on him—but he is saying the same old NAB stuff that you are going to hear and read as long as you allow them to talk to you, or send you material.

He said something about the record companies not making enough stuff for him, because the record company cannot live on that kind of music—"beautiful music," as he called it. Well, his beautiful music is a little different from what many of us call beautiful music, but it is good music.

As Duke Ellington said, "There are only two kinds of music."

Somebody asked him, "Do you like rock?"

He said, "There are only two kinds of music. There is good music and there is bad music."

And it is not rock, or pop, or jazz, or classical, or folk, or whatever—soul, or gospel, or hymns, or whatever. There is good music—and bad music.

He was talking about the fact that no record company could live recording the kind of music that he wants to play.

Why does he want to play it?

Because he found that he had an audience.

If he has an audience, he has a rating. If he has a rating, he can sell commercials.

That is it!

Nonetheless, it may be true that no record company can live on making just the kind of music he wants. But his stations, and several others in this nation, live on playing that music free; and that is what is important, I believe.

Now, the payment of these royalties is not going to solve any big economic thing in the United States.

It is not going to suddenly make a larger group of musicians, and creative singers, and creative artists, generally available to us.

It is going to pay them their just deserts.

He talked about the "American way."

The American way is: when you get caught, you pay! That is the American way. And I believe it. The American way is not: The cream rises to the top. Or, "Go home, little John. If you are a good boy, and you study * * *." You know, how do you get from here to Carnegie Hall? Practice! Because it worked that way. There aren't that many people performing in Carnegie Hall.

I don't have to lay on that stuff! But it was so obvious, it was insulting! It was embarrassing to me on your behalf, because I heard it so often. I am in no official position to have to react any way but violently; and you have to be polite!

But that is the whole point. You know, the "constitutionality," the "economic impact"—that doesn't mean anything! One other canard!

And this, again, was Mr. Dorf. Unfortunately, I cannot argue with Bob Wade. He is the only one I have heard talk today.

Mr. Dorf, in his written statement, which I leafed through quickly, said, in effect, "You will just be feeding the fat cats." He was talking about Mr. Sinatra. He was talking about the Beatles. And that is not whom we are talking about.

We are talking about the side men. He said, "old boys." I'll bet you he could not tell me one "old boy's" name; or a cellist, or a percussion instrument player!

Those are the people we are talking about. We are talking about the people, also, who are the four to six singers on the Sinatra record; or on the Beatle record who were not the Beatles; or on the Supremes, that were not the Supremes that you see in the night clubs; or who backed up the Percy Faith orchestra when they gave their choral works; the Mitch Miller choral people—those are the people we are talking about.

We have reached an agreement. It is easy to reach an agreement; we don't have any money to talk about, yet.

But we reached an agreement with the AF of M, which represents the musicians in this country, and we reached an agreement with the recording companies, on a 50–50 basis, and I think that was your question, Ms. Bostick.

We think it is equitable.

Now, after they get their 50 percent, they have to deal with us. But that is the American way. Collective bargaining! And if they make a lot of money, we will get some of it. We are prepared to relax our demands at this point. We think it is fair. They do have copiers, and arrangers, and composers, and production people, and engineers. Those people have to be paid. We don't pay them; the recording companies do. They do take chances; they do take risks.

We are in a collective bargaining relationship with them; so we can correct any inequity.

We are not concerned about that. We don't think there is an inquiry. We think they deserve half of it.

The other 50 percent would be distributed as follows:

If you had a Mitch Miller—some of you might be old enough to remember Mitch Miller's choral recordings, and you still hear them, of course, although sometimes, as Mr. Dorf says, they are not identified. It is just something that the station gives you—with largesse—they "distribute" it.

There were, on those recordings, maybe 40 singers; perhaps 30 musicians—maybe 40.

In those instances, you would just split the 50 percent amongst the singers and the musicians.

In the instance of Mitch Miller, there is no fat cat except Mitch Miller. He got the royalties. None of the singers and none of the instrumentalists on that recording did.

In the instance of a soloist—and let's say Perry Como, to sort of bridge the gap between us and those other young people—where six singers sang as background singers to Perry Como. That would make seven singers.

Let's say there were fifteen musicians, That would make twenty-two.

The fifteen musicians would get 15/22's, and the seven singers would get 7/22's, in contributions. As to how it would be divided: that remains to be seen. And I don't think that should be an obstacle in the way of adopting the legislation.

I am sorry. I went longer that I intended, Ms. Ringer. Will you forgive me?

Ms. RINGER. It was very useful. I appreciate it.

Let's ask questions sort of collectively, and I will leave it to you as to how you answer them. If you both want to answer them, please feel free to do so.

Harriet?

Ms. OLER. Okay. Mr. Golodner at one point said that "private taping is the wave of the future". I think that is probably true. To the extent that it is, I wonder if you don't think that this legislation is, really, an anachronism; is it really worth the fight?

Mr. GOLODNER. I think both Mr. Wolff and I have said that this is not a panacea. Maybe the boat has already sailed, as far as helping the performing arts, the creative arts in this country, without massive grant-in-aid type subsidies.

I think, at one time, we had great opportunities for requiring contributions from the commercial users. But we let that boat sail, and we are paying the price now in our tax monies.

But this pales alongside the inequities that Bud is talking about here. There is—and I think this was mentioned earlier by Ms. Ringer—there is an analogy here to property rights. We are talking about a performer's property—the contribution that he makes to a tangible thing—that sound recording—which others are going to enjoy.

Narrowing this down to the specifics of your question—I can go off on a tangent here, I can see that;—that is all the more reason that the broadcaster in

the future will not be selling—even if they are, today—he certainly will not be selling records, in the future. People will be listening to radio—and it is happening already, incidently. Certain FM stations and AM stations are announcing beforehand the time of the number they are going to play; what the frequency level is; the decibels, so that you can set your tape recorder. This is a service, now!

I can see in the future, when the costs of taping equipment come down within the means of the average consumer, we will be sitting at home, and we will look in our radio guide, or we will subscribe to the station's guide; and it will tell you the technical data you need to record their program.

Then what are they doing?

They are getting audiences because they are selling a service, the service being, "We are going to provide you with all of these artists' talents, so that you can build your home library."

Mr. WOLFF. We are cooperating with the pirates!

Ms. OLER. Well, maybe they will be doing that, say for only once a year for each selection.

Mr. GOLODNER. They will turn around and they will say to the recording industry, "What is wrong with you people? You are not producing enough records for us, because the appetite is voracious. We have already recorded that one; and 50 million people have it in their libraries! Come out and get some more records going!"

And they will say, "If you don't, they will sell it cheaper in England, where it is subsidized, where the artists are gaining some royalties."

You know, the recording industry will then be made the goat. But that is all the more reason, then, if they are selling the service, and the service they are selling is the talents of a performer, so you and I can sit home and record it—the inequity becomes even greater, in my mind, then, that they don't even want to say, "look, we have bought this artist's time, and we are making it available to you, our listeners."

Mr. WOLFF. Ms. Oler, no offense: I sometimes can get offensive. It is like saying, "So many more automobiles are being produced. Maybe we don't need public transportation."

Ms. OLER. I see your point. But I wonder if the fight is really there, then, or if it should be somewhere else.

Mr. GOLODNER. How do we cope with that?

You are getting into another area, here. Already blank tapes are outselling recorded tapes, you know. What are people doing with those blank tapes?

Mr. WOLFF. But are they keeping it?

You know, in the first place, it is like—what is it—the male mosquito bites once and then is dead, or the female, or one of the mosquitoes.

Ms. OLER. It must be the male!

Mr. WOLFF. They get one bit of the apple, and that is about it.

Merely because the pirates are out, does not mean that we should not close some of the doors. The whole thing is just wrong! It is just bad! They are making millions. Millions! I don't talk figures because I can't understand them. They are $8.5 billion; $9 billion. A little string radio station: $3 million in profits!

Which brings me, I think, to your question.

It was your question, about the stations that cannot afford it. Was that not yours, Ms. Oler?

Ms. OLER. Yes.

Mr. WOLFF. You talked about: How would you decide how they paid?

Was that not correct?

Within the legislation, there are some levels of income, and so forth.

Well, the gross dictates the net. Take the kind of station that is run by Mr. Dorf: I think he has 12 people on his payroll, four of them are salesmen, and he runs around the clock, as I recall, on two stations. So, whatever the gross is dictates the net; and once they make a break-even, it is all gravy, and they are doing it with our music! And you have got to be impressed with that.

Ms. OLER. Well, I do see your point.

Mr. WOLFF. I am not asking you to declare yourself now, but I don't see how you can help but be impressed with it. That is why, you know, big statements about unemployment, economics, and constitutionality, and all of that are just beside the point. Just beside the point! It can't be constitutional to steal it!

By the same token, it can't be "unconstitutional" to make you pay for taking something. It just can't be!

I happen to be a brain surgeon, so I don't know the constitutionality. I am not an expert on that.

Ms. OLER. I would like to get you off on another point.

You mentioned Canada, and their retraction of the right because of the fear of excessive payments going to the United States.

I wonder, if we do enact some kind of legislation along these lines—but don't join the Rome Convention—do you feel that we should give payments to foreign authors?

Mr. WOLFF. I think it is only fair. I think our society is enriched by whatever is written in Russia that we get to hear and see. I think it is enriched by what happens in London.

Ms. OLER. So you would accord national treatment, even though we don't join the Rome Convention?

Mr. WOLFF. I would have no objection to that, personally. I am an open, no-barrier type guy. That is a personal opinion. I think it is only right.

You know, we had a boom in popular music that was caused by four guys from Liverpool. It really was. The Beatles. They caused a boom in the music business!

And I would feel, you know: How can I talk ethics and not be ethical?

Or how can I talk morality, and not be moral.

How do I feel about the money going back to Liverpool? That is fine!

Canada doesn't want to pay out money because it comes to us. That is wrong! I think it is wrong, in the long run. It is a long view.

Mr. GOLODNER. I think there is another aspect, also, to the Canadian situation: That they saw no hope that the United States would be able to reciprocate.

Mr. WOLFF. I think, in the Rome Convention——

Mr. GOLODNER. Did we have the kind of thing we are asking for now? At least the Canadians could see some reciprocity. We are losing money right now. I believe that, in many countries where American-made records are being performed on the air, royalties are being collected on them for the performers, but they are not coming back to the American performers. They are being divvied up by the European artists—or whatever country it happens to be—because there is no reciprocity with the United States. So we are cheating ourselves, right now.

I believe, on balance, we are probably losing quite a bit—American artists.

Ms. OLER. Right!

I would like to ask you, Mr. Golodner, one further question. I am not sure. This may be a little too technical. If it is, you can just let it go. This is a question that came up, in Atlanta; about the term of protection for performers under the Danielson type of proposal..

The term of the protection—how long they would be getting these royalties.

Do you think the terms of protection the way the Danielson Bill is set up—the terms of protection for the record producers and the artists—are tied together, so that there would be a joint authorship situation, and then, I think, under the Bill's formula, the life of the longest living author would be determining the term, for both the record companies and the performers?

Is that how you read it?

Mr. GOLODNER. I would rather defer to Bob on that.

Ms. OLER. OK.

Mr. GOLODNER. I could not answer your question in Atlanta, either!

Mr. WOLFF. My whole view is highly simplistic.

I take whatever I can get, now. That is too simplistic. It is not very scholarly. But it is important that we get started on this. That would be of the utmost importance.

I don't know how the NAB can continue to defend against this type of legislation unless they start nitpicking—like, "For how long?" Or, "To Whom?" "How is it going to get distributed?"

This is all a delaying, defensive tactic, and I don't really think it is very important.

If we can get it for the life of the singer, fine.

If we can get it for ten years from the date the record is released, fine.

If we can get it for fifteen years, with one renewal, fine.

I really don't care!

I think that if we can get some legislation adopted—passed—we will find that is whole thing about; "You are going to put radio stations out of business, and then the Congressman can't get on the station to tell his people what he did last week in Washington," and, you know, all of that stuff, it is all nonsense! We can prove that it is wrong, if we just get some legislation.

I am certain of it!

Ms. OLER. OK.

Mr. WOLFF. As you can tell, I feel strongly about it.

Mr. GOLODNER. You might want to think of it in terms of—I think I referred to it earlier in my statement—the symmetry of the law—the internal balance. And if you were to start making drastic differences in what the terms should be—creating execptions—you might start to create unneeded complications, you know. "This person has a life, plus 50; but, in this case, the copyright holder would only have something else."

Ms. OLER. Well, under the Bill, formerly, it was an employer for hire, or a corporation—we get into different terms.

Mr. GOLODNER. That is what I am getting at. Right!

My suggestion was to make it conform as much as possible to what the pattern is, to maintain the intrinsic strength of our copyright code.

Ms. OLER. One last question:

There was some comment—some of the written comments referred to a Phonographic Record Manufacturers' Fund and their payments to performers.

Are you aware of this?

Do you know how it operates?

Mr. WOLFF. You are talking about the Musicians' Fund—Performance Fund?

Ms. OLER. I am not sure, exactly.

It was referred to as the "Phonographic Record Manufacturers' Fund."

Mr. WOLFF. You know, where is that fellow who was talking about the American way of life?

Collective bargaining is part of the American way of life. We have, some of us—the Musicians Union specifically—been capable of negotiating in open bargaining across the table, where nobody gives anything away that they don't have to give away, or they don't do anything that they don't think they can afford. They have been able to negotiate a Performance Trust Fund. It is a very simple thing. The number of times you work, the number of jobs you do, the number of musicians: there is "X" dollars percentage of sales, which is contributed to that fund, and then it is distributed amongst the working musicians. But those are the working musicians. It is an entirely different thing.

Ms. OLER. It is not distributed on the basis of the performances?

Mr. WOLFF. Not performances of records. Not of the number of records sold, per se, but on the gross sales of all records.

Now, we have a modified version in AFTRA—the American Federation of Television and Radio Artists—for both narrations—of which there, really, few—and background singers, where we do get an additional fee when records reach a certain peak: 100,000; 200,000; 300,000; 400,000, etc.

Mr. GOLODNER. I think, to make it clear, the American Federation of Radio and Television Artists represents, also, recording artists.

Mr. WOLFF. We have gone through this a lot. I think everybody knows who we are and what we are going to say before we say it. I am sorry. I should have further identified it. We represent singers, narrators, and actors on sound recordings.

Ms. OLER. Thank you.

Ms. RINGER. Mr. Katz?

Mr. KATZ. Mr. Wolff——

Mr. WOLFF. Yes.

Mr. KATZ. A few moments ago, you mentioned that the broadcasters are saying the costs of this will be prohibitive; but that they really did not know what the costs were.

I don't know whether you have the information now. My question is, really, whether we can know what those costs are; whether your organizations are in a position to determine what the costs of administration are going to be for this.

What methods are going to be used to insure a fair and equitable system of distribution, and so forth?

We don't have this information now; and I think we could use it.

Mr. WOLFF. Okay. I don't have it either, because nobody has ever done it; but let me give you a parallel situation—a comparable situation, I guess.

I happen to be the Chairman of the Pension and Welfare Fund for the American Federation of Television and Radio Artists. It is a rather large fund. We have lots of people who are paid a lot of money; and contributions are made on all compensation received.

I made a study. I asked for it to be made, rather, as to the administrative costs of our fund. We have an average of about 5 percent since 1954. There is no reason why it should exceed that.

I did not make it for this purpose. It just happens that we had a 10-year meeting, and I wanted to—when I presented the budget—be able to present it. I don't see any reason why it should exceed 5 percent.

Probably in the start-up, just as we experienced in our Fund, the record shows that in 1954, it costs us 11 percent. Well, there was a lot of travel; there was a lot of actuaries; there were a lot of consultants, and so forth.

Mr. KATZ. What role do you seek for your own organizations in this process?

Mr. WOLFF. Recipients!

We don't want to run it. I don't think the musicians want to run it.

I always have a concern about governmental running of a bureau, only because of the political aspects, but I am not paranoid about that. The system works.

I would like to see it in the Copyright Office, at least as long as Barbara is there.

Barbara, I am sorry. I should not have said that.

Ms. RINGER. No sweat!

Mr. GOLODNER. These questions are important ones, I recognize that, but I am sure you will admit that they are fairly hypothetical until we know what kind of mechanisms are being proposed, because you can't cost out one way of doing it; then find out that the legislation is going to call for a different way of doing it.

I think the only way we can approach this is by opposing options.

Your question was: "If it was done this way, what would be the benefits?"

We don't even know what the pay-back is on this—what the royalty rates are going to be.

What I am suggesting is that we pose different hypotheticals. Supposing the rate was set at this? What would be the return, given—and these are known figures—given broadcast industry, and juke box industry, and background music earnings in recent years. They are going up rapidly. In fact, I believe that the Department of Commerce can project—as good as any projection is, you know—but it can project, through 1985, earnings in the broadcast industry.

So that you say, if the payments are going to be set at so much, and given this projection of earnings for the next ten years, this is how much is going to be returned. Is the distribution mechanism going to be handled this way, this way, or this way? Give us options.

One way that I think we mentioned in some of the proposals—in the paper submitted earlier—was exploring a piggy-back situation with the composers, at least to the extent of monitoring plays, because they have to do it anyway. Monitor the play for the composer.

Mr. WOLFF. That is no big deal. Everybody has computers.

Mr. GOLODNER. There are different ways of doing it. The point is, if you agree on the principle, I guess what we are saying is that we can always agree on the mechanism.

Mr. WOLFF. Madam Chairman, may I ask: Are the previous records, Congressional records, going to be reviewed by you?

Ms. RINGER. Yes. Obviously, there is a continuum here. To answer your question, we are going to have to go back to the 1975 hearings in some detail. The extent to which we will go back, beyond that—into the Thirties, for example—is a question; and I am going to address that question to you, to some extent, when I get to my questioning.

Mr. KATZ. As you pointed out, Mr. Golodner, these are all hypothetical considerations at this point.

What I am really getting at is whether or not there is any apprehension, or anticipation on your part that, at least in the beginning, the costs of this situation—the cost of administering it; collecting and distributing—are going to wind up in a situation where the recipients are going to owe the people who are doing the collecting.

Mr. WOLFF. I used, Mr. Katz, the experience we had with our Pension and Welfare Fund. It is close to a $100 million fund now, just on pensions. $80 million. Maybe $90 million. Something like that. Anyway, it is not my money, so $10 million more or less is unimportant, I guess.

We found, in the start-up, that 11 percent was our cost, and that was a lot! Of course, then it was like a million dollars. But we were collecting from some 600 contributors—at least 600 at that time. I don't know what the number of

contributors or payors would be at the beginning. That, of course, dictates to some extent the expense. I don't see it being great.

You talked about automation earlier, and, certainly, if you ever had an argument with Sears Roebuck, you know how automated most people are in collecting; and it is not a big deal.

Mr. KATZ. You spoke briefly about the 50–50 split. Are you concerned at all as a representative of a union, that the recording companies—the other side of the 50—will, in some manner, be able to get their hands on more than a 50 percent allocation?

Is their bargaining power such that through, say, for example, additional fees for recording studios, they will be able to recover more from a different source?

Mr. WOLFF. I have to tell you—and I know I would be supported if you talked to anybody in the industry—at least one gentleman here can support me, I am sure—the record business, the phonographic record business, has changed a great deal in the United States.

It used to be that large, elegant, elaborate studios were maintained by all of the large companies—companies of any note: RCA, Columbia, Mercury, ABC, Capitol.

A very small number of recordings, released by the large companies—the companies releasing a lot of records—are made in their own studios. If you want to do Crosby, Stills and Nash, Crosby, Stills and Nash will bring you a recording and then you release it. That is the way it works today. I don't see them sandbagging people to come into their studios. You don't sandbag today's popular music people.

I think, to a great extent, it works the other way.

Mr. GOLODNER. Could I comment on that too?

Mr. WOLFF. Did I catch your question?

Mr. KATZ. Yes.

Mr. GOLODNER. In this manner, we only anticipate, so far, what is going to happen. When you—in law—create a property right—a vested interest—an interest in anything—it is not the function, I don't think, of the Government to say to the owner of that property how, or what is going to happen to him later.

If the artist cannot protect himself, collectively or otherwise, there is nothing that the Government can really do about that.

By the same token, if the industry is not looking out for its interests in this case—that is what collective bargaining is all about. That is its trait. The problem here—I notice that this was raised, too, by the broadcaster this morning when he was saying, "Why doesn't the artist go to the recording company?"

The problem here is that there is nothing to bargain over because neither the recording industry, nor the artist, has any property interest in the return of the revenue being made on the use of the record. They had bargained on the sale of the record, and they were doing that with negotiations. That they can reach, because the record company does get the revenue back, on the sale, and that is a bargainable question of how it is divided up between the artist and everybody else.

But nobody can protect you against the pirate! You know, he has taken it. It is gone!

What is there to bargain over?

Mr. WOLFF. Mr. Katz, I am not a classicist, but you can harken back to Lysistrata, if you want to, and that is our ultimate weapon: We just won't perform.

Somebody said "this is the American way" about 17 times today.

Mr. KATZ. Mr. Dorf earlier raised the possibility that if this legislation goes through, the broadcasters will use less recorded music.

Mr. WOLFF. Great!

Mr. KATZ. Does this frighten you?

Mr. WOLFF. Not at all. I say, "Great"!

I sat and listened to a recorded performance of "The Death of a Salesman" in my office, one afternoon, all alone. It was a fantastic thing! And I got Mutual Radio to play it. That was about five years ago. It had a tremendous audience response, and Mutual is the largest radio network in the world. It got a tremendous response. And I wondered how much more could be done—if

they would sacrifice a few minutes of commercial time once a week, and stop playing rock records, or Beethoven's Fifth—I don't care; it depends on where you are—and they played some of these fine things that can be recorded—if one company recorded a great many fine things that get very little play, it would be a wonderful thing.

So you know, you cut down on the amount of music. It is like cutting down on your cholesterol. You live better, I think.

Ms. RINGER. Ms. Bostick?

Ms. BOSTICK. Following up with what Mr. Katz asked, I would like to know whether there is any apprehension that the performers' royalty might be recouped by the broadcasters by their advertising costs. If that were the case, would you consider that——

Mr. WOLFF. I don't know how they would do that.

Ms. BOSTICK. Don't you pay for advertising?

Mr. WOLFF. We wouldn't pay for it. That is their problem.

No. No. We don't pay for it now.

We spoke earlier, Ms. Bostick, when the question was asked by the Musicians' Performance Trust Fund. That does not take it into account.

Ms. BOSTICK. Do the record producers pay for advertising?

Mr. WOLFF. Sure!

Ms. BOSTICK. Well, all right. In that case, could they recoup the cost there?

Mr. WOLFF. They could, but it wouldn't be our money.

Oh! Hold it! Were you talking about the radio station?

Ms. BOSTICK. The broadcasters, yes.

Mr. WOLFF. Oh! They do a great deal of it now, and it is paid for. There was a time when regulations were more honored in the breach—I mean, the FCC regulations were more honored in the breach than they were actually; and the station personnel would really advertise records.

There used to be a time where you would say, "Now, the Supremes are appearing at the Orpheum next week. Let's hear this great record of the Supremes."

Well, they can't do it any more. That is a commercial. It has to be logged as a commercial. If it is going to be logged, you know darn well that the radio station is going to get paid for it. And it was not just the regulation that caused that. It was because the radio station wanted to be paid.

That is why any time anything smacks of a commercial, it gets paid for.

That is true when you see many albums sold on the air over television. That time is extremely expensive.

In these last two years, you could set a test pattern on television. You would find people buying commercials for records.

Ms. BOSTICK. My question then is: Are not the broadcasters in the position of recouping any performance royalty that they would pay to you by just upping their advertising rates?

Aren't they in that position?

Mr. WOLFF. To a certain extent. But I can't lean on that. I cannot use that as a crutch, Ms. Bostick.

Ms. BOSTICK. Well——

Mr. WOLFF. It would be wrong for me to do it.

Besides, they make so darn much money, anyway, it doesn't matter where it comes from.

Mr. GOLODNER. They probably will—let's say, Bob gave the example about them charging $150 a minute, and an extra dollar or two. They will probably add on $40 to the advertiser.

Ms. BOSTICK. Your position is that this is a property right that you should have, so it doesn't matter.

Mr. GOLODNER. The advertiser is one of the end beneficiaries of the artist's talent here. This is the advertiser who chooses to advertise on a program that people listen to because of what the musician and the actor bring to it. So, yes, he is the sponsor. He owns that show, or that segment of that show. So why shouldn't he pay for it?

But I think far and beyond this little matter of payments to the musician—to the artist—what dictates price, here, is supply and demand. Radio programming—and television programming—is finite. There is only so much air time you can sell. As the demand for time on the air increases—and if the FCC was to continue to limit the licensing of new stations—if that time on the air continued to remain limited, that is going to dictate the price increases far beyond whether the artist gets his money or not.

This is an article from the Wall Street Journal last year, Broadcasting concerns, Seller's market for ads, Stocks are seen below full potential. . . .

The lead is: "Increasingly, the broadcast industry has been dealing with a new problem: how to stretch the finite supply of advertising time against the rapidly accelerating demand."

"There is a shortage scenario in the industry, and the networks and group broadcasters are profiting from it," says Richard Rice, Jr., Senior Vice President, Shuston, Hagen, Stone, Inc.

This is what dictates your advertising prices.

Ms. BOSTICK. I have another question.

In a case where you have a performer who has not contributed any copyrightable amount to a recording—because the performer is a bird.

How do you see, according to H.R. 60–63, that performance royalty being split, it at all?

Mr. WOLFF. Let me try that, may I?

No. 1: The number of performances that don't carry the human voice on sound recordings is infinitesimal. Even the Chipmunks! Remember the Chipmunks? Even those had to start out with a few notes! Okay. It happened there that the sound engineer was the creative guy. They sold a lot of records that were used by thousands and thousands of people. But the number in which the human voice, or the instrumental musician is not present is infinitestimal. I would not care if you tried to strike them out, or you included them, because it would not make any difference.

All of us have had this experience at one time or another, when we got enamored with sound—a stereophonic sound. You bought a record and had a train running through your living room.

Ms. BOSTICK. That is what I am talking about.

Mr. WOLFF. There aren't many of those. They give those away to see how the stereo works. Now, it is 8 track, and 12 track, and 16 track.

Ms. BOSTICK. I have just one other question:

In the 1975 testimony, I believe, Mr. Gordikoff said that RIAA would contribute a certain amount to certain performing artists, if it were split 50–50, out of their 50 percent.

They would contribute, say, 5 percent or something.

Is there any likelihood that the fat cat performers might want to do that same sort of thing?

For example, would Frank Sinatra, or Diana Ross—would they tend to, also, want to contribute to a fund for benevolent reasons?

Mr. WOLFF. Ms. Bostick, do you mean they would want to share in the largesse?

Ms. BOSTICK. Might, for example, a performer who already earned $10,000, say, in performance royalties decided that everything past that would go into a collective fund?

Mr. WOLFF. Ms. Bostick, I want to tell you something. Performers in the United States are the greatest givers—to any and all charities. I mean this very seriously. They give of themselves—which is probably the greatest kind of contribution you can make. They give of themselves so much that we have established, about ten years ago, an authority which is joined in by all of the performing unions, which is called the Theater Authority, so that the performer today says, "Fine. Call Theater Authority about your benefit, or about the contribution of my services that you want."

Any of the biggest names: Mr. Crosby, Mr. Sinatra—I am talking about a million names, not latter-day millionaires. Talk about the Beatles: talk about Crosby, Stills and Nash—they are making a lot of money—but it is a drop in the bucket compared to what the broadcast industry, by your licenses, your franchises, is earning today on their investment.

No doubt, if somebody made an approach to these artists who are making a lot of money, he would get some money, but that is not the way it should be.

Maybe I misunderstand your question.

Why should they give anything?

In the first place, out of the performance royalty, Led Zeppelin, when they record, employ four to six singers to back them up to get the kind of sound that sells and is enjoyable—or they believe to be enjoyable.

The way we look at the performance royalty, the No. 1 guy was Led Zeppelin—probably the biggest revenue earning group in the world today. The No. 1 guy

in that group would get no more than Susie Smith who was a background singer whom you never heard of.

That is the way we look at it.

Ms. BOSTICK. Why would the RIAA want to contribute to that sort of thing?

Mr. WOLFF. Why do they want to do it? Because they want to establish this, as well as we want to establish this, No. 1.

No. 2: You can bet that RIAA is going to live up to their informal agreement with the Endowment for the Arts. They will hang them out to dry! I am not worried about that at all.

I hope nobody looks at that as bribery. It isn't. It is not bribery on RIAA's part, and I don't often say nice things about record producers. But I think it was a normal thing for them to do. I mean, to establish that they are not just trying to make more money.

I don't know if Columbia Records has delivered a statement to you people. They did some time ago; in 1975. They supported the legislation. The other record companies who are broadcasters were too chicken. They did not do it because their affiliates screamed at them. And the NAB screams at them! And Columbia was the only one that had the courage to say, "We support this legislation. We believe it to be right."

Now, Columbia also owns CBS, so they would be paying money, as well as getting money. It made them very unpopular with their affiliates. I saw some correspondence; and there was some publicized.

They've got a bigger lobby than we have. They are tough to beat. They have money. The have Congressmen. They have Senators. They have people who die to get on the air—anywhere from Muskegan to Maine, and from Maine to California.

I mean, that is the way you are elected—by getting to your people. I know that, and you know that.

I am not going to convince many of the people in Congress unless I can first convince you, and I think you are in a wonderful position of just looking at the ethical aspects of it.

I don't see how you can disagree that this legislation is right and proper.

Let me just go very quickly—I have a bad habit of talking too fast, and thinking everybody knows everything that I do.

Let me take one instance that I referred to before. There was a young lady that came to the Kastenmeier Committee in the dog-and-pony act that we put on there—AFTRA and the American Federation of Musicians.

She was one of the original Supremes. Her name was Shirley Matthews—a wonderful, wonderful woman, who spent her life studying to be a singer.

When you saw the Supremes—if you did—in Las Vegas, at the Palace, or any place, you did not see Shirley Matthews. It was a whole different act: Dancing, singing, the whole thing. But Shirley Matthews was on every one of the records originally made by the Supremes, and she got the fat amount of, like, $21 for singing a song—in the days that the Supremes first started. That is all she got! And they were heard millions of times! The cement that kept the commercials together, or apart, whichever way you want to look at it, philosophically. And that is all the music is for. They would play real Chipmunks if they could get people to listen to them!

Ms. BOSTICK. I read the 1975 hearings. I saw that.

I think I have one final question of you, Mr. Golodner.

Where a performer is unidentifiable, how do you see——

Mr. WOLFF. They are all identifiable.

Ms. BOSTICK. You think they are?

Mr. WOLFF. Sure!

Ms. BOSTICK. Where is the remuneration that is undistributable?

Do you see any undistributable funds, anywhere?

Mr. WOLFF. If I may?

Ms. BOSTICK. Yes.

Mr. WOLFF. Yes, there are some record companies—I am sorry. Do you want to get that from Jack? I just happen to know about this particular thing. I don't know much; but I know something about this.

At the present time, the great mass—the great bulk—of record companies have a union agreement, with both the American Federation of Television and Radio Artists for the singers and narrators, and with the American Federation of Musicians.

There are many instances down South where they are recording and distributing records that don't have union agreements; so they fall in the cracks. But that number, again, is infinitesimal.

We get a report of every performance, of every record, and it is very simple. You name a record that was made in the last ten years, and I would bet that I can tell you who is on it. You know, the little people, as well as the stars. Give me about a half hour, and I can get on the phone and find out.

Ms. BOSTICK. You have the mechanism, because you collect it at the time of recording.

Mr. WOLFF. That is correct.

Mr. GOLODNER. May I comment a bit on the N.E.A., here?

The National Endowment of the Arts—which was established about 11 years ago, with very strong support from the AFL–CIO, and unions like Mr. Wolff's—has had, from the very start, a program which is designed to encourage private giving to the Arts, because we don't want, in this country, I don't think—or, at least, we would like to postpone as long as possible, the eventuality of the arts being wholly dependent upon Government money.

So they do have various matching fund authority and, in this case, I think the recording industry has made a very good deal because, by contributing this money to the Endowment—earmarked, to be sure, for the encouragement and enhancement of musical development in this country—they are leveraging more money from the Endowment into music; and I wish that the broadcast industries, and the juke box industries, and the background music firms saw their future as clearly as the recording industry knows it. It knows its future is based on the health and quality of American performing artists.

You know, it is the old theory that I mentioned before: the necessity to re-seed, and re-plant, and encourage. So, I guess, from their perspective—you can ask the recording industry later: I understand they will be before you later—I can see very clearly pragmatic considerations here that, to them, it is a way of taking their money, doubling it with government funds, and it is going to go to musicians, and musical compositions that they can, later on, record and test out. So it is feeding their industry.

I wish the other parts of the industry saw their future as responsibly!

Ms. RINGER. Waldo?

Mr. MOORE. Just one question, please.

In making a recording of the performance of performers, do you urge that it entail also the requirement, as enforceable and morally right, that the artists have to be identified each time they work in a performance?

Mr. WOLFF. No. May I?

Mr. MOORE. Please.

Mr. WOLFF. Just along that line—identification—we just are about to wind up some collective bargaining in the record industry right now, and we have received a proposal from one of our Wages and Hours Committees—the Proposals Committee, which puts together the proposals for bargaining—demanding that the names of all group singers—unidentified group singers—be put on the album cover.

When I first saw that proposal. I said, "There is something wrong with this. I better check with the other singers."

I found that many of them don't want to be—the majority don't want to be identified on the albums as a background singer, because, when they get to be a star, you look back and say. "Well, that is Susie Smith who worked for $30." Sometimes you will find—many times, today—in pop music, members of one group singing background for another "name" group, and then they change off, just for kicks, really, not for the money.

Mr. MOORE. Not even for the lead artists, in the case of their performance, as an enforceable canon?

Mr. WOLFF. I would rather—I would think that it would be more important to identify in classical music, the composer and the conductor, than it would be in popular music, because, in popular music, the listeners know who it is. The strange thing is they don't "cover" it—what they call "cover"—well, to put it another way: It used to be if you came out with a song—any of the old popular songs—Crosby, or Sinatra—somebody else would cover it. They would do their rendition of it.

That does not happen today. The Led Zeppelin group plays Led Zeppelin music in the popular music field, and Crosby, Stills play their music, etc., etc. They don't copy each other—they don't "cover" each other, so to speak.

So, if you hear a Led Zeppelin number, it is a Led Zeppelin number and, believe me, the young people who listen to it, they know who each and every one of them is.

Ms. RINGER. Dick Glasgow?

Mr. GLASGOW. Yes. You may have covered this when you responded to Mr. Katz' question, but let me pursue it just a little bit more.

Based on the rate that is proposed in the Danielson Bill, do you have any idea, or any ball park figure at all, as to what this would mean to the income of a performer?

For example, Mr. Wade referred, here, to his father.

Do you have any idea what that would have meant to him today, if he had lived?

Mr. WOLFF. Mr. Glasgow, I had attempted to establish that just for my own curiosity's sake, but the figures available to us from the FCC don't give us a station-by-station report. We will get the income and revenue of the whole network, or all of the networks, or a whole city, or a whole market, but we won't get it broken down by stations. Because it is a graduated scale that is suggested, we cannot establish it.

Mr. GLASGOW. Are you satisfied with that scale?

Mr. WOLFF. I am satisfied to get invited to the party, Mr. Glasgow. It is a long time coming, and I fight with every one of my colleagues who wants to quibble about language, or rates, or figures, or dollars. I think that the ethic has to be established.

I mean, that is my feeling.

Mr. GLASGOW. One other question.

What is your response—you have spoken about this somewhat—but what is your response to the broadcaster that says that he publicizes your records?

You sell records because of what they do.

What is your response to that?

Mr. WOLFF. I think it is a specious argument. I don't know how to answer that.

It's like: I happen to own a horse, and if somebody breaks into my place and takes my horse, they can say, "Well, we gave him exercise."

I say, He doesn't need your exercise. Go buy your own horse and exercise it.

It is really a specious argument. I don't know how to answer it other than that. That, again, is simplistic but, again, it's like: "I broke into your house because I knew you were going to be gone for the weekend. I saw you leave with your car packed up, and there was food in the icebox. It would have been spoiled when you got back."

"Well, leave it alone. I will eat it, if it is spoiled. Maybe I like it spoiled." That's what they do.

It is a crazy argument.

Mr. GOLODNER. I recall reading, in one of the statements here, an analogy to Roots. If you carry this kind of argument, "We popularized your work," I think Mr. Haley owes ABC a lot of money. ABC doesn't owe him a dime!

After all, Roots sold millions of copies after the program. So if we follow this to its extreme, why doesn't ABC demand payment?

Mr. WOLFF. This is taking Adam Smith, you know, a lot further than he intended to go, I believe.

Mr. GOLODNER. Besides which, I think, serious consideration must be given to the other side of the coin.

Isn't this an overblown argument?

Granted they sell some records. Maybe the station is playing the Top 40. It is playing a very infinitesimal number of the records produced——

Mr. WOLFF. I am going to interrupt you, which is bad.

Don't dignify that dumb argument by even responding to it. It is dumb! It should be rejected out-of-hand!

They are not playing it for the public, and they are not playing it to sell records. They are playing it for space in between the commercials—or separating them, or holding them together. I don't know which.

Mr. GOLODNER. I agree with you.

Mr. WOLFF. It just does not deserve that kind of dignity.

Ms. RINGER. Jon?

Mr. BAUMGARTEN. Mr. Wolff, you pointed out—this is nothing new—Mr. Golodner, and representatives of the NAB who have been here, have been over this ground for many years, and the rest of us have had varying experience with it.

My question is: What are we really doing here, today?

What can the Copyright Office do?

You might want to answer. I will ask the same question of NAB.

It is not what we can do to see your position, and when, but what can we do to make a difference. The broadcasters have the power; you have political power; the Congressmen feel it pays off if they spend it on Welfare—all of the arguments you heard before.

Aside from the fact that there is now a Revision Bill, and that cannot be held hostage, is there something different we should be doing?

What difference can we and should we make?

Mr. WOLFF. Okay.

No. 1: I believe that Representative Kastenmeier gave his word that, if he got, from you people, a favorable opinion, that he would think favorably about the Bill he waivered on last time around.

I think that your decision—whatever your opinion is going to be—and I don't know what form it will take—or how you are going to transmit it—I don't know what that is all about—but I do know you are being asked for your opinion. It was in the report. I probably have it in the mass of papers back there.

And I think it will be determinative, if he is an honest man, because I believe if his Committee comes out—and his vote would have done it in 1975—one vote—we lost, by, in the Committee——

Mr. BAUMGARTEN. You are talking about when it was in the Committee. You are not talking about the Floor. You are talking about the Committee.

Mr. WOLFF. I am talking about the Committee. But I think we could have done it on the Floor. But once the Committee came out negatively, we were dead!

You know, we are not really poor cousins in the AFL–CIO. We have some friends. We have some notes out. We helped elect a lot of people. You know, our whole system is lobbying. I think it is right. I think it is great. I am all for it. As long as it is honest and above board. I am all for it.

We are going to work awfully hard for it. We are going to work on the Congressmen at home, because our people are all over the country. We are going to work on it. We are in the Halls of Congress. We are dedicated to this.

Now, what you can do is see the light and transmit it. That is all I can say.

Mr. BAUMGARTEN. Do you think our opinion will carry weight?

Mr. WOLFF. I will tell you this: We can't win without you. We may lose with you; but we can't win without you—if that is what you are asking.

Mr. GOLODNER. Quite seriously, I think the Congress recognized in the legislation last year that, in the past, it has tried to come to grips with this problem always in the context of the total Revision package, and there was some concern on the part of some of the Members of Congress that there are some technicalities that have to be worked out: the mechanisms for distribution: the identficaton of beneficaries; the things we have been talking about here. I think that they have very seriously determined that the expertise lies with you in the Copyright Office, and are looking to your good judgment on mechanism.

We are delighted to work along with you. As Bob says, if we can agree on the principle, I am sure we can agree on the mechanisms for making it work.

If the political climate has changed, as was mentioned earlier, we have commitments—both political parties in this country recognize the principle of what is at stake here.

You have heard from the National Endowment for the Arts. It is the major agency in our Federal establishment concerned with the well-being of American artists.

I believe last year—correct me if I am wrong, Ms. Ringer—but I believe that the Copyright Section of the American Bar Association said, in principle, that these things did not occur ten years ago, the last time around on this. The only people today who are continuing to justify parasitism are the people who are——

Mr. WOLFF. The parasites.

Mr. GOLODNER. [continuing]. The parasites!

That is understandable. I think we will go down to the wire fighting this, but I don't know how many people are willing to believe this any more.

The broadcast industry in this country is not going to go down the drain because of this; and they have no God-given right to take other people's creativity without returning something.

So, yes. Congress has now, in the law—not just in the report, but in the statute—turned to the Copyright Office for its expertise and guidance, and I

think that your recommendations are going to carry great weight, certainly with Chairman Kastenmeier, in this next Congress.

Mr. BAUMGARTEN. One final aspect of that question.

Do you have any suggestions as to our methodolgy—not our conclusion—but what we are doing, and how we are going about it?

Is there something we should be doing differently?

Should we spend more time on the foreign situation than on the domestic situation; or spend more time on economics than on morals.

Do you have suggestions at all?

Mr. GOLODNER. I would say that—as I think is coming here—there is a great need for all of us to look at the international experience; the mechanisms that have been developed—not with the idea of copy-catting, because I don't think we could take, whole cloth, other systems of doing things and transpose them to the United States. But the big "assist" that is needed here is the meat and potatoes procedures. Granted the principle, how are we going to engrave this on our way of doing things in the copyright law field?

We would love to help you.

Mr. WOLFF. Mr. Baumgarten, may I ask you: Are there statistics available to you that are not available to us, as the general public, such as the income of stations, station-by-station, so that you could establish what the revenue might be?

Mr. BAUMGARTEN. We don't have any subpoena power—or anything like that.

Mr. WOLFF. I suppose you could take a percentage of the entire revenue of radio stations across the country, and maybe be off half a percent or something, as to what the revenue would be.

I don't know how we can help, really, any more than we have, but we are available. If your Chairwoman makes a call, you know we will be here. We have people, and we will spend some money on it. It is not much, but we will do it.

Mr. BAUMGARTEN. A few other brief questions:

Just to try to identify parties who are being represented here, do either of you—or, if not, who does—represent the actors on spoken records? Everybody has been talking about music.

Mr. WOLFF. The American Federation of Television and Radio Artists. Yes.

Mr. BAUMGARTEN. Is everything that you said about music true, pretty much, across the board, about the actors on the spoken record?

Mr. WOLFF. Yes, except that the play is minimal. I would hope to see more. I refer to "The Death of a Salesman," which I think was a classic production in sound recording.

There is so little being done—there is one company. I cannot think of the name of it. Cadman!

Cadman has a whole catalogue of fine things that have been done by fine actors, but there is a problem—playing a full record not made for a radio broadcast. They have a problem, there.

Mr. BAUMGARTEN. Is there anything in the area of the spoken record, aside from the magnitude of the play, that deserves either treatment—either special or some other kind of treatment—separate from the problem with respect to the musical; either in terms of distribution, or identification, or, perhaps, even formal representation?

Mr. WOLFF. I would be concerned about complicating the issue further, Mr. Baumgarten.

Mr. BAUMGARTEN. Along the same lines, who represents, or who speaks for the independent record producers?

Are they just going to sit back and rely on what you are saying?

Mr. WOLFF. Most of them are in RIAA. I don't know, but my understanding is that most of them are part and parcel of that organization.

Mr. BAUMGARTEN. I will save that question for Los Angeles.

Mr. WOLFF. They won't let me talk for them, I will tell you that!

Mr. BAUMGARTEN. We received a comment letter from Broadcast Music, Inc., raising a question that has been troubling a lot of other people—publishers, composers. I believe you know the question. Let me read just one sentence from it.

"BMI believes that performers should be fairly rewarded for their efforts. Our concern, however, is that there be no erosion of funds already set aside for distribution to those whom we represent. . . . "

Does this concern you at all?

Mr. WOLFF. Well, it concerns me because I hate to take it from those people, so to speak, but they have had it a long time. It is time for us to get some of it.

You know, this is a government of advocates. I mean, our whole system is one of advocacy. "Go make a case and, maybe, they won't take it from you. Get some more for yourselves."

I really think it is wrong of them to put that ghost up.

Mr. BAUMGARTEN. They did not put it up. This was raised by BMI.

Mr. GOLODNER. BMI is living about 70 years ago in the trade union movement when there was limited pay. "If the carpenters get more money, the electricians get less."

After all, they were fighting over a limited pot.

It seems that they are about fifty years behind the times. We know that pie is growing. All the statistics show that. I don't think there is any need for anybody to feel there are any intrusions on their turf, by doing what is ethical.

Mr. WOLFF. A related question was, I guess, brought out by Mr. Dorf.

He said something like, "The record companies make a lot of money because we sell a lot of their records. That is why they make a lot of money."

It just doesn't make any sense, you know. I use yours, but you are prospering.

I can't get on an airplane and say to the American Airlines, 'Well, you have 98 other passengers. It doesn't make a bit of difference if I ride. Let me ride free. It doesn't cost you any more for gas, or oil, and the seat is empty." I would get short shrift out there at the airport.

Mr. BAUMGARTEN. One final question for Mr. Golodner.

I think I know what Mr. Wolff's answer to this question will be. I will take it any way I can get it.

Let me ask you about compulsory licensing.

Can it work any other way?

Can it work on a voluntary basis?

Mr. GOLODNER. Philosophically, I don't like the idea of compulsory licensing, either. I like the concept that if a person is entitled to something, he is also entitled to give it away, at his option, or sell it, at his option, or do whatever he wants with it.

But we have to be realists here, and I think—as somebody answered before—there is a precedent for using compulsory licensing in this type of area. There is a fear, on Congress' part, of creating monopolies.

This is sort of ironic. I was reading one broadcaster's statement saying that nobody came to him and said, "Don't play my records." He used this as an argument. All they have to do is tell them not to play his records, as if that had any force or anything.

It is a right that looks good on principle—the right to withhold your work—but given our society today, I think that compulsory licensing probably is the only thing that is going to work. Yes.

Mr. WOLFF. I would only add that to withdraw compulsory licensing in any aspect would just sort of mess up the whole industry at this point.

Mr. GOLODNER. Maybe you want to look into how this is handled in some of the countries on the Continent—I believe France does have some sort of a peculiar right of the artist to prevent the play of his work for artistic reasons. I seem to remember in the back of my mind that there were some cases there over artists saying, "Look, you butchered my work by doing . . . ." You recall what some gentleman said this morning: "We do edit the tapes a little bit, because we decide what is the better sound, and what is going to work better."

The arrogance of that, I think, is in presuming that they know that better than the artist.

But I believe on the Continent, in France, there is some sort of obscure right there.

Again, as I said before, we can't take, whole cloth, what is true in other countries. I don't think, within our system, it is going to work.

I am agreeing with you, Bud!

Mr. WOLFF. The carpenter really is in no position—and I don't think he wants to concern himself with the architectural aspects of the building he is working on.

I think the architect, perhaps, can say, "I am not going to do that slot thing. I don't like it, and I am not going to do it."

I know Picasso sent to Chicago a piece of sculpture. He dictated where it was going to be and how it was going to be displayed. But I still can't go to Picasso's heirs and say, "I want to make a bunch of postcards." Nor can I put a camera in the window and take a lot of pictures, and send out postcards.

Ms. RINGER. As a matter of fact, you can, because the Chicago Institute, or the City of Chicago, inadvertently, threw the work into public domain.

Mr. WOLFF. That is that one piece. I could not go to his massive works that were never released and just take a lot of pictures.

I might say that I filed a lawsuit—that was, fortunately, settled—for a sculptor against the Chicago Art Institute, because they were making postcards of this piece of sculpture, and that is not what it was there for.

Mr. GOLODNER. I believe Indiana never got anything out of the reproduction of the Louvre.

[Simultaneous colloquy.]

Mr. BAUMGARTEN. One final question.

In response to something Mr. Wolff said: The copyright law has, and there is precedent for protecting the author against an inferior bargaining position under the new Act. Termination rights cannot be bargained away. I think that in the Danielson Bill that there is a provision preventing the performer from transferring his or her share to the record company.

Is this something you would like to see retained?

Mr. WOLFF. It doesn't really make a lot of difference, because if it is not retained, we will bargain it. I am sure we will.

Mr. BAUMGARTEN. Let me pick up on that last statement and ask my last question.

Unions have always had a particular impact on copyright law. This is true particularly in manufacturing.

You just said if it is not there, you will bargain it.

Why don't you bargain with the record companies and get those background singers a royalty cut instead of a flat session performance fee?

Mr. WOLFF. They don't owe it to us, by right.

I can go to them and say, "We want it," like Samuel Gompers. You know, finally, you get down in bargaining to, "Why should you have it?"

"We want it."

This belongs to us! Somebody is prospering on our services, and it is wrong!

I can and do say to the record company, and it has some effect, "You made x million dollars last year. We are raising the rates."

"Fine."

And I do get an increase. If I am at all effective, I will bargain an increase, but it is not that they owe it to me.

The radio station owes it to us. They are using our services to make money, not to cultivate, not to educate, not to popularize, not to sell records. They are doing it—again—it is a cement between——

Mr. BAUMGARTEN. I am not taking a position. I am asking a question.

Why has not the union been able to negotiate a royalty cut rather than a session fee for the guy who ends up in the flophouse in Chicago and hears his music being played over the radio?

Mr. WOLFF. The soloist artist, as you know, is capable of negotiating that for himself or herself; and properly so! We have negotiated, as of three years ago, an inroad into a royalty arrangement. We call it a supplementary payment, or a contingent scale—an additional contingent scale payment.

That is because we are able to bargain, and because the economics were there—not that they owed it to us. It is because we had the strength to bargain it.

You know, it was La Strada again. At some point you say, "I'm not going to work for you." Well, that is bad, but I can't say that to the radio station. I have to have a law.

Mr. GOLODNER. As a matter of fact, historically, you ought to be aware—I think it came up in the 1975 hearings—you have such a thing called the Lea Act, which was passed in 1976, which forbade anybody from bargaining over the use of sound recordings or broadcasting.

Mr. BAUMGARTEN. I was talking about "negotiating."

Mr. GOLODNER. At that time, when you did have musicians and actors employed by radio stations and other broadcasters, they had some bargaining leverage because they were working there and they were in privity with the broadcasters. At that time, they could not even raise the question of the use of sound recordings and displacement of themselves by their own recorded works, because it was forbidden by law; and it still is.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. We are getting into an area that I wanted to explore a little bit. Actually, I am interested in two broad things that have not, really been dealt with in great depth.

One is the history of this, as it affects performers and the performers' union.

The second is a little more about the structure of the union representation of individual performers and their relations with the record industry.

Let me try it this way, maybe, to save time—although this may be a mistake.

This is my impression—a thumbnail sketch of the history of this whole problem—correct me if I am wrong. I very well could be.

The question of rights in recordings came up in the 1909 legislative history, and I think that it was primarily the record industry that was raising it. There were no performers in the picture, as far as I can recall. It was the Victor Talking Machine Company, in particular. At one time they were very strong for rights. Later on, they drew back because of a big hassle over the compulsory license with respect to any recording of music. This became a pre-occupation, and they did not press the point.

It did come up again in various legislative contexts later on, in the Teens and Twenties, and then, when the big impact of playing records on radio took place, we had a long history that has not been referred to here, today, although it is part of copyright law: The whole Waring case history, and the legislation that accompanied it. Again—and here I am going to ask a question when I get through—the spearhead for this came from an individual band leader rather the collective—what was then the American Federation of Musicians.

The judicial efforts were successful at the State level, and there was an adverse decision—but only one—in the Federal courts, which probably was washed away by the decision in *Erie* v. *Tompkins*, because it was based on a Federal decision involving State law. In effect, it was a Judge Learned Hand decision in the *Whiteman* case—also. RCA—that one could not put an equitable servitude on a chattel. One could not say, "Not licensed for radio broadcast." This was not something one could do under whatever law was being applied; until and if the Register of Copyrights could be induced to register claims for copyright in sound recordings, it would not be possible for the Courts to uphold this.

The whole thing just dropped at that point, but meanwhile, in Europe, the protection of records and recorded performances was going on apace, with a long history that eventuated in the Rome Convention.

I am skipping around. This is very, very sketchy.

I might say, to those who are interested, that there is a wonderful Law Review Article on this subject called "The Organized Musicians" by Verne Countryman, Chicago, in two parts, back in the early Fifties.

Mr. GOLDNER. Even though he was a Guild.

Mr. RINGER. Yes, he was a Guild.

He has gone on to better things!

Of course, it is out of date now but, for the history, I think it is an excellent piece.

The adventures of the unions in this area—if that is a proper term—have been very interesting. I think that there was a genuine aversion to using copyright as a form of protection, because the feeling was that collective bargaining and collective power was much more important—let the record show that the witnesses are nodding—in "agreement." I take it!

Mr. GOLDNER. This carries over, if I can digress for a moment——

Ms. RINGER. Sure!

Mr. GOLDNER [continuing]. Into the history of the trade movements in this country and in Europe. One of the major distinctions is that Europe, very early on in the trade union movement saw that, if they were going to make progress, they were not going to make it in free collective bargaining, but rather, through government edicts and government support and government coddling.

In this country, being the Gompers, there was an attitude—I hate this word—of laissez-faire. "Give us our rights, and then the give and play, the supply and demand, the economic strength will determine it, and we will determine it, privately. We don't want Government."

There is a strong strength, in the American labor movement, that is just as paranoid about Government as anyone else here; whereas the European labor market grew up very early. In fact, many of you who are trading in Europe are not dealing with independent unions, but the adjuncts of political parties.

Ms. RINGER. Let's take that—the experience in this country. There was—whatever you want to call it—the strike in the Forties. I remember Frank Sinatra and his voice, recording a whole lot of stuff to make a backlog. And there was a period where you had humming, and a cappella stuck in the background, and kazoos—because they were not under collective bargaining. It was a very interesting period.

This was, take it, the direct cause of the Lea Act. Is that correct?

Mr. WOLFF. That is correct. Yes, ma'am!

Ms. RINGER. Do you want to comment on the background of that in any manner?

Mr. WOLFF. I don't know in what way.

Ms. RINGER. Well, I will put it this way:

There was an outpouring of outrage. This was an Act that was a very restrictive, anti-labor Act, that was passed without a dissenting vote, as I understand it.

Mr. WOLFF. The Lea Act was almost a natural reaction to the leadership and the strength of James Petrillo. No other man in history could have achieved the kind of stoppage that he achieved. Unfortunately, if you have a strike in the coal fields, it takes a while to use up what you've got in your cellar, but when you turn on the radio, and you hear not the music that you are used to hearing—it affected people immediately. Certainly, we were not a labor-minded country in the first place—when this occurred. It was very easy to get the legislation adopted. You might remember: There is one room at CBS that has a series of pro or anti-Petrillo cartoons.

Ms. RINGER. I have never set foot inside of CBS.

Mr. WOLFF. They are very amusing. This was a great man in the labor movement. A really exceptional guy! But the union I represent fought with him all during the Forties because he wanted all of the radio personnel, and we had staked our claim. That was before my time, because I am a very young man!

It was a losing battle, but I think it had its effect.

I might say—and I cannot be condemned for it because I am not part of that union—up until 1970, the James Petrillo heritage survived; I think it was Herman Kennett at the time—1970 was the last year in which there was a large studio orchestra. I mean they maintained these orchestras, this employment.

I happen to believe that it was not only for the benefit of the men employed, and the women employed, but for people generally—listeners, generally. The studio orchestra is gone now, but, up until about about 1970—maybe 1969—I recall—maybe it was 1968—there was a studio orchestra at each of the networks, and there were some studio orchestras earlier than that—probably up to the Fifties—that had individual stations. There were singers on the staff in radio stations. We are getting in an area of repeating that in 1975.

The Lea Act was a vindictive move against Jimmy Petrillo. There is just no doubt about it? And it went too far! There are aspects of it that would have been legislated, anyway, without the Petrillo strike. They made it a sort of a secondary boycott—to negotiate with an employer as to what he would play on his station.

I don't know what else I can say.

Ms. RINGER. Well, what it did, in effect, was to deprive the parties in turn, of their prerogatives.

Mr. WOLFF. That is right!

You know, unfortunately, we lawyers—perhaps not meaning to—sometimes dictate policy. We should not tell them what they "can't do". We should tell them what they can do! Since I have been a union executive, I have adopted that philosophy. But we all lived with Waring and Whiteman; that is what we were brought up with. And it did not become that important, until—I think it was 1960.

Ms. RINGER. Okay. I was involved in some of this in the preparation for the Rome Convention. In the Fifties, in the light of the Lea Act, there was, I think, pretty observantly, a policy change in the AFM, which was putting all of its eggs in the trust fund basket. The basic idea was that, "okay, we can't strike, but we do have bargaining power, vis-a-vis the record companies, and we are not really interested in copyright."

This was quoted to me directly by one of my predecessor Registers of Copyrights, who had talked to Petrillo personally, about this. Petrillo was just not at all interested in copyright.

Arthur Fisher came back on a boat with Petrillo, and they discussed it at great length. The report was that, although Fisher was very interested in enabling

rights, and something in the copyright area, this was not Petrillo's area at all; that he did feel that the basic salvation for the performing artists that were left was to provide a large, well-based, well-funded fund, which could provide employment for technologically displaced performers.

I would like to test you on this: The upshot was that there was a great revolt on the West Coast—was it Local 47?

Mr. GOLODNER. Yes.

Ms. RINGER. "Local 47." Its argument ran. "We are actually performing, and our works are being used." These were the West Coast performers.

Mr. WOLFF. Studio musicians.

Ms. RINGER. Movie studio musicians and recording artists. And their argument was that, "You are taking money out of our pockets and paying it to people that are unemployed, and are actually competing with us."

This is what I remember from the trade papers at the time. Maybe that is an oversimplification, but my impression is pretty strong that, essentially, this restructured the union.

Isn't that correct?

Mr. WOLFF. I don't think that that "restructured" the union. I followed it rather closely. There was a change in administration on the West Coast. Trade papers often blow a thing way out of proportion, because they have to write about something. There are three of them, out there.

Ms. RINGER. There are three of them in here, too!

Mr. WOLFF. What Mr. Petrillo believed was precisely what Jack was talking about. "We don't want your help. We'll take care of ourselves." And that pervaded our labor union history here in the United States. It was sort of laissez-faire.

The labor leader in the United States has never believed that he is going to get anything from the Government—which is a completely different philosophy than you find in South America.

You know, when we sit and talk to our colleagues in South America, we study each other's agreements and we are talking in two different languages. Theirs is a franchise—and ours is muscle. It just really is! And all of a sudden, the union is gone! We have a big union in Argentina, and all of a sudden, it's gone! You get a letter saying, "I am living, now, in Costa Rica. I don't know what happened to the union." [Laughter.]

It is true! You get deposed as the President, or whatever, and you try to be a mechanic.

They never depended on it, and they never would. And then when I started practicing labor law, the people I represented would not go into a courtroom. They would never initiate litigation. "We got our problems. It's in the family. We don't look for anybody's help."

Mr. GOLODNER. Well, there is no doubt that during the period you are talking about, you had this jobs-versus-money argument, which Petrillo was reflecting. At that time, I remember my father was with the NBC and he had a job, on staff, at the station, and he could see that the records were going to displace him. So the object was, in the 1940 strike, to cut down on the use of records, because it was displacing musicians. They were opting for the jobs, because they still had the jobs, then, by 1960, when Cecil Reid came along, they lost most of these jobs. The battle was over, and the only hope left was to get some sort of a—it was not even a fair return—but some sort of a return, now, since the recordings were taking over, and it was their work.

So you are going 20 years later, and the issue became very sharp in 1960 and it is much sharper now.

Ms. RINGER. That was on the eve of the Rome Convention. There was support from the unions, of course. The Rome Convention gives rather limited protection, in this case.

Mr. GOLODNER. But there were still performers' organizations that were torn internally; they were schizophrenic. You had those who were working in the station—they wanted to protect their jobs. Then you had others who were making recordings, who said. "Let's get a stake in that."

Ms. RINGER. I guess what I am really trying to bring out is the fact that no one can really bang the unions over the head for not having addressed this problem. They were trying, but they were trying in different ways.

Mr. GOLODNER. There was a phantom living with James Petrillo, and that was what happened to his predecessor as a result of the sound movies.

You see, overnight, I believe, 20 to 30 thousand musicians lost their jobs in movie theaters around the country with the advent of "The Jazz Singer" and what came after that.

Now, the President of the Musicians Union at that time dismissed sound movies because the fidelity was so poor—"it could never replace the live thing"; it was not the same.

But it did!

Petrillo, I am sure, was living with this specter that here, now, was history repeating itself—the sound recording was beginning to displace the musicians in broadcasting, and in restaurants and cafes all over, and he opted for the jobs—trying to protect the jobs of those people before it got out of hand, which, then, of course, it did.

Now, here we are, saying: "Give us this day our crumb from all of the mass of work that is being done."

Mr. WOLFF. One other aspect of it, if I may.

Most of us who bargain realize that, in going into bargaining, there is a dollar we can bet. We don't know what it is. Nobody will ever tell you. Ordinarily, you can take that dollar and split it up in several different areas. It is not boorism, exactly, but it comes close to it.

The company comes in and the industry comes in. They have "x" dollars in their head. First you have to establish what it is; then try to get some more.

What occurred in the music business was that the studio musician was very busy, but felt that he could not raise his rates commensurate with the work he was doing and the contribution he was making, in the rates, themselves, because those rates were tied in with all other rates in the industry.

So he said, "Lay on this other fund."

That is what was established—to give them something additional.

Mr. GOLODNER. I wonder if anybody sees the irony here, of the industry this morning, talking about free enterprise, saying "You should not recommend this. Don't interfere. 1946."

Unlike the unions, they ran to the Government and said, "Stop them from negotiating with us on this issue. Don't let them exercise free collective bargaining when it comes to our turf."

That is the free enterpriser!

Ms. RINGER. There are many, many ironies in all of this. But the upshot was a kind of a period between then and 1960, where the unions were not too active. The performers on the unions were not too active in Copyright. We were in a development period, and there was not much action by them.

Mr. GOLODNER. I remember Stan Kenton headed a group.

Ms. RINGER. Yes.

Mr. WOLFF. That was not until 1968 or 1969.

Mr. GOLODNER. It was even in the Forties, with the performing arts. Something out of Philadelphia.

Ms. RINGER. That was Fred Waring; and Senator Scott was his loyal supporter when he was in the House.

The point, though, is that there was this general feeling that this will never fly. The time had not come. There were no rights in sound recordings at all!

In 1965, in the House hearings, there was a breakthrough. I was there, when Allen Livingston spoke—he is going to testify three weeks from now on the West Coast, and he was then the President of Capital Records. He said, "I don't care what anybody says. This is right. We should do it."

The thing began to take off in 1965, actually.

Mr. GOLODNER. I think the broadcasting industry, by displacing and eliminating live talent from its airways, managed to unite the United Artists on this issue, now.

Ms. RINGER. There is one other factor which ought to be brought out, somehow. The music that people were receiving began to change. You had a good deal more mixing between performers and composers. The acting opposition, which had been very adamant, from the traditional copyright owners, began to dissipate.

Mr. GOLODNER. I think, to go back to the Forties—we are trying to reconstruct an era—this was a time when broadcaster/licensees took their licenses very seriously, and there were various requirements that they would promote local live talent. I remember that phrase being in some of the FCC dicta.

I am going back to the late Thirties, and you had things like the CBS Workshop. You had live drama. You had the Met. Opera, "live." I think those early

pioneers of broadcasting saw it as a great boon to the cultural life, the development and evolvement of new talents and new skills through the magic of the airways. There was great excitement.

Now, I think, they would like to say with honesty—but they can't—"that one musician is replaceable by another". "There is nothing creative here. We just put on a record. It sounds the same, and it is a machine."

Ms. RINGER. A basic question here has got to be asked: You have your trust fund, and it is bumping up against $100 million.

It is not too clear to me what it is used for. And I guess—as Mr. Dorf said this morning—there is obviously more than one union here.

Mr. WOLFF. There are two fronts.

Ms. RINGER. I really want to bring this out on the record.

Mr. Dorf would say, "All right. The answer is: If they want money, get it from the record industry."

Well, you are getting some of it from the record industry. Why is that not an answer to your problem? Go on and explain about the funds, and what they are used for.

Mr. WOLFF. I will try! It is not my union; but I think I can do it fairly well.

There is one fund, which is the old fund, which is for, actually, making jobs for the unemployed, in a way. They pay out of that fund for people to work. And they pay union rates, in certain situations. There are two people here who can say it better than I.

The other fund is merely an additional compensation for the men who do the work in the studios to make records. That is all it is. It is based on the sale of records. In that way, the resistance felt they were not stifling production. If they did not sell, they did not get paid. And it is divided up, each year, amongst those musicians. There is a system of "how many jobs," and "how many hours," and so forth; and you get paid accordingly. How many sessions?

You know, there was one other deterrent in the Forties. That was—Learned Hand wrote the decision, you know. That was a problem.

Ms. RINGER. Very much so!

Mr. WOLFF. Who is going to go fight with Learned Hand?

I know back when I was in school, that happened.

Ms. RINGER. Is the first of those funds working?

Mr. WOLFF. Yes. It works. The first one works quite well. I guess there isn't a holiday that is not celebrated by a whole group of musicians playing in almost every town and village in the city and the country.

Ms. RINGER. Well, I am asking again: Why is this not an answer to your problems?

I am asking for you to tell me.

Mr. WOLFF. It is wrong! If we get money, it should come from the broadcaster. I can't negotiate with the broadcaster for it.

Ms. RINGER. You are really saying that there is money here, but there is a principle involved, too.

Mr. WOLFF. The bulk of the broadcasters can buy—and not even have to sell—the record companies. They could keep the companies, and put them out of business, and not do anything with them.

There are two things that you must look at:

One is the amount of air time given to these free-play recordings; and the second is the income derived from that amount of free play.

Ms. RINGER. Okay. Okay.

Mr. WOLFF. It is too simplistic.

Ms. RINGER. I think I understand your answer.

I think you make a mistake when you dismiss the argument about promotions, and so forth, being out of hand. There are record industry people who do nothing else but go out there and try to get their records on the air.

Mr. WOLF. That is correct! And there is nothing wrong with that. That is how we sell things in this country.

The point is: I don't know of a record company—and it is my business—that does not have a bad year, and a good year, and a bad year, and a good year. This is where our problem comes, in negotiating. We negotiate to the best of our ability and, in this area alone, we make every effort not to stifle production. And we have done that for nine years now. We don't want to put any costs on which will stifle production, because it is such an up-and-down business.

You know, as I mentioned earlier, we have the Deutsche Gramophon Company recording the Chicago Symphony Orchestra.

Costs are high. The return on classical recordings is extremely low. We have a separate set of rates for singers and choral works, oratorios, and things of that nature. It is only because the groups are so large that we make the rates very low; much lower—about half of what they are for popular songs.

The singers—and I can talk to them much better than I can to musicians—the singers are extremely careful about making the rates too high. That is the only aspect of our union, or any other union that I know of, that has that constant endeavor not to stifle employment—production and, therefore, employment. It is the only one I know of. It pervades their whole philosophy.

Ms. RINGER. Okay. I really would like to know a little more about the interrelationship between the performers' unions and the performers, particularly in a case where you have a big star who negotiates his own deal—or his agent negotiates his own deal: How does the union enter into that kind of deal?

Mr. WOLFF. We negotiate a collective bargaining agreement. In that collective bargaining agreement, there are certain prohibitions, so to speak, which concern the star performer.

(*a*) He has to get paid.

He cannot come in and do this on just an "if come" basis.

(*b*) You cannot reduce the royalty to that star performer—except for certain things.

For instance, you cannot reduce his royalties by reason of the supplementary scale payments paid to our people—to the background singers.

It is in ways of that nature that he is affected by collective bargaining, just as during this last negotiation, which we are just winding up, because of certain star singers in the Nashville and Memphis area. We have a prohibition now against a star performer being required to sing lyrics that he believes to be irreligious or immoral. There are very strong feelings among many of our country and gospel singers in that regard, and so we have negotiated that. It will require the companies to memorialize a particular statement and distribute it amongst all their producers, etc., etc. Set up the whole thing. It has nothing to do with wages and hours, but it has to do with people.

There are other instances in which our collective bargaining affects the star performer who has negotiated, for himself, a royalty.

Ms. RINGER. You do represent them. They are all your members.

Mr. WOLFF. And, in addition—and what is of extreme importance—the contributions are made on the compensation paid by the star performers to the same pension and welfare fund that our background singers and "anonymous" people—as somebody mentioned—are involved in.

Of course, he gets more out because, on his behalf, more is put in—as far as the pension is concerned. But as far as welfare is concerned, this has the same health, welfare and hospitalization coverage.

Ms. RINGER. Let's take the case of a performer who doesn't write his own material—like Barbara Streisand. I suppose she does now, but anyway——

Mr. WOLFF. She is doing pretty good!

Ms. RINGER. Let's say she doesn't. Give me a rundown, very briefly, of the typical chronology of the bargaining.

Mr. WOLFF. Do you mean on Streisand's behalf?

Ms. RINGER. No. The whole bit. Obviously, she has a combo, or something, backing her. Maybe some singers.

How is that all arranged?

Who does what?

Mr. WOLFF The first thing that happens: Of course, she has an arrangement with the company. That arrangement can provide many things. It could guarantee that they will do so many sides, or songs. "Sides," we call them. So many sides a year. They guarantee her that many sides.

It might even provide for an advance against royalties. That is one kind of arrangement.

Another kind of arrangement is where a star of that caliber—of that stature—might say, "I will give you *x* number of songs per year. We will have joint discretion as to what the material will be. If we cannot agree, we will arbitrate it by a third party. If we can agree, I will perform them. But I will deliver you the master for the advance that you have given me against my royalty arrangement"—which can be anything from one, up, depending upon the stature and sales power of the performer.

If it is going to be done—if the company is going to produce her records, it will call the performer and say, "Here is a list of titles. We will send you the

numbers, or somebody is going to come over and play them for you. You can read the lyrics and go to the studio on such-and-such a day to make the Christmas market," or whatever.

You know, the performer, if he or she has the right to reject material, he or she will use his or her discretion as to what material he or she wants to do.

Let me say, as a first instance, that the performer is going to go to RCA on Sixth Avenue in New York, and is going to record there. The producer—the actual line producer—or the RIAA man—some of them are RIAA men, and some of them are just producers—he will then call background singers. Well, first he has to get his arranger, and arrangements. Then, when he knows what he is going to do, he will decide how many background singers he wants or needs.

He will call singers he knows, or he might call what we call a contractor, who also sings with the same group, so that we don't have another agent, or something like that floating around. He must be a singer.

To that contractor, he will say, "I need six women and two men," or, "I need two sopranos, and four so-and-so," or, "Come on in and look at this music and let's decide what we need."

They might do that with a well known, capable contractor. He will call that number of "voices," and he will go in the studio. It used to be that everybody would get into the studio at once—the background singers, the artists—they would all get in there. But now, it is different. The musicians will go in. Then the singer will come in. Then the background singers will come in.

This doesn't happen all the time.

Down in Nashville, they will get a whole bunch in, there, but they will do it in parts. Then they come back, and the musicians will add a track.

Now they have something that is called a "black box", which is an electronic—I don't know—it lays another track on, but it is the same track, and then they can change it a little bit.

Most often, for the real classical, they call the singers back and lay another track, or, in that same session, they will lay what we call, in swing, "mulley-tracking," and get another track, to get what it is that the producer wants, and so that a star of the magnitude that you mentioned is satisfied. An awful lot of it never gets off the cutting room floor. A lot of it does.

Ms. RINGER. In terms of representation, you represent Streisand. You represent this little singing group behind her. You represent them.

Mr. WOLFF. That is right.

Ms. RINGER. And AFM represents the "side" men—whatever you call them.

Mr. WOLFF. That is right. The conductor and the side men.

Ms. RINGER. And how many contracts are there in this situation?

Mr. WOLFF. Contracts? Well, if you had six—our collective bargaining agreement requires a written agreement with each of the singers.

Ms. RINGER. So it is per individual, in the AFTRA situation.

Mr. WOLFF. That is right.

Ms. RINGER. How about the AFM situation.

Mr. WOLFF. Just one. The leader will file a contract.

Ms. RINGER. All right.

And the extent of what are called "residuals" in the television area—do you call them that?

Mr. WOLFF. We call them "residuals."

Ms. RINGER. Okay. The extent of "residuals" is determined by the bargaining power of the star.

Mr. WOLFF. Do you mean royalties?

Ms. RINGER. Royalties. Right.

Mr. WOLFF. That is correct. That is right.

Ms. RINGER. And the amount that goes into the trust fund out of that: the star's share is determined by—

Mr. WOLFF. It doesn't go out of the star's share.

Ms. RINGER. It doesn't go out of the star's share?

Mr. WOLFF. It is contributed by the record company, on the star's account, but there is no contribution by the performer.

Ms. RINGER. All right. But this is part of the basic contract between AFTRA and the record company.

Mr. WOLFF. The collective bargaining unit, yes.

Ms. RINGER. Then the singers, the background singers—what do you call them?

Mr. WOLFF. "Background singers."

Ms. RINGER. Background singers. They have separate contracts but are they separately negotiated?

Mr. WOLFF. No, they are not negotiated, because you get a call, you go to work. They work to a scale. They work for the collective bargaining scale. They make more money when they do more work.

Ms. RINGER. And, in this situation, there are no residuals. No royalties.

Mr. WOLFF. There is only what I mentioned before: the supplementary scale compensation. When the record sale hits certain peaks, those persons on the record will get a percentage of their scale.

Ms. RINGER. Yes. That is different! That goes into a fund and comes out again.

Mr. WOLFF. No!

Ms. RINGER. It goes directly to——

Mr. WOLFF. The most they can make—the scale, right now, is $35 a side, or per hour, whichever is—whatever it is. But nobody ever goes in to work for $35 because you can't make records for that. But, per record, that is what it is, per side, per song: $35.

Then, when a record has sold *a* hundred thousand, or a half a million, then a percentage of that scale is paid, again, to the performer and each of the individuals—not to a fund.

Ms. RINGER. That is AFTRA. But in the AFM situation, it does go into the fund.

Mr. WOLFF. They have a fund.

Ms. RINGER. In one contract, it goes into a fund, but it is the second fund that you are referring to.

Mr. GOLODNER. "Special payments."

Ms. RINGER. Which does involve payment-per-record sold beyond a certain point.

Mr. WOLFF. The income is based on gross sale.

Mr. GOLODNER. It is based on the number of different records of the individual musician.

Ms. RINGER. Okay. This is very useful, and it does give a little better picture of the economics.

I don't know whether anyone else on the panel wants to ask anything about this, or not. We have to press on. It is getting on to 4 o'clock.

Let me ask one last question. It is a question of international protection.

I have had a lot of contacts with people in the international performance rights area, and there is a very, very strong feeling, internationally, by both performers and now, the record producers—who have made pretty much common cause—that the salvation is a performance royalty. There has been a lot of talk about funds and various other collective devices under Article XII of the Rome Convention.

I guess I will put this in the form of a statement.

My impression is that there is really no strong interest. They pay it lip service but, among the unions in the United States, they are in very strong contradistinction to the unions internationally—in England, particularly. There really is not that much interest in the Rome Convention.

The opposition to the Rome Convention came very much from the broadcasters. And there was not any countervailing pressure to do anything with it, and therefore, nothing has ever been done with it.

Mr. WOLFF. I think it was the personality of the people in the unions—you know them as well as I—or even better—at that time.

I can remember when they first went to Rome. There was some disagreement amongst the unions—performers' unions. That disagreement has now been dispelled. We don't have a disagreement. It was on sharing the largesse, actually. as I recall, but those were personalities, I believe, and two of the dominant ones are no longer with us.

Mr. GOLODNER. But isn't this all part of the same ball of wax?

There is no sense in talking about the Rome Convention when our own domestic law would not allow us to participate in it.

Ms. RINGER. That is one way of looking at it but, obviously, there have been conventions that preceded laws, in many cases.

What I am merely saying is: I saw no interest on the part of unions in the United States in the Rome Convention—except for a few rather general comments.

Mr. WOLFF. I have had several sessions with you at the State Department really, in regard to this subject matter. I guess I gave up depending upon the legislation that we are talking about today, because, you know, I am just sort of spiting all kinds of people there. I did not see any reason for it.

Ms. RINGER. That is a good-enough answer.

On video tape, we are having a meeting—just to break this question open and explore its dimensions—later on this month, and I hope people will be there from your sector.

Mr. WOLFF. I hope to be present.

Ms. RINGER. I have an impression—and, again, I am asking some difficult questions—you have to forgive me, but that is why we are here. We are not here to have a love feast!

I get the impression that there is some friction in the labor organizations.

Who is to have jurisdiction in this area?

Mr. WOLFF. It might be in the technical crafts, but not as far as the performers are concerned. We made our peace with our fellow people. We have no problems. None, whatsoever! I am talking to SAG today.

Ms. RINGER. On this. I am talking about video tape, and the whole question of video discs, and so forth.

Mr. WOLFF. We have made our peace.

Ms. RINGER. Who will represent the performers?

Mr. WOLFF. I had intended to be there.

Ms. RINGER. I mean, who will represent the performers?

Mr. WOLFF. We both do it now. I will give you a definitive answer—but brief.

Ms. RINGER. Brief!

Mr. WOLFF. We have made our peace, and it depends upon whether the producer is traditionally a film producer, or a live producer, or a tape producer.

AFTRA continues to represent—or, if it is in a broadcast facility, it is all ours. If it is Universal, MGM, Screen Gems—if they stay in their studios and put in tape equipment, as they are doing now—it remains with the Guild, who traditionally had a contract with them.

We have just completed a joint negotiation in Hollywood—I just got back from there—with the film and television producers.

Mr. GOLODNER. I would like to comment on that.

I know there has been talk among, particularly, the Educational Broadcast field. I don't know if that is what you are referring to—the new question of off-air taping by educational stations. I remind Bud that he and I were both in a conference at Columbia, Maryland, where the Public Broadcast people were told, "Come in and negotiate on off-air rights."

They were very reluctant to talk about it. So I don't think there is any foot-dragging.

Mr. WOLFF. There has not been a bit of that!

Mr. GOLODNER. On the union side.

Ms. RINGER. You cannot tell players without a program. I would like to get some idea here.

Mr. GOLODNER. The conflicts that you may have heard may have been on the technical side. That does not relate to copyright problems, or off-air taping problems. These problems are, for instance, "Who is going to man a particular camera?"

Ms. RINGER. I am really more interested, though, in whether SAG is going to have more of a role in this area that we are now talking about, later on. We are at the beginning of something big here. I don't know where it is going to go but, obviously, they are in the picture.

You are here speaking for them. Nevertheless, you are not really the bargaining agent in the area.

Mr. WOLFF. That is right—not in the sound recording.

Ms. RINGER. Okay.

Mr. WOLFF. No. There is no question about that. And they have enough to do.

Ms. RINGER. I think I have probably worn everybody out sufficiently with my questions, but I am very grateful to you for your prompt answers.

Thank you very much.

Our next witness is Nick Allen.

Let me ask Mr. Popham: Would you be willing to come tomorrow, so that we don't completely exhaust our audience?

Mr. POPHAM. That will be agreeable.

Ms. RINGER. Okay. Thank you.

STATEMENT ON BEHALF OF THE AMUSEMENT AND MUSIC OPERATORS ASSOCIATION BY NICHOLAS E. ALLEN, ESQ.

Mr. ALLEN. I would like to introduce Mr. Michael Weiss, with the firm of Kirkland, Ellis & Rowe.

He has supported us over the years; and he is here to support us today.

As I mentioned to you at the break, Ms. Ringer, I would like to just submit our statement—our written statement—without reading it; partly because we have been over the same ground so many times, and there really is not that much need to read it.

I will be glad to answer questions, such as you might have, on the panel.

Ms. RINGER. Did you want to add anything, Mr. Weiss?

Mr. WEISS. Not really. We did submit a statement, also. We generally support the operators. They are our greatest customers in these things, and we are interested in their health.

Ms. RINGER. You submitted a statement in response to our original inquiry. You don't have a prepared statement——

Mr. WEISS. That is true.

Ms. RINGER [continuing]. But it is available to anyone who wants to read it in the Office.

Let's leave it with that, and start immediately with the questions. Ms. Oler?

Ms. OLER. The one question I had was: In your testimony, you were worried about the $1 additional fee; and I think that that has been changed. That was a previous proposal, but at least in the counter-proposal, the fee would be a further split of the $8 fee. There would be no additional fee.

Does that remove your objections to the whole thing?

Mr. ALLEN. That removes that objection, Ms. Oler, sure! It saves over $450,000 a year, to begin with. The principle of two royalties on one performance is still in the Bill; and that is the problem we have with it.

Ms. OLER. There would be no additional money, as far as you are concerned. It is just who is getting that share of the dollar.

Mr. ALLEN. Right. By saying it in the beginning. Once you open the door, everybody knows we are not going to stay with those original rates.

Ms. OLER. I don't have any further questions.

Ms. RINGER. Mr. Katz.

Charlotte?

Ms. BOSTICK. No questions.

Ms. RINGER. Dick?

Mr. GLAGOW. Yes. I would just like to ask a couple of questions.

You have just heard Mr. Wolff and Mr. Golodner testify.

In your statement, you say that record manufacturers and performers have no need for this royalty—this performance royalty.

How do you answer their argument that there are those that are making money by exploiting the creation of the performers and the record producers, and are paying nothing?

Mr. ALLEN. Well, we are talking economics, and the impact on both sides—the user and the creator—but look at the realities of it.

Billboard reports, this year, $12 million in one of the funds. Suppose there is $1.00 a juke box a year, royalty—$450,000. The differences are so great, I think they tend to answer it, themselves: the power of the unions and the position of the performers, to establish, by contracts, sufficient compensation to throw over $12 million in one year, as against less than half a million from the juke box people. I did not know until this afternoon that there are two funds.

So I think that amplifies that answer.

Now, on the other point about free use of music, I would not be reflecting the position clearly if I just sat back and said, "Well, so what?"

But let me say, for the first time in history—this is the reality of the situation with the juke box people—for the first time in history, they are preparing to go into a licensing regime. They've got a lot of adjusting to do, and I am happy to say, Ms. Ringer, that we have begun discussions with the performing rights people, and we have had a very fine discussion with the BMI people—Mr. Weiss and I were there—last week.

But the point is, here is an industry that is endeavoring to prepare itself for licensing in a way that it had not had to do before.

Now, I would like to, also, reiterate again—as we have so many times—that juke box people have been generating lots of royalties, all along, by reason of

the fact that they are such a large consumer of records. We are estimating—I believe our estimates are conservative—we buy some 75 million records a year and, with the royalty rates that we have, you can see that several million dollars a year are going to the creators of music.

So it is sort of a distortion of the real situation to say, "There has been free use of music on the part of the juke box industry in the past." Or that, in the future, it is going to be free under the law, as it is now.

So there is a lot to be said for the status quo under the new law, as it is right now, in principle and in the economic impact.

Mr. GLASGOW. Would you comment further on the constitutional objection that you expressed in your comments—particularly in view of cases like the *Shaw* v. *Kleindeinst* case, and the *Goldstein* case.

In the *Goldstein* case, they recognized that song recordings are comparable with writings of authors.

Mr. ALLEN. I knew you would ask that!

I am thankful that Mr. Wolff was saying that he is an advocate of that!

I can't say, in the company of Ms. Ringer and all of the other lawyers present, how the Supreme Court is going to come out on this thing. In the long run, nobody here can be at all sure!

Now, I have not written a big brief on this, and I am not about to do it! I think the authorities are here on the other side of the table—namely, with Ms. Ringer.

I will just ad lib! Friend Wolff ad libbed all afternoon. I will ad lib once!

When this question was up—a couple of years ago—in the Senate, and an associate and I called on Senator Ervin of North Carolina—then the great champ on the subject, from our point of view, and pretty much a Constitutional authority—at least among his peers in the Senate.

We sat there and tossed the problem around a bit, and he said, "Just a minute."

He got up and walked over to a big wall with books all along that side, and he walked right over to one little place, and he ran his finger along the wall. It was quite clear, obviously, that he had done this before. He pulled out a little book, so large—a little thing. He flipped the pages over and he came to Article 1, Section 8, and he read it.

He got down there to the "encouragement of authors" and he stopped and he said, "Now, we are talking about performers." He said, "They are not authors. They are performers. Why should they be singled out for a Constitutional grant of a monopoly?"

And he went on from there.

This was Senator Ervin.

Well, that is about as good an authority as I can throw out this afternoon. I will leave it at that.

Mr. GLASGOW. Thank you.

Ms. RINGER. Jon?

Mr. BAUMGARTEN. I saw Ervin making a commercial, last night. [Laughter.]

He must have changed his opinion when he became a performer!

Nick, you referred to paying two royalties on one performance.

Mr. ALLEN. I like that argument. I don't know if anybody else does; but I like it.

Mr. BAUMGARTEN. Just to pierce it a bit. the answer is that it is really two performances, since it is one performance of two different things: the contribution of the publisher, as opposed on the one hand by the contribution of the record company and the performing artist on the other hand.

Putting that together for my question here: You did refer to the fact, for the first time, that the juke box people are paying money. There are those saying that they are not, for the first time, but that it is about time that the juke box people are paying money.

Mr. ALLEN. I have heard that before.

Mr. BAUMGARTEN. Just putting those together, what's wrong with taking care of the whole ball of wax?

Going beyond the rhetoric of two royalties on one performance, an equally cogent argument is that there are two performances.

Is your basic objection that the industry is just, really, new to the whole concept of paying royalties, and you have enough to worry about without dealing with performance rights societies, and you can't spend your time worrying about these things?

Or is it something deeper than that?

Mr. ALLEN. What you said is really a big part of it. I would say it is both of them.

I am not being facetious, when I say that I believe that when one track is being played, I call that one play.

If it were broken down into two pieces—the song writer's contribution, and the musician's or the performer's contribution—sure, those are in there but, good gracious, maybe there are 100 different contributions.

And, as a matter of principle: If you are going to break it down into two aspects, logically, you could just break it down into as many as there are who contribute!

There is a real potential of a proliferation of exclusive right claims that can be presented to Congress—and I don't know where the end of it would be! It does not have to be just two. It so happens that back in 1967 and 1968, the Musicians' Union and the representatives of the performers, after they had locked horns for a bunch of years, decided they could live together, and so they worked out a 50–50 thing.

Good heavens! Who knows whether it is 50–50, or not, really? It is a purely arbitrary, pragmatic thing that has happened.

It could just as well be 50 people getting together and deciding that they would push for 50 rights, and there would be all 50 rights right around the play of that record, that one time!

So I don't think it is such a facetious thing, or a distortion, to say that one performance should generate one royalty, or share in one royalty.

Mr. BAUMGARTEN. I don't want to get in a dispute with that. We could argue that for a long time—and we have been!

Could you explain to me a little bit more about the relationship between the people Mr. Weiss represents—and the people you represent?

Are the manufacturers totally distinct from the operators?

Mr. WEISS. Oh, yes. Manufacturers manufacture the machines and generally sell them to distributors, and the distributor, in an independent chain, sells them to the operators. There is almost an insulation between them!

Mr. BAUMGARTEN. So there is a manufacturer, a distributor, and an operator in one location—athough they are all different people?

Mr. ALLEN. Yes. This is the pattern. You could have a location owning a machine—this can happen, and it does happen, on a one-by-one situation, many times. But that is an exception to the real practice which goes into the business of owning and operating machines, and servicing them. It is a service business, and the manufacturers are totally separate. I know of no instance where a manufacturing concern has interest in any juke box route.

As to the distributors; that is essentially separate. I think there is a little difference among the manufactuers as to how they set up their distribution systems.

Mr. WEISS. There is one manufacturer who has part of his distribution through his own distributor. There are also one or two operators, I guess, who are working from the other end—who, also, distribute machines. But I know of no case where it goes all the way through.

Mr. BAUMGARTEN. Is the juke box industry still a viable industry in Europe?

Mr. WEISS. I don't know.

Mr. BAUMGARTEN. Your clients: Do they have foreign subsidiaries?

Mr. WEISS. I am not aware that they do in the juke box manufacturing. There are foreign juke box manufacturers; and a handful are sold in this country.

Mr. ALLEN. Were you asking the question about the viability of the juke box?

Mr. BAUMGARTEN. How wealthy is the business, in your opinion?

Mr. ALLEN. Well, let me put it this way:

Juke box operators operate juke boxes primarily as a supporting activity for games—amusement devices—and, to some extent, their vending, which goes in with that. Cigarettes, for example.

Until about two years ago, there was one juke box operator in the United States that I knew—of all of those who are members of the national organization—who operated only the juke boxes, and he was a marvel! Nobody understood how he could do it! He is out, now, by the way!

Mr. BAUMGARTEN. Somebody probably found out how he did it; and stopped him! [Laughter.]

Mr. ALLEN. I don't mean that he failed. He was a pretty good businessman.

But all juke box operators operate other things than juke boxes, and they operate juke boxes as incidentals. That is the point I want to emphasize. It is incidental to their other business.

So that—to come back to your question—a juke box operation, itself, would not be a sustaining business. It is self-sustaining only because they operate other machines—mainly amusement.

Mr. BAUMGARTEN. Instead of asking some detailed questions, let me ask you: Do you have any knowledge or information about how the performance world works in Europe vis-a-vis juke box operations?

Mr. ALLEN. We are terribly ignorant on that. We just don't have that information now. Maybe we will have to make some studies that will help out, when we get down the road a bit. But we don't have that right now.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. I think a lot of questions that I had have been answered very well.

I would like to pursue, a little bit, whether there have been any changes that are worth noting in the economics, or the structure, of the industry since the 1975 hearing in the context of the performance royalty—the compulsory license.

You did present a very bleak picture of the economics—but you did mention $450,000 which is about the figure that was bruted about at those hearings.

Is that an educated guess?

Mr. ALLEN. Yes, it is, Ms. Ringer. We have not made any new study, since then, but the input, through our periodic ratings about twice a year, is that we are still using those figures as the best figures that we think are available. I would say that is a fair figure to use—about 450,000 machines; on the order of 7,000 or so operators.

We are still figuring about 75 million records a year. That may be a little low, but that is about it.

Ms. RINGER. Right! I have very little evidence—I do have the impression that there is a trend back toward this kind of entertainment—maybe not more juke boxes, but there may be more juke box plays. There does seem to be more attraction to putting a coin in a slot rather than watching the television at a bar—that sort of thing.

Mr. ALLEN. You may be right. I am inclined to doubt it because I think the background music, to the extent that it is used, is probably offsetting that. I don't know. I must confess, I really don't know.

Ms. RINGER. You have presented the picture of this as a "dying" industry. Obviously, there were reasons for you to do that—aside from the fact that it may very well be the case.

What I am really trying to get at is some feel as to whether there are trends in music popularity, and methods of purveying. Obviously, there was a period in which everybody thought the phonograph, itself, was going out the window; the radio was "going to replace it"; the TV was "going to replace the radio."

Our boss, the Librarian of Congress, is perhaps the principal ideologist in arguing that you never replace anything; you just add on to it!

I wondered whether, as a representative of the juke box industry, you have any feeling that this industry, in its present form, will be with us around the turn of the century.

Mr. ALLEN. I am under the impression that it will have a hard time, because of technological developments; and other ways of getting musical input into establishments where there is music.

I don't know how the manufacturers see it; or whether there are any statistics available now.

Mr. WEISS. Only the very most general and summary. And that is that, I think, for the first time in about four years, one of the manufacturers made money selling juke boxes last year. I am not sure they made that selling to operators. I wonder if juke boxes are not the fashionable thing to have in a well-heeled family room. Those kinds of people are not going to be paying royalties; or anything else!

Ms. RINGER. I think there is something to that! I think there have been some sales in that area, but I don't know whether it would be enough to make a difference between a profit or a loss.

There is a question in my mind as to whether or not this is an economic area that we are plunging into since, obviously, you are going to be lumped in under a compulsory license—whatever happens here.

Mr. WEISS. I think, too, Ms. Ringer, I look forward to this under the new law when it becomes operational and, by 1980, I think there will be some reviews. Statistics will be developed and we will be able to see trends that we are not able to really perceive right now.

Ms. RINGER. Well, 1980 is an interesting date in this regard, since everything will come together at that point, I assume.

Any other questions?

Mr. BAUMGARTEN. The coin operated television machines that we now see in airports: Are your clients involved with that?

Mr. WEISS. At least one of my clients also makes some of those machines, but I am not sure if he makes any coin-operated television machines. He makes some other kinds of amusement games.

Mr. BAUMGARTEN. Are the operators represented by the Association?

Mr. ALLEN. There is no such thing in operation, I don't believe, at all. About five years ago, an experimental machine was shown at our annual convention in Chicago.

Mr. BAUMGARTEN. They have the TV machines in the Port Authority in New York. But they are not represented by your Association?

Mr. ALLEN. No.

Ms. RINGER. I think you may be talking about video players.

Mr. ALLEN. I believe I was.

Mr. BAUMGARTEN. I was talking about over-the-air television.

Mr. ALLEN. I am sorry. no.

Ms. RINGER. I think the video player is a very interesting question.

Mr. BAUMGARTEN. That was going to be my next question.

Ms. RINGER. Go ahead.

Mr. ALLEN. I don't believe they are in operation. I don't believe so. It just did not seem practical.

Ms. RINGER. But, certainly, we are going into an era where you have sound-and-picture. It is just as cheap to put the picture up, too, and, conceivably, you would have a situation in which people would put a coin in to get the music, primarily, but you would have a singer up there, too—singing at the bar.

Mr. ALLEN. Is that a non-dramatic musical work?

Ms. RINGER. It is a non-dramatic musical work. It is also an audio-visual work!

Mr. MOORE. I think, about thirty years ago, there were some machines like that.

Ms. RINGER. But they were very complicated! They had a film projector in them, and so forth.

We are at the point where we are almost ready to go with this, and I think you will have a whole new era to confront, there.

And you have thought about this in your industry?

Mr. ALLEN. I don't really believe they have given it serious thought. I am not aware of it, if they have. The manufacturers and, I think, the studios may have—but I don't think our people have.

Ms. RINGER. As far as your clients are concerned, you don't think they have.

Mr. WEISS. No. No. On that one point, no.

Ms. RINGER. I have a feeling, ten years from now, we will look back on this as being——

Mr. ALLEN. Obsolete!

Ms. RINGER [continuing]. The first discussion of something that has become a fact. I have been through this too many times not to take account of that.

I think, unless there are other questions, we have probably covered the ground.

I appreciate your coming very much.

Thank you.

Mr. ALLEN. Thank you. Glad to be here.

Ms. RINGER. We will resume in the morning.

I appreciate very much, Mr. Popham, your willingness to appear tomorrow. I think everybody is pretty exhausted.

We will convene at 9:30, and we will just go on until we finish. We have four other rather short witnesses.

[Whereupon, at 4:35 p.m., the meeting was adjourned until July 7, 1977, at 9:30 a.m.]

Ms. RINGER. I would like to reconvene our hearing on Docket 77-6: The Performance Rights in Copyrighted Sound Recordings.

The next witness is James Popham, representing the National Association of Broadcasters.

Would you introduce your colleague, Mr. Popham?

Mr. POPHAM. Yes, I will.

STATEMENT ON BEHALF OF THE NAB BY JAMES J. POPHAM; ACCOMPANIED BY JOHN DIMLING, VICE PRESIDENT, NAB, AND DIRECTOR OF RESEARCH

Mr. POPHAM. With me is Mr. John Dimling, who is an NAB Vice President and Director of Research.

I will skip over some of the other formalities this morning and go right into our statement, which is relatively informal.

Among NAB's objects, as you well know, is that of a major trade association representing the broadcast industry, for the protection of its members from "injustices and unjust exactions" and the encouragement and promotion of "customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

Today's hearing, in our view, involves not only an "unjust exaction," but, also, a proposal which would weaken the broadcast industry and prevent it from providing the best possible service to the public. That proposal, of course, is the establishment of a performance right in sound recordings.

Every day, at the flick of a switch, literally hundreds of millions of Americans hear music on their radios. The immediate source of that music is a sound recording performed by a broadcast radio station. Radio stations are the primary vehicles for the dissemination of recorded music and, thus, are partners in the business of giving the American people instant, constant, nationwide access to the product of highly creative and talented record industry.

Establishment of a performance right in sound recordings would require broadcast stations which perform sound recordings to pay copyright fees to record companies and performers for the right to perform their recordings on the air.

NAB's opposition to the establishment of a performance right in sound recordings is long-standing, well-known, and well founded. Those seeking establishment of a performance right in sound recordings attribute our opposition to establishment of such a right to simple distaste for paying additional fees for use of their recordings. Broadcasters, of course, already pay copyright fees to the authors and composers of the recorded music broadcast on their stations. The real issue which Congress has asked you to study, however, transcends the simple question of economic gain or loss to one industry or another. That issue is whether a performance right in sound recordings has any place in the copyright law of the United States and, to that question, we must answer with a resounding, "No!"

For reasons on which I will elaborate momentarily, NAB submits that establishment of a performance right in sound recordings is constitutionally questionable. Beyond that, as a matter of national policy, it is unnecessary, unwise, and unfair. We also believe the arguments advanced in favor of establishment of a performance right in sound recordings, while superficially and theoretically appealing, fly directly in the face of economic reality, and fail to take account of important national goals.

Article I, Section 8 of the Constitution of the United States provides that Congress shall have the power "to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."

Article I, Section 8, obviously, is permissive not mandatory. The Constitution hardly demands that Congress afford every type of copyright protection to all varieties of artistic endeavor. It permits Congress to do so, in its legislative judgment, when establishment of a particular copyright would constitute sound public policy. Indeed, Congress should be circumspect in establishment of new copyrights because arrayed against such action are two or our most important national policy goals—those of competition and freedom of speech and expression. A copyright, after all, is a governmentally-sanctioned monopoly. In a nation such as ours, with an economic system and philosophy firmly rooted in free competition, monopoly is anathema. Therefore, monopoly status can be conferred on an endeavor only for overriding reasons.

Similarly, we are loathe to place any restraints on an individual's First Amendment rights to speak and express himself as he so desires. Only those restraints which reasonably further more imperative national interests are tolerated.

The tension between establishment of copyright protection, and our long-standing traditions of free speech and free competition, requires careful scutiny of proposals to expand copyright protection. Before we take a step which is inherently inimical to our most fundamental goals and traditions, we must be absolutely certain that step is "necessary and effective toward promoting progress in science and the useful arts." To be blunt, if a bit more abstract, we should not embrace ineffective solutions to non-existent problems!

Proponents of the performance right in sound recordings have sought to establish the need for a performance right in sound recordings, and their arguments do have some appeal. We have heard about "White Christmas" and the "Yellow Rose of Texas," for example—songs which were largely unnoticed by the public until certain performers lent their accents or styles to the music and lyrics composed and authored by others.

Now, "White Christmas" and the "Yellow Rose of Texas" are veritable classics, thanks to Bing Crosby and Mitch Miller. Certainly, it is argued, Mitch and Bing are as much artists or creative talents as the original composers who are compensated by royalty payments. Mitch and Bing should be compensated, too. Furthermore, the proponents imply that numerous "would-be classics" are awaiting to be rescued from oblivion, if only performers were properly compensated for their efforts via a performance right in sound recordings.

The romantic appeal of these arguments, however, must give way to a realistic assessment of the need for a performance right. The basic question is whether performers and record companies are adequately compensated in the absence of a performance right in sound recordings; or must we further reward their talents in order to "promote progress in the useful arts?"

We submit that performers and record companies are well compensated for their efforts and, thus, no need for establishment of a performance right in sound recordings can be demonstrated. The revenues which would flow to performers and record companies if a performance right in sound recording were established would, in effect, constitute an unwarranted windfall.

Several years ago, NAB retained Dr. Frederic Stuart, Professor of Business Statistics at Hofstra University, to estimate the relative extents to which the various parties to record-production, distribution and performance were compensated in the absence of a performance right in sound recordings. Dr. Stuart calculated the revenue from two sources—record sales and broadcast performance license fees—and estimated the relative amounts of such revenue flowing to the four parties to the production, distribution and performance of the sound recording. The four parties are the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record.

NAB presented the results of Dr. Stuart's research before the last Congress, but those enlightening results bear repeating today. With no performance right in sound recordings, only composers and publishers receive payment for broadcast performances. On the other hand, all four parties—composers, publishers, performing artists and record companies—share in the revenues from record sales.

Based on revenue estimates generated by a random sample of records, Dr. Stuart found that performing artists and, to an even greater extent, record companies, received shares of record sale and performance revenues which exceeded those of composers and publishers. The income distribution figures, themselves, are startling. Composers received $2,570,000, or 13 percent, of the revenues generated by the random sample of records. Publishers received $2,910,000, or 15 percent, also, or $2,860,000. Record companies, after variable manufacturing costs, received $10,720,000, or the remaining 56 percent of the revenues.

Dr. Stuart refined these results to reflect two important factors:

1. The cost of unsuccessful records which must be borne by performing artists and record companies, thereby reducing the amount of money they receive; and

2. The royalties from broadcast performance received by performing artists who also are the composers and/or publishers of the songs they record.

When so refined, the revenue distribution from the same random sample of records was as follows:

Composers received $1,530,000 or 9 percent of the revenues.

Publishers received $1,200,000 or 7 percent of the revenues.

Performing Artists received $4,200,000, or 25 percent of the revenues.

Record companies received $10,000,000 or 59 percent of the revenues.

Dr. Stuart concluded: "The foregoing analysis shows the performing artist to be . . . well ahead of . . . composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies; and none of these figures takes into account the substantial revenues generated by live concerts."

This study squarely rebuts allegations of the need for a performance right in sound recordings. The compensation received by performing artists compares favorably with, or exceeds, the compensation received by composers and publishers. The compensation received by record companies far exceeds that received by performing artists, composers and publishers. Therefore, the present copyright law provides adequate incentives to the production and distribution of sound recordings.

A performance right in sound recordings would not only be unnecessary, but it would also be unproductive. The supposed benefits which would flow from providing greater rewards for creative efforts in the production of sound recordings would be illusory—the assumption that the prospect of additional compensation would stimulate additional creative efforts being valid in theory only. No one can deny that successful recording artists are amply rewarded and hardly need further encouragement. Nor do the record companies which produce and distribute their recordings. The arguments for a performance royalty thus are particularly appealing in the case of unknown, unproven performers who record songs of unproven authors and composers. A performance right in sound recordings allegedly would provide a new stimulus to recording and distribution of their performances.

But would it, really?

Law Professors Robert Bard and Lewis Kurlantzick have conducted an extensive analysis of the impact of a performance right in sound recordings. It was published in the George Washington Law Review, Vol. 43, No. 1, November 1974 at pages 152 through 238. Regarding the possibility that a performance right in sound recordings would stimulate recording of unproven songwriters and performers, they pointed out that:

"Records of new songs from unproven composers, performed by unproven artists, are risky enterprises, and decisions to make such records are based on educated guesses regarding the sales potential and record companies' need to maintain their flow of new releases.

"Public performance revenues in these instances will be very difficult to calculate, and only represent a small fraction of revenues obtainable from record sales. The margin of error in these decisions is so large that the small amounts of additional potential revenues from the sale of a public performance right are unlikely to be considered."

In short, a performance right in sound recordings will provide no stimulus to the creative endeavor of unknown and unproven performers.

A performance right in sound recordings would be similarly useless in stimulating production of classical records. Again, Professors Bard and Kurlantzick point out that the "increased income from the sale of performance rights is far too small to be considered in estimating the potential revenues from new classical record releases."

Looking to legislation proposed in the 93rd Congress, they estimated that performers and producers of classical music recordings would gain "no more than $59,000 from public performance fees, and probably less." This amounts to less than two-tenths of one percent of the $32 million dollars generated by classical music sales in 1973. It would be described, generously, as a drop in the bucket, in terms of providing any stimulus to classical record production or enhancing rewards to classical music performers.

Providing additional compensation to unknown performers and classical music performers is a most appealing goal. The illusory and theoretical benefits of a performance right in sound recordings, however, provides no real means of achieving that goal.

Furthermore, it is doubtful that performers would benefit at all from a performance right in sound recordings. The inordinate share of revenue which flow to the record companies evidences the overwhelming strength of the record companies' bargaining position. If we made the relatively safe assumption that the record companies will seek to maximize their gains, through their leverage in the bargaining process, they will have every reason to reduce performers' compensation to the extent the performers benefit from performance royalties.

Thus, the record companies' already substantial share of the revenues from record sales will be augmented directly by their own performance right windfall and indirectly by the extraction of at least some portion of the performer's share in the performance right royalties. Establishment of a performance right in sound recordings then would not shift bargaining power from one part to another in a way which would lead to any increase in performers' share of recording industry revenues.

In view of the lack of need for a performance right in sound recordings, and the inability of performance rights to stimulate the creative efforts of recording artists, enactment of a performance right in sound recordings would exceed the powers granted Congress in the Constitution. Article I, Section 8, empowers Congress to establish copyrights merely for the purpose of reallocating revenues from one industry to another. Yet, that would be the only real effect of a performance right in sound recordings. Thus, we submit that the establishment of a performance right in sound recordings would constitute not only an unsound public policy judgment, but a Constitutionally impermissible act, as well.

Let me digress for a moment to anticipate a common, but totally unfounded, criticism of our opposition to performance right in sound recordings. Some say that if Congress has the power to create exclusive reproduction rights in sound recordings, then, certainly, it also must have the power to establish a performance right.

NAB, of course, did support establishment of the limited copyright in sound recordings. In contrast to the performance right, however, creation of that right was a necessary and effective measure designed to promote progress in science and the useful arts. It was necessary to provide protection against unauthorized reproduction, or "piracy" of sound recordings, which had permitted record pirates to siphon rewards for creative endeavor properly belonging to the recording industry. A performing right, on the other hand, is not necessitated by any similar injustice or threat to the integrity of the creative process.

In view of the above, we submit that establishment of a performance right in sound recordings is unnecessary to satisfy any demonstrable need or otherwise promote any legitimate interest. A performance right in sound recordings—in simplest terms—would produce no public benefit. On the other hand, establishment of a performance right would be costly in public interest terms and highly inequitable.

Most of my station's programming is composed of recorded music. I cannot deny that I benefit from the use of that recorded music; but the performers of that music, and the record companies which produced and distributed the sound recordings also benefit handsomely from the constant, continuous exposure of their products on my station. To require stations to play their records, thus, seems to me highly inequitable. Time on stations is all they have to sell. They should not be required to pay for the right of devoting a substantial portion of that time to promotion of another industry's product.

We obviously disagree with the record industry over the desirability of a performance right in sound recordings. Yet we clearly agree that the exposure a station provides their product indirectly compensates recording artists and record companies. The promotional benefit reaped by recording artists and record companies is staggering and, perhaps, the very reason for their overwhelming financial success. The record companies readily acknowledge the value of broadcast exposure to their success.

Stan Cornyn of Warner Brothers Records is quoted in *Daily Variety* of March 4, 1975, as saying:

"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 Warners won't even put an album out unless it will get air play."

How important is radio to recording artists?

Bobby Colomby, the drummer of the rock group, "Blood, Sweat and Tears," appearing on the radio program "The Politics of Pop," broadcast June 5, 1975, put it this way: "Well, that is it . . . what you're doing is . . . you're advertising."

Perhaps the best indication of the value of broadcast exposure to the recording industry is the money they will spend to promote air play of their records. Consider the following excerpt from the October 27, 1975, edition of Newsweek concerning a Bruce Springsteen album:

"The LP has sold 600,000 so far, and Columbia has spent $200,000 promoting it. By the end of the year, they will spend an additional $50,000 for TV spots on the album. 'These are very large expenditures for a record company: we depend on airplay which cannot be bought,' says Bruce Lundvall, Columbia Records' vice president. 'What the public does not understand is that when you spend $100,000 on an album for a major artist, your investment is not so much on media as on the number of people you have out there pushing the artist for airplay.' Now, for the first time, a Springsteen single, "Born to Run," has broken through many major AM stations where the mass audience listens."

In the last Congress, Mr. Wayne Cornils, then general manager of KFXD-AM and FM in Nampa, Idaho, related to the House subcommittee considering the performance right in sound recordings, how local record retailers relied on radio exposure to promote record sales. Mr. Cornils quoted one drugstore manager as telling him, "If it were not for record exposure on radio, I would not have a record department."

He also noted that one local tape retailer ordered 8-track and cassette tapes on the basis of Mr. Cornils' station's play list. Obviously, radio sells records, but it does even more: Radio exposure of recording artists also enables them to charge substantial fees for personal appearances, and to play to full houses virtually everywhere they appear.

As is apparent, we broadcasters are more than mere beneficiaries of the creativity of the recording artists and record companies. We are really partners in the creative process. It is, after all, the efforts of radio broadcasters that are primarily responsible for huge record sales and huge audiences at recording artists' concerts. Radio broadcasters, too, serve the creative process. We ensure broad exposure for creative works via airplay of records and, thereby, promote and stimulate the sale of original artistry. We, too, insure appropriate records for creative endeavors, and encourage additional creative efforts by record companies and recording artists.

Our role in this creative partnership is of considerable benefit to the record industry. Record sales revenues have grown, dramatically, to $2.76 billion in 1975. Radio industry revenues were over one billion dollars less.

To require broadcasters—who contribute so much to the creative process and the success of record companies and performing artists—to pay the beneficiaries of our efforts for the right to continue to make this invaluable contribution would be grossly inequitable. In fact, because record companies and recording artists really need no additional stimulus to their creative abilities, and because a performance right in sound recordings would provide no real stimulus to creativity, in any event, it would be more than inequitable: It would be outrageous!

We have seen that a performance right in sound recordings is unnecessary, would be nonproductive and would be inequitable. Common sense would tell us to stop at this point and forget it, because no case can be made in support of this addition to our copyright law.

Nonetheless, let me tell you how establishment of a performance right in sound recordings would affect the radio broadcast industry and, moreover, how our listeners—the public—would be affected.

Establishment of a performance right in sound recordings would jeopardize achievement of an important national policy goal—namely, the maintenance and development of a nationwide, but locally oriented radio broadcast service. Primary responsibility for achievement rests with the Federal Communications Commission, and the United States Supreme Court has stated that "the significance of the Commission's efforts can scarcely be exaggerated. for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population."

Consequently, the effect of a performance right in sound recordings must be given considerable weight in reaching a determination on the desirability of establishing such a right.

Payments made by radio broadcasters to performers and record companies would impose a substantial burden on the radio industry. They would threaten not only the vitality and the quality of the industry, and reduce its capacity to serve the public, but, also, threaten the viability of numerous stations, and lead to reduction or total loss of service in many communities.

For purposes of illustration, NAB has calculated the total payments required of the radio industry under the fee schedule in H.R. 6063, based on the latest FCC AM and FM Broadcast Financial Data. The total payments for the entire radio industry would be $15.2 million! That is data from 1975.

Payments of this magnitude would have a substantial impact on the radio industry. Total pre-tax industry profits were $90.7 million in 1975. Thus, the total payment, under the presently proposed legislation, represents 16.8 percent or slightly over one-sixth of industry profits.

While it is easy to think of broadcasting as an industry swollen with alleged monopoly profits, and easily able to withstand a reallocation of one-sixth of its profits to record companies and performing artists, that impression bears little resemblance to reality.

First, radio is highly competitive.

Just turn your dial and consider the number of stations you hear—and more stations begin operation each month.

Second, many, many radio stations lose money.

In 1975, nearly 40 percent of the AM and combination AM/FM stations lost money; 60 percent of the independent FM stations lost money. Notably, unprofitable operation is not characteristic only of smaller stations which would pay a flat fee, i.e., those with revenues greater than $200,000. Even among stations with revenues greater than $200,000, only 70 percent reported profitable operation in 1975. Obviously, for the many unprofitable and barely-profitable stations, imposition of a record performance royalty would be particularly burdensome, and severely detrimental to their ability to provide the best possible service to the public.

In conclusion, broadcast stations should not and need not be required to subsidize record companies and performers who already are amply rewarded for their creative efforts, and who already benefit continuously from broadcast exposure and promotion of their records.

Establishment of a performance right in sound recordings is unsound—economically, constitutionally, and as a matter for fundamental statutory policy. For these reasons, we ask that you recommend against inclusion of a performance right in sound recordings in the copyright law of the United States.

Thank you very much.

Ms. RINGER. Thank you, Mr. Popham, for a very clear and well-stated argument.

Did you want to add anything, Mr. Dimling, at this time?

Mr. DIMLING. No. I am here just to provide what help I can in answering questions.

Ms. RINGER. Thank you very much.

Can I ask you, Ms. Oler, to start the questions?

Ms. OLER. I have two questions, based on my reading of your original statement, which was pretty much what you presented here today.

Mr. POPHAM. Right.

Ms. OLER. It seems to me that you have two major arguments. The first one is constitutional, and the second one is economic.

On the constitutional argument, I think the thrust of your whole argument is that it would be contrary to the First and Fourteenth Amendments to create a new copyright for these performances.

I wonder, in light of last week's Supreme Court decision in the *Zacchini* case, whether you still hold to that argument.

I guess you know, probably, that in that case, the Court held that Ohio could, constitutionally, protect a human cannonball's rights in his performance.

Mr. POPHAM. Well, in the *Zacchini* case, we are talking about a specific Ohio law which created a right of publicity in Zacchini's act, or similar acts.

First, I think this is distinguishable from a "copyright."

Second, there has, obviously, never been a Supreme Court ruling on a performance right in sound recordings. Until there is such a ruling, we believe that is open to question. We are willing to—and will continue to—argue that constitutional arguments are valid.

Ms. OLER. So you would distinguish it simply on the basis that this is a common law statute, even though the Court analogized it to a copyright?

Mr. POPHAM. Well, I confess that I haven't seen the decision, yet.

Ms. RINGER. I have seen it.

Mr. POPHAM. But I would make that distinction between the two. Right.

Ms. OLER. On the economic arguments, I have a problem, since we have been charged with writing this report. Your figures show that what you would be paying out under H.R. 6063, just for record broadcasts, would be in the neighborhood of $15 million.

The record industry, on the other hand, estimates that the total revenues from the whole thing, covering background music, juke boxes, and every other kind of performance that would be covered, would be in the neighborhood of $11 million. That is pretty wide disparity; and I wonder if it is not possible for the parties to come up with some kind of ball park figure that is reasonably close. Otherwise, you know, you are tempted to conclude that each side is throwing up a smoke screen; and whom do you believe?

Mr. DIMLING. May I respond to that?

We would, certainly, be happy to sit down with them. I believe—in the material that we have submitted—the details of our calculations were laid out in some detail. If not, we would be happy to provide them.

We worked from SEC financial data, which was necessary because of the step feature of the payments required in the proposed legislation, and, while we may be off by $100,000 or something like that, I am quite sure that the numbers can be substantiated.

So we would be happy to sit down with anybody—or sit down with you—and go over our calculations.

Ms. OLER. Yes. I think that would be useful.

Mr. DIMLING. Certainly!

Mr. POPHAM. May I go back to your initial question?

Incidentally, there are a number of constitutional arguments which have been made. The one that we concentrated on today was that the performance rights in sound recordings are not really going to provide any stimulus or progress to science and the useful arts. Therefore, it will exceed the power of Congress—which is a different argument.

Ms. OLER. But that is based on the economics of the situation.

Mr. POPHAM. Well, they are related arguments.

Ms. OLER. Right!

The constitutional argument and the economic argument are certainly related.

Ms. OLER. Whereas the First and Fourteenth Amendments are really conceptual?

Mr. POPHAM. Yes.

Ms. OLER. Okay.

Well, I think I know the answer to this one, but I will ask it for the record, anyway.

If there is some question about what the economic problems stemming from this would be, and what the revenues would be, would it in any way solve your problems if there were a law proposed with a termination date?

Mr. POPHAM. No. I don't think so, because it certainly would not satisfy our constitutional objections, and it would be, in our view, a pointless endeavor to impose this burden on the broadcast industry—even on a temporary basis.

Ms. OLER. Okay. That is all I have.

Ms. RINGER. Thank you.

Let me ask Mr. Katz if he has any questions.

Mr. KATZ. Yes. I have several questions.

First, I would like to ask you to explain a couple of points that you made in your statement by way of background.

At one point you suggest that the crucial issue in this controversy is whether or not a performance right for sound recordings belongs in a copyright law. I assume that, as part of that, you state that the basic question is whether or not there is adequate compensation in terms of the promotion of progress to science and the useful arts.

Could you explain a little bit about how you determine what is "adequate"? What factors do you consider?

Mr. POPHAM. Well, I think the factor that we looked to, here, was a comparison between, or among. I guess, the various parties who receive revenues from record sales, and from broadcast performance fees.

We found them to be comparable, on the theory that composers and publishers are adequately compensated, and the compensation which now flows to the performing artists from the record companies certainly exceeds what the publishers and authors are receiving.

Mr. KATZ. That really leads me into the heart of what I am confused about, and those are, really, the statistics that you referred to.

I am a little unclear about, first of all, the basis for the sampling.

You said "it was random." I am a little concerned about who is put into which category.

You make some reference to the group that includes both performing artists and composers, and then you refer to statistics—a group of four statistics. I think it is on page seven of your statement, at the bottom—you refer to one class as composers, and one class as performing artists. I am not clear from that which group those who are both fall into.

Could you explain that?

Mr. POPHAM. The first four figures, I think, did not take into account the fact that some performing artists were also composers—whereas the second group did.

Mr. DIMLING. If I may interject—in the second group, in the case of the artists who were also composers, who got royalties from air play, the money from air play is included in the figure for the performing artists. So the $4,200,000 includes their royalties from air play, as well as from record sales.

Mr. KATZ. But those royalties are only the royalties that they receive as composers.

Mr. DIMLING. That is right. That is right.

Mr. KATZ. Those are not royalties that they are receiving by virtue of the fact that they are performers as well.

Mr. DIMLING. Right.

Mr. KATZ. So then, if you are going to make the distinction between composers and performing artists, it just seems to me it would be more reflective of the situation to then increase the statistics, that you referred to in the same cluster, for composers: that those royalties would be included in that picture.

They are not receiving royalties, really, as performers.

Is this the only basis that you have for saying the performers share in performance royalties and broadcast performance royalties?

That is really the heart of my question.

Mr. DIMLING. Yes. I think it is.

Basically, the argument we made about the nature of the distribution, and the extent to which it appeared to be adequate, I would say, is based on the issues at the top of page 7—not the figures at the bottom of page 7. The figures at the bottom of page 7 simply take into account that a performing artist, by virtue of his having airplay of his compositions, gets compensated in two ways instead of in one way, and indeed, very frequently—by virtue of his popularity, he—not as a composer but as a performer—is able to get air play of his own compositions in a way that a non-performing composer cannot.

Mr. KATZ. You suggest that he is getting compensated in two ways, rather than one way?

Mr. DIMLING. Once as a composer and, secondly, as an artist.

Mr. KATZ. Right! Isn't there a distinction between the act of composing and the act of performing?

Mr. DIMLING. Sure. Sure!

Mr. KATZ. I am just a little bit unclear about that.

Maybe you could explain to me, a little bit more, how—in what other ways, if there are any—performers do share in the performance revenues that are presently generated.

Mr. POPHAM. BMI, ASCAP?

Mr. KATZ. Yes.

Mr. POPHAM. Only if they are composers. They benefit in other ways from air play but—if they are not composers and publishers—they clearly don't get any copyright profits that broadcasters currently make.

Mr. KATZ. So, then, the conclusion would be that, to the extent that the performers are distinct from composers, those performers do not receive any performance royalties—any compensation for the use of their work.

Mr. DIMLING. They are two different things.

They don't receive any performance royalties or any copyright payments, but, as Mr. Popham indicated, we believe they receive substantial benefit from the air play of the records——

Mr. KATZ. Substantial "benefit" from the air play?

Mr. DIMLING [continuing]. In terms of generating record sales, in terms of generating popularity.

Mr. KATZ. But you were referring to the sale of the records in terms of the "increased"—presumably—popularity?

Mr. DIMLING. Yes.

Mr. KATZ. Their ability, in some instance, to draw larger audiences at live performances.

That seems to me to be a little bit removed from the actual performance that they have recorded—the use of that performance.

Do you follow the distinction that I am trying to draw?

Mr. DIMLING. I guess that I do.

While it is removed, I think there is a fairly clear direction of causality. A performance that is recorded and played over the air is clearly distinct from somebody buying a record; or a performance for which the artist is compensated.

We are simply suggesting that one flows from the other.

Mr. KATZ. To follow that argument, then, couldn't you really say the same thing about anything that is broadcast; that it receives substantial benefits simply from the exposure?

Mr. DIMLING. I don't know about "anything" but, certainly, that is true of a lot of things that are broadcast. I assume that people on the Johnny Carson show benefit from more than the $300 they get—in international exposure.

Mr. KATZ. So that there are other benefits, whether or not you choose to call them incidentals.

It is not important, but there is a distinction.

Would you agree to that?

There is a distinction between the actual performance, or the actual appearance on the Johnny Carson show, if you will, and the incidental benefits that derive from that.

Mr. DIMLING. Sure. I am not sure what the significance of the distinction is, but they are certainly different things.

Mr. POPHAM. When the performer and/or the composer gets the money, I don't think he is terribly concerned about where it really came from. The fact of the matter is that he has received compensation.

Mr. KATZ. Thank you. That is a very nice lead into the remainder of my questions.

If Sergio Mendez is on the Johnny Carson show, he is on with a group of nine or ten other people, and they perform. But, after they finish their song, Sergio Mendez is the only one who walks over and sits down and talks to Johnny Carson. Sergio Mendez may derive a great deal of benefit from that.

What about the other people that support him?

Mr. POPHAM. I would certainly say that the supporting people gain quite a bit from his popularity—from Sergio Mendez' popularity. If he were not a popular artist, obviously, they would have to look somewhere else for employment.

Mr. KATZ. My question, again, relates to the statistics which you referred to. You talk about two groups; successful artists, and unknown artists.

Well, it is my impression that there are a great number of people that fall somewhere in the middle. The proportion of performers who are hugely successful—I think you used that word several times—seems to be rather small, compared to the large groups of people who do make their livings as performers.

Have you given any consideration to that in the development of any statistics about who is going to be affected, and who will be benefited by any performance?

You referred to the law review article by Professors Bard and Kurlantizick.

You refer to one particular quotation concerning the impact.

Mr. POPHAM. Right.

Mr. KATZ. I checked the article, and the sentence that follows your quotation—if I can read it—is that: "* * * Whatever the impact of a record public performance right upon the behavior of individual record companies, overall record publication will increase and, assuming some elasticity in record demand, record prices should decrease."

That seems to cast a little bit of a different light on the implication of the quotation that you read.

Could you comment on that, at all?

Mr. POPHAM. Well, the point of the quotation is that creating a performance right in sound recordings is not going to be beneficial to the unproven artist and, possibly, even to these mid-range groups of artists that you are talking about; to the extent that the record companies are going to be creating new and additional records which will benefit them in one way or another.

Mr. DIMLING. May I make a comment about that, too, because it relates to some of the data.

The amounts of money that we are talking about here—while a substantial portion of the profits of the broadcasting industry—is really quite small in relationship to the total revenues of the record industry. With the kind of elasticity that is talked about there—if it is anything like a unitary elasticity—the drop in price, or the increase in production, would hardly be noticed. It would be less than 1 percent.

Mr. KATZ. I see.

You also make some reference, particularly to the problems associated with classical records.

Mr. POPHAM. Right.

Mr. KATZ. I think everyone knows the cost of producing those records is very high, and that the returns are relatively low compared to some of the other products of the record industry.

You refer to the statistics in the law review article, which states that only about $59,000 is expected to be generated.

I get the impression that you have made the assumption that only that money which is specifically generated from the performance of classical records will, potentially, be turned back into the production of classical records.

Mr. POPHAM. I think they also made that assumption when they came up with that figure. They also dealt with the question of whether or not profits or other amounts received from the performance royalties were going to be used to subsidize classical musical recordings.

I believe they came to the conclusion that there was no reason to believe that they would be, necessarily.

Mr. KATZ. By the same token, is there reason to believe they would not?

In other words, if the record companies are able to defray their costs of production, isn't it equally likely, at this point, that they will be able—or at least be in a position—to have developmental projects?

Mr. POPHAM. They may be in a better position, simply because they have more money in the coffers, so to speak, but it does not necessarily mean that they are going to do that.

Mr. KATZ. I think there is one last question that I have about something that is bothering me personally a little bit. Maybe you could assuage my fears.

There has been a lot of talk about the "American way" in the last couple of days, "free market competition," and so forth.

I am a little bit confused when I hear the "free market" argument in reverse, coming from you, that there is too much competition in the broadcast industry, so that a performance royalty is really going to be such an added burden, because it is really going to be a vast hardship on broadcasters, as an industry.

I was wondering if you could explain that to me a little bit.

Mr. POPHAM. Well, I am not sure that I understand the question.

Mr. KATZ. Well, it was said yesterday by Mr. Dorf, and in your statement, today, that the "American way," really, is free competition, and that there is really no need for Congressional interference in this situation, in the form of creation of a performance right.

Then I also hear the argument that, in the broadcast industry, there is too much competition.

Mr. POPHAM. I don't think we said there was too much competition, at all. We did not imply, or mean to imply, certainly, that competition in the broadcast industry was bad. We simply said that, as a result of competition in the broadcast industry, there are quite a few radio stations and, obviously, a number of those stations are simply not making money.

Mr. KATZ. Yes. I understand that.

You say that it is "highly competitive." That is the term that you use.

Mr. POPHAM. Yes!

Mr. KATZ. What I would like you to explain to me is why I should consider that factor in whether or not there should be a performance right.

Mr. POPHAM. Well, I think it is well understood that the impact on the broadcasting industry should come into play in making this determination and, while competition on some abstract, theoretical level may not be a terribly relative factor, certainly the fact that, as a result of competition in the broadcast industry, there are a number of stations that are not operating on a profitable basis and will be substantially affected by having to shell out more of their revenues for performance royalties—that would, certainly, be a relevant consideration.

Mr. KATZ. But then, won't the free market, in its free operation, really solve those problems?

Mr. POPHAM. I don't think it is going to, no. I don't think it would solve the problem. The free market is already operating to a great extent in the radio industry.

Mr. KATZ. I think it is also acknowledged that there are other considerations, such as promotion of progress in science and the useful arts.

Mr. POPHAM. Right.

Mr. KATZ. And if Congress, in its determination, feels that a certain factor—an additional statute—will promote progress in science and the useful arts. what is the balance between that consideration and arguments of free competition?

Mr. POPHAM. Well, first of all, we don't feel that the performance right is going to promote science and the useful arts, to any extent!

Mr. KATZ. Assume now, that the Congress decides that it will—to the extent that they consider it a free market—as it affects the radio industry.

Mr. POPHAM. Other than to take away, basically, one-sixth of the radio industry's profit, I am not sure that the performance right is going to be a tremendous competitive factor in the broadcast industry.

Mr. KATZ. Thank you. I have no further questions.

Ms. RINGER. Thank you.

Charlotte?

Ms. BOSTICK. Yes, I have one question.

I would like to know whether the 16 percent, that you say that you would be paying in performance royalties, is based on the flat fee in H.R. 1663; or is based on the optional fee.

Mr. DIMLING. It is based on one percent of the revenues for stations with over $200,000, I think, in revenues. There is a $750.00 flat fee for stations.

I forget the breakdown, but it is $750, and 1 percent for stations with over $200,000 in revenues.

Ms. BOSTICK. Okay. You state that this 16 percent is "pre-tax"?

Mr. POPHAM. Yes.

Ms. BOSTICK. Do you have any idea—I don't know how you figure it out—but do you have any idea what percentage it would be if you expensed that 16 percent; and what it would be after taxes?

Mr. DIMLING. It would be approximately the same, because it would be, presumably, business expense.

So it is about the same amount. We report it as pre-tax simply because that is the only way that the FCC reports the date.

Ms. BOSTICK. I see. Okay.

Do you have any intention if it should come to pass that the performance royalties would come into law—of passing the cost on?

Or would you attempt to absorb that?

Mr. POPHAM. I think the key to your question is whether or not the radio stations and television stations which would be affected could raise their advertising rates to compensate for paying out this additional amount of money.

The answer to that is, "No, they can't," because advertising rates are based on the audience the station can draw, as well as other competitive factors in the market. It is not simply a matter of passing the cost on. It would be absorbed, yes.

Ms. BOSTICK. I have no other questions, thank you.

Ms. RINGER. Waldo?

Mr. MOORE. Yes.

What proportion of your radio audience are listeners in automobiles? Do you have any idea?

Mr. POPHAM. Yes. It amounts to about 25 percent of total listening hours. Between 20 and 25 percent of the total listening occurs in automobiles.

Mr. MOORE. When the gasoline rationing took place, did that make a flip on your charts?

Mr. POPHAM. Not really. Not very much.

Mr. MOORE. Well, if the dearth of gasoline was prolonged, do you think that would have any effect on marginal stations, for example?

Mr. DIMLING. I certainly think that it could.

One of the things that happens with gas rationing, or gas shortages, though, is that people tend to ride in car pools, and things like that. And, from the standpoint of a radio audience having four people in one car listening to the station, or four people in four cars listening to the station, does not affect the total numbers.

Mr. MOORE. Mass transit would, I take it.

Mr. DIMLING. I think that is probably true.

Mr. MOORE. Do you find that there is any impact from the CB radio?

Mr. DIMLING. Not very much. People in the radio industry have been concerned about this, but it has not shown up in the numbers to any great extent.

Mr. MOORE. Do you think there is any logical relationship between the CB phenomenon and the lack of live performances on radio?

This is highly speculative, of course.

Mr. POPHAM. I cannot perceive any. I never thought about it, at any rate.

Mr. DIMLING. It is an interesting comment.

Mr. MOORE. Thank you very much.

Ms. RINGER. Dick Glasgow.

Mr. GLASGOW. Yes.

Do you feel that there is some kind of basis in law for your argument that broadcasters don't have to pay the performers for the use of their property because they are already adequately compensated?

Mr. Wolff said yesterday if he did not buy a ticket at American Airlines, he would not last very long because he could not say, "Well, American Airlines is making thousands of dollars and therefore, they don't need my $50—or whatever it is—to buy this ticket."

Is there a basis in law for this argument?

Mr. POPHAM. I think that, very definitely, there is! I think the Constitution prescribes a certain power for Congress that they may act in the copyright area if it is to promote science and the useful arts.

As we said, this does not encompass the power to simply reallocate profits from one industry into another industry. And the performance right in sound recordings is not, in fact, going to promote science and the useful arts, at all!

Mr. DIMLING. I just wanted to indicate that I think that the analogy that Mr. Wolff used yesterday, while it is rather dramatic, was somewhat misplaced.

My feeling is that if Mr. Wolff's flying American Airlines encouraged lots of other people to fly American Airlines, they would be happy to give him a ticket on the plane! And if one is trying to analogize the circumstances he described with radio's play of records, I think you would have to take that into account.

Mr. GLASGOW. Do you feel that you are taking the property of the performers in using it without compensation?

Do you feel that at all?

Mr. POPHAM. Not really, because we feel we are providing a great deal of indirect compensation to them through promoting their works or their product.

Mr. GLASGOW. When you responded to one of Mr. Katz's questions referring to the study by Dr. Stuart, did you mean that none of the money received by the performing artist went to side men and background vocalists, and people like that? None of that went to them?

Mr. DIMLING. That is my understanding, but that is a reflection of the contract negotiations of the people that make the records with the record companies and, as I think we suggested, if there is a problem for those sorts of people—I neither deny or accept that there is—but if there is a problem, it really relates to their relatively weak bargaining position with the record companies.

Mr. POPHAM. I would add to that—going back to Sergio Mendez—certainly a side man, negotiating with Sergio Mendez for compensation for his work knows that Sergio Mendez is going to make a lot more money than he is, and should be in a much stronger bargaining position.

Mr. GLASCOW. Mr. Wolff testified that they were not in a strong bargaining position.

We get bombarded by letters from the broadcasters saying that this is "going to put me out of business," etc. You testified that the broadcasting industry is almost on the rocks in some places.

Do you have any idea how much of this really would be detrimental—not detrimental but really fatal to your business?

Surely you have some idea of what percentage of the broadcasters will be put out of business.

Do you have any idea at all?

Mr. DIMLING. I don't think we have an idea about what percentage would be out of business. The data that Mr. Popham cited indicates simply that there is a very large number of stations that are either losing money, or right at the break-even point, and it is kind of hard to predict how people would behave.

It is just as clear that there is not very much money there to split any further than it is being split.

Mr. POPHAM. I think there is more to this than simply asking who is going to be put out of business because, certainly, the type of service and the quality of service that stations provide in this community—particularly in terms of news programming, and public affairs and discussion programs, which are not remunerative to us—is going to be adversely affected by taking away a certain proportion of the station's profits, or by increasing its margin of loss. So there is more involved in simply asking, "Who is going to go out of business"?: it is what type of service the community is going to be provided by this station. It certainly could reduce the quality of that service!

Mr. DIMLING. I am sure, for instance, that there are some stations in smaller markets where the imposition of this kind of fee could make the difference between their paying for an A.P. wire, or not paying for it. I know that sounds hard to believe, but some operations are that close to the margin right now. That is the sort of reduction in service that Mr. Popham is talking about.

Mr. POPHAM. There are stations—contrary to the ones cited by Mr. Wolff, which charge hundreds of dollars for a minute—that simply charge one dollar, or two dollars for a minute of advertising.

Mr. GLASGOW. If this did become more expensive, then, to put on this kind of music, what would they do? Go to more news, or go to different kinds of broadcasting?

Mr. POPHAM. Well, I think, under the law, the choice would be simply not to play any records at all or to continue to play and pay.

Certainly stations, I think, would continue to play the music in most cases. On the other hand, the cutbacks in the service are going to come in, in other areas, such as news, public affairs, and perhaps it may affect the viability of some stations.

Mr. GLASGOW. Thank you. That is all.

Ms. RINGER. Thank you, Dick.

Jon?

Mr. BAUMGARTEN. You already are compensating by virtue of the fact that you are promoting sales with respect to the sale of records.

Doesn't that hold true for the publisher and the composer as well? Yet you do pay the publisher!

Mr. POPHAM. Yes, we do pay the publisher and the composer. On the other hand, we are benefiting the performer more than simply promoting record sales. We are also benefiting him by his personal appearance revenues, which can be tremendously substantial and, I think, flow not only to the performer but certainly to the orchestra that backs him up when he goes on the road.

Also, as we pointed out already, the shares of the revenue generated under the present process are very comparable for performers, publishers, and composers and certainly, in the case of the record industry, itself, they are very excessive in comparison.

Mr. BAUMGARTEN. How about the old days of radio, when you had live talent and paid them? I presume it promoted the sales of those persons' records and promoted their personal appearances: in fact, quite a great deal more than personal appearances today.

What is the difference between paying for live performers, and the fact that it is on wax, or tape?

Does that make a difference?

Mr. POPHAM. Well, I think it does.

I think we have a much more developed record industry today than we did at that point.

Mr. DIMLING. In the days of live radio, the performers did not volunteer to come into the studio and play for nothing. In contemporary radio, record

distributors bring records to the station and say, "Here is a free record. Play it, please."

Mr. BAUMGARTEN. I was waiting for somebody to say that.

Mr. POPHAM. Here is an example which might be like riding free on American Airlines.

Mr. BAUMGARTEN. In the whole area of constitutional arguments, have you given up the argument that the sound recording is not a right of an author, or that a performer is not an author?

Is that by-the-by?

Mr. POPHAM. No, we have not given that argument up, yet. When the Supreme Court decides against us, I suppose we will give it up. I have never had the opportunity to be in Sam Ervin's office! [Laughter.]

I think it was stated as well as it could be stated, yesterday.

Mr. BAUMGARTEN. On page 12 of your statement, here, you justify at least a production right in sound recordings. It seems to me that if they are products or writings for the purpose of a reproduction right, then they are authors or products of writing for the purpose of performance records.

Mr. POPHAM. Well, I don't know whether the Supreme Court agreed with your analysis.

Mr. BAUMGARTEN. If you accept the reproduction right that is given, which you seem to accept, how can a work be a "writing", or its creater be a "author", for protection against one form of exploitation, but not be an author or a writing in terms of other protection against exploitation?

As for your other Constitutional argument—I will get to that in a minute—I don't see the distinction between anti-piracy legislation and performance rights legislation.

Mr. POPHAM. Well, the anti-priacy legislation went to solve a very serious——

Mr. BAUMGARTEN [interposing.] It could not be enacted if they . . . [inaudible].

Mr. POPHAM. All I can do is point to the conflict between yourselves, the courts, Senator Ervin, and others, and leave it to the Supreme Court to decide when that day arises.

The other leg of the Constitutional argument that you stressed today is sort of a "but for" test. You cannot prove that it will not promote the cause of science and the useful arts. If you cannot prove that it will result in the creation of more sound recordings, then the Congress is not empowered to create the legislation.

When you secured, in the new Copyright Act, the successfully imposed imposition on cable television systems, was that a "but for" test, or is that just because of the fact that the cable television system is using your property?

Could you show that, absent legislation, no more television or radio programs would have been created, or is it simply the fact that cable systems were engaged in profit-making businesses, based upon their exploitation of the property of others?

Mr. POPHAM. I think there is a difference between the cable situation and the performance right situation.

First of all, in the cable situation, our concern was not so much that cable systems may be using broadcast program product without paying for it, but they were using it, without charge, in competition with broadcast stations who were paying for it. There was the element of inequity and unfairness in that unfair-competition element.

Mr. BAUMGARTEN. But it was Constitutional, in the sense that you are posing the tenets of the Constitutionality of the copyright legislation.

Couldn't the cable systems have argued that they are enhancing the market for these programs, at least with local retransmission, or that it could not be proven that, absent liability, nobody would be creating new broadcast programs?

Mr. DIMLING. I think, in an economic sense, there is a clear distinction between the cable situation and what we are talking about here.

First of all, for the most part, it is not the broadcasters who get the payment in a cable situation. The copyright owners—which means movie producers, program producers, people of that sort——

Mr. BAUMGARTEN. But you were an innocent bystander in the cable-copyright fight! I seem to recall that.

Mr. DIMLING. You are quite right! That is correct. An "innocent bystander"! Yes!

The producer of a program that is imported by cable system into a distant market is losing value in that program because that program is picking up audi-

ence from that station in that market, and as that station's audience is reduced, his ability to pay the program producer for that program is lessened. The producer simply, can sell that program in the distant market for less money, as a result of its having been imported by cable systems.

Mr. BAUMGARTEN. I don't want to fight the cable fight all over again, here, you know, and I can accept the distinctions, and Congress has accepted those distinctions. But I am wondering about the application of your version of the constitutionality test on the two. I am not sure I see the distinction, but I think we've pushed that far enough.

Mr. DIMLING. It goes to whether the person that produces the product is being compensated or not, and whether the performance, if you will, reduces his compensation. And in cable, it clearly does!

In this circumstance, it does not!

Mr. POPHAM. Ultimately, I think, we are talking about a very small cable industry, today. Perhaps ten or fifteen years from now, we will be talking about a much larger cable industry where, without copyright legislation, there could have been some clear harm which would have led to a reduction in program production.

Mr. BAUMGARTEN. Would you answer a question based upon an assumption that the legislation is enacted?

It is something we really have not touched upon.

There was a lot of talk, yesterday, about Benny Goodman; and Mr. Golodner's father; and the fellow in the hotel who uses a record player.

The assumption, at least of the Danielson Bill, seems to be—although it is not expressed—that it would only apply to sound recordings fixed after a certain date.

Do you have any feelings about that?

If the legislation is enacted, should it be or can it be retroactive to the sound recordings fixed before 1957 or, indeed, sound recordings fixed many, many years ago?

Mr. POPHAM. I was just going to say that we have not taken a formal position on that particular question.

Mr. BAUMGARTEN. My final question is: Aren't there types of listeners who listen to the radio to hear the music, and don't particularly want to go out and buy records? I don't buy a heck of a lot of records. When I do, they are usually "Western." When I listen to the radio, I listen to classical music.

Doesn't the radio industry exist for purposes other than simply promoting record products?

Mr. POPHAM. We certainty cannot deny that! We do much more than simply promote record products.

On the other hand, we, obviously, do promote those products. Just because everybody doesn't buy them doesn't mean that there are not a lot of people going out to buy records, which is clearly the case.

Mr. BAUMGARTEN. Well, based upon your research—maybe I will ask this, better, in Los Angeles—but, based on your research, is there a type, or style, or age of music when people generally don't buy the records, either because they are not available, or maybe because it is not the type that record outfits deal in; yet it is a very popular form of audience-grabbing muscle on the airway.

Mr. DIMLING. I am sorry. I really don't have any research on that. The radio industry is more concerned with that from a marketing standpoint. I just cannot give you any information.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. I was troubled by some of the economic data laid out and the conclusions drawn from it. I don't think I will probe into it, in the questions, on the assumption that your response to Ms. Oler's question will be followed through; namely, that when we get a consultant who will probe into the economics of this, that you will give us the basis for your statements, etc.

But, really, in terms of Richard Katz' question, this sentence did bother me a good deal: "The compensation received by performing artists compares favorably with, or exceeds, the compensation received by composers and publishers." Yet it was clear—and we just cannot be flimflammed this way—that this was based on sales of records and, of course, the main compensation that composers get is from performance on radio. That is the main compensation that the composers and authors get. To say that the incomes of performers—who are getting zilch from this—compare favorably, bothered me a great deal.

Mr. DIMLING. We certainly don't intend to "flimflam" anybody! The study that Dr. Stuart did used the following approach: It said, "We have four parties here that are involved: The composers, the publishers, the performing artists, and the record companies. Two of those parties, the composers and the publishers get revenue from two sources: From air play of records, and from sale of records. The two other parties, the artists and the record companies, only get revenue from one source.

Let us look at the relative amounts of revenue that these four parties get, two from the two sources, and two from the one source, and simply see what it looks like in the aggregate. And the statement that you referred to refers to a conclusion based on looking at the revenue from two sources for the two, and one source for the other two.

Ms. RINGER. Yes, I understand that, but how much do your affiliate members pay to ASCAP, BMI, and SESAC?

Mr. DIMLING. I think it is about—I have not looked at the figures lately—it must be about 3%.

Ms. RINGER. Total figure?

Mr. DIMLING. Well, it would be 2½ percent to 3 percent on $1.7 billion, I guess.

Ms. RINGER. Would you not plug that into the revenue that is being acquired by composers?

Mr. DIMLING. Yes. That is included in the data that is cited there.

Ms. RINGER. It is?

Mr. DIMLING. Yes. Definitely!

Mr. POPHAM. I have been informed by other counsel, here, that the figure is somewhere in the neighborhood of $47 million for radio, and this has been filed, I think, in ABC's comment.

Mr. DIMLING. That is about right.

Mr. KATZ. Just one follow-up to that.

Again, I go back to the class that includes both performers and composers. Would you suggest that, because these people are receiving the added benefits of the promotion of their product from the air play, or radio, that you should not have to pay ASCAP, or BMI for those performances?

Mr. DIMLING. No. No! We are not suggesting that at all!

Mr. KATZ. Why not make that distinction?

Mr. DIMLING. Because, as you said when you asked the question initially, there are two different acts: one is a performance and one is the composition. We have no problem with that distinction at all.

Ms. RINGER. I want to probe that a little bit. The figure that you have given was $47 million, and you say that $15 million—which is your estimate of what you would be paying under the Danielson Bill—would put stations out of business.

Mr. POPHAM. I don't think we are saying that "it will put stations out of business." It could well put some stations out of business, but it certainly is going to affect the quality of service that a great many stations provide, particularly those—and there is a high percentage of them—who are not operating profitably, and would have to cut back even further on their expenditures.

Ms. RINGER. I understand that, and that is about as good an argument as you can make.

On the freedom of speech and monopoly questions, which you hit glancingly—I am not going to ask you to put anything to rest. I understand your position very well. But I do want to make an observation, and maybe you will have some comment on it.

The principal argument in this *Zacchini* case—in this human cannonball case—was the freedom of the press—or the freedom of speech.

Let me read you a few things from that case. I have it here. It is a very interesting case. It is recent; and it is from the Supreme Court. It is not a sound recording case; and you seem to think that there was something stronger in the case of the human cannonball than there would be in the case of the sound recording.

In other words, this would be more likely to be given protection by the courts than a Tchaikovsky recording, or something like that. I don't think you really meant that. Maybe you are saying it is a different legal "genus."

Mr. POPHAM. That is what I was saying.

Ms. RINGER. All right. This is what Byron R. White said. Now, I have to say that this was a five-to-four decision. There were some rather strong dis-

sents—one on a more technical ground, and three rather strong on the freedom of the press point.

But this is what the majority said:

"An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages." By suing, although he had asked them not to do it, originally. "The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent—the broadcaster—to film and broadcast a copyrighted dramatic work without liability to copyright owner."

In other words, they made a clear equation of something that is not protected under copyright, but is entertainment; then they cite a whole bunch of cases which I think would be relevant to this question. I am skipping around, as you can see, but I am trying to make a point.

"Of course, Ohio's decision to protect petitioner's right of publicity here, rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the patent and copyright laws, long enforced by this Court."

Then they quote a very famous passage from a decision involving a lamp base in the form of a Balanese dancer, which is not in Mr. Ervin's book, I would think! [Laughter.]

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors, and inventors, in 'science and useful arts.'

"Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

Justice Reed immortalized himself in that sentence!

"These laws perhaps regard the reward to the owner [as] a secondary consideration . . . but they were intended definitely to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public . . . 'The Constitution does not prevent Ohio'—and certainly, not the Federal Congress—'from making a similar choice here, in deciding to protect the entertainer's incentive in order to encourage the production of this type of work.' Citing *Goldstein*, which did deal with a sound recording: 'There is no doubt that entertainment, as well as music, enjoys First Amendment protection. It is also true that entertainment itself can be important news . . . but it is important to note that neither the public, nor respondent, will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized.'

"Petitioner does not seek to enjoin the broadcast of this performance; he simply wants to be paid for it.

"Nor do we think that a State law damages remedy against respondent would represent a species of liability without fault contrary to the letter and spirit of *Gertz*, supra.

"Respondent knew exactly that petitioner objected to the televising of his act, but nevertheless displayed the entire film."

This seems very much on point as to what we are talking about. I am going to say, at the end of this hearing, if anyone wants to put in rejoinders, etc., I would be very grateful for your comments on this. It does seem to me it pretty well lays the freedom of speech argument to rest. You may not agree. I would like to know what your thoughts are.

Mr. POPHAM. Let me make a very important distinction of the *Zacchini* case from the area of performance.

Mr. Zacchini, when his act was shown on television, felt there was no point in my going to the county fair at that point, because I had seen his entire act—although that was somewhat at issue in the Court's decision.

On the other hand, if I hear a performance record on my radio, I may very well go out and buy that record. Mr. Zacchini has lost all hope of benefit, from me, by the broadcasting of his act on television. On the other hand, that is not true in the case of a recording.

Ms. RINGER. I am sure that if you were trying to distinguish this case from your situation, that is exactly the argument you should use.

Okay.

Ms. OLER. Well, Evel Knievel performs on broadcasts all the time. It just increases his popularity. More people come out to see him jump the canyon.

Ms. RINGER. The other point is your monopoly point which, of course, is a traditional argument against extending copyright into any area. But you don't really address in your statement the fact that nobody is suggesting that this be a monopoly. Everyone assumes that this will be under a compulsory license, and involve simple compensation as distinguished from the right to withhold. I do think maybe you could address that point.

Mr. POPHAM. I raised those two arguments, not so much because of their direct relationship to the performance right, but just to point out, in the copyright area, generally, that Congress should have a very slow approach, and look very carefully at what they are doing to assure that it is going to do what Congress thinks it is going to do.

Ms. RINGER. OK.

Let's go back, for a moment, and discuss what did happen in the Twenties, and Thirties, and Forties, and Fifties.

The initial question that arose in this whole field, when broadcasting began to take hold, was whether or not this was a "performance." The old question in the cable cases, as to whether or not the picking up of a performance, say, from a ballroom on the top of a hotel, and passing it on to the people in their individual homes, was a "performance."

Let's take that as an example.

Of course, it was held that it was! This is a very famous case.

The fact that people were spread around did not, any the less, make this a performance.

Now, you did have the whole panoply of arguments that you laid out here today addressed in this case and in the hassles that went on about it. There was legislation in Congress going both ways on this point, as you probably know; and it does seem to me that we are at a different stage now, the difference being that, in the case of music, you had a traditional art form, if you will. The technology when people invented writing, they were able to fix and pass on to other people, whereas in the case of the sound recording, I think it was Judge Leibell who said in a famous decision, that the art had existed all of these years, but they simply had not been able to fix it until this invention came along.

So you did not have this well-established concept of a recording as the writing of an author, and as copyrightable material. But we have been through this whole thing with respect to photographs and motion pictures, and so forth. We have gotten computer tapes, now, on the threshold, and it is a little bit farfetched to argue that this is writing, this is authored, but that recordings are not writings of authors. I think we can dispose of that argument in the sense that you may very well say that Congress should not do this, and say that, if they do it, we will attack it Constitutionally, because it does not serve the purposes.

But to say "it is not a writing of an author and, ipso facto, it should not be protected," does seem to me kind of wasting our time a little bit.

I do think you have arguments for not doing this at all; and you can make these various arguments very strongly in Congress when you get to the point of saying "You should do this," or "You should not do this," but to put it on the basis of what I think are rather threadbare Constitutional arguments—now, you may completely disagree with me and, if you do, I would be interested in hearing you say it.

Mr. POPHAM. We do believe there is a difference of opinion and, admittedly, it is between court cases on the one side, and some Constitutional experts on the other. We will continue to pursue that, obviously, and we are not willing to concede that point.

On the other hand, the bulk of our statement today certainly went to some very substantial other reasons as to why we believe there are constitutional questions, too.

Ms. RINGER. OK. What I am trying to say, though, is that you lost the court battle, in the Thirties, with respect to music. You were making all the same arguments then.

I don't think you could really, in good conscience, say that this is a completely different type of thing, because you are paying royalties on stuff that you were making the same arguments about—a heck of a lot of royalties.

OK!

In the Fifties—well, in the Forties—you employed a lot of musicians, and that was because television had not restructured the broadcast communication. When television replaced radio, as the basic form of entertainment, everybody was laid off. It was not too gradual, if I understand what I read, and the radio programming changed radically. The drama just went completely kaput. All dramatic works. There just isn't any—it is very spotty on commercial radio now. And you did have people still trying to limp along with some live programming.

I was told, yesterday, that this is completely economically impossible now; that a station—even one that is trying to serve an audience that is interested in good music, if you will—simply cannot afford to hire musicians—live musicians—because it is economically impossible.

I would like to ask you what you think; and I would like you to develop in further comments, if you would like to, what you think would have happened in the Thirties if the *Waring* case had held up. It has never been overruled, you know. It was followed in other cases, in other State courts. If it had become the pervasive rule, under the law, that you had to pay royalties to performers, what would have happened to broadcast programs?

Mr. POPHAM. We would be happy to develop that.

Ms. RINGER. You really don't know; do you?

Mr. POPHAM. Even with hindsight—predicting with hindsight—what might have happened if we go back 30 years, and project what we do know now, it is, obviously, a little bit different.

Ms. RINGER. Well, I will give you the hypothesis to start you on the answer. You would not have had the Top 40 stations, because this was the way they could keep on the air; keep their advertising revenue; and still compete with television to some extent. They did not have to pay anybody—just the announcers. They just put on the Top 40, and then they went to town.

I would ask you this: Do you think this was a good thing in the radio broadcasting profession?

Mr. POPHAM. Well, I think radio faced a very difficult period with television and had to seek out, really, a new role for itself. And, certainly, the new role that it found was one that was dictated, really, very largely by public taste, and it continues to be. Radio's role today, really, is basically working in a competitive marketplace and providing the type of services that the public will listen to. Certainly, a great number of people do listen to the radio, which evidences the fact that radio has developed in a way that serves the public interest.

Ms. RINGER. I am not trying to draw you to any other conclusion. Obviously, it could have taken different forms, and I have a very strong conviction, I must confess to you, that it would have taken very different forms if you had had to pay royalties in a free market situation—if you had had to pay royalties. In other words, if the performers and the record producers had had exclusive rights, just like the composers and the authors, I think this country would have been different. This is the way I feel.

I do deplore what happened to radio. I listened to radio a lot, but I don't much any more. I think there are a lot of people out there who would like to have spoken drama, and that sort of thing. You don't have it at all, now, because you have this free source.

Okay.

What is the economic difference between the costs of a station that does, say, all news, or all call-in—as distinguished from a Top 40 station, or that sort of thing, that does nothing but play records all day?

Mr. POPHAM. I would think that, generally, a station that does not play records all day, is probably paying these individuals a bit more, although they are, obviously, paying, at an all record station, a little less.

Ms. RINGER. I know that. I have seen figures—and they are quite startlingly different—that the "all news" is very, very, expensive!

That is true, Mr. Dimling, is it not?

Mr. DIMLING. Yes. That is my understanding, also.

Ms. RINGER. So that, really, you are using music—those stations that specialize this way—partly because it is less expensive. The more recorded music you use, the less expensive it is, and you more or less said that in answer to Mr. Baumgarten: "That if you had to pay out a little more, you would have to cut back more on these more expensive things."

Mr. DIMLING. I don't think anybody in radio denies that.

Ms. RINGER. The words that ring through my mind are, "a free ride". Maybe you would take strong exception to that!

Mr. POPHAM. I do take exception to that, because there is a balancing of the benefits, here.

Certainly, radio benefits from the use of this music. We do not deny that. We could not possibly deny that!

On the other hand, the performers are paid very handsomely because of the exposure they have on radio.

Ms. RINGER. I think that is the strongest argument you have, as a matter of fact, I think, in certain areas, it is true. But I don't think it may be as true across the board. I think this is something that we are really mandated to explore very, very thoroughly.

If I am asking you difficult questions, forgive me, because I am trying to draw you out a little bit.

Networks: You are representing only your members which, of course, are the network affiliates and independents, both.

Mr. POPHAM. And the networks, as well.

Ms. RINGER. Well, I am trying to probe that.

We only got one response from the networks.

I did misspeak, yesterday, by the way. I think I said, in answer to a question, that we had had no responses from the networks, but we did from one—ABC—who did take a position consistent with yours.

Attached to it was a separate statement which identified it as representing their affiliates. It did seem to me that the thrust was mainly the view of the broadcasters, as distinguished from the networks, but it was, still, ABC, and they own a record company, and they said that, in spite of this, they were taking your side.

What about the other two? Do you have any input, there, as to why they did not respond, and as to what their views are?

As we said yesterday, CBS had taken a position in favor of this legislation earlier.

Mr. POPHAM. That is the last I am aware of.

Ms. RINGER. You have had no further discussion?

Mr. POPHAM. No.

Ms. RINGER. I don't see how we cannot draw them out, to some extent. I think they are too important a factor in all of this, and I would hope that maybe something at these hearings—or in conjunction with them—could emerge. But you are not the ones, necessarily.

Mr. DIMLING. We certainly would not want to speak for them. But I would, simply, point out that most radio network programs, of course, today, do not have the sort of music that local stations play. That is a commentary.

Ms. RINGER. Yes. I am just curious.

There was some testimony yesterday with regard to private home taping; and the possibility of this.

I am not sure that this is very important in this context, but to what extent does NAB have policies with respect to restraining their members in encouraging home taping?

Mr. POPHAM. In terms of asking our members not to encourage people——

Ms. RINGER. Not to give the running time, or the decibel count, or what-have-you.

Mr. POPHAM. I am not aware of any particular provision. This will be a matter for NAB.

Ms. RINGER. I understand.

Mr. POPHAM. I am not aware of any provision they have that goes one way, or the other, on that. I will be happy to double check on that.

Ms. RINGER. I am just curious. I have heard that there are some stations and some programs, particularly, that seem to be set up to provide this service to their listeners. In the classical area, this is not all that uncommon, I gather. Maybe it is something that the record companies and the performers tolerate.

I think I will get into this a little bit: You make a big point about the promotion aspect of this and, as I indicated, I think you have a point, there in relation to some performers who are benefited from this kind of exposure.

On the other hand, payola is something we really don't know very much about. You read bits and pieces here and there. You read little passages in books about other subjects that deal with this, and most of them are very definitive and self-serving, and they gloss over the uglier aspects.

It is very much involved in this whole thing and, again, I have drawn a conclusion and, if I am wrong, I would certainly want to be convinced that I was wrong.

Part of this is the result of not having a law that gives protection and an orderly basis for licensing in the use of recorded music and, therefore, you have people that are performing the same function that song pluggers did with respect to the sheet music in the Twenties and Thirties; folks that go out and try to plug records and get them on the air, because it does sell certain kinds of records, and does benefit certain performers.

My conviction is, essentially, that a lot of these awful things that happen—the Top 40 programming, and the terrible payola, and the disadvantage that it had to listeners who wanted to hear other things and were not able to find those other things on the dial—were the result of a lack of orderly protection, here. It would have taken an entirely different form. It might not have resulted in Utopia in programming, but I do think there would have been more selection, more choice for listeners. And there would have been less of this criminal activity which I can't help but feel damaged the record industry and the broadcasting industry very, very seriously.

Mr. DIMLING. May I respond to that from an economic standpoint—the question about payola?

If one assumes what goes on here is true and, as you say, quite properly, it is hard to get any kind of definitive information about it, but if one assumes it exists, it seems to me that the economics of the situation would suggest that if the performer's royalties were enacted, then the incentives to play for payola would be more substantial than they are now. It would simply be worth that much more to have records played on the air, and, therefore, whatever resources are now committed to that kind of activity—either legal or illegal—presumably, would be increased.

Ms. RINGER. Well, I suppose you could make that assumption but I don't, really. If you would like to develop that argument I would be very interested.

Mr. DIMLING. Okay.

Ms. RINGER. I did want to follow up on Jon's question about cable.

I understand your argument—that broadcasters have a geographic market in which they sell, and cable interfered with that, and was seriously impairing your licenses of copyright owners, and was seriously impairing your geographic markets.

That is certainly true with respect to distant signals.

But what you did to individual performers—I am leaving the record industry aside, for the moment—what you did to individual performers can be analogized, it seems to me: That they had a market for their services; for their artistic performances—whatever you want to call them—as live musicians and, by taking the records that they had made in the aggregate and not paying them and using them to the exclusion of individual human musicians—whom you stopped hiring and fired—you, in fact, did pretty much what you feared cable was doing to you.

I think there is an analogy there.

Mr. POPHAM. There is, also, a distinction, too, because one of the critical elements in the decision on the cable-copyright question was the fact that the program producer was being damaged by the distant retransmission. There was really no gain to him from that.

On the other hand, as I think we are all in agreement with, to some extent anyway, there is certainly a benefit to preformers; which comes from the use of their recordings.

Ms. RINGER. Okay. And this, really, is the nub of your argument that, in effect, "you are not hurting them—you are helping them"—and that, essentially, what the Danielson bill at least proposes to do would simply be "stealing from the rich to pay to the rich", in effect.

Is that it?

Mr. POPHAM. Well stealing from some poor and some rich! [Laughter.]

Ms. RINGER. I never really had anybody out here who did not poor mouth at some point!

Mr. POPHAM. On the part of stations who are losing money, we cannot come up, totally, as "fat cats."

I think there is another aspect to our argument, too, that is equally important. That is the fact that the performance right that has been contemplated in recent bills really is not going to be of any great help. It is not going to promote progress

in science. I think the gentleman from the unions more or less agreed with me yesterday.

Ms. RINGER. I would want to ask him if he did, but anyway, this brings me to my last question, which is probably multi-part.

The theme—the coordinate theme—that runs through your statement is: This is all a piece of foolishness; in effect, you will be just charging us a tax—as it is called in this context, usually—and you won't really be benefitting anybody because by the time the money filters down to the people that really deserve it, it will be so small that it won't affect anything.

I want to listen seriously to this argument. I tried to test it out in economic terms. But, given that—I mean, even assuming that that were true, that this is kind of a Rube Goldbergish contraption, and it isn't really the answer to anything—you obviously are not going to have exclusive rights. We have gone over that cliff a long time ago.

What is the answer?

I am thinking particularly about the experience we have had with the juke box industry, which had an exemption written into the statute at the outset.

Yours was there by nature, rather than by fiat, but, nevertheless, it was there, I guess, and the result has been that you do have a de facto situation, and you have this constant hammering in Congress and elsewhere, in the press and so forth, over a generation or two, about the injustice of this. I see this here. There is no question that this is what is going to happen.

Now, I think that the broadcasters have taken a position which, from their point of view, is undoubtedly solid. You don't have to pay, now; you don't want to pay; and you will come up with any arguments that you can to support that position.

What I am really saying is: Do you want a generation, or two, of this kind of haggling and hassling, and so forth?

You are not willing to let the camel's nose get under the tent in any form—compulsory license, or any other. But do you have anything better to suggest?

Mr. POPHAM. I don't think NAB has any specific position on how, exactly, this "alleged" problem may be handled. I think some other parties that have testified have come up with some other ideas, such as various trust funds, and direct subsidies through endowments to the arts, and what have you. But that is not something that we addressed or, really, would be appropriate for us to address.

Ms. RINGER. Because you would not be involved in paying?

Mr. POPHAM. To some extent.

Ms. RINGER. Suppose you were?

Mr. POPHAM. Well, I think it is fair to say we will cross that bridge when we come to it.

Ms. RINGER. What I am really trying to get at is: Okay, you don't want to recognize any kind of specific right—that would allow a particular amount of money to grow from a five-year interval to a five-year interval—whatever.

The result is that you have to stonewall this—to use that phrase—with increasingly weak arguments, or with arguments that, over the years, become increasingly difficult to sustain. What I am really asking is: Can't you come up with something that would involve some recognition of obligation on the part of broadcasters to deal with this problem—but in a way that would actually help the people that need help, and that would benefit the public thereby?

Mr. POPHAM. Well, I am not sure it is our place to do that. We think that there are other parties that are willing to address the issue, and they should carry through with it, perhaps, before we amend the copyright laws, or add something to the copyright laws which we feel is unnecessary and unethical.

Ms. RINGER. I understand.

Are there any other questions?

Mr. KATZ. Just a couple of other things that I would like to explore a little further.

In drawing your distinction between the analogy to the cable situation, do you suggest that the difference is that, in the cable context, the market is reduced?

In other words, if I see a play on television, I am not going to be inclined to go out and buy a ticket and go see the play—because I have already seen it.

Is that really the analogy that you are making? I think you drew the same analogy in the *Zacchini* situation.

Mr. POPHAM. I made the distinction in the *Zacchini* case but I don't think we made that type of distinction in the cable area, because, there, they were looking to the market for the producer.

I guess it was, simply, because we were talking about the same entity. Station versus a distant station.

Mr. KATZ. That argument seems to me to really reflect the basis for the distinction in the 1909 Copyright Act between reflecting the for-profit limitation on the exploitation of musical compositions. The thinking was that: "Well, we won't charge them because we won't exact a royalty unless the musical composition is used for profit, because people would be inclined to go out and listen to the music again. It won't diminish that market."

It seems to me that that is the same situation here, and I really have difficulty accepting the argument—if it were suggested—that the broadcast industry does not use recorded performances for proft.

Mr. POPHAM. Well, I don't think we deny the fact that the use of recordings is beneficial to us.

On the other hand, we counterbalance that with the fact that it is also beneficial to the parties whose music we are playing—which is not the case in cable.

Mr. KATZ. I won't go into that. Okay.

There is one other thing that I want to ask.

NAB represents television broadcasting—is that correct?

Mr. POPHAM. Yes.

Mr. KATZ. How does the NAB feel about products such as the Sony Betamax?

Mr. POPHAM. We have not yet taken a position on that. It is not, really, something that we have given any thought to as a policy judgment. [Laughter.]

Mr. RINGER. See you week after next!

Mr. POPHAM. I think it fair to say that the networks and motion picture producers have very definite positions on that.

Mr. MOORE. Just one final question, please.

Assume for the moment that this payment is imposed on you. I take it that your view is—this is all speculative, of course—but I take it that your view is that the result will not be stations going out of business so much; or advertising costs going up and being passed on to the public, but, rather, lessening of services.

Mr. POPHAM. That is primarily so, although I think it is conceivable that stations, here and there, may all go out of business.

It is not totally unusual.

Mr. MOORE. One final question:

You say that 40 percent of these stations don't make money.

How the hell do they stay in business?

Mr. DIMLING. For one thing, it is not always the same stations each year.

Mr. MOORE. They have good years and bad.

Mr. DIMLING. Some people enter the business and lose money for five years, and sell the station, and sometimes it comes into stronger hands—better management—whatever. But it is not always the same 40 stations.

Ms. RINGER. Thank you very much, indeed.

Mr. BAUMGARTEN. Excuse me.

Ms. RINGER. Oh, I am sorry!

Mr. BAUMGARTEN. We heard a lot of talk, yesterday, about something that has not been mentioned this morning. That is the European experience.

I assume you believe there are differences in the structure of broadcasting, entertainment, and performing that make the European experience a poor analogy to rest upon.

Mr. POPHAM. Well, I think there are, obviously, great differences in our system of broadcasting and the European system of broadcasting. Generally, in Europe, you have more governmentally-owned broadcast systems. Here we have a commercial, privately-owned, broadcasting system—for the most part.

Mr. BAUMGARTEN. Why does that make a difference as to whether payments should be made?

Mr. POPHAM. I think, to some extent, there are differences in the programming offered here, and the programming that is offered in Europe, perhaps, on radio. I think, as I understand it, there is more feeling among the European record producers that this is more injurious to them whereas, here, it is obviously considered to be beneficial.

Mr. BAUMGARTEN. Does NAB have any affiliation with broadcasters abroad?

Mr. POPHAM. I don't think we have any formal affiliation, as such.

Mr. DIMLING. No. We maintain informal contacts with them.

Mr. BAUMGARTEN. I really meant, you know, with the members. Is there a continuing working relationship?

Mr. POPHAM. I would say: "Not that I am aware of." I think we do, from time to time—but not any constant contact.

Mr. BAUMGARTEN. Let me ask a question that I asked, yesterday, of the union people. Again, this is pretty much old hat. It has been gone over again, and again, and again.

The Julie London story is part of the war of copyright revision.

Going along the lines of some of the things the Register was talking about, what can we do now that will, perhaps, put an end to it once and for all?

You can answer it, again, as I asked it, in two ways:

What can we do to advance your cause?

Or what can we do just to put a definitive resolution to the issue, whether it is in your favor, or not in your favor?

Is there anything that we are not doing that we should be doing?

Do you have financial information that we cannot get anywhere, that could be voluntarily given to us?

Mr. POPHAM. I doubt that we have access to financial information. I suspect that it would be easier for you to get than it is for us, since the repository is the FCC.

Obviously, we feel that if you recommend against it, that probably it would put an end to it, at least for a while, perhaps.

Also, I think we suggested there are some very serious questions about how effective a performance right would be in solving the problem that had been raised by the other side, which we don't necessarily agree is a problem. But I think these matters should be very thoroughly explored.

Mr. BAUMGARTEN. You were here most of yesterday—all of yesterday.

Are there any questions that we are not asking you that you would ask if you were in our shoes? [Laughter.]

Mr. POPHAM. I cannot think of any. I reserve the right to any supplemental remarks that we might have, until—I think August 26—which is the cut-off date.

Mr. BAUMGARTEN. I have two other brief questions.

You used a phrase—just in concluding your last answer—that still troubles me. You said, obviously, that the performance of music is beneficial to you. That is what troubles me. It is just like saying that reprographic machines are beneficial to Xerox machines. That is their business. That is what they sell.

I get this message not so much from your testimony—I think you are a little more erudite. Some of the letters that we have received from local broadcast stations would lead us to believe that the broadcasting industry does not exist on its own. It is the financial area, which is incidental to the recording industry.

You can tell from my earlier question that I have a lot of trouble with that.

You are making a profit.

I had the unenviable experience of sitting at the Wilson Bridge, waiting for the drawbridge to go down. I think your music made it more pleasant. And I probably listened to some of the commercials!

Help me out a little bit on this theory of your services, vis-a-vis the record industry, and your services vis-a-vis your own profits?

Aren't you making a profit on the exploitation of these records?

Isn't that the reason you exist?

Mr. POPHAM. Well, are you saying that the radio industry would not exist without recorded music? I am not sure we could really answer that. Again, we really do not deny that we are benefitting from the use of the music; and, again, the counterbalance to that is simply the fact that we are not the only beneficiary. We are—as I have decribed—partners in this arrangement, and much of the financial success of the record industry and the performers is because they have been exposed to the extent that they are on radio.

Mr. BAUMGARTEN. The publishers and the authors are partners, too.

Okay. I think we have taken that far enough.

Ms. RINGER. Thank you very much, indeed. We appreciate your testimony.

The next witness is Mr. Dunham, Director of Public Relations of the American Symphony Orchestra League.

Mr. DUNHAM. I am pleased to be here.

STATEMENT ON BEHALF OF THE AMERICAN SYMPHONY ORCHESTRA BY BENJAMIN DUNHAM, DIRECTOR, PUBLIC RELATIONS

Mr. DUNHAM. I am Benjamin Dunham, Director of Public Relations of the American Symphony Orchestra League, a non-profit organization based in Vienna, Virginia, serving symphony orchestras in the United States and Canada.

The League was founded in 1942 in Kalamazoo, Michigan, and in 1962, was granted a charter by the United States Congress "to serve as a coordinating, research, and educational agency and clearing house for symphony orchestras in order to help strengthen their work in local communities."

The League also has a responsibility to "encourage and recognize the work of America's musicians, conductors, and composers."

Today, League orchestra association membership numbers over 500, and this includes virtually all of America's professional orchestras. In fact, all symphony orchestras, I believe, in this country presently making records and syndicating broadcasts belong to the American Symphony Orchestra League.

In 1909, when the old copyright law was drafted, we were centuries past the age of the troubadour, when the composer and performer were identical. We were, however, still years away from a realization of the potential of modern technology to disseminate widely—through records and broadcast media—the creative efforts of our talented performers. As long as broadcast could be viewed as a promotion of the live art, there was no threat, and no special reason for protection.

But by the time of the copyright revision in the early 1960's, the diffusion of recorded performances through broadcast and other media had been recognized as a possible alternative to live performance, for a large segment of the public. Especially in the classical music field, which depends upon the maintenance of a relatively small repertoire, that has withstood—or is thought able to withstand—the test of time, it is the performer who can make the difference, and to whom this threat is real.

Symphony orchestra recordings are notoriously expensive to produce. The Boston Symphony concert, for example, may reach 9,000 to 10,000 people in Symphony Hall. A record of this same musical program, with many extra production costs, may reasonably expect to average sales on a similar scale, if it is a successful release. In this limited market, many, many, many classical recordings do not break even. But when a record is repeatedly played over the airwaves, it reaches a far greater audience. For entertaining that audience, symphony orchestras and their musicians presently receive no remuneration. This situation must be viewed in the context of the economic dilemma symphony orchestras continuously face.

A symphony orchestra has no way of increasing productivity; no way to improve its efficiency. Beyond a certain audience size, the live symphony concert experience is lost.

Ironically, it is this intensity and intimacy of musical experience that is possible to achieve larger audiences with recorded and broadcast performances.

Symphony orcrestras are confronting larger and larger budget-deficit projections. But they can't redesign their live product to fit market conditions without losing their special cultural value. If symphony orchestras and their musicians are entertaining large national public audiences over the airwaves, a royalty on this service could help offset the deficits symphony orchestras now find so dangerous. The result would serve to guarantee the continuation of the art form that concert music broadcast stations choose to promote.

The proposal before us, we understand, would create a fund that would be divided equally between recorded sound producers and performers. The fund would be built from royalties paid by those media that use sound recordings as program material. In the plan we have seen, the dollar amounts that would be paid into this fund do not appear to be an impossible burden on the broadcast media involved. In fact, the fee seems so reasonable that, with classical music which is heard on a relatively small number of stations, the potential income from this provision would seem less significant than the principle.

The American Symphony Orchestra League believes it would not be inappropriate for the stations that air classical music to make a modest contribution toward paying for the pre-recorded program material they use. Most of these stations, including the non-commercial educational stations, are willing to negotiate fees for performance rights to syndicated broadcasts of live symphony orchestra concerts, and this principle should govern the performance of pre-recorded material, as well.

Both commercial and non-commercial stations will now pay composers for airing their works. They should both pay performers, as well, since the benefits are analagous.

In taking this position, the League would not want to encourage any action that works against the wider dissemination of classical music, and would recommend that a performance royalty be levied in such a way as to prevent this. And it believes that it can be.

Of course, the concept of a performance royalty for sound recordings raises a number of intertwined questions, which may or may not have been addressed at these hearings. Foremost of these would concern distribution of the royalty.

Would the royalty, in the case of symphony music, go to the individual symphony musician, thereby creating a different climate for the negotiation of upfront recording costs?

Or would the income be distributed to the sponsoring orchestra organizations, resulting in greatly needed financial support for symphony orchestras and their musicians?

And would the distribution of performance royalties be weighted toward the profession of serious music and thus follow the precedents established by ASCAP and BMI for composers, and the example of the European "trash" tax, where the performance of popular music is taxed to benefit the support of serious musicians?

The American Symphony Orchestra League would support that approach.

One last point: The American Symphony Orchestra League offers its help and assistance toward the creation of a workable plan of performance royalty collection and distribution that will promote the cause of good muisc, both live and recorded. We stand ready to work with all segments of the field toward this end, and thank you for the time given us this morning to raise these points of discussion.

Ms. RINGER. Thank you very much, Mr. Dunham.

Let me start the questioning with Ms. Oler.

Ms. OLER. I just have a couple of questions, I think.

You referred, again, to a "weighted" distribution system.

The weighted distribution now, under the ASCAP formulas, are private licensing arrangements. Do you really propose that we legislate this weighted distribution; or is this something you would hope to see worked out in the event that a private licensing organization functions within this context?

Mr. DUNHAM. I would think it would be something that could be negotiated after the performance right is established in the legislation.

Ms. OLER. It would be a voluntary thing?

Mr. DUNHAM. I would think so.

It will be interesting to see whether Congress is interested in taking that up. We have not addressed that.

Ms. OLER. The other thing is: I am fully aware, both from your statements and from personal experience, that there is a limited market for classical recordings: but I wonder if you have any idea of what the typical broadcast life of a classical performance is.

In other words, it seems to me, from personal experience, that the most popular classical pieces—the things that people really want to hear, and demand are recorded over and over again by different groups.

What is the actual life of a classical performance?

Mr. DUNHAM. I am not sure. I don't know. I don't have any research on that.

Ms. OLER. Okay.

Ms. RINGER. Thank you. Mr. Katz?

Mr. KATZ. Just one question.

Are you aware at all—and if so, to what extent—if home taping from the broadcasts of classical recordings has affected the sales of these recordings.

Mr. DUNHAM. I don't have any research on that, either.

Mr. KATZ. Is the American Symphony Orchestra League in a position to determine that?

Mr. DUNHAM. I don't think so. We would have to go back to the recording industry.

Mr. KATZ. Thank you.

Mr. RINGER. Ms. Bostick?

Ms. BOSTICK. Yes. Do you know anything more than you said in here about the European "trash" tax?

Ms. DUNHAM. Only an article I read in the New York Times about a year ago. I don't know if anybody else here read that.

Ms. BOSTICK. Could you amplify just a bit?

Mr. DUNHAM. There seems to be some kind of a levy on the broadcast and sale—I think also of records—of popular music, which is then given back to the producers and performers of serious music. I did research on that. I have a clipping attached to the statement.

Ms. BOSTICK. Okay. Fine! I would like to know what kind of music is deemed "popular", that sells a lot.

Mr. DUNHAM. Maybe they were distinguishing between Tchaikovsky, and pop songs, which we would not be doing, here.

Ms. BOSTICK. Whatever you have, I would be interested in it.

Ms. RINGER. Waldo?

Mr. MOORE. No questions, thank you.

Ms. RINGER. Dick Glasgow?

Mr. GLASGOW. Just a couple of questions.

Do you have any opinion on whether or not the passage of this legislation would stimulate the creation of more classical material in sound recordings?

Mr. DUNHAM. I can see how it would after the negotiation process if there were more money coming into the field. After all, sypmphony orchestras are in a "need" position. There are many things that they have to turn down—that they cannot do—simply because the funds are not there.

The same with recordings. There just is not the capital—in many cases—to get into a lot of the projects that we would like to do.

To the extent that money would come back to the symphony orchestra field, or the serious music field, I think it would make more of these projects possible.

Mr. GLASGOW. So, in the few questions that you have raised at the end of your statement, which of these would you prefer? That the money would come back to the organization—or to the individual performers?

Mr. DUNHAM. I think it is important to realize that symphony orchestras have a higher percentage of the budget of the symphony orchestra going to performers. Anyway, that is the only reason that the Symphony Orchestra Association exists; to have the music produced. I think, on the average, 70 percent of the symphony budget goes to the performers. I think the Symphony Orchestra Association would prefer a system where the money would go back to the sponsoring organization, if only because it would be easier to distribute that way.

Mr. GLASGOW. Thank you.

Ms. RINGER. Jon?

Mr. BAUMGARTEN. Just one question.

How do you respond to the assertions made by the broadcasters that they are compensating you. They are compensating you by engendering the sales of records.

Mr. DUNHAM. I don't see how that is different from the composer, because they pay the composer for promoting his works. The symphony orchestra pays the composer for promoting his works. The symphony orchestra, also, very often pays the publisher of the music, as well as an ASCAP licensing fee, or a BMI licensing fee. There is a payment at both ends, there, to the actual producers of the hard copy, as well as the composer.

I don't understand the distinction in terms of promotion.

Mr. BAUMGARTEN. Well, they make a distinction on the grounds that the composer does not have a secondary market. If he doesn't get it there, he is not going to get it. The composer does not go out on personal appearances.

Mr. DUNHAM. At least in the symphony orchestra field, of course, there is a promotion of the composer's work which generates the sales of the work and generates more planning of the work.

Mr. BAUMGARTEN. OK. Thank you.

Ms. RINGER. We have seen some rather radical changes in the economics of symphony performances over the last 20 years, and I am trying to look at the broader picture.

For one thing, there are more classical music stations. I am trying to look at the ways that classical music, or symphonic music, reaches the public. And there obviously has been a radical change in the amount of American classical musicians that are recorded regularly.

Mr. DUNHAM. Yes.

Ms. RINGER. And, obviously, a lot of money back in Lyndon Johnson's day was pumped into the performing arts, but some of that seems to be drying up.

I would like to get some feel from you, as someone who works in this on a day-to-day basis, as to what has happened and where it is all going.

Mr. DUNHAM. There has been a resurgence, both in the number of American orchestras that are recording and, also, those syndicating broadcasts. So there seems to be a demand for the material. There are about, I think, something on the order of 30 commercial stations that are regularly broadcasting a high percentage of classical music—30 to 50 perhaps. Then there are the national public radio stations, which also do a lot of broadcasting of both recorded music and syndicated music for broadcasts.

Ms. RINGER. This is one point I wanted to bring out—that the injection of public radio into the field has enlarged——

Mr. DUNHAM. It has enlarged the market, right!

Ms. RINGER. And they are sitting ducks—that is what they always say: "Everybody can go after us because the government funds us to some extent."

Would you charge public radio the same as you would a commercial station?

Mr. DUNHAM. The same as the symphony orchestra would charge for performing the music. We are all nonprofit, educational type organizations, and we are all in the same business, really; but the material that we use, we have to pay for.

Ms. RINGER. But the difference is that they will go on, and they will have the classical programming, whereas you will have WNCN—is that the right one?

Mr. DUNHAM. Up in New York.

Ms. RINGER. There is flak in New York over the effort to sell a station that will go to the Top 40 program, because it is more economically beneficial; and I have seen with my own eyes a lot of classical music stations bite the dust in the last ten years—two that I have listened to in various parts of the country. I take it that some of that slack has been picked up by public radio, but you say that the imposition of this would not put the commercial stations out of business.

Mr. DUNHAM. We would hope that it would not. We do say in our statement that it can be avoided. We would want the regulations to be designed in such a way that they would not.

Ms. RINGER. What I am really getting at is: Would you sock it to the public radio stations because they, obviously, can get the money from the taxpayer?

You look for the large trends, and this is, frankly, the way I see it going.

Mr. DUNHAM. The trend toward classical music is that classical music is being played more and more on national public radio and national educational stations. They seem to be willing to negotiate with us, with symphony orchestras, and other performers, for live broadcast material.

We would not want to see the same thing, I suppose, happening that happened to commercial radio, which you described during the last testimony, which would argue for less live music being on the air and more recorded music.

Ms. RINGER. How do you account for the resurgence of recording of American symphonic groups? I think there was even an opera recorded in this country. That is very unusual!

Mr. DUNHAM. Yes. There are two things that I see. I really have spotted just two isolated instances.

One was a renegotiation of the contract for AM/FM which allowed more music, basically, to be gotten out of the recording session.

Ms. RINGER. In other words, the unions made concessions?

Mr. DUNHAM. It was just a change in language, I think, that allowed the symphony orchestra to do more chamber music broadcast recordings out of the same recording session. It was just making enough to get the companies interested in recording American orchestras.

The other thing was a realization that the American orchestra can cut a lot more music in the same amount of time. I know that the VOX Productions discovered this maybe five, ten years ago. They say, "Yes, it costs a lot more to record an American orchestra, but we get more useable music out of it."

Like any trend, it took somebody to demonstrate that the American orchestra could record, and sell, and make a profit for the companies, and now we see the result of that.

Ms. RINGER. In this trend, is any public money involved somewhere in the background?

Mr. DUNHAM. Actually, less and less. To get it started, there has been a whole syndrome in the past, maybe, ten or twenty years, where Symphony Orchestra Associations would put up their own front money to have the orchestra recorded. The recording company would use their expertise. They would produce the records, but the payment-to-musicians cost to make that record would be borne by the Symphony Orchestra Association.

They would do this simply so they would be able to reach an audience with something they were especially proud of—the conductor, or the composer—work that they had commissioned. Something like that.

Now we see more and more record companies simply being more able—more symphony orchestras being able to negotiate contracts with the record companies on a business basis.

Ms. RINGER. Is this because they are more profitable, or somebody is seeing the light, or what?

Mr. DUNHAM. Of course, the records are selling better.

Ms. RINGER. They are selling better?

Mr. DUNHAM. Surely! There was a time in the late Sixties when I, myself, was buying more rock records than classical music records. I remember that. But I think that it shifted. There was a large interest among serious music listeners in rock music at that time, and I think they drew away from the classical music field. I think in the early Seventies and the middle Seventies, that has now come back to the serious music field.

Ms. RINGER. One last question.

Do you have any concerns about the amount of government subsidy, and so forth, that is involved in the overall picture of classical performance in this country, of all sorts?

Mr. DUNHAM. That is a very large question.

Ms. RINGER. Indeed, I don't want a long answer. Just something from your vantage point.

Mr. DUNHAM. I am not sure, really, how I can address that in terms of this copyright.

Ms. RINGER. Let me try it in a very direct sense.

You, in your statement, are proposing some kind of a distribution scheme that would favor classical recording, classical performance, and so on, and I think I understood you to say in your testimony that this could be done under some kind of government aegis. But, of course, this requires a great deal of fine tuning, and does involve some major concerns; and I think this is an example of something that could be pervasive. You do see the government hand in this, more and more.

Mr. DUNHAM. Yes. There is, of course, a growing feeling among the symphony orchestra and the arts, in general, that the government will increasingly have to accept more and more burden for the support of the art and the culture that the public is demanding. But at what level is this resolved? This is a matter of negotiation and discussion in any number of forums.

Ms. RINGER. You are not at all concerned—I won't put it that way.

There is the other aspect of this. Whoever pays has a string and, obviously, in the symphonic music area, looking at it rather superficially, you don't think about thought control but, obviously, you know, musicians lost their jobs during the McCarthy era, and that sort of thing. More government is involved.

Mr. DUNHAM. When the National Endowment for the Arts was established in the mid-Sixties, of course, this was a matter of serious discussion; and the National Council for the Arts was created to interpose itself between any kind of direct Federal control and the arts constituency. I think that most of the people coming before this panel would testify that it was in the last decade that it worked very effectively.

Ms. RINGER. This is my impression: that they have pretty well kept their clammy hands off of the actual programming, and so forth.

Mr. DUNHAM. Of course, there is constant balancing in spending the taxpayer's money: What do you want it to go for? How does this represent the taxpayer?

Once you start addressing yourself to those issues, you exercise a certain amount of control. But it is something that the National Council has been very careful to do: Involve the symphony orchestra field and our arts constituency in the decision-making process, so that you don't have one man behind one desk saying, "This is the way it is going to be done in the future."

It is really a cooperative effort, and one that has proved to be effective, and we hope it will be more effective.

Ms. RINGER. Thank you very much, Mr. Dunham.

I appreciate your testimony very, very much.

The next witnesses—I believe you are intending to testify together: Michael Newton and Theo Bikel, President and Vice Chairman, respectively, of the Associated Council for the Arts.

STATEMENT ON BEHALF OF THE ASSOCIATED COUNCIL FOR THE ARTS BY MICHAEL NEWTON, PRESIDENT; AND THEO BIKEL, VICE CHAIRMAN

MS. RINGER. Welcome to these hearings.

However, you would like to divide your testimony—you have a prepared statement.

MR. NEWTON. I could go to my prepared statement.

I am honored to appear before you, as a representative of ACA. I should, perhaps, explain that we are a national non-profit coalition of arts interests—comprising State and community arts councils and agencies, performing arts organizations, universities, libraries, and allied art groups. As an organization, we are fundamentally concerned with the art of our country.

In addition, we embrace a program called Advocates for the Arts, which brings together nearly 4,000 individuals concerned about the cultural life of our country. We are indeed grateful for this opportunity to appear before you and feel deeply indebted to the Copyright Office for addressing a most serious and unfortunate shortcoming in our Nation's copyright laws. I refer, of course, to the lack of performance right attaching to sound recordings.

We believe there are few more important functions for Government than providing a legal and political environment in which creative people in our society can work and flourish. Clearly, it was this human creativity that the Constitution tried to protect and encourage, by giving to Congress the power ". . . to promote the Progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive right in their respective Writings and Discoveries . . ."

The sound recording has been held to be, and is, a "writing."

Who, then, is the author?

The composer and arranger are recognized in current law. We believe it is unconscionable that our law ignores the creative contribution of the performer. Among those who know the art of music and acting, there is no doubt that every performance of a given work is unique; and what makes it unique, is the work of the performing artist. If this were not so, why would people argue over the merits of a Beethoven Ninth recorded by the Boston Symphony versus one done with the Los Angeles Philharmonic?

Why does the same composition performed by one group of musicians sound differently from one recorded by another group?

Can anyone seriously contend that folk and jazz artists are interchangeable?

The arguments for passing a performance royalty are uncomplicated but, as always, subject to misinterpretation and self-interest.

Less than 20 percent of all recorded works are successful. By "successful," I mean that they earn more than they cost to record. The other 80 percent stimulate the growth and expansion—not only of the recording industry, but of the Nation's artistic life as well. Recording companies have one source of support, and that source is the individual consumer. Under the current practices, those who benefit most from the recording industry's development are broadcasters and juke box owners, who pay the least for these benefits which yield them profit.

The debate can be clouded by tales of extraordinary sales of pop records, and astronomical incomes of the latest and hottest rock group. But these are momentary winners in the royalty sweepstakes. The consistent loser, however, is the consumer who buys individual recordings, for it is currently up to the consumer to bear the entire cost of the recording industry—including a royalty for interpretive artists, while broadcasters, background music merchants, and juke box chains pay nothing!

Regardless of the fleeting popularity of most of our so-called popular artists, the income of pianists, violinists, singers, concert performers, opera companies, theater groups, and symphony orchestras is also affected. These artists and arts organizations should be compensated, along with the composer and author, every time a work in which they have a part is used commercially.

As Erich Leinsdorf, conductor of the Boston Symphony Orchestra, stated in his testimony for the Senate copyright hearings in 1967: "When the artist performs twice in live performance, he is paid twice. If you perform six times, you are paid six times; but with a recorded performance my work can be 'exhibited' as often as the station likes—and the cost to the radio station will be

the same—nothing! There is something wrong about this. There is no doubt about it!

". . . radio stations will play recordings time and time again over many, many years—long after it is possible to buy that recording in a music shop. For the composer and the publisher this is not a problem, as they continue to benefit from fees. But the performer gets nothing, even though in most instances it is the performers . . . who create the demand.

"And do not forget," said Mr. Leinsdorf, "that all sorts of musical performers, particularly singers, have limited time in their careers. One problem prevailing with singers . . . is that they have no way of depreciating themselves in the tax structure. It is not fair for others to be making a profit from performer's talents long after the performers stop receiving any income."

There is an urgent need for Congress, through a revised copyright law, to encourage the creative talent of the performer, and provide value for its expression through legal protection and economic incentive.

Our case rests on this argument.

Do you want to add anything?

Mr. BIKEL. Yes. I would like to.

I am exceedingly happy to be here, although it meant flying through the night, so, while I will try to be as eloquent as I can be, I may be a little slower.

You may recall that a couple of years ago, when we testified before the Subcommittee on the Judiciary, from which emanated the report on which you are acting now—or will be acting before January 3—I made a number of arguments then, and I don't know whether everybody here is familiar with those. So, for the record, I would like to enter that testimony, and I will not reiterate it since it mostly concerns itself with the aspect countering the argument that the artist does not make a creative contribution to the work.

I said then—just to state it briefly—that his work is not recreative, not imitative, but creative intrinsically, and, as my colleague, Mr. Newton, just stated—Mr. Leinsdorf more poetically—cannot be denied. In fact, I noted this morning when the broadcasters were before you, that they no longer emphasized that aspect of their argument, which was so strong—perhaps the sole argument that they advanced two years ago. They no longer were siting on that horse as strongly, and as tall, and were no longer debating the aspect of the artist's creativity in his contribution to what he does—he, or she.

Rather, they were resting on their last hope; namely, that they are "promoting" the artist's work through the use of their medium.

I find the argument a little spurious, although I will not deny; one must be fair. Some promotion, obviously, accrues to the artist and his work. But, then, the promotion—as one of the gentlemen quite rightly said—accrues to everybody, including the composer and the lyricists, who do get compensated for the replay of their recorded works. And if, as they let slip so nicely, there is a partnership of some sort here, I don't know of a business—and we are talking about free enterprise—where there is one partner who gets paid, and another one who doesn't!

Besides which, what has happened to human society? There used to be a notion that everybody who works gets paid for what he does.

Why should the electronics have to change that? Just because we have an electronic media, everybody in civil law recognizes the fact that you can indulge in electronic stealing! We have a whole slew of cases now, where people steal by computer merely by touching some buttons. You can steal services: If you ride on a train without paying for a ticket, you are accused of stealing. You "steal" a service.

Why is that not stealing, and why and who made those determinations, and why is there no analogy between ourselves and the European countries—which, by the way, is another grievous point, because there is an interactability between countries on that front which is being thwarted by the fact that we do not do as other people do.

Indeed, fees for American recording artists are collected in those countries where they are, as a matter of law, collectible; and, sometimes, not even transmitted to the artist here, because there is no reciprocal agreement. Reciprocity can only rest on something that is equal in its application and its usage.

Whether the popularization of the records has anything to do with the intent of what the broadcasters are all about—I have great doubts about that!

There are motivated by the good old "profit" motive, and I don't begrudge them that. But they should not come before us—before you, before me, before the public, or before the Congress—and plead poverty! If they really want to plead poverty, why make the artist pay for that?

The cleaning people are paid in the building of a radio station. The rent is being paid. The advertising elsewhere, in the newspaper columns—which has gone up by the way—is being paid by the radio station.

Suddenly, when it comes to the artist and the pittance that the artist is to get, there is poverty!

I agree with you that some radio stations are in more trouble than others, but we are making, here, an argument that concerns itself with equity and with justice—not with pragmatism. Besides which, even those radio stations that are making a profit are sometimes not "making it" on paper. You know very well that they keep losing money because it is a write-off and then, suddenly, ten years later, this broke station gets sold for $5 million and everybody has a profit in his pocket.

So I am not too moved by that poverty argument that we get.

One more thing about the popularization: I guess the question might be asked; Are they playing things in order to popularize them, or are they playing things—mostly things—that are popular?

Don't they go around record stores to find out what is selling, and then they say, "That is what we are going to play." That is what the "Top 40" means, anyway—leaving aside the classical things that don't fall within those boundaries of concept. But the unknown has a hell of a time getting on the air waves! Indeed, that is where your payola comes in, because in order for him to get paid, he has to bribe. They play what is already popular, and what already sells!

As to the argument that you are making the rich already, richer; that is only the top of the iceberg. There are other artists—supporting artists—those who never get mentioned. Sometimes the music is not even identified as to what it is, who did it, who composed it, who wrote it. The composer and the writer, however, get it because there are those controlling organizations who check and who do spot checks, and who do collect for him. Not always! Something slips by them, as well.

But I find it rather humbling, and I find it quite appalling, that our laws should be less advanced, less progressive, less cognizant of human rights, and people's rights than the laws of Ireland, of Paraguay, of Denmark. We can do better. We must do better!

Thank you.

Ms. RINGER. Thank you.

The fact that you were exposed to the Red Eye Special did not, in any way, impair your eloquence.

Quite the contrary!

Mr. BIKEL. Thank you.

Ms. RINGER. I would add, only, that unfortunately, that has been the history of intellectual property in this country. We have always been at least 50 years—maybe more—behind the rest of the world; and it is an appalling fact which needs to be taken note of.

Let me start the questioning with Ms. Oler.

Ms. OLER. Just a couple of things.

In holding these hearings, and in asking for public comments, we have had a great amount of comments from big industry representatives, and from performers' unions, etc., but we really have not have any response at all from individual performers, with the exception of yourself—and a letter from Benny Goodman. That was it!

Mr. BAUMGARTEN. Woodie Herman?

Ms. OLER. Woodie Herman!

I am sorry.

Do you have any explanation for it?

Are they really not fighting for it?

Are they not concerned?

Mr. BIKEL. Artists are less well organized than other people. Obviously, the artists are concerned—those who have time, and who are pressed into a corner to think about it.

I can only say to you that I think people accept the notion of their enslavement after a while, and don't think to fight back any more. I doubt whether

many people within the Soviet Union petition the Kremlin for more freedom!

Artists have accepted the fact that they "don't get nothing," and some of them are not even aware that a movement is underfoot to give them something for air play, and those who are aware that there is a movement afoot say to themselves, "Ah! I'm not going to go into it."

I guess that is my explanation.

Mr. NEWTON. If I could add one word to that: I think that the other truth is that our organization seeks to represent artists as well as art organizations. Many of our organizations are hearing the kinds of needs, which Mr. Bikel so eloquently expressed, from artists in their community. We are, in a sense, their agent—their spokesman.

Ms. OLER. I also wonder whether you share the view that has been put forth today by the broadcasting industry—that their studies show that even if some form of legislation akin to this were enacted, the performers, themselves, would not ultimately benefit because the record companies are in a superior bargaining position, and they would take their cut elsewhere from the performance, reducing the performer's initial payment.

Do you think that is true?

Mr. NEWTON. No. I do not think so. I think that is an extremely cynical view. I think it is for that reason that there exist musicians' unions, and performers' unions, who will see to it that that does not occur.

They will not fall below the present levels and, indeed, they are either going to stay where they are, or they are going to go up. It is extremely unlikely—in fact, impossible,—for the record producers to get it elsewhere out of the artist's pocket.

Ms. OLER. Okay. Thank you.

Ms. RINGER. Mr. Katz?

Mr. KATZ. This is, I think, somewhat more arcane than a lot of the discussion that has gone on before, but it has been sort of hovering around in the air for the last two days. It has been bothering me a little bit. I hope that, maybe, you could comment on it; and I would appreciate your views.

At least to the extent that sound recordings contain music, music is a very special category of intellectual property or creative effort. It is special in the sense that, unless it is performed, it does not exist!

It may exist in the mind of a composer, but if it is not played—if the instrument is not played—there is no sound, and that really is, in essence, what music is.

I was just curious whether you had any further thoughts on that; and how that affects the situation that has existed before, and what other things in connection with that we should consider now.

Mr. BIKEL. In terms of the fact that the third dimension lies solely in the performed act, it is not necessarily different than the other media. Let's face it. The vision of a sculptor may be in his head but, unless he sets chisel and hammer to work, it does not emerge as a sculpture. Michelangelo said, when asked by the Disciples how he made these fantastic sculptures, "It is fairly simple. I remove the superfluous marble."

There, too, was a vision. It is nothing, obviously, unless you have the tools to bring it to fruition. I cannot put a percentile value on the performance of a work. I only know that each performance becomes different. I know that my own performance of yesterday is different from my own performance of the same work of today, and certainly, would be different ten years hence, and it thus becomes unique, and extraordinary, and unduplicable—even by myself!

Mr. KATZ. If I could pursue this a little bit.

You raised the visual perception in terms of the sculpture. Here, we are dealing with our sense of hearing—not so much as seeing. I cannot help but wonder if the problems that have existed in this area have stemmed from, at least in historical perspective, an inability to see the sounds. It is not something we can see. It is not something we can touch. Therefore, you have the copyright requirement that when you copyright a musical composition, you have to submit it in some form of musical notation, because this we can see. We can touch it. We can feel it.

That is not really the music that we hear.

Mr. BIKEL. No. That is just the blueprint.

Mr. KATZ. Yes.

Mr. BIKEL. The problems may have stemmed from that, but I think that problem has been overcome rather successfully elsewhere. I don't see why we can't make a quantum jump here.

Mr. KATZ. Thank you.

Ms. RINGER. Ms. Bostick?

Ms. BOSTICK. I would like to know how familiar you are with the collection and distribution systems of European countries.

Mr. BIKEL. I am fairly familiar.

Ms. BOSTICK. Could you tell us something about them?

Mr. BIKEL. Yes! I have something I can read you—including what the performers' shares are, et cetera.

Ms. BOSTICK. One thing that I am particularly interested in is: What percentage of collection and distribution by that organization is paid to support the mechanism?

In other words, how much does it cost to operate it?

How much does it cost to collect and distribute it?

Does it cost 3 percent? 2 percent?

Mr. BIKEL. I don't think I have any figures on that. They probably vary from country to country very widely, just as it does in your charity dollars. You know, some people tell you that it costs ten cents to raise a dollar. Other people tell you it costs forty cents to raise a dollar. The cynics will say "ninety cents—and only ten percent goes to the actual charity!"

In some countries, where it is extremely efficient, and where the collection agency does a triple job—namely collecting for the artists, for the authors, for the composers, etc., and sometimes, even for the record manufacturers—in those countries, obviously, the costs are cut down because it is one kind of staff that monitors and receives and distributes to the various ones that have to collect under the agreement. But, you know, from Austria down to the U.K., they range, and the performers share ranges from—well, we can disregard Spain. They only get 10 percent there. A few of them are in the 25 percent bracket—most of them that I have here, are in the 50 percent bracket. That is the performer's share, the percentile share. And in Germany, West Germany, 64 percent. In Norway, 80 percent.

Ms. BOSTICK. Was that contained in your testimony in 1975?

Mr. BIKEL. That is not in what I have here, but it is in the printed record of the hearings, yes.

Ms. BOSTICK. All right.

You said that performers receive less now than they would if we had a reciprocal performance right.

Do you know of any performers who now receive performance royalties from the air playing of their records in the foreign countries?

For example, do you receive any?

Mr. BIKEL. Yes, I do, from time to time. That comes through the record company, itself. Not air play royalties!

Ms. BOSTICK. I mean air play.

Mr. BIKEL. No! No. Just record sales. I receive nothing. I know that my records are played.

Ms. BOSTICK. I understand that some record companies make foreign production arrangements where they bargain for at least 50 percent of the broadcast royalties, and I was wondering whether any of that got back to the performers—or whether any substantial amounts were, indeed, paid to American performers.

Mr. BIKEL. If they are, I am not aware of it. I doubt whether they are substantial.

Ms. BOSTICK. Yes, but they may get some.

Mr. BIKEL. They might!

Ms. BOSTICK. Do you hold a position with Actors Equity?

Mr. BIKEL. I am the President of it.

Ms. BOSTICK. I thought so!

Mr. BIKEL. For my sins!

Ms. BOSTICK. Do you have any idea of what, if anything, the actors intend to benefit—even by reference—from a performance right of a sound recording?

Mr. BIKEL. I suppose so. We are entering an age when it is not only going to be sound recording, it is going to be video recording, as well. There will be ramifications of that in the future, no doubt.

Ms. BOSTICK. I see. Thank you.

Mr. KATZ. No questions.

Mr. GLASGOW. No questions.

Mr. BAUMGARTEN. You mentioned in the introductory portion of your statement that the organization includes a university.

Is it possible that some of your membership may be on the paying end, rather than on the receiving end, of a performance royalty?

If so, are they aware of that fact?

Would it cause them any problems?

Would they seek special exemption?

Mr. NEWTON. Well, the statement which I read was approved by our Board of Directors—which included a spokesman from that particular community. I think that they, themselves, were looking at what I would regard as a higher interest.

If I could, Ms. Ringer, just address myself a moment to a question which you raised with Mr. Dunham.

Ms. RINGER. Please!

Mr. NEWTON. You asked the question about his view of the expansion of Federal government support for the artists which, clearly, has grown up over the past few years—so, today, the orchestras that he represents come to about 4 percent of the budget in the United States.

In essence, he was worried by that.

I think one of our feelings in developing the position that we have—apart from the feeling of equity—is that it is desirable to use the marketplace, insofar as possible—we are believers in the free enterprise system equally with everyone else who spoke this morning. And the more the forces of the marketplace can be brought to bear for the support of artists and artists' organizations, the happier we are, and we really welcome, in a sense, the spread of Federal responsibility—in different ways—for the support of the arts.

We don't believe that it is necessarily desirable that everything should come through one agency. We recognize there is an opportunity for greater freedom where the burden of responsibility is shared.

Ms. RINGER. Thank you very much.

Mr. BAUMGARTEN. I am still having some trouble! It has nothing to do with this. I am still trying to figure out why the old lady swallowed the fly! [laughter]

Mr. BIKEL. I don't know why! The answer is given in the song.

Mr. BAUMGARTEN. I have no other questions.

Mr. BIKEL. It ends by saying, "The old lady swallowed the horse. She is dead, of course!" [Laughter.]

Ms. RINGER. Actually, my main question was going to be the one you have anticipated—the extent to which—as you see it—the whole thing is trending toward more and more government activity in this field, and the government assuming the old role of the royal patron, or the noble patron, back in the post-feudal period. This troubles me a good deal! I admit that what has occurred in this country in the last ten years has not been cause for alarm. I think there has been a good deal of constraint on the part of the Government people that are doling out the money.

I do see, in the author area, this drying up of small magazines, and other outlets for authorship, and the grubby efforts to try to get money, any way they can, in order to subsist. And it makes my blood run cold because, obviously, there is a personal selling aspect, and I have seen how copyright works in the U.S.S.R., and it does have its troubling aspects. There is no question about it!

I guess my basic question is the one I have asked other witnesses, which is: Is this the answer—the establishment of something that I think we all recognize has to be a compulsory license. We are past the point where we could have exclusive rights with a certain amount of payment attached to it and, presumably, the opportunity to increase that payment, the more you can increase the pressures and prove your case, and prove that nobody is going to go out of business.

That is part of it.

Is this the answer?

Or is the answer more substantive; or some kind of combination; or some collectivization under some aegis other than copyright?

It obviously emerged, yesterday, that the performers' unions put their eggs in the trust fund basket back in the Thirties and Forties, and early Fifties, and

it was not until 1960, that they began to think about, "Oh, my God! We've got to do something to assert out exclusive rights, here. It is too late, but we have to do something."

And we are now really almost 20 years beyond that.

The question in my mind is really a very fundamental question. All right. "You are going ahead with this as a program." Is this enough? Is it too little, or too late, or is something else a better solution to what is, obviously, a very, very, fundamental problem?

Mr. BIKEL. It is certainly too late, and somewhat too little. Nobody is going to be enriched by what is contemplated here. We are talking about—in individual terms—individual artists—he or she would be lucky to get $200, or $300, or $400 a year.

But you are also talking about people, by and large who, under the 1969 Census—I noted this down—"musicians earned $4,688." That was their median income.

The nation's median income was "$7,620" that year, according to the Census. Actors fared a little better—but still not the national median"—with "$6,800." So it is going to be to little.

But when you are in this kind of income bracket, every little bit helps.

Obviously, it is a twofold, manifold, thing that has to happen here. There will have to be a subsidy from elsewhere, as well, but I would rather it be an art subsidy than the other kind of insiduous one that you are going to find anyway, because Government dollars will be spent to support these people on the dole—which is not as dignified a subsidy as the one that comes from art monies; or other kinds of grants.

Ms. RINGER. I certainly agree with that!

Did you want to add anything?

Mr. NEWTON. I think the other point is that—just going back to the comment made previously—one of the real problems for the arts, historically, in this and any other society, is the difficulty of creating a marketplace in which art can be sold. It is very difficult to merchandise the work of a poet. It is very difficult to merchandise the work of an individual musician, or an actor. Some of the ways—in which our society is structured—work against a viable marketplace for the arts, as there is, say, a viable marketplace for the sale of the recordings.

I think what we are anxious to see happen is that the marketplace for the work of performers—the conditions of the market place—are improved. And that is why I think the first issue we deal with here—the establishment of rights—is so important.

A second consideration, I think—when one looks at a public subsidy—is the tendency on the part of the more traditional subsidy bodies—which are the National Endowment for the Arts, and the State arts agencies—it is funny to be talking about them as "traditional," when they are only ten or twelve years old—but the agencies tend to, easily, gravitate towards support of art institutions; to the support of museums; orchestras and theaters, rather than the support of individual creative artists, or the individual performer, because it is much easier to do it that way, because there are less risks involved.

And one of the advantages which could be secured through performance rights in sound recordings is that the opportunity for the individual performer to achieve payment for services is enhanced.

Ms. RINGER. I think that is a point that no one has made before. I think it is a very valuable addition.

Are there any other questions from the panel?

If not, thank you very much!

I think this is a very useful end—our Washington end to these hearings. Let me just announce that we will pick up the second leg of these hearings in Beverly Hills on July 26—probably the 27th—maybe the 28th.

The record of these proceedings will be kept open until August 26. If anyone wants to file anything that is supplemental; or answer any of the points that were made, it would be most welcome. The comments would be most welcome.

I would not doubt that we will be contacting some of you, directly, in our various other inquiries—either directly from Ms. Oler's team, or from the economic consultant that we have laid on.

Thank you very much.

[Whereupon, at 12:30 p.m., the meeting was concluded.]

THE LIBRARY OF CONGRESS COPYRIGHT SECTION—PERFORMANCE RIGHTS IN SOUND RECORDINGS, DOCKET 77-6, BEVERLY HILLS, CALIF., JULY 26, 27, 28, 1977

HEARINGS II

(Beverly Hills, Calif., Tuesday, July 26, 1977, 9:30 a.m.)

MS. RINGER. Could I call the hearing to order? I'd like to open the second half of the Copyright Office Hearings on the question of Performance Rights in Sound Recordings. We had a rather interesting two-day hearing in Washington about two-and-a-half weeks ago, and this is a continuation of that hearing.

We have scheduled three days of hearings in Los Angeles, this time in Beverly Hills. I think we'll probably take all of that time. If it's possible to condense, we might find it desirable. But, as things now stand, it looks like we will run through Thursday.

I'd like to make some announcements at the outset about the statements and about additional statements. We have not gotten statements from all the witnesses who are scheduled to speak during these three days in California, and if any of them—any of you would like to hand in your hearing statements to supplement or reflect your testimony, please feel free. We'd be very grateful for that. We have the statements that have been given in. We have 10 copies from the witnesses. We have duplicated them into 50 copies, and they are on the table over there. Each panel member has a copy, and each witness has a copy, and, as long as there are additional copies, feel free to take them. If you would like to have additional copies, you can obtain them from the Copyright Office.

The transcript is available in rough form from the Washington hearings. The transcript of this hearing will be available in about 10 days, and can be obtained from the Snyder Heathcote, Inc., Reporting Service, 3055 Wilshire Boulevard, Los Angeles, for 75 cents a page. We will edit the transcript in a very rough way, just for syntax, grammar, and typographical errors, and then, if you would like to get a copy of the transcript and do some further editing, without changing substance, please feel free. We will eventually publish a final record, an edited record, but it will probably not be available for sometime.

This morning we are scheduled to hear from Alan Livingston, President of Twentieth Century-Fox Entertainment Group and then from Hal Davis, President of the American Federation of Musicians.

May I call Mr. Livingston to give the first testimony?

Welcome, Mr. Livingston.

MR. LIVINGSTON. Thank you. Good morning.

My name is Alan W. Livingston, and I am a resident of Beverly Hills, California. I have been in the entertainment business for over 30 years as a musician, song writer, record producer, and record company and television executive. I have held the position of President and Chairman of the Board of Capitol Records, Inc., Vice President in charge of television programming for the National Broadcasting Company, and have been an independent producer of records and motion pictures. I am currently President of the Entertainment Group of Twentieth-Century Fox Film Corporation.

I would like to point out that neither I nor Twentieth-Century Fox would benefit, under our current mix of business, by a performance royalty in records. Our record company is quite small, and its catalogue of records available for air play is minimal. On the other hand, we own three television stations and are actively seeking additional ones, so that it might seem, on the surface, that it was to our disadvantage to promote the issue at hand. Nevertheless, speaking as an individual and with the blessing of the management of Twentieth-Century Fox Film Corporation, I strongly support the creation of a performance right in sound recordings for artists and record manufacturers.

Some 12 years ago, I was the original proponent of this right, and introduced the subject before a House Committee in 1965, and again before a Senate Committee in 1967. So much has been said and written on the subject since then that I wish to do little more today than reiterate my position and make a brief statement of my views and strong commitments on this issue.

A phonograph record is nothing more than a delayed performance. It was created to be sold for home use. It was not created to be performed publicly for profit beyond the control of the recording artist and record manufacturer. The writers of the original copyright law could not possibly have envisioned radio,

juke boxes, wired music services, discotheques, television, and all of the other commercial enterprises that sell time or service for a fee. It is simply improper on the face of it that programming which is sold to advertisers along with time is not being paid for, either by the radio stations, the advertiser, the wired music services, the commercial discotheques or others. This in itself should be sufficient argument for revision of the copyright law to protect the creator and owner of his own voice and musical performance, and the manufacturer who financed it.

Those who oppose the performance right in sound recordings are those who now program their business free of charge. The fact that this inequity has existed for so many years does not make it right, and whatever economic adjustment must be made is no reason to continue the exploitation of other people's property.

As to the arguments of those who oppose a performance right, I would like to make some brief comments. First, consider the position taken by radio stations that they provide free promotion for sound recordings through air play. The same position might as well be taken that they provide free promotion for the underlying copyright. The song writer and music publisher benefit by radio play. In fact, most music publishers employ record promotion men to encourage as much air play as possible. They recognize that air play creates demand for sale of records and sheet music and other use of their products, and therefore enhances its value. But radio stations have accepted that fact that they must pay for the use of this underlying copyright. Therefore, the promotion value to the record is no different from the promotion value to the song itself, and there is no reason why that argument should be used against the performance copyright any more than it should be used against the copyright of the original work.

One opponent of this performance copyright is a "beautiful music" station manager, with the complaint of product shortage of such music. Supposedly, he argues, American record companies refuse to distribute music that doesn't receive plugs by name artists on radio stations. Just the opposite is the case. If there were performance compensation for the "beautiful music" that is played by radio, it would encourage record manufacturers to produce it. This music does not sell to any extent in stores, and its use is mostly without compensation. If radio stations want a greater variety of music, they had best pay for its use.

Regarding all of the economic implications of a performance royalty which have been raised, whether for juke box operators, radio stations, wired music services or whatever, the free market will certainly make a proper and fair adjustment. An economic burden to radio at the expense of the exploitation of someone else's rights is not a proper complaint.

Another claim is that the copyright clause of the Constitution was not designed to reallocate profits from one industry to another, but rather to promote the progress of science and the useful arts. This is a rather naive thought. All of the arts, whether motion pictures, television, the theater or the performance of music are supported by those who pay for the privilige of being entertained. The commercial use of sound recordings must be paid for in the same manner as someone who must buy a ticket to a theater.

As to the claim that the performance royalty would force broadcasters to reduce public service programming, this is contrary to the fact. It is my opinion that more symphonic and classical works would be supported by such a situation, and although I make no distinction between one kind of music and another, certainly I do advocate that radio be encouraged to satisfy all tastes. If the performance royalty should result in a lessening of music performed on radio, and an increase in dramatics, news, or other broadcasts, there is nothing wrong with that either.

In summary, I can find nothing in the broadcasters' claims which follows any logic, or is in any way in the public's interests. Radio does not promote the sale of recordings. It merely programs their performance, and thus exposes them. People buy what they want to own, whether they hear it first on radio, on a juke box, in a discotheque or elsewhere. Actually, only a small percentage of what is programmed by these enterprises is purchased by the record-consuming public. Much of the programming is provided by records that are bought in very small quantities, if at all, and in many cases are not even available for sale any longer.

I repeat that I am an entertainment executive with many years in almost all aspects of the entertainment industry. I personally have nothing to gain currently

or in the foreseeable future by the enactment of legislation which would provide a performance fee, and I consider myself unbiased in this regard. I leave it to the Record Industry Association the details and statistics to back up the points made here, but it seems to me that the case under consideration is very clear. Radio simply does not want to pay for something they have had for free these many years. That does not alter the fact that they have no right to the commercial use of another person's performance or creation, without a proper license and compensation.

Thank you.

Ms. RINGER. Thank you very much, Mr. Livingston.

As you suggested, a great many of the points you've made have been made by others, but I do think that you occupy a kind of unique position in this whole affair. I was present when you more or less turned the tide on this issue in 196——

Mr. LIVINGSTON. Five.

Ms. RINGER. A long time ago. But obviously you occupy a different position now, and I think there is some significance in the fact that you still retain your views.

Could you give us a little bit of insight into the situation as you found it in 1965? My impression, if I may, is that you actually did break from a position that was occupied generally by the record company and the performer.

Mr. LIVINGSTON. Well, I remember that day in Washington quite well. As a matter of fact, I was being besieged on either side by representatives of two major record companies, who also happen to own radio and television stations, begging me not to make a statement, and I made the point that they had a conflict of interest in their presentation, and that, really, their position should not be taken into consideration. I believe they have since changed their position. In 1965, the record business was different than it is today. In a sense, it was better then. Today I think the class of music which is being sold has narrowed. I think that the market for a certain kind of music is so tremendous that most record companies are ignoring a lot of music for which there is a market and which people listen to constantly on radio. Most of the records you hear on radio—or, certainly, a great many of them—you couldn't buy if you went into a record store and tried.

So I think it's changed in that respect. I think it has gotten worse, if you will, I think it's a narrower span of music than it was then. I think that we had a wider range between so-called good music or beautiful music or whatever. There's far less of it today available, or at least, being produced.

Ms. RINGER. Thank you.

In other words, you really were breaking with fixed positions, and there were efforts to get you to——

Mr. LIVINGSTON. Totally. I was on the Board of the Record Industry Association, and could not get the Board to take a position at that time. I remember the late Gotter Leverson—I would not let him get on with the meeting without taking a vote, and, as I recall, I think they finally agreed to commit $5,000 to make a study, and that was the beginning.

Ms. RINGER. Could you cast any light on why the position was as you found it then, and why it seemed to change so dramatically after your statement?

Mr. LIVINGSTON. I think people woke up, frankly. I think everybody was involved with trying to get that narrow channel of business and was busy with it. Things are different now, too, today, in that the record industry is not dominated by RCA, who had radio interests, although Columbia and CBS are certainly very large today. There are many record labels that have no radio interest or conflicting interest of any kind that I think the representation on the industry organization is more in their own interests, rather than a conflicting interest.

So I think it's made a difference. I think they just woke up, looking at their business, and knowing how different it is—how if you don't have a certain kind of hit within a three-month period, you can be in serious trouble, and yet your records are being used constantly through hundreds and thousands of radio stations throughout the country.

Ms. RINGER. Thank you.

I think I'll ask you some other questions, but I'll hold my thoughts and, perhaps, some of them will be asked for me.

Let me start at the right and introduce Richard Katz of the legal staff of the Copyright Office.

Mr. KATZ. Mr. Livingston, I've read your testimony from the past years, and I am very impressed by it.

I have one question that is in connection with the last points that you raised about the narrow spectrum that you find.

If Congress were to pass this legislation, and performance royalties were instituted, and more revenues were generated for the record companies, what indications are there that they would broaden the spectrum of music that is produced, rather than simply concentrating on the mass market music as they do now?

Mr. LIVINGSTON. Certain record companies will continue to concentrate. However, if so-called "beautiful music," or however you want to identify it, brought revenue by performance—and, if you just run down an FM station in Los Angeles, you can go down the dial and there's so many stations you can't keep up with them, and you hear beautiful music which you can't buy on records—if that brought a compensation it would encourage record companies to produce more of it. I just can't conceive that this wouldn't happen. To what extent, we don't know. But, certainly, if they're no longer producing only for the teenage record buyer who is going into Tower Records or Licorice Pizza, whatever, there is every inducement. It's the free market which will create production of a product which somebody is already using and now will have to pay for.

Mr. KATZ. Thank you.

Ms. RINGER. Thank you.

Ms. Harriet Oler, who is the head of our team that is investigating this. Harriet?

Ms. OLER. Yes.

I wanted to pursue basically the same thing that Richard was talking about.

I think the record companies get so much more from the mechanical royalties than they could hope to get from performance royalties, especially in the good music or classical music area, that I really wonder what effect——

Mr. LIVINGSTON. Well, record companies don't get anything in the way of mechanical royalties. Music publishers do. But the record company gets nothing except when somebody walks in the stores and buys the record.

Ms. OLER. We had some testimony about the beautiful music in this country, and they had to go to Europe to get it. Do you suppose that is because there's a performance royalty in Europe, or is it just the difference in the broadcasting setup over there or what? Do you have any idea?

Mr. LIVINGSTON. I think part of it must be because beautiful music, when programmed, is compensated for, and here it isn't, and there's no inducement for Twentieth-Century Fox Records, for example, to make that kind of music. We'd go broke. But if, on the other hand, we knew that we were going to be compensated for that commercial use, it would certainly be an inducement for us to make it, and I would have to assume that your European record companies are acting the same way. I think you'd have to talk to them and ask them.

Ms. OLER. You think that would be enough to offset what I was referring to before? I misspoke and said "mechanical royalties" but I really meant sales of records, and the revenue from sales is so much more than we would get even from a projected——

Mr. LIVINGSTON. That's true, but, on the other hand, I'd like to compare it to a music publisher, who gets more money in a given year from his current hit, but the use of his music creates a consistency that encourages him to put in his catalog Hawaiian music, symphonic, classical music, many things which he does not get revenue from by the sales of records. So I think the same would work for a record company. I think there's been many companies who will specialize in that kind of music and service radio stations for the purpose of air play. It may be sufficient to keep them alive. Whether or not they want to go off the hit market is another matter.

Ms. OLER. Going back for a second to your explanation of the changes since 1965, it is based largely, I take it, on the way the music industry is set up by broadcasters. How much overlap is there at this point? You said there was less overlap now between record companies and broadcasting stations. But do you have a more specific idea how much overlap and how much control one has over the other? Are they speaking independently?

Mr. LIVINGSTON. I say there's less overlap because there are so many more record companies. Those record companies which had broadcasting facilities still do. But Warner Bros., for example, who does probably 25 percent of the companies' record business, I don't think they have any radio interests whatsoever. Not that I know of. Twentieth-Century Fox has no radio, although we do have television interests. All of the record companies, like Casablanca, A&M, Motown—all of them are big record companies—they are all interested and they represent an important factor here. They have no conflict of interest.

Ms. OLER. If some kind of performance legislation were enacted, what kind of a split would you favor? First of all, would you favor both the performers and the record companies getting a split, and, if so, what?

Mr. LIVINGSTON. Yes. I've always favored a 50–50 split, and I relate that to the same situation as the music publisher and song writer. The song writer is the creator and the publisher is, in a sense, the manufacturer who spends the money and makes the investment to make that song become successful, and it's traditionally been 50–50. Now, I think in this case it should be 50 percent for the manufacturer of a record who, incidently, spends far more to promote records than a music publisher spends to promote music and the creative people. How that 50–50 percent would be divided among the creator and publisher, I would think would have to be worked out.

Ms. OLER. Is your recommendation based on your analysis of the creator, the equal creator input into this thing, or——

Mr. LIVINGSTON. You mean as related to the manufacturer?

Ms. OLER. Right.

Mr. LIVINGSTON. It's just traditional. It's based on music history, and it's always been that way. It's been 50–50 between the publisher and the creative people.

Ms. OLER. Some European countries do have 75–25 splits, for example.

Mr. LIVINGSTON. In favor of whom?

Ms. OLER. Well, it goes both ways.

Mr. LIVINGSTON. Yes. The cost of exposing a record today, the cost of developing a record artist making a hit song is absolutely mind boggling. I've been away from the record business and just got involved in it in the past year again, and it was a shock to me. I think if anything—as compared to a publisher, where it's 50–50, that the manufacturer might be given an edge, but I hesitate to even suggest that. I think we'd have too much resistance.

Ms. OLER. But is that a copyright consideration?

Mr. LIVINGSTON. It's a consideration as to who makes what kind of a contribution to the development of a recording, and you are really comparing a business and financial commitment with the creative commitment, and I think that the only way to approach it is 50–50. Otherwise there would be tremendous resistance, and I think 50–50 is reasonably equitable.

Ms. OLER. Lastly, I would ask you whether you have any comments on the particular positions of the Danielson Bill that was introduced last April, which, basically, follows the format of earlier——

Mr. LIVINGSTON. I'm not familiar with it. I have no knowledge of it.

Ms. OLER. Thank you very much.

Ms. RINGER. We call on Jon Baumgarten, General Counsel of the Copyright Office.

Mr. BAUMGARTEN. Mr. Livingston, you mentioned that most of Twentieth-Century Fox's interest is in television—

Mr. LIVINGSTON. Yes.

Mr. BAUMGARTEN. Most of the testimony referred to opposition as a radio station.

Mr. LIVINGSTON. Yes.

Mr. BAUMGARTEN. Could you tell us a little about how performance rights would impact television.

Mr. LIVINGSTON. Less than radio. Certainly throughout the country—particularly on smaller independent stations, recorded music is used in many cases. Sometimes it's used as a bridge. Sometimes it's used as a background in a variety show. It can be used in many ways. Radio programs music in some cases almost a hundred percent of the programming time. So obviously, it's far more severe a situation than television. But I'm sure television stations would oppose this because it's a nuisance. They don't want to bother with it. They never paid for it before. Why should they have the interference and have to go take a license in

the same way we take a license? Whatever the cost. If it's a dollar a year, they'd oppose it. But I'm sure that they would take that position. I've never discussed it with them. I have discussed the situation with the Chairman of the Board and the Board of Twentieth-Century Fox. I told them my position, what I was intending to do, and, when they understood it, they totally supported me. I don't know that other television station owners would have that broad a view.

Mr. BAUMGARTEN. You referred to the tradition of this 50–50 split.

Mr. LIVINGSTON. Yes.

Mr. BAUMGARTEN. Traditionally, it was negotiated.

Mr. LIVINGSTON. True.

Mr. BAUMGARTEN. Another tradition is the radio stations paying nothing.

Mr. LIVINGSTON. True.

Mr. BAUMGARTEN. You've been in the business a long time. Is it your opinion that the industry has paid nothing for so many years, whether right or wrong, and that certain relationships, certain ways of doing business, certain structures have grown up, and that performance rights would be a substantial change—too sudden, too quick, and unnecessary——

Mr. LIVINGSTON. I don't think it's that complicated. I think it's the principle which is opposed, not the implementation of it. The implementation is the problem of the record companies and the creative people. A simple aspect would be the way my license arrangement is made, and it really comes down to money and nothing else. The implementation of it is complicated only from our end or from the record company-creator end, and that can be worked out, and will be worked out. Radio stations will deal with one limit, a performing society, and they will license the use of all member record companies of that society, which, presumably, will be 99 percent of the records made. So the only resistance I see is to the fact itself, not to complications. There should be no complications from their end, and I understand their position. I understand it perfectly. If I were a radio chain owner, I'd probably take the same position. That doesn't make it right. It's a totally subjective viewpoint.

Mr. BAUMGARTEN. Just a few sentences back, you referred to some of the implementation being a problem for the creative talent and the record producers. Let me just take that a step further. The broadcasters tell us that the whole thing is a problem to be resolved by the record companies and the creative talent; if sidemen aren't getting paid, they should let the union negotiate a better deal with the record companies. If a certain kind of music isn't being performed, let the record companies make it. It's really a separate problem. Let them take care of their own house.

Mr. LIVINGSTON. It's a ridiculous argument. As to the complications, it is the problem of the record companies and the performers. We're prepared to work it out. Radio stations do nothing but sit back and then negotiate with the performing society. That's all they need do. So it gets down to a dollar and cents negotiation from their standpoint. Sure it's our problem.

Mr. BAUMGARTEN. One final question.

How do you feel about the threat, fear, however you wish to word it, depending on which side you're on, that some of the performers' money is now going to the composers and the publishers will end up being adversely affected by the establishment of the performance royalties?

Mr. LIVINGSTON. Some of the performers would be adversely affected.

Mr. BAUMGARTEN. That the money available now, there will be less of it.

Mr. LIVINGSTON. Who are also writers, you mean? I call that the free economic force, and, however it works out, I'm sure down the line the negotiations will be reasonably equitable. In any event, it's going to cost radio more, and that's the problem, and whatever more it costs should go to the performers and the record manufacturers. If you're going to keep the radio cost the same, then you're going to take it away from the composers of the song, and that's not the intention of the recommendations here.

Mr. BAUMGARTEN. You believe that the broadcasters will pass it on?

Mr. LIVINGSTON. Of course. They'll have to.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. Thank you, Mr. Baumgarten.

Let me call on Charlotte Bostick. Ms. Bostick of the Copyright Office Examining Division legal staff who is a member of Ms. Oler's team.

Charlotte?

Ms. BOSTICK. Thank you.

From what I understand, there's a difference between beautiful music and good music so that when you say beautiful music, you're talking about the easy-listening stations. You've got good music—all of it's good, of course, but you're talking about serious music. You're talking about music that symphonies play. I can certainly see that you might get more air play for the beautiful music, but under the Danielson Bill, where each performer's going to be compensated per capita, there wouldn't be that much available for the symphony, the composers of the symphony and the musicians. So how do you expect that's going to help the good musician, the classical, the serious musician?

Mr. LIVINGSTON. I don't think it will, to a great extent. Radio stations which program symphonic music will continue to be limited for the simple reason that it's a limited audience, and there aren't that many people who listen to classical music. I happen to be one, and I know they're hard to find. So I don't think it will help them that much. That's, again, you know, a condition of our economics. It's a free economy, and radio will program what people want to listen to. I don't think that would change to such a great extent insofar as symphonic music is concerned. It may a little. I doubt it will help it much.

Ms. BOSTICK. I have another question. You are with the motion picture industry. How do you expect the motion picture industry is going to be affected by a performance royalty? Do you think, even in the long run, that there will be any affect on it whatsoever?

Mr. LIVINGSTON. Not that I can see. We examined that, and somebody brought up the thought that maybe if you copyright an audio performance, somebody might decide you should copyright a video performance, but that seems pretty remote and farfetched to me because video performances provide for residual payments. The guilds have taken care of—SAG has taken good care of its actors and actresses—and I have a wife who is an actress, and I know the checks come out of nowhere because somebody reran her picture on television. But that doesn't happen in audio. I don't think it will change the video scene at all, nor need it be changed because it's well protected.

Ms. BOSTICK. You don't think the performers will come forward and say, "Pay me for my individual performance"?

Mr. LIVINGSTON. Not really, because they are being paid as of—I've forgotten the date, but whatever year it was provided for—if you made a picture or television show after that provided date, there is a reuse provision under guild rules, and you must be paid when that film is run.

Ms. BOSTICK. I assume it's not 50–50?

Mr. LIVINGSTON. It's not 50–50. As a matter of fact, I don't know what you'd call it because it's a set fee, and you don't know what the manufacturer of the film is getting for his film at the time he sells it. He might be losing money or he might be making 90, 100 percent. Whatever may happen to turn out. It's a different situation.

Ms. BOSTICK. I see.

Thank you.

Ms. RINGER. Thank you, Ms. Bostick.

Mr. Livingston, you read your statement. Do you have a copy that you could leave with us?

Mr. LIVINGSTON. Yes.

Ms. RINGER. Thank you.

Mr. LIVINGSTON. You can keep this one, if you like.

Ms. RINGER. I don't need it now, but if we could have it for the record.

Thank you.

Just picking up a few points that were mentioned here in the questions.

You expressed the feeling in response to Ms. Oler that, possibly, the runaway record, the use of European instrumental musicians for this type of music might have something to do with the fact that the performance royalty right isn't recognized in Europe.

Mr. LIVINGSTON. Well, if I understood her question, I thought she was referring to recording in Europe for Europeans.

Ms. RINGER. No. I think it was——

Mr. LIVINGSTON. OK. That's a different situation. I think that those who record in Europe are doing so to avoid the AF of M license royalty fee.

Ms. RINGER. Yes, this was really——

Mr. LIVINGSTON. Plus the lower cost of musicians. I don't think that's in any way related to this situation. It's another problem.

Ms. RINGER. This is my impression, too. That's really what I was getting at. I'd like to probe a little bit more because you do have a lot of experience, and played a very important role in all of this. I guess you and I and some of the others in this room play roles in "Whatever Happened to the Class of '65."

Mr. LIVINGSTON. I said 12 years later, and here we still are.

Ms. RINGER. You're right.

There was a feeling at the time that the principal concern of the record industry was the mechanical royalty, the two-and-a-half, three, whatever cents, and I have some feeling on this, too, that, really, at that time the people who are policy makers in the industry were concerned that if they introduced this factor into the Congressional arguments, that it would muddy the water, and they'd be likely to lose rather than gain. It's the overall industry posture. There was a dramatic change, and it had instant results, and would you say that the reasons were that there was a sympathetic response rather than an adverse response on the part of Congress, or was there some overwhelming reaction in the industry or among the performers?

Mr. LIVINGSTON. I'm sorry. I'm not quite sure what you're asking.

Ms. RINGER. I'm trying to get at why this radical change occurred. The industry and the performers went to Congress with a certain posture. You testified and then everything changed.

Mr. LIVINGSTON. Yes, I think it's just—again, I say it woke people up. We have a recording industry which never follows a straight line in its profit and loss statement. I've seen companies that have made millions of dollars in one year, and are terriby in trouble the following year. Now, there's no consistency, no base. You build hit records, and they say, "What have you got this month?", even though the same record which was a big hit and is no longer selling is being played constantly for profit, and I think people woke up to that need because the business is a very difficult one, and this would level it out.

Ms. RINGER. As you suggest, the type of music recorded and the record industry have changed radically since 1965. Do you think it would have been different if there had been a performance royalty?

Mr. LIVINGSTON. It might have been. That's hard to say. If the business had a greater stability, and if everybody wasn't forced to chase that very narrow channel of type of music, and people were satisfied to give a broad range of music and were able to support their business on that basis, I think it might well have been.

Ms. RINGER. Do you think that radio programming might have been different?

Mr. LIVINGSTON. I would hope so.

Ms. RINGER. Well, this is an important question, and you answered Charlotte Bostick, but I was suggesting that, well, this is the marketplace and so forth. But isn't it arguable that the music taste is affected by what the people hear, and if there had been a broader base and more classical music available—we have seen the classical music stations drying up around the country. I don't know whether there's any choice, but it would be interesting. I'm trying to get views on this.

Mr. LIVINGSTON. Well, I think young people today are conditioned by what they hear on radio, and I think that if you took kids—like my 12 year old—and exposed them to Benny Goodman from the time they were nine years old, they would be a Benny Goodman fan today instead of a Beatles fan or whatever. I think they're stimulated by the music, and I think radio plays a terribly important part on what their tastes are and how they react to it.

Ms. RINGER. Do you have any personal experience with the operation of the trust funds from the record industry viewpoint?

Mr. LIVINGSTON. No.

Ms. RINGER. Not at all?

Mr. LIVINGSTON. No.

Ms. RINGER. One final point, which was addressed in Charlotte's questions. I have heard people in the movie industry express concern about this movement in terms of recognition of the legal, Constitutionally-based right on the part of performers, that, under the 1912 law that brought motion pictures into the copyright statutes, the beneficiary was not identified, and patterns have emerged, and, as you suggest, when television came in, there were residual rights established. But under an existing umbrella of a copyright, which did not really identify who actually owned the rights, and there have been cases where per-

formers were sufficiently dominant to own the copyright or get it back, like Hopalong Cassidy. That sort of thing.

Mr. LIVINGSTON. Right.

Ms. RINGER. But inevitably, if performance rights are recognized, expressed in the statute, you're going to have a somewhat different basis for bargaining. As a motion picture executive, does this concern you?

Mr. LIVINGSTON. No. Because I don't think that the burden to the motion picture industry would be any greater than to the Screen Actors Guild or the Writers Guild of America. The do protect their writers. They do protect their performers. And residuals are a way of life for us. So whether it's under a copyright provision or whether it's under a union agreement, I don't think it will influence us much one way or the other.

Ms. RINGER. Thank you very much.

I'm sorry. Mr. Baumgarten has an additional question.

Mr. BAUMGARTEN. I want to follow up on something—getting away from the actors and actresses—to what extent does the motion picture industry utilize the music that's already recorded?

Mr. LIVINGSTON. Occasionally. The majority of motion pictures are scored with original music. Occasionally some motion picture company will take a group of records of a contemporary nature, usually, or of a period nature, if it happens to be a period picture, and use them to score the picture, and, in that case, they must go to the record company and the performers and acquire the rights to do so. They cannot use them without negotiating.

Mr. BAUMGARTEN. Well, the song rights would come from the publisher.

Mr. LIVINGSTON. You're right.

Mr. BAUMGARTEN. Why are they going to the record producer now?

Mr. LIVINGSTON. I don't know. But they do.

Mr. BAUMGARTEN. They do?

Mr. LIVINGSTON. Yes, they do. And they give proper screen credit, and they negotiate for the privilege. Now, the fees may not have been that much. Maybe the record companies do it for exploitation reasons or whatever. But I know of no case where a motion picture company has used a record without permission, and you usually see on the screen "By arrangement with Capitol Records," or whatever.

Mr. BAUMGARTEN. So they might go to the producer. They don't go to the talent, then?

Mr. LIVINGSTON. They go to the record manufacturer—and I don't honestly know whether the performer is considered or compensated. I would assume that they are. I don't know the answer to that.

Mr. BAUMGARTEN. I assume——

Mr. LIVINGSTON. Does anybody know? The audience says yes.

Mr. BAUMGARTEN. I assume the type of picture we're talking about is, like, American Graffiti?

Mr. LIVINGSTON. Certainly. The AF of M has to be compensated.

Mr. BAUMGARTEN. On the other side of the coin, looking at the motion picture industry as a record producer of soundtrack albums, are they generally, for lack of a better word, verbatim reproductions of—

Mr. LIVINGSTON. No. They're edited in order to fit the length and in order to make more complete works out of them, and sometimes they're rerecorded. In either event, the musicians are compensated as if they had been rerecorded.

Mr. BAUMGARTEN. When the sound track album is released, this is generally done through an established record producer who has established some kind of contract between the ——

Mr. LIVINGSTON. You mean a producing company?

Mr. BAUMGARTEN. Yes.

Mr. LIVINGSTON. Yes, absolutely. Invariably, they will offer it to them first. If they turn it down, they'll offer it to others. There's no tremendous demand for soundtrack albums. A majority of the pictures never have a soundtrack album released. It's the exception, and there's only certain kinds of soundtracks and certain kinds of pictures which create that demand.

Mr. BAUMGARTEN. I'd like to go into this a little bit more, and I'm not asking you to do it now—perhaps in the supplemental statement, not the first. When the motion picture company uses existing recordings, from whom are they seeking permission, why, and what do they do?

Mr. LIVINGSTON. From the record company.

Mr. BAUMGARTEN. I'd like to know why?

Mr. LIVINGSTON. They certainly pay the musicians, and I'm not familiar with the average regulations of that record. But I would assume there's some arrangement, because that performer recorded for a phonograph record and was paid for the phonograph record not to appear on the film screen. So I would assume since it's being used for a different purpose and transmitted to a different medium, namely, from the record to film soundtracks, they'd have to be compensated. But I'm not familiar with the terms.

Mr. BAUMGARTEN. All right.

Thank you.

Ms. RINGER. Thank you very much, Mr. Livingston.

The next witness is Hal C. Davis, President of the American Federation of Musicians.

Mr. DAVIS. Thank you, Ms. Ringer. I'd like to introduce Mr. Henry Kaiser, the General Counsel of the American Federation of Musicians.

Ms. Ringer, members of the panel, my name is Hal C. Davis. I am the President of the American Federation of Musicians (AFL-CIO) whose 335,000 members are the instrumental musicians who provide much of the music heard in our great country and around the world. With me today is Mr. Henry Kaiser, General Counsel of the Federation. With your permission, I would like to read our statement for the record, then make myself and Mr. Kaiser available for any questions you might have. We have filed our preliminary statement with you earlier, of course, and we testified before the Senate and House Subcommittees in 1975, when performance rights was last considered by the Congress.

Indeed, the question of a performance right has been considered seemingly forever, some 40 years in fact. The painful history of efforts to win for the performing artists some measure of economic security in the face of technological changes that have robbed them of employment and even compensation for their work has been described in our previous testimony before Congressional committees. It is fully documented and, frankly, it is shameful. I submit that any fair-minded person would agree that there is no justification for broadcasters and others to enrich themselves by exploiting our talents without asking, pay us nothing, often truncate our careers, and misrepresent this injustice as beneficial to us. I will not belabor today the justice of our cause, which fills the record and is apparent on its face. Instead, I would like to touch on points which I understand the people who profit from the free use of our talents have raised, and which should be answered.

First, opponents of performance rights have talked about a "quid pro quo"; they say we are amply compensated for their exploitation of us because they are, in their words, "promoting" our talents and the products of the record manufacturers who employ us. They have even clouded the issue by citing examples of alleged "payola" payments designed to get a particular station to play a particular record or promote a particular group.

They do not tell you that over half of the recordings played on radio are those with no meaningful sales life remaining. They do not tell you about the retired musician who sits home with his social security check to support him and listens to himself on the radio, while the station broadcasting his work for nothing may charge as much as $150.00 a minute for commercial time. They do not tell you that exhaustive investigations of "payola" have produced very few examples of current practice; and that the people whose records are involved in this infrequent but unhappy practice are young, unknown artists. No one pays to get stars' records played. It is because broadcasters have no interest in promoting new talent that recordings by new talent are most often involved in being bribed onto the air. This lays bare the specious argument that promotion of the talent is ample compensation for its use.

Even if such use of our talents did promote our interests, haven't we the right to say anything about it? What has happened to the concept of free choice? If you want to borrow my lawnmower on the questionable theory that the extra use will sharpen it, you should ask me—don't just steal it.

Another thing our exploiters haven't told you: All background music and most broadcast music doesn't really promote anybody, because the talent is seldom given credit. The background, anonymous musician playing behind a star finds little comfort in listening to his records sandwiched in between commercials on the radio. What good does that do him—or her?

But perhaps the most important point is this: Whatever good was derived by the music profession for the playing of records by commercial entrepeneurs

was long ago undone because of all the musicians displaced in cafes, restaurants and especially station staff orchestras. Before the Lea Act was enacted at the behest of these same broadcasters there were thousands of musicians employed by radio stations throughout the country. Now there are none. The broadcasters have told you they play free recorded music for our benefit. We say, "Fine, let's test your claim. Stop doing it. We don't want your charity. Don't play our music anymore."

The NAB with its characteristic brazen audacity has told you and Congress that radio stations cannot afford to pay any royalties at all, even those so modestly proposed in the Danielson Bill. But its own study, conducted for the National Association of Broadcasters by the broadcast consulting firm of Frazier, Gross and Clay (and reported in the May 23, 1977 issue of Television Radio Age Magazine) projected an 85.9 percent gross in radio station revenues between 1975–1985; going from $1.7 billion (in 1975) to $3.2 billion (in 1985).

Opponents of performance rights would have you believe that creation of these rights would only serve to make the "Fat cats" richer, but that they won't help anybody else. Let's examine that.

In 1976, recording companies paid scale wages (excuding royalties) of $28,678,467 to 25,452 musicians. These were session fees, and included symphony recordings as well as others. (Symphony recordings, as a point of interest, accounted for $890,157 of that total). That means that the average amount earned by each of those 25,452 musicians was $1,072.11 from recording session fees in 1976. I ask you: How fat are these cats?

In addition, recording musicians, as a result of union-negotiated contracts, will receive payments totaling $11,129,129 this year, through the record manufacturers special payments fund. This payment is divided among approximately 40,000 musicians, and will provide them with an average of $278 each. While these extra earnings are most certainly welcome, they hardly qualify the recipients as "Fat cats."

Although the special payments fund is entirely apart from any of the matters now before us, and has no bearing whatsoever on the subject of performance rights, let me, in the interest of clarity and for the record—and to dispel once and for all the notion that recording musicians are "Fat cats"—tell you how it works.

The fund has been in existence now for 13 years. Under the terms of AFM contracts, each record manufacturer makes payments to the fund based on its sale of records. Each union member who made phonograph records receives an individual payment based on the relationship of his scale earnings from phonograph record sessions he played to the total scale earnings of all union musicians engaged on such sessions. Payments are made annually to musicians who made records during the past five years. Thus, musicians who will receive checks next month (based on last year's contributions) have made recordings from January, 1972, through December, 1976. Administration of the special payments fund is entirely independent of the union, and its proven success during its 13 year history demonstrates that the mechanism for independent, efficient and economical distribution of royalties already exists.

We do not suggest that the special payments fund should administer a royalty distribution. We merely cite it as one viable solution because of its success as an economical and independent instrument for doing so. We would be satisfied to rest on the experience that the Copyright Office will have after investigating the European experience and your study of how ASCAP and BMI have successfully accomplished this. We do suggest that by utilizing the facilities of ASCAP or BMI, both composers and musicians would benefit by sharing administrative costs. Indeed, an entirely new and independent organization could be established in your office if Congress felt the need. What is important is that whatever system is adopted or devised, it should be independent of the unions involved, economical and efficient.

I would like briefly to describe the music performance trust funds, since they have been mentioned during previous testimony. I believe the question was asked why MPTF doesn't answer the problem we are discussing here today.

MPTF is an independent organization administered by a trustee appointed by the U.S. Secretary of Labor. It is financed by the recording industry under agreements with the American Federation of Musicians. Its sole purpose is to provide performances of free, live instrumental musical programs on occasions which contribute to the public knowledge and appreciation of music. In many

areas of the United States and Canada, MPTF-supported programs are the only source of live music.

Since its inception, MPTF has spent over $130,000,000 to present approximately 1,000,000 live, free public performances on occasions where no political or commercial advantage is served. You have all enjoyed music played in schools, in parks, on the 4th of July, at parades by marching bands, at neighborhood block parties by rock groups. You know someone who has enjoyed a strolling musician in a nursing home. These are the kinds of programs that MPTF makes possible. In addition, it supports literally hundreds of community orchestras, and enlists the co-sponsorship of business and community groups to provide even more programs. These activities are made possible because the American Federation of Musicians and the recording industry—after some struggle, admittedly—agreed that creation of this independent organization, devoted to bringing live music to the public, was a positive solution in the public interest to the problem of people being displaced by technology.

While the MPTF is worthy, independent, and operates with superb efficiency, it bears no relationship to the question of performance rights, and the two ought not to be confused. The trust funds have nothing to do with background music or with broadcasters. On the contrary, the money to support it comes from the recording industry.

We are not here to talk about the recording industry and what we need from them. We can negotiate with them. But we cannot, under the repressive Lea Act, negotiate with radio stations who use our records against our wishes. We are here to argue on moral and legal rights and to have a say in what the broadcast industry is doing with our records. The distinction is clear, and easily understood.

The bill introduced by Representative Danielson to establish a performance right was written as a compromise, to get legislation on the books. It is a sad comment that even its modest fee proposals failed by one vote to be reported by Chairman Kastenmeier's committee.

It is our belief that the precise royalty should not be prescribed by Congress, but, by a proper commission after full investigation of all the relative data.

If it were not intended to perpetrate an outrageous injustice, we would find laughable the repeated allegation in the statement of the NAB that radio stations "perform sound recordings." Do they also allege that a magazine that prints a painting of Rembrandt created the work of art? Is it enough to have our works taken without our being compensated? Must we also welcome to the creative fold as fellow artists the very people who rob us of the only means we have to earn a living, and who themselves grow rich on that denial of our rights?

The days of the robber baron in this nation are supposed to be over. The rape of our resources is now, thank God, the Government's legitimate concern. The talents of American artists, too, are a legitimate and vital national resource, and no one has a right to steal them.

In summary, ladies and gentlemen, the American Federation of Musicians strongly urges establishment of a performance right for sound recordings. We believe that if you're going to milk the cow, you'd better feed it once in a while.

Mr. RINGER. Thank you very much.

Do you want to add anything, Mr. Kaiser, at the outset? Then let's start the questioning with Mr. Katz.

Mr. KATZ. I just have a few very brief questions. The two funds you have, a special——

Mr. DAVIS. Payments fund.

Mr. KATZ. Special payments fund and a——

Mr. DAVIS. Music performance trust fund.

Mr. KATZ, What is the source of these payments? You say the record companies provide——

Mr. DAVIS. The source is the sale of recordings. The sale of records.

Mr. KATZ. That's the sole——

Mr. DAVIS. That the sole source.

Mr. KATZ. Do you think that the repeal of the Lea Act would be a reasonable or acceptable alternative to——

Mr. DAVIS. The two shouldn't be confused, at all. They should be separate and apart. The repeal of the Lea Act is——

Mr. KATZ. Would that give you the ability to bargain with the broadcasters over the use of——

Mr. DAVIS. It would give us an ability which we don't have today, but it's questionable as to what degree. I would like to refer to general counsel Kaiser on this question.

Mr. KAISER. Well, the difficulty there is that the negotiations assume employees of an employer who is represented by the union. We have no employees in the radio industry. Nobody to represent, and, hence, no negotiations. The situation is fairly complicated by the fact that on the Taft-Hartley Act, the power once enjoyed by the union to negotiate or effectively to obtain an employment in the radio industry no longer exists. That power stems from the ability of the unions to cut off very popular national programs at their source; to threaten the network with a strike if it sent that program to an affiliate which discharged its musicians and employees are otherwise treated unfairly. The boycott prescriptions of Taft-Hartley cut off that. So while we think the Lea Act should be repealed, because it is—in my most sincere judgment, one of the ugliest pieces of legislation enacted by a Congress that's capable, as history so tragically demonstrates, of ugly legislation. That act, like the bogus campaign that effectively barred our inclusion in the division of the basic copyright law last year, was merely a reflection of the awesome political power of the broadcasting industry. And it was premised on the wildest assertions and personalities, but it was a very effective, very effective job on the technical point of view, putting pressure on the Congress of the United States. I think we secured one dissident in the Congress, a wild gentleman by the name of Mark Antonia.

If I may, I can recall that I happened to be in the office of the then Senator from California on an entirely different matter when he was interrupted by a call to vote on the Lea Act, and he said, "How are you going to vote, Senator?" "Oh," he said, "We're voting for you," but that's not the way the vote came out.

But it would help, really. Except as further indications of what we're up against. Indeed, I must say that some of the questions being put by your very distinguished group I find a little surprising, in the sense that nobody has contested the moral legitimacy of this. Nobody is against the creative contribution made by the performing artist. I think we have no better supporter of that moral than Ms. Barbara Ringer. I go back to the Class of 1960 with her. It's almost carrying coals to Newcastle to make these statements of hers. She is as fully familiar with our problems and our rights as are we. And I suggest the only reason we're here today is because, as a practical matter, it was felt that you could not achieve or reach an end to your very constructive and laborious efforts. It was so many years to get the basic provision because of the awesome, if ugly, power, political power in the broadcasting industry.

Mr. KATZ. If I may, one thing.

What are your thoughts on the compulsory license aspects of this proposed legislation?

Mr. KAISER. In what respect?

Mr. KATZ. Do you favor that? Do you accept it?

Mr. KAISER. Yes; I do.

Mr. KATZ. That's all.

Ms. RINGER. Thank you.

Ms. Oler is next.

Ms. OLER. I think the questions aren't supposed to be indicative one way or the other. We're just trying to make a full record on the whole issue, and to hit the broadcaster side as well.

Mr. KAISER. Nothing personal.

Ms. OLER. Picking up on the compulsory licensing—one of the arguments is that performers do deserve this type of remuneration because over-exposure often shortens their careers, their earning careers, and if there is a compulsory licensing scheme—although it may be the only practical solution if there is this kind of legislation, it will, in effect, remove from the control of the performer the exposure of his recording.

Mr. KAISER. I don't——

Ms. OLER. That doesn't bother you that much?

Mr. KAISER. No.

Ms. OLER. In previous testimony, we had a figure of 80 percent unemployment by the AF of M. Is that pretty much square with your figures?

Mr. KAISER. Well, that's a hard figure to come by. I don't know the exact figure. but we have over 300,000 members, all of them qualified musicians of varying

degrees of talent, to be sure. The agent or musician who makes a living or a substantial part of his living on music is much smaller than that. It would be, I would guess.

Ms. OLER. That was my next question.

Mr. DAVIS. It would not be 20 percent. It would be closer to 12 and 15 percent.

Mr. KAISER. Some people want to play music, who can play music, but are engaged in other enterprises because of the want of live opportunities. And it is a fact that the phenomenon of recording passes by talent, and then you use it in perpetuity, which is the basic source of this unemployment. Whatever good it has brought—and it has brought a great deal of good for all of mankind—it has had a savage impact on the economic stages of professional musicians, of the musicians and talent, for instance.

Now there is another phenomenon of the recording artists who almost, by definition, represent the best talent we have, who are unemployed right here in this town, which is, probably, the saddest home of the greatest concentration of musical talent that the world has ever known, and that's not just flag waving. I think it's a fact because of the attraction, economic attraction of the work opportunities and potentials always here in this town. There are many, many extremely gifted musicians in this town who are unemployed and who are still seeking their livelihood just from music. The unemployment is a result of the endless play of all recordings with very little or no compensation to the musicians. In that connection, the gentleman who spoke first this morning, who I heard for the first time made a very inspiring statement, which was a little mistaken in response to, I believe it was your question. The musician does not get any reuse in the film industry, any residuals in the film industry, and, indeed, by sheer happenstance, we happen to be occupying a room next to a room where negotiations are taking place with that industry this very moment. And that's one of our basic demands and has been over the years. We get no compensation for film and film recording for reuse.

Ms. OLER. Getting back to the unemployment, for a minute, presumably these figures will be important if there is a thorough economic study of some sort prior to rate setting, and——

Mr. KAISER. Where I find difficulty is—do you call a musician unemployed if, as so happens, you train him for so many years, and he is simply unable to sustain himself as a musician. So he sometimes, as I indicated in, I think it was the House hearing, is forced to reduce himself to studying law.

Ms. OLER. A mean fate.

Mr. KAISER. Well, he's employed. There's money coming in, but he is an unemployed musician.

Ms. OLER. All right. Just take those persons whose full-time living is musicianship. Have you noticed or can you tell if they represent any particular type of music, classical versus rock or jazz or any other type?

Mr. DAVIS. You're covering the entire gamut of the profession. All phases. Those who are working as a full-time—as you say, musician. We have some 40 major symphonies in the country today. They're comprised of, roughly, 100 players in each orchestra. So there's 4,000 there. The rock groups that we're hearing, the full-times, they're members today. It's awfully difficult to come up with an exact figure based on total unemployment.

Now, there's a difference between unemployment and underemployment. The National Council for the Arts at the present time has a survey going on for all of the performing arts to try to determine just how much unemployment there is and how much underemployment, and the underemployment figure we anticipate—and are fairly reasonably sure that we're right—is going to far exceed the unemployment figure.

Mr. KAISER. That is an extremely important distinction that didn't even occur to me. Do you call a person unemployed, if he gets one recording a month to do? That's employment, but damn little. I guess that would be underemployment.

Ms. OLER. Let's see. In your testimony, in your written testimony, you supported the Danielson formula for a 50–50 split, and presumably you assume that the inalienability provisions and so on will be sufficient protection for the performer.

Can't that be circumvented by bargaining with the record companies?

Mr. KAISER. We have not only some confidence in the good faith of the recording industry, we have supreme confidence in our own economic muscle in that industry. We're not that concerned about getting the wrong shake. We've had no trouble in negotiating with the recording industry, and that's one of the few industries

where, the union having demonstrated a power in two national strikes, and because of the inherent nature of the industry, they must negotiate if they are to survive economically. But we've never had any real trouble in negotiating with that industry because there the need is self-evident and real—the need to hire live musicians. And if you're a live musician employed by the industry, that's pretty good security.

Ms. OLER. When we were in Washington last week, we spoke with Mr. Woods, who is President of the AF of M up there, and he was suggesting—pardon?

Mr. KAISER. He is the Vice President of the AF of M in charge of Canada.

Ms. OLER. He was suggesting that if Canada were to enact performance royalties that the union might adhere to the distribution—probably the collection as well—and that he thought that with their experience in the trust funds administration and so on, they could work out a much less costly system of distribution based on records they already had.

Why do you advocate no union involvement in the distribution?

Mr. DAVIS. I'll let Mr. Kaiser get into the details, but you have the radio industry in Canada, in the main controlled by the government, the Canadian broadcasting system, so that the source of control of those records is pretty much on the one spot. But in the United States with free enterprise, we don't have this sort of a situation to start off with, so that our problem is a little bit more compound.

Mr. KAISER. Of course, we have statutes in this country that have no equivalent in Canada. There's a criminal proscription against any payment by any employee to a union. Indeed, the original instruments fund that we now have was administered by the union, and even more economically than it is currently being administered. That was put out of business by Taft-Hartley, which prohibits any payment to a union by any employer. That prompted the second strike with the resulting industry's reaction, but I think the whole climate in America, in the States, is such that we believe it would be more salable to a public to have this, as President Davis' statements suggest, administered by an entirely independent market so as to avoid any claims of possible skulduggery.

Ms. OLER. What records do you have that would be useful to an independent distribution agency?

Mr. KAISER. What?

Ms. OLER. What records do you now have? What documentary——

Mr. KAISER. Records of what?

Ms. OLER. Well, I assume that you would be able, from the records, to identify what performers were on what recordings, that sort of thing.

Mr. KAISER. Oh, yes. We have complete records on that. We have documentation on every selection that's made with the names of the performers, to whom it was made, when it was made, et cetera.

Ms. OLER. So the identification will be no problem?

Mr. KAISER. No.

Ms. OLER. Just one last thing.

What's your position on the Rome Convention? Do you favor joining the Rome Convention?

Mr. KAISER. Yes. We supported the Rome Convention, and I believe we were the only group that supported the Government on that. As I recall—And my memory is kind of dim on that, Barbara—but my recollection is that the Rome Convention would not have added anything to what the American musician already had achieved by the bargaining group. We supported it, as a matter of principle, the notion of establishing a performers' right, one that would be very dear to him, but we were overwhelmed by the groups that were opposed to it, the opposing groups, the motion picture industry, the record industry at that time, with some exceptions. And the broadcast industry.

Ms. OLER. Is that position——

Mr. KAISER. And I think they persuaded the State Department not to push it, at all.

Ms. OLER. Is that position based entirely on your hopes of getting a better balance of payments coming into this country to our performers, or would it be consistent even if that weren't true? For example, in Canada, they're talking now—if the legislation is passed up there, they're going to up—the Canadian content ruling said that there wouldn't be an outflux of payments to the United States performers.

Mr. KAISER. Our position would be the same, regardless of whether it meant more money to the U.S. musicians.

Ms. OLER. Thank you very much.

Ms. RINGER. Jon Baumgarten, next.

Mr. BAUMGARTEN. Mr. Davis, you referred to the fact that the question about performance rights has been considered seemingly forever. Mr. Kaiser made some similar comment. What do you really think we're doing here today? Can the Copyright Office make a difference, or is this just a futile exercise, and, if we can make a difference, is there anything that we're not doing that you think we should be doing, or anything that we should be doing definitely?

Mr. KAISER. I hate to go on the record on this. I don't see any dilution in the political forces that, in effect, created these hearings. I believe—I'm giving away a personal opinion. We were given a political brushoff and a convenient one. Nevertheless, I'm an old-fashioned fellow. I just think it's an ugly aspect of contemporary American life that the Congress is motivated not by what it considers to be the right thing to do, but by what its actions or how its actions will reflect on the next election. And I therefore think it behooves people like yourselves and people like ourselves who are fully persuaded—perhaps I'm making some reflections about yourselves—I'm speaking mostly of my knowledge of Barbara's attitudes—to keep calling this to the attention of the Congress of the United States and to the people of the United States until what is right is achieved, if only to expose some of the machinations of the political scene in Washington.

Mr. BAUMGARTEN. Thank you.

Would you be in favor of the existing performance rights societies representing composers and publishers, if there were performance rights, or would you rather see this separated and the composer-publisher interest kept separate from the performer interest?

Mr. DAVIS. We think we could perhaps utilize the mechanisms of ASCAP and BMI and other groups in existence today, as far as their air checks and so on, and, perhaps, by a sharing in the administrative costs of such a plan, this would provide more for the performers if it reduces the operating costs, and reserve all the other ramifications, find out what was playing, what time, where, so that it's ability—in our judgment, that we could utilize the existing setup and all participate in sharing the costs, the California costs.

I don't know if you have any other thoughts.

Mr. KAISER. I agree with what you say, and we have no clear preferences. We want anything that will work, and there's—as Mr. Davis suggested, if these groups would accept us, we have no objection to participating with them—for the reasons he asserted.

Mr. BAUMGARTEN. Do you have any statistics on how many of your membership are also composers?

Mr. DAVIS. We don't have any exact statistics, but most of the composers in this nation today are also members of the Federation. However, when we renegotiate their contracts and the motion picture contracts and so on, we do not represent composers. Several years ago, they requested permission to form their own guild, and it was granted by the Federation at that time. So that they belonged to the Federation, as far as being instrumental musicians are concerned—talking about Mancini and so on, fellows like that, but, when they are operating as composers, they have their own guild, and they do their own negotiating with the employer as to their compensation for the composition.

Mr. BAUMGARTEN. Mr. Kaiser, did I understand correctly that when rerecorded music is used in the motion picture industry, that there is no compensation paid to the performers?

Mr. KAISER. No, you did not. What I said was that I believe the previous witness said that there are residuals in the film business. He was addressing himself essentially to the TV film business, and we do not have residuals in the sense of reuse. We have it, curiously, in what we call a tape side of the business, the networks on variety shows—the musical variety shows you see on the air are made on what we call a tape contract. There we have residuals. We have no residuals either in theatrical film or TV film. The word "residuals" is a little tricky here. We get no reuses so that the old films that you still see on TV, the old theatrical films which go no endlessly, pay nothing to the musicians. The film series, TV stuff that goes on and on and on, repeatedly, pays nothing to the musician who made the track for those shows. But use of records in motion pictures is prohibited or was prohibited by our contract with the film industry. Our contracts provide that if there is any score for

any film produced in the United States or Canada, that that score would be done live. Now, because of an occasional use or desire to use a record in a film, we have now in the contract their right to do that, provided they pay the original musician the same fees they would have paid had they engaged them anew to make a record.

Mr. BAUMGARTEN. Thank you. That answers the question I had.

My Class of '60 was different than yours. But I do recall reading some of the history of it, and, apparently for some period of time, the unions stayed away from the performers' rights answer to the problem, and preferred to seek other courses. There was a time, I understand, when the unions were not the strongest advocates for performance royalty as the solution of the problem of the record replacing the live performers.

A suggestion has been made, at least by one broadcaster, that you're trying to use copyright to solve a problem that you blew a long time ago and that you should have done a better——

Mr. KAISER. I don't hear you.

Mr. BAUMGARTEN. You're trying to use copyright to solve a problem that you pretty much blew a long time ago and that, if you handled your negotiations better, you could have solved this problem, vis-a-vis, a better deal with the recording industry. So you're now back for a second track. I'm not taking that position.

Mr. KAISER. That's simply not true.

Mr. DAVIS. I would suggest that that broadcaster is being very careless with the truth. Prior to the induction of the Lea Act, we handled our radio industry quite to our satisfaction. And that's why the Lea Act was adopted, because we were handling the radio employment to fit the needs of the musician of that time. With the adoption of the Lea Act, our bargaining rights were taken away from us, our negotiating rights were taken away from us; so we have no other place to go now except to concentrate on performers' rights, in my judgment.

Mr. KAISER. I'd like to suggest that, as far as I'm aware, and I've been associated with this union for 30 years or more, the union always ardently supported the concept of performers' rights, including the Rome vehicle. We supported that throughout that meeting and we continued to support it when we came home, and we were the only group that I know of that urged the State Department to push this with the Senate so they'd ratify that treaty. Now, it gets a little tricky. I indicated that the basic problem for musicians the world over today has been the displacing power of any record. But the initial step was one like the—I forget their names now, the old English workers who simply started destroying the factories that were replacing them. The initial step was a ban on recording back in 1940, which resulted in the first trust fund that we now have. But the records came, and the union recognized that they had no more power. Now, you had an internal basic—an internal conflict of interest within the union, and, in the sense that the recording musician, who was, indeed, much in the minority, who was, for a period of time—I mean a period of his career, actively engaged in a recording, unable to sustain himself and his family with some dignity, obviously was benefitting from the record phenomenon. The displaced musician was not. The membership consists of both. We've made adjustments. They are not logically consistent, but, practically, they kept this union alive. On the one hand, you have this fierce desire to get jobs on radio stations, enough to have them playing records all day. The musicians throughout the United States and Canada. Jobs that they once enjoyed. We had, as you are aware or may be aware, jobs in every movie house in America which ranged from a single piano player to a full-blown orchestra. They were all put out of business by the phenomenon of sound movies.

Now all of these things are definitely here. Nobody's going to stop them, and so we worked out these various accommodations, none of which are wholly satisfactory, but the interest of the musician in this legislation is to benefit the recording musician, whose creative talent is making the broadcasting industry rich, and giving him nothing.

I don't know if I've fully answered your question, but there have been inconsistencies in our policies. Indeed, I forget his name, Barbara, the chap who represented the BMI for years.

Ms. RINGER. Sidney Kapp.

Mr. DAVIS. Sidney Kapp, on one of our joint trips to the Congress way back before the Rome Convention, he acknowledged resistance in those days. The BMI and ASCAP resisted us, too. I don't know where they stand today. I know before they got their act, they were keeping quiet. Anyway, they were not opposing them.

Mr. BAUMGARTEN. Well, BMI has filed a statement in this proceeding. Essentially they stated that they support your course, but they're worried because they don't want any dilution of the funds that would otherwise go to them. Does this trouble you?

Mr. KAISER. Well, it's news as far as Sidney Kapp is concerned, if he's still around. He was prepared to go along, if he could get assurances that they not cut off the records on the air if we had complete power to authorize. That's all. We recognize it's going to go on the air. We're not opposing that as such. We want this royalty paid.

Mr. BAUMGARTEN. Well, apparently, if a broadcaster has "X" dollars to pay, it's now going to BMI, ASCAP and SESAC. If there's another party in the pot, it will just come out of their pocket.

Mr. KAISER. Well, it's a self-evident proposition. But I think the real fact there is in the profits of the industry that continue to be lucrative by adding to the payments rather than by maintaining a rigid size of that pay.

Mr. BAUMGARTEN. Thank you very much.

Ms. RINGER. Go ahead, Charlotte.

Ms. BOSTICK. I'd like to ask a few questions about the collection and distribution system proposed in connection with the proposed performance royalty. I'd like to know, for example, whether you would be prepared to go with a weighted system on a per-minute scale so that if a worker performed for a long period of time, like a symphony, the symphony musicians, being larger in number; would get a larger portion of it. The Danielson Bill talks about a per capita payment. Would you be at all amiable to a voluntary weighting system so that a work that was a long work, that extended over an hour or a certain amount of time, would get paid more simply because it lasted a longer period of time, because it was a longer performance time?

Mr. KAISER. I have no—I really—I don't know if Hal has. We've never addressed ourselves to that particular problem. My offhand reaction would be, though, that there would be a license to use any of these recordings and payment accordingly.

Ms. BOSTICK. My question was concerning payments to the musicians themselves—whether the distribution would be more in favor of these symphony musicians. You perform for a longer period of time. Is your answer that you think they would not? They would just get paid per capita?

Mr. KAISER. We'll have to think about that and yet you know in writing.

Mr. DAVIS. Our experience today has been on a per capita basis. We would certainly take a look at the weighted method that you're suggesting here. I can see your point. Where you have a hundred-piece symphony orchestra and the work might take anywhere from, depending on the work, anywhere from 40 to 50 minutes, that if it were on per capita, those hundred people for playing that record as a one-time record would not participate to the extent that the musician, on a popular record that takes two, three minutes, a minute and 50 seconds to play, would participate. So we're not in any position to give you a yes or no answer. All I can say is that we will certainly give it full consideration and give you our response to it.

Ms. BOSTICK. OK.

Is there any concern that the performance royalty might create economic disfunction in luring more people to the music field than are already in it? I don't know. Someone said that the grandfather generation was a doctor so that the father generation could be an architect so that the one generation could be musicians. So, evidently, musicians must be pretty powerful people. It must be very great to be on stage and to be a performer. People come to music from all sorts of fields. Is this going to make everybody come to music so we won't have very many doctors, we won't have very many dentists, et cetera?

Mr. DAVIS. I can only respond to that by saying a musician isn't made, per se. A musician is born. They've got this inborn talent that has to be developed, and I don't think that there will be a great influx of people switching to the music profession because of a performance right provision of the Copyright Act. I just can't visualize that, at all.

Ms. BOSTICK. OK.

I have one other question about over-exposure. You say that sometimes you get over-exposure from radio play. How does that work? Musical works, for example, get to be classics because they're exposed over a long period of time. Talk about Beethoven's 5th. Everybody recognizes it now by the first four notes. Are you saying that a person is really hurt by continued air play of his work?

Mr. DAVIS. It is conceivable that a popular star who has air waves saturated with their latest recording—be it a rock group or any other type of performer—could hit the over-saturation point, and it could be harmful rather than helpful. There's a fine line there which it's awfully difficult to define, but there is this possibility.

Now, take into consideration that of the air time on the radio today, 75 percent of the hours is recorded music. Only 25 percent are the talk shows, the sports, the news and things of that nature, so that a vast majority of time on radio today is used for recorded music. It is possible—in any given market area—that a performer, for example, coming in to perform at a certain club or hotel, can be oversaturated by the performance of his recordings before he gets that date. It is a possibility. I didn't say that it's an everyday happening, but there is a possibility.

Ms. BOSTICK. OK. So you're saying that if a recording is played continually over a short period of time, then for a certain type of recod, at any rate, that could oversaturate the market and make people not want to buy it I believe somebody asked "Why should you buy a record when you can hear it for free over the air?"

Mr. DAVIS. That is possible.

Ms. BOSTICK. But in some classes of works, repeated air play doesn't necessarily mean over-exposure.

Mr. DAVIS. That is true in some.

Ms. BOSTICK. That's all I've got.

Ms. RINGER. Thank you.

I guess I should say something, repeat something that I said in Washington about the realm of the Copyright Office and my own personal dilemma here.

I am on record as supporting the performance of royalty in principle, but I was asked very directly at the time you described, Mr. Kaiser, when the bill including the performance royalty was before the House subcommittee, if instead of them addressing the problem and voting it up or down, that if they included a provision that is now in Section 114, that the Copyright Office would make a study, and I really had no choice. I had to sit, and I realize I was in kind of an awkward position because of the stand I had taken on my own behalf and on behalf of the Office, a stand on the principle of the question because I did feel very strongly that we should make as objective and searching a study as we possibly could. I think Harriet will bear me out on this. We agreed to take a very hard look at this question, and that I would lay down no directions, no conditions whatever. The basic instruction that we gave to her—and Jon was also involved in this—was to study it as searchingly and broadly as we could in the rather short time that we have. And I said this to the broadcasters in Washington, also.

If the questions seem difficult and put you in an awkward position in some case, it is to get information, and, with that in mind, I have no idea what I'm going to recommend to Congress eventually. We are making an economic study, and we're going to lay out for Congress as much information as we can induce, and that is one reason that we want to go into some of this history. It is painful, I know. It's painful for people in various parts of the music industry to review all of this. But I think it is important to try to figure out where we come from and why this issue is arising in 1977 in the context it now exists when, obviously, performance rights and recorded music have been with us for 50 years. And I do go back in this a long way myself. I know from my own personal observation and what I was told directly that at one time—although the performers, the organized musicians never took a position opposing performance royalty—you can tell at a particular point whether the support is more or less formal or whether it is real, and, I think, in 1965, at the point that Alan described earlier, there was a change.

Mr. KAISER. Yes, there was a change. The change was essentially, that by that time, we got a deal with a recording industry to get their support in the recording industry. Now, you will remember that way back in Rome there were a few people there from the recording industry in opposition to the official posture of that industry in support of performance rights. Now, without diluting the description obviously made by this extremely impartial gentleman that spoke earlier,

that was the real genesis of a re-energized push for legislative relief in the copyright field. What I suspect happened is not just a wild suspicion, but I'll put it in those terms. What happened was that the industry was totally dominated by some of the real fat cats who also and primarily were in the broadcasting industry. The Columbia Records, RCA, and, even in those days, to some extent, ABC, were very important in the recording industry, but their main lifeline was the broadcasting industry, and they bulldozed the rest of the industry with a few heroes in their push for their economic right and their moral feelings about it.

Now, that changed. Possibly part of that change was a growing recognition on the part of the public of the tremendous power exercised by the networks. Now, they were in there—of course, they need affiliates. They were in there protecting the radio broadcasting, and, therefore, their own interest. There was the really effective critical change that—and we got together with President Kennan, Jerry Adler, a colleague of mine, and with the industry. They said they were prepared to go along with a support of this performance rights.

That was the change that occurred, in my opinion.

Mr. RINGER. You may well be right. My impression at the time was, though, that the genesis may well have been the development of Rome and the Rome Convention itself, the actual going forward with the program. The sort of fountain of testimony that we saw in the House and Senate later on did not occur until after the Livingston testimony when there was a breakthrough. I'm not sure that it wouldn't have happened, anyway, but I do look on that as some kind of watermark. And it went beyond that. I did have the impression that, under James Petrillo, there was a certain reluctance to push copyright for fear that it would interfere with the basic trust fund devised that he looked upon as the solution.

If you disagree with that, say so.

Mr. KAISER. I not only disagree with it, the impression is erroneously premised. To begin with, Petrillo was out in '58. Kenin's whole orientation was different from President Petrillo's in this regard, and, as far as I'm aware, there was never anything but support for performance rights, even under Petrillo. He had no concern about diluting the fund through copyright, none whatsoever.

Mr. RINGER. It would have been unthinkable for him to oppose it, obviously, but it was a question of priorities, and I did have the impression that he was less than enthusiastic.

Let me ask you a little bit about the second strike. Could you give us some background there. What led to the second trust fund?

Mr. KAISER. Well, I indicated that the fund was going fine. I think they called it a radio and transcription fund, RTT, and, believe it or not, there's still monies going to the current trust fund from the 1942—I think was the time we established that. Now, that fund was automatically put out of business with the enactment of Taft-Hartley, Title 3, which prohibited these payments to a union. That's where they established the pension fund and so on, and the statutory language, if memory serves, is that those that are permitting the establishment of pension and welfare fund, the statutory language was payment by an employer to his employee—and the fund, obviously, was not a payment to his employees; it went to the musicians throughout the country. That was automatically outlawed and precipitated a second strike, which was worked out, finally resolved, by getting around that prohibition and making the payments to an independent industry. We went to the Secretary of Labor, got an opinion out of Bill Tyson, who was then Solicitor. His opinion was sent over to Tom Clark, who was then Attorney General. They approved it, and that's after this strike.

Ms. RINGER. That was a restructuring of this performance fund? OK.

Let me come to the second trust fund, the special payments, or whatever it is. Give us some background about the Local 47 fight and the——

Mr. KAISER. Well, that was the best illustration that I have of this very important effort I made of describing the union's efforts to reconcile the inherent conflict between the recording musician and the displaced musician. One of the causes of the difficulties we had here in California on the part of the recording musicians was the feeling that it was their effort, their recordings, that was generating the payments to the trust funds, and they felt that was wrong, and President Kenin met that problem by deciding to split that fund. So that, in effect, half of it now goes to the special payments fund and half to the musician performance trust fund.

Ms. RINGER. It's split in half, then?

Mr. KAISER. Yes. In other words, of what used to go entirely to the fund for these free public concerts, half of that money now goes to the fund, half goes to special payments fund.

Ms. RINGER. Are these arrangements renegotiated with the recording industry as a whole at regular intervals?

Mr. KAISER. What happens is that all of the records made during the life of any agreement are—in perpetuity subject to that fund. One of the changes that was made in relatively recent years is that payments to either fund cut off, I believe, the 10 years after initial production. The trust agreement is technically subject to change at each negotiation of the recording agreement, the record agreement. The tie-in is the collective agreement; part of its stated 72 consideration is a requirement of the employer to subscribe to the trust funds now, both funds, the special payment fund.

Now, only once in my memory—I know I'm right—has the price paid by the industry, the amount of pennies paid for each record sold, been changed only once, and that change was not calculated to trigger higher payments, but, rather, to resolve some difficulties that developed under the old system. So that the formula for payment was changed somewhat.

Ms. RINGER. Are these included in individual contracts with the separate record companies, or is there a record industry negotiating team that represents the entire industry?

Mr. KAISER. Well, it's a serious thing. Technically, we bargain with each employer separately. As a matter of actual preference, what happens is this: The larger companies, some of the larger companies—but a relative handful of the industry, that are better than 2,000 signatories to those payments, come together, and we negotiate together. It is not a bargaining association, the RIAA. It does not negotiate. Individuals do. But de facto it is.

Ms. RINGER. OK. I think enough on that.

We've touched on the question of payola, and in your statement, there was one remark you made, you referred to—both of you. Where does the impetus come from in the normal case? Your testimony is to the effect that most of it is to try to put young, inspiring performers before the public eye, but who is doing the pushing? Is it the individual performer, the agent, or a business manager of the individual performer? Is it the record company? I don't want to talk details. This is a painful subject, but it's a fact of life in the industry.

Mr. DAVIS. It could be the agent of the performer who feels he has a good talent available here, and he goes to the—forgive the expression—disc jockeys and makes arrangements to push this record on the air. That is my understanding of, initially, how it occurs. And it's in order to push the talent that they're trying to sell.

Now, the recording companies as such: There's been some records made in the past that, if memory serve me correctly, where there had been some recording company officials involved. I think that one had quite a high position, and, following the investigation, he no longer retained that position. So I guess it cuts both ways.

Mr. KAISER. Sometimes even the disc jockey takes the initiative.

Ms. RINGER. I'm trying to get some kind of pattern. Do you think that there is any organized activity here?

Mr. DAVIS. If you're indicating on the part of the recording company, actually, no. There is no organized effort. I think it's an individual effort, depending on the personalities involved. I think that that is the basis for that.

Ms. RINGER. Is it something that the organized musicians as a whole should fight?

Mr. DAVIS. We certainly disapprove of it. We have no part of fostering or helping it. But, like anything else that occurs behind the scene or under the table, before you catch up with it, it's already a fact of life.

Ms. RINGER. I am getting the impression that it's pretty pervasive still. Am I wrong?

Mr. DAVIS. According to recent investigations, it doesn't seem to be as prevalent. According to the most recent data that I was involved in.

Ms. RINGER. Do you have any explanation for that? I haven't noticed any massive crackdown.

Mr. DAVIS. Well, I think the fact that some of the people involved in the broadcast industry are no longer with the industry is one indication that they felt perhaps the price was too high to pay for the remuneration they received under the table or behind the door.

Mr. KAISER. That was pretty good publicity. That might have been one of the facts that diminished.

Mr. DAVIS. Most of the recent indictments have been under the recording piracy acts, enacted by either 47 or 48 of the states. They've been cracking down on these record pirates pretty thoroughly. In most of the 48 states, there have been some heavy penalties, including jail sentences.

Ms. RINGER. But that's really something else.

Mr. DAVIS. That has been the bulk of the activities called to my attention recently. The payola has sort of receded, diminished.

Mr. KAISER. You say you have the impression that it continues as widespread?

Ms. RINGER. You can't get people to talk about it very openly, but the impression I have is it's not much better than it was, and maybe even worse. This is an impression, and I'm just trying to get some feel from you and other witnesses on that. You really think it isn't as bad as it was at its height? Maybe you are right. It does your union no good, obviously, since your members are involved.

Mr. KAISER. It's not the union that's normally involved. It's usually the single artist. Some of the rock groups, of course, would be involved. Probably they would be in on it.

Ms. RINGER. I guess what I'm really saying is that what's happened to music and to the whole music industry in the last 20 years. It is a fairly dismal picture. This is part of it, but, in addition to that, the whole nature of music and the type of music and the variety of music that is played on the radio has not changed for the better.

Mr. KAISER. Well, you are expressing a very subjective view; one that I happen to share, but how does one account for tastes? We now regard some of the jazz music as classics. They went through the same.

Ms. RINGER. If there were some jazz on the radio, it would be better.

Mr. KAISER. No. I say there was a time when jazz was regarded with the same contempt from our ancestors.

Ms. RINGER. But what we have now seems to be a situation, at least to some extent, where it's not choice, it's bribery that's producing the programming, and this is a rather serious situation.

Mr. KAISER. No question about that.

Ms. RINGER. OK. It has some relation to what we're talking about.

Mr. DAVIS. The country-western studies have come up in volume.

Mr. KAISER. There are even some very good indications of the big band coming back. I don't know if you follow any of that.

Ms. RINGER. Well, we shall watch those developments with interest.

Mr. KAISER. I understand Benny Goodman was out here just a week or so ago.

Ms. RINGER. Just two or three more questions.

The documentation that you referred to: How is that kept, and to what extent does the public have access to it? The records that you keep of the recording sessions with the full list of performers and instrumentation, I suppose, and the dates and the times and so forth—is this available?

Mr. DAVIS. Yes. The contracts are sent into our local unions in whose jurisdiction the recording is taking place. Copies of the contract and the listing of all these musicians with their social security numbers are then sent to our pension fund, and this is put into the computers, and this is how we keep the records.

Ms. RINGER. Would this be available to the contractor that we have through the economic study, if that should be considered relevant?

Mr. DAVIS. Yes, I will be happy to make it available.

Ms. RINGER. On the question of the Rome Convention: What you're saying is quite true, on the basis of my own observation, that the principal group in this country that supported the Rome convention—at the time it was being developed and at Rome—was the organized musicians and the organized performers generally. But you made a statement which I don't think I agree with, which is that it was merely a matter of principle; that you would not have really gotten anything out of it in terms of the improvement of the individual musician's legal status in this country, but my feeling is that if the United States had gone forward and ratified the Rome convention, first of all, you would have had anti-record piracy legislation much earlier, 10 years earlier than you did.

Mr. DAVIS. This is true.

Ms. RINGER. Second, obviously, the Rome Convention does establish, under certain conditions, the right we're now discussing, the performance royalty

requirement in Article 12. It's true that Article 16 does allow a country to make reservations or withhold the right altogether, and some countries have taken advantage of that ability to make reservations, but it would establish the principle of payment to the performer or to the record company or both as a matter of principle, and the country would have to take affirmative action to withhold that right or to qualify it.

Now, wouldn't this have been a very substantial improvement in the legal status of the performer?

Mr. KAISER. Certainly, as you described it. As I said, my memory is dim. I do know that the feeling we had at the time was that we were more on the conceptual than on the economic level. My dad—in those days, no one was as sensitive to a piracy problem, as events developed, or the piracy problem was not an acute problem back in those days. At least we were not aware of it in those days. But you may be absolutely right. My recollection, and as you recall, there was a good deal of dilution of the original proposal at the Rome Convention that came out of the ILO way back, and my best memory is that as diluted, it offered very little in terms of immediate economic return to the American musician. But, nevertheless, we were all for it because of its conceptual gain.

Ms. RINGER. Similarly, the record industry has taken the lead with respect to the Danielson Bill in working out of the details, I guess one thing that bothers me about it is the fact that although it isn't—it is ambiguous, but as it seems to add up, the beneficiary of the right, basically, is identified as the record producer, and the performer is simply entitled to 50 percent of the royalties. In some ways, this seems like turning, getting the cart before the horse, and I wonder if you want to comment on the attitude of AFM to that.

Mr. KAISER. Well, I don't want to, but I will. There were some questions asked that reflected my own thinking, questions asked by this panel. And this will cut across the whole gamut of copyright law.. I think its initial stimulus, of course, was to safeguard the livelihood of creative artists, and the commercial interests have interposed themselves over the years and become very much a part of the action—indeed, the greatest part. And, again, speaking very personally, I think too great a part, and, to that extent that has subverted the Constitutional right that's involved here. But realistically, we don't feel we can overcome that. It's way beyond our capacity, and, also, there is a distinct contribution made by the company that invests the money in any recording, without which we'd have nothing to talk about, and, politically, I don't think we have a ghost of a chance. We were knocking on Congress' doors for many, many years without hardly an affirmative response from anybody. But once the industry got into the act—and, I must say, I think they conducted themselves well, and apparently put in a lot of time, energy, and money. They cooperated with us. We've tried to cooperate with them, and at least we reached a stage of one favorable vote from the Senate committee, short lived as it proved to be. And there is current interest in the problem for which we must pay our due respects and gratitude to the industry. Starting from scratch, I would change it right now. Book publishers do not——

Ms. RINGER. Well, you mentioned the analogy that I had in my mind. In the case of books, the copyright belongs to the individual author initially, and the publisher's rights are contractual, and it's true that the record industry does add creative elements to the record. I think that's something that most people will now concede. On the other hand, of course, a book publisher—and, to some extent, a music publisher, argues the same thing, and in some ways is creating a right initially. Now, it's almost as if you're saying we're going to give the right to the book publisher initially, but we want to make sure that the author gets 50 percent of the proceeds. You say this otherwise would be unpopular politically, but I'm not sure that's true. I think, from my own discussions in Congress, there is some concern that the performers, as in Rome, are taking too little, really. But what I think you're really answering is that there are political realities here, and that there has been a grand alliance.

Mr. KAISER. That is right. There are political realities, and there's a very genuine sense of gratitude on the part of the performers union that this industry has gone to the lengths it has to bring this to the attention of the Congress and the public.

Ms. RINGER. Is there anything in the Danielson Bill you would prefer to change?

Mr. KAISER. Yes.

Ms. RINGER. Would you want to tell us what that is, just very generally?

Mr. KAISER. Well, the only important thing is that I think we are prepared to sell at too cheap a price. I think that what we're asking for is just to get a foothold to open that door. I think myself that it ought to go to some tribunal and get all the facts and decide what a fair payment would be.

Ms. RINGER. This was your testimony?

Mr. DAVIS. Yes.

Ms. RINGER. But isn't it true—and deny this if I'm wrong—but isn't it true that you would accept almost anything in order to get the right established?

Mr. KAISER. Could I give you that answer privately?

Ms. RINGER. No, but you don't have to give me an answer. All right. You've given me an answer.

Are there any other questions from the panel?

Mr. KATZ. I have just one question.

I'd just like to raise an issue and see if you have any thoughts about it. And, in some respects, it may represent the crux of the situation that we've been considering up until now. That's the issue about recorded commercials and people who are selling the products' use. They use the talents of musicians and performers and these things technically, in the case of radio, are used by broadcasters.

How would you suggest that we respond to these in this general scheme?

Mr. DAVIS. I'm not sure that I understand your question. Are you referring to what we call "jingles and spots" on radio?

Mr. KATZ. Right.

Mr. DAVIS. Where they're selling a product in a 30 or 60 second spot? Through contract negotiations, we have that situation handled, and our performers, including our people, are paid according to the terms of our contract.

Mr. KATZ. But you would expect, then, in the jingles that are broadcast over and over again on the radio to be excluded from this——

Mr. DAVIS. It's an entirely different ball of wax. We're talking about recording music as such, and you're referring to an advertising jingle or spot, and we view those as two separate entities.

Mr. KATZ. You're drawing the distinction, then, between art and commerce?

Mr. KAISER. Not really.

Mr. KATZ. Conceptually, it's not quite as easy a problem to deal with. Performers may feel that their talents are being used and exploited outside the contractual relationships they have with the advertiser of this situation, just as performers who make recordings have contractual relationships with the recording companies.

Mr. DAVIS. I think there is one basic difference. When the performer makes a jingle or a spot, he or she is paid for that performance, and they receive additional payments for the continuing use of that jingle or spot. When you're talking about a record, that record is made, somebody uses it for profit without giving the performer one penny.

Mr. KAISER. That's right. He's employed to make a commercial on the air. On top of that, if you don't know it, our contracts stipulate that the commercial can only be used for 13 weeks. If it's reused, the trick is another payment.

Ms. RINGER. Any further questions?

Mr. Davis, Mr. Kaiser, thank you for your very illuminating testimony.

We will take a five-minute recess, and then hear testimony from Mr. John Winnamon.

[Brief recess.]

Ms. RINGER. Mr. John Winnamon has arrived, and I think we should hear from you now, if you're ready.

Mr. Winnamon is representing the American Broadcasting Companies, Inc. He is also representing broadcasting radio station KLOS, FM, here in Los Angeles, and I welcome you.

Mr. WINNAMON. Thank you very much.

I'm John Winnamon, Vice President and General Manager of KLOS, FM, in Los Angeles. I've been in the Los Angeles market all my life. I'm a native of this community. I've been in the broadcasting business for 17 years, and acted in a number of broadcasting associations, as pointed out in the statement that I filed with you folks.

I think rather than reading from the statement let me just—in the interest of your time, let me just get to the issues that are on my mind, that I think are so doggone necessary.

It's really to me a case of fairness and economics. I'd like to address the point of economics first.

There are many radio stations in America, some 5,000 AM and FM stations, and many of the stations in this country are not making money. There are 82 signals that get into the Los Angeles market alone, 40 stations or 46 stations report in the architrone, which means they have enough measured audience to be in the ratings. Otherwise, they don't show in the ratings, and it is a fact that there are stations losing money today because there are so many of us on the air trying to, you know, attract large audiences, and, true, there are some stations making money, but there are others not making money, and to burden them with additional fees, and this particular kind of fee, appalls me.

It is clear that the air play of records is very essential to the sale of records, and when you consider an industry that has grown to over two-billion dollars, and from, say, 1972,—let me get the exact figures for you so I can be accurate. From 1.4 to over two billion dollars is incredible. If you saw the recent *Time* magazine article on the millionaires, there was a young chap, an English gentleman by the name of Peter Frampton. Peter Frampton has an album out called "Frampton Comes Alive." It sold, I'm told by the record company, over 11 million copies worldwide. Peter wrote and recorded this album, and he made personally, six million dollars.

If you look at the charts today, the way music is running in this country, there's some sort of a love affair with rock-and-roll music and young people, and, as a result, you have a burgeoning growth in album-type FM stations, because the real money being made today by record companies is with albums. It used to be singles, but today about 90 percent of the real dollars are albums, and I believe—I'm not real sure of this, but I believe Warner Bros. last year profited something like 15 million dollars. These figures come out in Billboard and Cashbox constantly, and some of these artists, they live like kings. The real biggies do. There are a lot of artists that don't make it, just like there are radio stations that don't make it. It is an economic issue, and the other area is this fairness thing that I referred to earlier.

I don't understand why there seems to be some misunderstanding, I should say, that air play doesn't mean much to the record companies. That is pap nonsense. The record companies—we set aside two days a week to receive the promotion people at the radio station. If we do not set aside that time, we would be deluged by them. When we put on a record by a core artist, they give us gold records for this sort of achievement for giving them exposure, because it does result in sales, like the current Fleetwood Mac album which just went into platinum, which means three million copies were sold. There was a comment earlier about over-exposure. Record companies love that exposure because the more cuts the listener hears on that album the more the younger person or whatever will be intrigued and go out and buy that album, and I have no sympathy for our friends in the record company business. They're doing very well. It's a beautiful business to be in, and the top stars, as I say, live like kings. They actually live in castles in England. Led Zeppelin, Rod Stewart, Peter Frampton, but God bless them. I I think it's wonderful if they're able to make this incredible type of money.

That's really the bottom line on this whole issue as a broadcaster, and I really want to state this. I am here not as a representative, really, of ABC. I speak as a representative of broadcasters in America. I belong to the National Association of FM Broadcasters. I've got to tell you something about these folks. There was a time when I used to attend conventions, and, I kid you not, they had holes in their shoes. And today they're just beginning to make some headway. The FM broadcasters—there's a lot of them, and they've clawed it out. They've promoted the radio stations. They've done all they could to gain larger audiences and to utilize the state of the art of the dynamic range of FM stereo which is what you would hear on your record player at home. I'm really, as I say, appalled that there's such things happening— that this air play is so darned important to record companies, and they spend so much time trying to talk our programming people into playing albums. They bring in gifts. They actually bring in—they bring in the stars, hoping that we will be very impressed and we'll go put their record right on the station.

We have very specific criteria for adding records at ABC, and it's based on merit and popularity because people like to hear popular music. You buy the artists that are the big ones—Carol King and Linda Ronstadt and Elton John and all of these biggies that are on the charts today. The days when you had Frank

Sinatra and Tony Bennett on the charts have been replaced by Wings and Fleetwood Mac and Elton John and all of these new folks that are the new music of today—all of these young people are going to these rock concerts and spending 12 dollars and perhaps, if they got scalped, 50 dollars a ticket to sit here and scream and watch guys on stage pounding their guitars and drums. But it works. That's what's happening today in music, and the record companies are doing well, very well.

So that, in essence, is my feeling about this whole business of the copyright. I would really love to hear any questions from you folks.

Ms. RINGER. Thank you very much. Let me start the questioning with Mr. Katz:

Mr. KATZ. Mr. Winnamon, there's a few things that I'm a little bit uncertain about. You just mentioned that popularity is the the basis for adding new materials to your program. How do you measure that popularity?

Mr. WINNAMON. We have very specific criteria. We do local research by calling some 300 record stores every week and finding out how albums and singles are going. We actually go out to the field and talk to these people. We do look at five different surveys—Cash Box, Record World, Billboard, Radio and Records, and Variety, and we have a formula for weighting that out, and when albums reach certain criteria of chart activity, we then make a decision to either add or drop a cut or two from that album. You see, we are an album station, not a singles station. And because of the extra exposure of the various cuts on a good album, the audience actually has a chance to sample different songs. Not just the single that they hear over and over and over again. And we've actually expanded the amount of music available to audiences today, and that's why—I think you've seen, well, Stephen Stills splitting away from Crosby, Stills, Nash and Young, and Neil Young splitting away, but they finally came back together again because they didn't do very well on their own. But they all said, "Hey, I want a piece of the action, too," and they went out and recorded their own albums, you see. As we play them on the radio station, we expose that product to millions of people.

Mr. KATZ. I think you just hit on the key word. To hear you discuss, you know, the popularity and the methods that you used to select these records to be broadcast, really suggests a circle. How do you determine whether or not to play a record by Mr. X, you know, of Song Y that no one has ever heard of either? That's not your general formula, is it?

Mr. WINNAMON. Well, I think what you have to understand is how the criteria is based. If people reach into their pocket and pull out five or six dollars to buy an album, that means that that album is saying something to you. It's hot. It's familiar. It's good to listen to. So we look at sales very heavily. Okay. Because that indicates popularity.

Now, to answer the other part of your question, if I understood it correctly, there are such artists that we call "core artists", and those are artists who have had a track record in the last six months or a year with a hit album. They're safe because they generally come out with another hit album. It is not too difficult to determine that—the new Carol King album just came out a week ago, and we went on it immediately because we know Carol King is a fine, established artist and a fine writer. She's written music for many, many of the big stars, James Taylor, just to mention one. So that is the criteria we work from. You see, to pick up an obscure artist is very dangerous.

Mr. KATZ. But then you suggest that—and I really don't think anybody would seriously contend with the point that radio or broadcasting generally provides exposure ——

Mr. WINNAMON. A lot of exposure.

Mr. KATZ [continuing]. But that is not necessarily equivalent to popularity.

Mr. WINNAMON. Exposure can dictate popularity. That's the point.

Mr. KATZ. It can, but it does not ——

Mr. WINNAMON. It can dictate popularity.

Mr. KATZ. It is not a necessary conclusion.

Mr. WINNAMON. Record companies have told me why they spend so much time hanging around the program department saying please play my album. It will develop into sales and they make money. That's the logical process of the record business and the relation to radio stations.

Mr. KATZ. Well, I have to question the logic of the conclusion. I see the arguments, but I have difficulty with the conclusion because of some concept that I have about the role that the public plays in this.

Mr. WINNAMON. OK.

Mr. KATZ. You say you pay very serious attention to record sales. If somebody is going to shell out five or six dollars, it means that that's a hot item. It seems to me that the public really is what decides whether or not a particular item is popular.

Mr. WINNAMON. They do.

Mr. KATZ. Now, the public may learn about this through the broadcasting of it.

Mr. WINNAMON. Absolutely.

Mr. KATZ. May be exposed to it. But they can also be exposed to something without automatically concluding that it's popular, even if they hear it 50 times a day. Do you see?

Mr. WINNAMON. I don't understand your point. How would they know about it unless they heard about it?

Mr. KATZ. That's what I'm saying. They may know about it, but they may not conclude that they like it.

Mr. WINNAMON. Well, I'll tell you there's a mentality of the public, and in the radio business or in the television business—I guess in any business where you're trying to sell a product to somebody—say "Here, folks, look at it. It's good. You need it. You should have it.

We are in a very competitive business, when you have—as I mentioned, I think in Los Angeles something like 22 competitive radio stations. And it becomes a bit of a dogfight when we go out to sell time on stations because we live by ratings in those markets, and our intention is to provide a programming service that will reach the largest possible mass audience, and we feel that by playing hot hit artists who do traditionally generate great sales of albums, that tends to be the way to go in radio today. And, as proof of the matter, your top stations that are playing popular hit music are the ones with the big ratings. And they're selling records, too.

Mr. KATZ. It seems, though, that this suggestion about the popularity exposure that's generated by broadcasting really cuts in the other direction, as well. For example, if the Beatles were to reunite and make a recording, but no one knew about this, and KLOS was the first radio station in the United States to broadcast that recording, that would be quite a coup.

Mr. WINNAMON. Quite a coup. It would be like the second coming of Christ, believe me.

Mr. KATZ. So——

Mr. WINNAMON. I mean that. There are kids out there just waiting for John and Ringo and George to get together again. You know, it's almost a mania.

Mr. KATZ. I think you're right, but the point that I'm trying to illustrate, though, is it seems to me that by virtue of using that occurrence that they—if they create by virtue of using that in your broadcast, you're going to generate what you refer to as ratings. You're going to increase the size of your audience, and that's going to—

Mr. WINNAMON. That would never happen, believe me. That is Alice in Wonderland. If that event ever happened, it would be the biggest thing to hit the music business since the Beatles, if you will.

Mr. KATZ. I understand that. I'm really using it as an illustration.

Mr. WINNAMON. I understand what you're saying.

Mr. KATZ. The point is that recordings—especially of well-known artists with track records, the use of those products does inure directly to the benefit of the broadcasters.

Mr. WINNAMON. Let me make one thing clear. There is a real nice marriage between the broadcasters and the record industry. It's like the tracks and the train. One helps the other. That's why I'm appalled. The air play is so important to these record companies. Why are they sitting here saying, "Hey, I want to reach in your pocket and take some of your money"? But beyond that, I really feel for these broadcasters in smaller markets, and maybe major markets that are right now in the red. They're going to have to go to the bank and buy the new transmitters and all that stuff that goes on every day in radio. I just don't think it's necessary. We already pay 97 million dollars a year to BMI, ASCAP. That's for the composer. They're not in trouble. They're in fat city. Believe me, they are. I don't have sympathy. I God bless them to make big bucks. I think that's fantastic. I don't want this poor me stuff. That just doesn't cut it.

Mr. KATZ. You refer to the Time Magazine article.

Mr. WINNAMON. Sure.

Mr. KATZ. I recall reading that. I think it was in May. I think I also recall reading where an economist at Berkeley made a reference to becoming involved in the entertainment industry as a performer, and I think he referred to it more or less like shooting craps about whether or not you're going to be successful. In other words, if you are successful, you can realize substantial amounts of money. However, the percentage of those people who do achieve that status is very, very small in proportion to those who try.

Mr. WINNAMON. There's only one president of General Motors and one president of the American Broadcasting Company, too. Hey, listen. You know, to be successful in this world, to be a performer in this world, you have to have some special quality to become a big hit star, and there's a lot of them that don't make it, but there's a lot of businesses that just don't make it, either, because the combination or the chemistry wasn't right. It just didn't have mass appeal and sell that great audience out there that likes to be entertained.

Mr. KATZ. I agree with you as far as that's concerned.

Mr. WINNAMON. Those who make it and those who don't make it.

Mr. KATZ. I agree with you, but I think that same reasoning should be applied to the broadcasting industry.

Mr. WINNAMON. I just don't follow you there.

Mr. KATZ. Well, if we're going to consider economics, and if we're going to say that some have the ability to pay and others don't and some people need it and others don't, I think it should be consistent reasoning, you know, throughout the process.

Mr. WINNAMON. Well, it is rather consistent. There are those who make it and there are those stations who do not make it, and there are artists who make it, and there are artists who do not make it. Let well enough alone is my point.

Mr. KATZ. That's all.

Ms. RINGER. Ms. Oler.

Ms. OLER. Speaking of the second coming, that was kind of awesome. But, anyway, I'll pull out ahead.

On the equitable question, on the format of the album oriented rock that you're producing, do you give identification to the background performers? I mean, don't they change from one album to another, and don't they suffer even more? In other words, they're not really getting promoted by your play of an album, are they?

Mr. WINNAMON. Well, most of your major rock groups today have bands that are very—they don't just go out and hire studio musicians. They travel and they do these concerts, and some of these tours generate very, very substantial dollars for them. The recognition of the star is generally the main recognition. Peter Frampton is generally referred to. His backup guitar and drummer are not really referred to. But we're not in the business of having a contract with record artists. That's the record companies' business.

Ms. OLER. No, but your argument is that you promote them, and I think that breaks down when you're thinking of the background artists and anyone other than the lead artist.

Mr. WINNAMON. We promote them because the name of the album happens to be the star. In other words, it doesn't say "Peter Frampton and Harry Jones and Bill Schwartz," and so forth, on backup. It just says "Frampton." So, obviously, when we front announce a record, "That was 'In You,' with Peter Frampton," we don't go into mentioning his other people. If they should be taken care of financially, I think that is the burden of the record company who are lining their pockets.

Ms. OLER. But you agree that they themselves are not being promoted by the record company.

Mr. WINNAMON. I don't think that the broadcasters have a position to promote them. I know sometimes on an album station we will say that was so and so and backing him up on guitar was Dicky Betts and whomever on drums. Just as a little musicology thing for the audience. Because the young people read the jackets of these albums, and they like to know who it is—sometimes it might be Carly Simon on a James Taylor album. That's her husband. And they like to know a little bit about this. That's so that they can sit around and rap with their friends, which is kind of cool, I guess. You know, in that whole area.

Ms. OLER. Well, moving on to your economic considerations, which, I take it, are really the foundation of your argument, you've testified that KLOS has operated at a loss during the past years.

Mr. WINNAMON. Yes.

Ms. OLER. How long has this gone on? Who absorbs the loss? Do you pass it on to the advertisers?

Mr. WINNAMON. No, the company absorbed the loss because we were not taking in as much as we were paying out. It took awhile to get established and recognized by the audience that we were a good station to listen to. And in those days, we lost money. But the company absorbed that loss. Thankfully, now we're returning a profit to the station. That's the American way.

Ms. OLER. You never considered changing to another format of collections because you were at a loss?

Mr. WINNAMON. Well, we floundered for a while in the earlier seventies. We—you see, a very interesting thing has happened in music. There was a period of time in America, going back to those Haight-Ashbury days, when our youth culture was flipping out with drugs, and there was a war going on, and there was a great deal of dissension, and I think that's waned considerably. Now, it's turning to sheer apathy, which is even more deadly, I believe. That's a little editorial comment on the young people of America today. There was crazy music: There was very strident, weird music in those days, and that's when this whole album thing was beginning to happen in the rock area, and then that sort of, you know, calmed down somewhat, and I think we tried at that time to really make a statement to these young people who were confused and anti-America and all that, but it didn't go anyplace. I mean that whole thing was so short-lived, and they found out that you have to have a dollar in your pocket to exist in this society. You can't just lie out in some street with some drugs in your pocket, and they wised up in a hurry, and that whole thing has just gone away. You look at young people today that are in big businesses. They make leather goods, and they do very creative things, and I applaud them for their creativity. And a lot of these young people are in the recording business, and they are paid handsomely for the work they do.

Ms. OLER. Well, so your particular station absorbed the loss, but you'd either go out of business or start making money. If some kind of legislation like this were passed, with across the board raises in the payments that you'd have to make to operate, would you raise rates—vis-a-vis your own industry, vis-a-vis the radio industry, and the radio industry, as I understand it, they're mass media. They are the cheapest form of mass media advertising in existence.

Mr. WINNAMON. You bring a very good point up. It's very difficult for radio stations to raise rates because there's so many of us.

Ms. OLER. But if everyone were raising the rates?

Mr. WINNAMON. Well, that's collusion. That's illegal.

Ms. OLER. If it's legislated?

Mr. WINNAMON. You just can't go out, get together, call the boys and say, "Let's all jack up the rates". That would be a big lawsuit. Certainly you can't do that, no. We're not only competitive to each other, but we're competitive to newspapers and television and anybody else that's going for a dollar. There are so darned many of us that are vying for that audience, and we show up in those rating books, in those little columns with numbers in them. If we're not in there, we suffer. You have, I think, as I mentioned, the most incredible situation with contemporary music stations. There's at least 20 of them all going for 12 to 34-year-old audiences, and the rate card de jure, believe me in some cases where what are you going to charge today, and you can't stabilize your rates as easily in radio as perhaps you can in newspapers. Like this one big paper in L.A., the L.A. Times, it's almost a kingdom. The Examiner is not that much of a competitor. It's difficult and to try to pass along this additional expense, especially if you're losing money, well, you know, that's got to be economic hardship. But from a business standpoint.

Ms. OLER. What do you see the consequences of this kind of legislation being on the broadcast industry, the radio industry?

Mr. WINNAMON. I think it's a burden. I think it's totally unnecessary.

Ms. OLER. Would it put you out of business?

Mr. WINNAMON. It wouldn't put us out of business, but it's just another cost of doing business. Every time we turn around in America today, we're getting more increases in what we have to pay for things. And, I tell you, just a little editorial aside, if we don't put a stop to the inflation in this country and all of the gassing around with coffee and sugar and oil and all that nonsense, we're going to be in trouble. And I think it's another example of reaching in someone

else's pocket when, in fact, we work in concert with these companies, and I thought we had a relationship with the record companies, really, as just a broadcaster speaking, because we do a job for them. And they know it. Believe me, they know it. They'll close their eyes when they're talking to you here. But they know it.

Ms. OLER. I have no questions.

Ms. RINGER. Jon Baumgarten.

Ms. BAUMGARTEN. I have just one question.

The whole area of this argument seems to come down to one thing. You're in the business of selling audiences to advertisers. That's what you do for a living.

Mr. WINNAMON. Yes; that's our economic viability.

Mr. BAUMGARTEN. And you do this by playing in your stations, you play album oriented rock?

Mr. WINNAMON. Yes, and singles, too, but primarily albums.

Mr. BAUMGARTEN. You don't play the albums to promote them, you play them because that's the way you sell your audiences?

Mr. WINNAMON. Yes.

Mr. BAUMGARTEN. And the basic argument of the record companies and the unions seems to be "you're using our creativity in your business," and that thing we heard about the American way, we heard about it in Washington. Isn't that the American way? "You're using my property in your business. Pay me for my property. You need a piece of recording equipment for your station, whatever? A turntable or something? You go out and buy it."

Mr. WINNAMON. Right.

Mr. BAUMGARTEN. "Go out and buy my products, too." That seems to be their argument, and the broadcasters always seem to come around to the air play argument, which may be a political argument, and I don't really see it as a legal argument, or it is not really a very practical argument. They're using their product to sell your product, and they want a cut of the action.

Mr. WINNAMON. Well, let me just go back one second, We do pay for the right to play music. To the composer, the man who dreamed up the song. wrote the music, published the music. They have to be made clear on radio's almost inestimable value in exposing their products to the audience by radio because radio is—radio doesn't cost you to listen to, and, to me, it's just one hand washing the other. We serve each other in that result, and there should not be any kind of a tax or fee put upon radio stations because we could turn around and say, "Hey, folks, if that's the way you want to play, why don't we charge you for the opportunity of exposure," because we spend hundreds of thousands of dollars buying television, newspaper and outdoor ads to promote these audiences that will be exposed to this product, you see, not to mention the kinds of monies we have tied up in our physical facilities.

Mr. BAUMGARTEN. Well, the unions have accepted that challenge this morning. They've said, in essence, do you want to play that way? Then don't play our music, the theory being that if everybody works the "American way," that people pay for each other's things. The best will survive. For years the juke box people took the position that they shouldn't pay anyone—composers, publishers, much less record companies, because juke box promoted the sale of records. Would you agree with that?

Mr. WINNAMON. I disagree with it.

Mr. BAUMGARTEN. Can you draw the distinction?

Mr. WINNAMON. I would say that when they make that kind of a statement, there are too many inconsistencies in the real world of air play. Why do record companies bring by artists? They could go sit in their mansions someplace playing pool or something. They want air play because they know air play means sales.

Mr. BAUMGARTEN. So your position, I think, essentially is that you are compensating the record companies?

Mr. WINNAMON. Yes, indeed.

Mr. BAUMGARTEN. By air play, rather than dollars?

Mr. WINNAMON. Yes, we are. When we play a song, it's a free commercial for that song because it's exposing it to the ears of the people who will go out and potentially buy an album.

Mr. BAUMGARTEN. That's all I have.

Ms. RINGER. Charlotte.

Ms. BOSTICK. Yes, I have a few questions.

What would you do in the face of a performance royalty? Would you pass the cost on to your advertisers, or would you stop playing copyrighted sound recordings? Would you change your format to news? What would you do faced with that?

Mr. WINNAMON. Well, I think, Ms. Bostick, basically we touched briefly upon that earlier. It's difficult to pass it along in radio because there are so many of us scratching for the advertising dollar.

Ms. BOSTICK. But if you all had to pay a performance royalty fee, then you'd all have to raise your rates, I assume?

Mr. WINNAMON. I suppose we'd have to raise our rates.

Ms. BOSTICK. Or there wouldn't be any competition?

Mr. WINNAMON. To have a continuing profit structure on the statement, yes. But that is easier said than done, only because of the sure competitiveness of the radio business, and, again, it has to be a two-way street. Right now it's a one-way street, the way I see it. In other words, the hand's out from the record company and the artist. The radio station should put its hand out and say, "Okay, we're doing a big service to you folks for playing the product," and here, again, we're getting back to that basic thing. I think it's unnecessary.

Ms. BOSTICK. So you're saying, then, that you would have to absorb the cost, you would try to absorb the cost?

Mr. WINNAMON. You'd have to pay it if it came through. You'd have to pay it somehow, either take a loss or try to pass it along. See, in our business, those ratings are so darned important, and, if you don't have those ratings, you simply don't do the business, because there's too much of a buyer's market out there.

Ms. BOSTICK. Right, but if all the radio stations then have to pay a performance royalty, though, then you wouldn't be having competition among each other. I mean that would not be a determining factor; is that not correct?

Mr. WINNAMON. If everybody had to pay, everybody would have to pay. And it would all have to be absorbed by those who are losing money and by those who are making money. But that is not the point here. It's unnecessary, I feel so strongly about this, and, forgive me if I get somewhat dramatic at times, but I think it's absolutely nonsense that they're asking for this sort or burden on the broadcaster.

Ms. BOSTICK. All right.

Some people said that the amount of the rate itself exists differently from the rate, and you have just said recently that some broadcasters can afford to pay and some cannot afford to pay. Wouldn't that go, then, to the rate? Wouldn't that go, then, to how much they should have to pay rather than whether there ought to be a performance right in the first place?

Mr. WINNAMON. I think the second part of your question, "Should there be a performance right in the first place." Is it fair to somebody who can pay to pay and those who can't pay not to pay?

Ms. BOSTICK. Well, if there should be a right, isn't that one question, and if the people cannot afford to pay, shouldn't they just then have lower rates?

Mr. WINNAMON. Why pay in the first place? Why don't they pay us?

Ms. BOSTICK. Couldn't you charge them?

Mr. WINNAMON. Charge who? No, that becomes, I think, an FCC problem, and that's why I think the whole thing is like a giant can of worms here, and you ought to get down to the—forgive me for just one second. We ought to clearly get down to one basic thing. Why is it happening in the first place? If the record companies are making so bloody much money today, then let them pay the artists for the art. I don't think Peter Frampton got ripped off when he made six million dollars.

Ms. BOSTICK. But his side man may not have gotten very much at all.

Mr. WINNAMON. That's the problem of the record company. They better sit down with their people and give them a better shake. That's not my problem.

Ms. BOSTICK. What kind of contributions do you make to live music in our broadcasts? Do you cover any music festivals? Do you cover high school music festivals or anything? Do you make any contributions at all?

Mr. WINNAMON. What we generally do is we are tied in with a promoter, concert promoter, and we primarily are an announcing facility about a given event coming up. Peter Frampton, again, was just out at the Anaheim Convention Center or the Anaheim Stadium. I think they drew something like 55,000 people out there for an afternoon show. Our function was to go out there and broadcast

from the site, not the concert, but the crowd information—there's a traffic jam on Katella leading into the stadium so that the Anaheim police has asked us to tell you to take another route. Please don't bring any drugs in because you'll get busted.

That's the kind of things we try to get.

Ms. BOSTICK. My question was whether or not you actually covered any live music, yourself?

Mr. WINNAMON. No.

Ms. BOSTICK. For example, if there were high school Christmas programs or something, you might cover that, but you don't do that sort of thing?

Mr. WINNAMON. No.

Ms. BOSTICK. That's not your format?

Mr. WINNAMON. No. We're really in the business of playing recorded music. Popular recorded music.

Ms. BOSTICK. I have no further questions.

Mr. WINNAMON. Thank you.

Ms. RINGER. I take it, as you've already indicated that you play album rock, primarily rock, and I assume you have profiles of your listeners. Is it the 12 to 24?

Mr. WINNAMON. I believe, Ms. Ringer, it's—we sort of say 15 to 30, but the core of 18 to 24 young adult men and women. However, we will slip over into 25 to 34, say 30 to 40 and sub-teen below 15, but album-rock stations generally appeal to an older teen, maybe a 15 to 18 and a core of 18 to 24 with some representation of the 25 to 34, depending upon the degree of intensity of the rock music. They have shades of rock, if you will, they have soft rock which is more of the mellow Carol King, Joan Baez, more mellow sound, and then you have the Led Zeppelin hard rock and roll, which tends to generally appeal more to a young male audience. The softer music stations tend to appeal more to the 25 to 34 young woman, and so there are definite variations in the rock presentation.

Ms. RINGER. But I take it that you really have singled this out as your—the people that you want to appeal to from the advertising point of view, and then you are trying to supply the——

Mr. WINNAMON. What they like. It's also important to note that the biggest record buying segment of the audience is the 18 to 24 year old. They buy more records than anybody else, and so, when a record is played on our station, because we have such a dominance in 18 to 24, it provides the record company with a very prime ground to go fishing in for sales.

Ms. RINGER. How many more AM stations in the Los Angeles area are trying to appeal to this same audience?

Mr. WINNAMON. I would say offhand about eight.

Ms. RINGER. Out of how many would you say FM?

Mr. WINNAMON. Out of all the FM, I think there's about 24. I'm not real sure. I have that data someplace.

Ms. RINGER. I'm just trying to get some idea. The radio, particularly in the FM area—I guess AM, too, has changed a lot since you came into it. I'm trying to get some idea of this trend towards specialization and the fact that the fundamental product that you're selling is a recorded performance, but there is some specialization among the audiences that are sought to be attracted. Would you want to comment on this?

Mr. WINNAMON. Sure. Radio today has gone to what we call "format radio." There's all news, there's rock-and-roll radio, there's what they call "middle of the road", which is sort of a hard thing to describe anymore because the way the musical tastes are going today is that, like I said earlier, it's not really Frank Sinatra and Patti Page, it's now Fleetwood Mac and Elton John. And they are considered by us to be rock-and-roll artists, and therefore, you'll hear them on the so-called middle-of-the-road stations, which, years ago, used to be more heavy toward that kind of performer that was popular in the 1940's and the '50's. And you have Spanish radio. You have country western radio. You have classical radio. You have good music radio. So there is quite a gamut of formats for us to choose from, depending on our musical tastes.

Ms. RINGER. Do you have any feelings that you don't have enough music available—recorded music available to you in the format that you've selected? Is there any lack of selections?

Mr. WINNAMON. No. There again, the artist, I believe, with their record companies, guarantee their record companies "X" amount of albums per year or per

time period, based on their contract. And if the album's a winner, well, obviously, you'll get air play. If it's a stiff, it will not get air play, and it depends upon what's happening now in the music business. If there's a lot of hot albums and a lot of albums are being played. It's just a sort of supply and demand.

Ms. RINGER. But you have a very ample supply to choose from in the format that you've selected?

Mr. WINNAMON. Oh, yes. Album rock is so big, there are so many artists, and many of them doing very well.

Ms. RINGER. Do you play any punk rock or bubble-gum rock?

Mr. WINNAMON. No.

Ms. RINGER. Why?

Mr. WINNAMON. I think punk rock is a little faddish at this time. It's very big in England, I think. It borders on revolution in some respects. Maybe it's just a flashy thing that will come in and go out. That if you look at the national charts, that's not where it's at. That's a cult of some type, I think.

Ms. RINGER. In other words, you're not playing it. Is it because it offends you as a manager or is it——

Mr. WINNAMON. No.

Ms. RINGER [continuing]. It will turn off your listeners?

Mr. WINNAMON. I don't think it's commercially viable, Ms. Ringer. I really don't. Maybe, like, a little group will get very much into punk rock.

Ms. RINGER. Well, what do you regard as your mission as a broadcaster?

Mr. WINNAMON. As a broadcaster? As a broadcaster, my mission is to program a radio station that entertains people, primarily. At the same time give them news, public affairs and information. Which we do a sizable amount of on KLOS. That seems to be what radio is all about today. It's an entertainment vehicle. It can also be a true information vehicle in the area of talk stations and news stations. But the music radio station is primarily entertainment today.

Ms. RINGER. The staple that you purvey is recorded music?

Mr. WINNAMON. Yes.

Ms. RINGER. And you say that you benefit the record companies and the stars. You have a little less conviction with respect to the bulk of the, numerical bulk of the performers that you're——

Mr. WINNAMON. The stars are the ones who win.

Ms. RINGER. I guess what emerges here—I think you've answered some questions you didn't realize I was asking. You came into radio in 1960. At a time when television had already pretty well changed mass communications in this country.

Mr. WINNAMON. Very definitely.

Ms. RINGER. But what happened—and I think it is demonstrable—was that radio stations had to reevaluate their role earlier before you came into it, and, by the time you came into it, they had pretty well concluded that to survive they simply had to use recorded music as the staple, and then there has been this substantial trend toward formating and so forth that you described very articulately today. But I guess what the fundamental question that one has to ask is when this happened in the early fifties, I guess when television began to change radio radically and when radio decided that—well, we've got to play records all day because we can't pay live performers, we can't pay actors to do dramas. What would have happened if there had been a performance right in records?

Mr. WINNAMON. Back in 1960?

Ms. RINGER. Say in '55.

Mr. WINNAMON. I don't really know how to answer that question because——

Ms. RINGER. It's a big question.

Mr. WINNAMON. It is a big question, and I'm trying to come up with some kind of a reasonable answer for you. Because of the necessity of individual radio stations to try to get an audience so they could sell their time to advertisers, they had to do something. We couldn't do "Amos and Andy" anymore or the serials and so forth because television was really providing that, only with a picture. A dynamic picture. So we had to do something back then, and we knew that a lot of people liked music. So we decided we'd play popular music.

Ms. RINGER. Because it was free; right? Because you didn't have to pay performers?

Mr. WINNAMON. Well, I don't know if that is the issue, whether it was free or not. I think it was because people like it, and you should do things—if you're performing or if you're trying to entertain somebody, you should do something they want to listen to, and I think that records or music, radio, and that was the

way to go, because music was becoming so popular then when the Beatles came in and almost revolutionalized radio, contemporary radio, especially.

Ms. RINGER. But the fact is you were and still are paying the composer and the lyricist?

Mr. WINNAMON. Yes.

Ms. RINGER. And because of the fact that the performance royalty, the right of a performer to royalties, had not been thoroughly established, there were court decisions upholding it in principle.

Mr. WINNAMON. I'm not really a student in this. I'm sort of a layman when it comes down to courts and judges.

Ms. RINGER. Let me say I think you are an extremely articulate witness. You've handled questions very well, and I think you undoubtedly reflected the strong feelings of all the station owners in the country.

Mr. WINNAMON. I'm adamant about the country. If I didn't work for ABC and I owned my own radio station out in Pacedena, I would feel absolutely the same way.

Ms. RINGER. I take this very seriously. On the one hand, people in your business are confronted with an economic fact of life right now that could have gone an entirely different way, and I think would have benefited your industry in the long run, if there had been—if a royalty right to collect royalties had been established at the time radio went through this transformation in the fifties, I think that you would have found a much more attractive industry. You wouldn't be forced into certain artificial channels that you have to be forced into now. I think your programming would be more varied. I think you'd appeal to a wider group. I think that you would find what you are doing more rewarding.

Mr. WINNAMON. I'm real sorry, but I don't understand what you're saying. I wish you could make an example.

Ms. RINGER. I'm not sure I can convince you. I'm not sure I could convince anybody else. But I'm trying to look at the large picture here. I see how the entire mass communications in this country change, and the fact was that the attraction of recorded music for radio was because of the fact that they did not have to pay live musicians to perform. It was free. It was sitting there. They just put the discs on the air.

Mr. WINNAMON. I don't think that's really the point. The point is what do the people want? We always have to get back to the people. Because they are the people we are licensed to serve. If they like something, shouldn't we give them what they like?

Ms. RINGER. But you're saying at the same time——

Mr. WINNAMON. They go out to spend money to buy records.

Ms. RINGER. We could go around on this quite a while, and I accept a good deal of what you're saying. You're saying that there would be an economic impact if a performance royalty——

Mr. WINNAMON. I honestly believe that. I honestly believe that, because I know of broadcasters that are struggling, and I feel sorry for those people.

Ms. RINGER. Let me ask one last question.

It does have to do with payola, and the question of plugging or whatever they call it now. There seems to be a thin line between this. So I'm asking most of the witnesses questions just to try to get information. I really don't have any strong feelings.

Do you have this problem?

Mr. WINNAMON. No, ma'am.

Ms. RINGER. Not at all?

Mr. WINNAMON. Not at all.

Ms. RINGER. You're sure?

Mr. WINNAMON. We take many, many precautions against that.

Ms. RINGER. Yet you described the record companies bringing—and you used the word "gifts."

Mr. WINNAMON. I said gifts, but I didn't qualify the statement.

Ms. RINGER. Please do now.

Mr. WINNAMON. Anything under $25.00 may be accepted. Most of the time I tell my programming people and disc jockeys you just don't take it. In fact, what I try to do at our station is I try to entertain them. If they want to go out and have lunch or have dinner, I pick up the tab. I don't want anybody to tell me that a record company was stroking me to play their records.

Ms. RINGER. In other words, you find this situation unacceptable? in other words——

Mr. WINNAMON. Absolutely. I think it's wrong.

Ms. RINGER. Yet it's this type of programming that you do and the whole economic structure that surrounds it that creates the inducement for this sort of activity.

Mr. WINNAMON. I think where the problem may be in this whole payola thing is that there are probably labels and artists that are really struggling to get some exposure. Because they know how valuable exposure is. And the great temptation, probably, in smaller markets, is to go to the program director and say. "Here's a hundred dollars. Would you, please, play my record." And, if that happens, they're asking for nothing but trouble. Because that's wrong. That's dirty pool. It's not fair to any other recording artist. And I think the days have gone by when those really serious payola infractions took place, and they walked disc jockeys out of radio stations in handcuffs and put them in the pokey to go to the courts for the hearings. And I honestly think that those record companies today—I mean the big respectable record companies, don't want any part of payola. And responsible broadcasters, again, don't want any part of that nonsense because you're playing in a very dangerous game and you could get thrown in jail for that kind of a game. If you have anything at all as far as your responsibility to serve the public, then you better think twice about the payola.

Ms. RINGER. Thank you very much.

Are there any other questions? Mr. Katz.

Mr. KATZ. I don't want to belabor the point, but about air play—I understand your position. When you play a record, you feel that that record is, in effect, compensation. More or less a quid pro quo for the——

Mr. WINNAMON. What does that mean, sir?

Mr. KATZ. A consideration. When you play the record on the air, the fact of air playing is compensation for your use of it, for your programming it and selling it to advertisers and so forth. Is that an accurate reflection?

Mr. WINNAMON. The fact that we play the popular record is, hopefully, going to make people listen to us.

Mr. KATZ. Yes. I understand that.

Mr. WINNAMON. And provide an audience to sell our time to the advertiser.

Mr. KATZ. People in the recording industry have raised the situation where—well, there are two aspects of it, really. One, that the meaningful sales life of a record is limited in some cases to several weeks and, generally, several months. And, also, that a substantial amout of recordings that are broadcast are recordings that are beyond this period where there——

Mr. WINNAMON. That's a good point, and I'd like to tell you my view on that point. When that record was a hit, it was selling like crazy ; okay? Fleetwood Mac, a good example, is now platinum. Three million albums have sold. And we're playing the dickens out of Fleetwood Mac because it's an excellent record. Time will go by, and it will go into another category, which we call a recent gold or an oldy. And it gets slower. The newer material is getting higher exposure because it's current, new, fresh. At the time it was big, whether it was on the charts for 30 days, six months. In the case of Stevie Wonder and a few of these superstars, they made their bucks. They made them big. I mean, Peter was 11 million albums, my God, that's the biggest live selling album in the history of music, and I have no sympathy for those folks at A&M Records and Peter Frampton, if they're crying poor, because they're not poor.

Mr. KATZ. You're saying that that is sufficient? In other words, that the original sales that you feel that you generate are sufficient for your use of the recording in perpetuity?

Mr. WINNAMON. Absolutely. They did well when the album was hot. Believe me, they did, sir. And rightfully so.

Ms. RINGER. Thank you.

Thank you very much, Mr. Winnamon. You were a very excellent witness. Thank you.

We will adjourn for lunch and resume at 2 :15.

[Lunch recess.]

AFTER RECESS

Ms. RINGER. I think we can resume the afternoon session of the hearings.

The only scheduled witness remaining for today is Peter Newell, General Manager of Radio Station KPOL, Los Angeles, and Chairman of the Southern California Broadcasters Association.

Welcome, Mr. Newell.

Mr. NEWELL. Thank you very much.

Ms. RINGER. Would you like to bring your colleagues up to the table? Please do.

Mr. NEWELL. That's my wife. She's just here to make sure I don't say anything embarrassing.

[Laughter.]

Mr. NEWELL. Is it necessary for me to use this microphone?

Ms. RINGER. Yes.

Mr. NEWELL. I wish you all a very pleasant, warm Los Angeles afternoon.

Madam Register, you have identified me. My name is Peter C. Newell. I'm Vice President and General Manager of Radio Station KPOL in Los Angeles, and I'm currently Chairman of the Board, serving a one-year term on the Board of the Southern California Broadcasters Association, which is the trade organization in this part of the country, consisting of 133 broadcasting stations.

I wish to make clear in the beginning, the strong opposition which our organization and the individual broadcasters of Southern California have to any performance royalty for recordings. Such payments, in our opinion, are totally inequitable and completely unfair. Now, you might ask how I can say that when you've heard so much testimony from record company executives and union officials saying that our failure to pay performance royalties is totally inequitable and totally unfair, and I'd like to answer that question, but, first, I'd like to deal with some of the specific accusations that have been made. No. 1, that the radio industry is accepting a free ride on the recording that we play. Secondly, that we're stealing the music. Third, that we take no risks at all, and, fourth, that we're not paying performers a dime. I'm here to say that these contentions are, at the very least, uninformed, and, at the worst, absolute balderdash. That's a word you don't hear too often, anymore.

Ms. RINGER. In this area, you can hear almost anything you want.

Mr. NEWELL. It's the strongest one I thought would be appropriate to the committee.

While it's true we don't pay for most of the records that we play, it certainly does cost us money to play records. Radio stations have investments in the plant, equipment, personnel, and most of the other costs that any other business incurs. We cannot play records unless we incur these costs, and, later, I'll talk about the benefits that the record industry and performers get because we do make these expenditures. But we do have costs.

Secondly, let's talk about the charge that we're stealing the music. This one is so ludicrous that it's almost funny. You know the radio stations have so many promotion men visiting them that they have to set aside special days of the week for seeing those people so the schedules of the program directors and music directors aren't being constantly interrupted throughout the week. In the 4th quarter issue, 1976, of Radio Quarterly Report, there were 185 record promotion men listed as operating in the City of Los Angeles alone. The same sources lists 52 record companies with a total of 684 promotion men throughout the United States. Now, let's face it. The record industry would not employ 684 people to call on radio stations if there were not substantial monetary benefits that flow out of these visits.

Let me give you another example: A&M Records— and you'll hear testimony, I think tomorrow from the president of that company—A&M recently released a single record from the latest album by the group called Supertramp. You may not have heard of them. It wasn't selling very well, not as well as they thought it could, at least, and the company took out a full-page ad in Billboard magazine. This is the ad [indicating] and I'd like to quote it now to you. It says:

"A message to all radio progammers and D.J.'s: Give a Little Bit! A few weeks ago we released "Give a Little Bit" from the new Supertramp album for a number of very strong reasons. In spite of them, "Give a Little Bit" is not getting the amount of Adds or Picks or Plays. Listen to it again. This is a Major Hit Record from a Superstar Group. Don't let it get away. Give a little bit."

Now, record companies spend millions of dollars for this kind of advertising in trade magazines. In fact, they're virtually the sole support of magazines like Billboard, Record World, Radio and Records, and so forth. They spend these advertising dollars primarily to influence radio programmers to play their products. They also gave away millions of dollars of free records to the radio stations, and they entertain programmers and D.J.'s, sometimes lavishly, and I ask how in the name of heaven can an industry which spends that kind of

money for promotion people, for advertising, for entertainment, accuse radio of stealing its product? I would say this might be the first case in history where the victim actually aided and abetted the crime.

Next, we're being accused of taking no risks at all. First of all, I can tell you that just being in the radio business is in itself quite a risk. We feel the industry is far too overcrowded with radio stations. About 45 percent of all commercially operated radio stations in the United States in 1975 were unprofitable, unable to make money. Almost half the stations.

On the subject of risk, specifically as it relates to records, the playing of new records is quite a risk for radio stations. Any programmer of a radio station will tell you that if you play enough of the rock records, you'll lose your audience. The old records aren't so risky. We've already established their popularity, and, by that, I mean we, the radio stations, have established the popularity of those old records, and we believe we should have the right to play them and continue to play them without recompense, whether they're still selling or not. In fact, many of the stronger albums continue to sell for years after their introduction. In addition, record companies regularly compile greatest hits albums which sell because of continued radio exposure of the older songs. In other words, they take the individual songs that they've brought out over a period of, maybe several years, and put the best of them together and sell the old ones. But, back to the risk, it's these new records that we play which are so important to the continued success of the record industry and of the performers, and these are the records that provide the high degree of risk to a radio station. And the record industry is doing very little research to minimize our risk. So we risk a great deal when we go on a new record, and when record companies have no research showing public acceptance for a new artist, how can they accuse us of not giving new artists a break? We take a risk every time we add a new record, and record companies and performers benefit from our taking that risk.

Now, finally, the statement that radio doesn't pay performers a dime. Here's where we get into what I could call the balderdash. If it weren't for radio, most recording artists wouldn't make a dime to begin with. The money they derive from recording work is the direct outgrowth of record sales, and record sales are mainly a function of radio station air play. If radio stopped introducing new records to their audiences tomorrow, the record industry as we know would cease to exist, and most performers would be on welfare. Every union and record company executive knows this, and I defy anyone testifying for this committee to deny it. I could develop a long list of quotations from record industry executives who testified to this, but I'll present only two.

The first is John Houghton. He's General Manager of Licorice Pizza Record Stores, a large record chain in Los Angeles.

"There is very definitely a correlation between record play and record sales. Radio station air play is, at this point, the most important factor in the sale of records."

The next quote is from Bob Sherwood, recently appointed Vice President of Promotion for Columbia Records.

"If it doesn't get on the radio, it doesn't sell."

I want to give you a specific example of how radio play sells records. I mentioned the group "Supertramp" earlier in my testimony. Their first album was released in October of 1974. Nothing happened in terms of sales. In January of 1975, one Los Angeles radio station started playing the album. By February—and I see I have a typographical error in my testimony, which I'd like corrected. By February, sales were up to 12,000 copies. My written testmony shows that as a hundred and twelve. It's 12,000 copies. The sales action stimulated two other radio stations to begin playing the album, and total sales in the city of Los Angeles alone presently stand at 65,000 copies. Now, that's a new group of performers whose careers were literally made by radio. Ask them whether radio ever put a dime in their pockets.

So let's not hear that radio doesn't pay performers a dime. Without radio, performers wouldn't make anything approaching their income today, and most of them wouldn't even be in the profession.

If it's unfair for radio to play recordings without payment, then it's equally unfair for record companies and performers to receive all that free air play for their product. The fact is that the present system benefitted all the parties—the broadcasters, the record companies, and the performers. Everybody is bene-

fitting from everybody else. To disturb the balance of these benefits in favor of record companies and performers is unfair to broadcasters. It is also unnecessary.

Let's say for a moment that a performer's royalty is enacted and radio and TV stations are forced to pay a portion of their revenues into a fund. What happens? The stations' profits decline. In order to maintain profit levels—which is the natural goal of every station manager—I'm either going to have to cut my operating costs or increase my prices. Cutting operating costs usually means reduction in personnel because people represent approximately 50 percent of the stations' operating costs. It is the biggest single item in our expenses. So, not only does this pose the possibility of loss of jobs, but loss of services to the public since fewer people invariably mean fewer locally produced programs, or poorly produced local programming. Since I'm in business to serve my community and not just to make a profit. I'll only write off people and only reduce programing if that's the last thing I can do. If I'm running one of the 45 percent of the radio stations who lose money, I probably can't cut my costs any further. The chances are I've got them down to the bare bones as it is. I may have to sell the station, if I'm in that situation, and, possibly, at a large financial loss. So the heaviest burden of this is going to fall on the stations who can least afford it or can't afford it.

Now, on the other hand, if I'm running a profitable radio station, I can raise prices to my advertisers to cover the cost of royalties, hopefully, and I probably can raise prices if I'm profitable because my successful and profitable competitors will all be faced with the same cost increases that I have, and they'll be raising theirs. But advertisers then are in the same dilemma. Their profits now decline. They have the choice of either increasing their prices or finding some way to cut some value out of the product they sell. The advertisers usually can opt for a price increase to pass those increases that I've given to them on to the consumers. So what happens? The radio and television stations haven't paid the performers and the record company. The public has. And it's the public who buys the hamburgers, the soft drinks, the toothpaste, and the automobiles who end up paying the royalties through higher prices in their goods and services. In other words, increases in prices which are not accompanied by increased efficiencies in production are inflationary. Uh-huh you might ask, why should I be worried about inflation and the consumer if I can pass these costs along? What difference does it make to me? Simply this, as a broadcaster, I have a strong interest in the welfare of the public. I have a strong concern about inflation. I am doing everything I can through my stations to fight this inflationary trend, to get the public to recognize the causes of inflation. I'm attempting to educate them and to see that they, through their vote, help the Congress recognize that this is a continuing problem in our country. And, through this testimony, some of which I hope will go to the Congress, I hope to get them to recognize that the problem of inflation is going to be exacerbated by performer's royalties.

Now, on the other hand, assuming that we have no performance royalties, and, assuming that the performers can, indeed, justify being more highly compensated for their work, they have the means to get those increases. They can negotiate individually or collectively with the record companies. If they succeed in making their case, I think you can be assured that the record companies will raise prices to cover the increased costs so that their profits won't be ruined. Evidence of this willingness to raise prices to cover costs can be seen in any record store. Just go into the store and look at the single record albums that are listed at $7.98 today that would have been selling two or three years ago at $3.98. The cost of vinyl, the increased cost of labor and so forth that the record companies have been experiencing are just being passed right on to the consumer.

Now, record companies executives have been telling you that they pay the performers. It's not quite correct. The record company serves as a conduit. If the performers' rates go up, the price of records go up. And the consumer of those records, the purchaser of records go up. And the consumer of those records, the purchaser of those records pays for those increases in performers' income. So, whether we have performer's royalties or whether we have negotiations between performers and the record companies, the performers' increases are going to end up being paid by the consumer. The question is which consumer, because with negotiations there's a difference. The record buyer who pays the increased price can see the cost increase and relate it to whether or not he wants the product at a higher price. If the consumer has to pay, then let it be the one who buys the product, not the hamburger buyer who never heard of the record and gets no

benefit from the performance. The record buyer is keenly aware of record prices and records are a discretionary purchase. He can avoid the price increase by not buying the record. Of course, if he does this, he's saying that the performers really shouldn't be getting the additional compensation, and that, ladies and gentlemen, is the law of supply and demand, and that is how we believe a performer's value should be determined.

Now, there's another reason that negotiations is the best way to go. It will result in all the dollars being realized going to the performances. Our experience with ASCAP, BMI and SESAC shows us that the performer's royalties would require an enormous organization to administer the program. Stations would have to be assessed, amounts calculated and billed, distribution of monies would be complex. Such an organization would siphon off substantial sums which would have gone directly to the performers. Once again, if the performers really should have more money, they should get all of it and direct negotiation with the record companies will accomplish this.

In summary, I hope I have been successful in showing you radio stations do not get a free ride. It costs money to operate and to play records. I hope you've seen that we don't steal the product we play, that it is practically forced on us. I hope I've shown you that we do pay performers or, at least, make it possible for them to be paid. We are the major means of promotion for record companies and performers. They know, but will certainly not admit to you, that we give them plenty—we give them the means to exist. To ask us to give them more is unfair to us. It also puts the cost of royalties on the heads of stations who are losing money and on the general consumer who receives no direct benefits.

So let's let economics and the law of supply and demand determine the value of performers and the profits of record companies. That, we feel, is the only fair way.

Thank you.

Ms. RINGER. Thank you very much for that very forceful and well written presentation.

Let me start the questioning with Richard Katz.

Mr. KATZ. There's one quesion that keeps running through my mind when you're referring to all the radio stations that are having such a tough time of it. What happens when the Department of Water and Power has to raise the rates of electricity?

Mr. NEWELL. Well, we all are faced with increases in costs at every level. And the results, the options that we have are the same options that are available in this situation. We either lose more money, if we're unprofitable, or we have to raise rates to compensate for that, or reduce services. We have those three options in case of any increase. In the case of the Department of Water and Power, they're faced with higher fuel costs which generally would be the main reason for them increasing the rates. That's part of the inflationary process that I discussed. We don't get anymore electricity for our money, and we do—if we can, pass those costs along.

Mr. KATZ. But it is a problem that everyone can see, It's not——

Mr. NEWELL. It's also a fact of life. It is an operating cost that we already have. I think we're talking here about operating costs that we might have to incur, on which there is definitely an option. We don't have any option with the Department of Water and Power, if we don't get our power, we can't broadcast. I think that there's a distinct difference in that this is not necessary—performer's royalties aren't necessary to accomplish the ends that the performers seem to feel need to be accomplished.

Mr. KATZ. I think that many of the people who are proponents of this legislation would argue that they haven't followed the negotiation route because we're talking about something that they don't have any basis for negotiating for. In other words, what is being discussed now is the use of a particular product. A repeated use of a particular product.

Performers would say that they are paid, indeed. by the record companies for making the record, the mechanical product, but that they have no basis for negotiating with the record companies or with the broadcasters for anything that is based on the use of that product.

Mr. NEWELL. Well, I think that what they're looking for in the end is more money. I don't think that, you know, they're using that as an approach or an attack to the issue. but what they're saying is we want more money. We're entitled to more than we get. And that's their justification. We want to get it

because we want to be paid for the use. But it still comes down to the same thing. They feel they're worth more money, and they can go to the record companies and justify the fact that they're worth more money. If the record companies' profits are exorbitant, if the record prices are too low in their opinion, if the record companies have the option of increasing rates to pay for that, I think it comes down to the fact that they want more money, and they are generally antagonistic in the sense that they are asking for more, and the record companies are trying to protect their profits. They're saying, "We don't want to give you anymore," and suddenly we see a common ground where we can go to the radio broadcasters. Let's stop fighting for a minute. Let's join forces. Here's a source of money that we haven't had before, and instead of battling it out over whether or not we're worth more, let's go and tap this source. I think when we get back to tapping the source, then we can go back to fighting again and we can ask for some more money.

I hope I've answered your question.

Mr. KATZ. That's all the questions I have for right now.

Ms. RINGER. Thank you. Ms. Oler.

Ms. OLER. Your argument is a *Palsgraf* kind of an approach: "But for the radio companies, there wouldn't be any record sales."

Ms. RINGER. You're not a lawyer.

Tell him about Mrs. Palsgraf.

Ms. OLER. It's a case in torts.

"But for this, the results would not have occurred." And what you're saying is, "But for the radio company, the records would not be selling." The performer would not be getting any money. But that still is not a direct payment, and you are paying composers and lyricists under copyright law. Others are paying—other copyright users are paying creators for performing their works.

Do you have any legal basis, any Constitutional grounds for arguing that broadcasters should not pay for the use of these copyrighted sound recordings?

Mr. NEWELL. Well, I'm not an attorney, and I'm not that familiar with the copyright law. I see, personally, quite a difference between a performer and the creator of a work, and I know that it's been argued that performers are creators. I suppose that you could argue that radio stations are part of the creation, too, because you can't have a performance without a means of transmission. A recording studio is part of the performance, in the sense that it acoustically contributes. A shill behind the band or a symphony orchestra is part of the performance and it channels the sound.

Ms. OLER. That's an argument we haven't heard.

Mr. NEWELL. Well, I couldn't answer your question directly. So I'm trying to avoid it and give you another answer. I think we are part of the creation to the same degree that performers are part of the creation, but I think I would not categorize either one of us as being the same as the person who wrote it, the person who wrote the music or did the lyrics or did the arrangement. I think that's a creative process that I look at as being quite different. But I'm not schooled in the legal aspects of this, and I would leave that to the National Association of Broadcasters, perhaps.

Ms. OLER. Let's turn to your economic argument. What you're basically saying is that a performance right and a performer's royalty would result in inflation. But that's really a two-sided argument. I mean, you can say now that because the performers are not—or arguably are not getting adequately paid for their performances and for their repeated performances, there is a high degree of unemployment amongst these people and you know they don't have the big power. So maybe it's just the shift in economic forces rather than a totally bad thing.

Mr. NEWELL. Well, I think maybe there are a couple of questions there, if I can sort them out. In terms of the inflationary aspect of the thing, I think that's different than whether or not people are out of work. In other words, I don't see that a performer's royalty will put people to work. The records will be purchased if they are "good" in the eyes of the consumer, and people will work if they produce a product that's in demand.

Ms. OLER. Well, presumably that would create more funds that would be available for the less popular type of music.

Mr. NEWELL. As I understand it, it would produce those funds only for those people who are working and not for those who aren't, and I'm not sure on the administration of this how those funds would be directed, but, in the case of composers and publishers, those funds are allocated according to the number of

times their work has been performed, and, therefore, the musical composers and publishers get the most money and the less successful, the least effective, get the least. So I would say that in this sense I would have to assume that the same allocations will be made.

Ms. OLER. Well, in that sense, you're right, but here they're saying if the record companies get a share of these royalties, they will be able to promote the creation of less popular types of music.

Mr. NEWELL. The record companies generally tend to promote and sell the kind of music that they can sell. I would find it very difficult to believe that they would take the funds that they would be allocated—and, incidentally, I'm not sure why they're being allocated any funds. This is called performer's royalties, and, yet, the record companies——

Ms. OLER. It's both the performer's royalty and performance royalty.

Mr. NEWELL. I'm not sure I understand that, and if perhaps the record companies weren't getting their 50 percent, you wouldn't find any of us here testifying on behalf of this.

Ms. OLER. I think the rationale is that both make some creative contribution, and, therefore, they would share.

Mr. NEWELL. Well, I think that they have decided to go together on this on the basis that they do share equally, and, if it were not equal sharing, that probably the record companies would lose interest in it very rapidly. The question as to what they would do with their revenues, whether they might pay those to little known groups or less rewarded artists to stimulate new product, I think, is highly debatable. The record industry already exposes new products and new groups, and they go pretty much on the seat of their pants. They do a little bit of research to determine how they will be successful. They know a very substantial percentage of the groups that they back will not make it. But the ones that will make it will make it so big that they will do extremely well. Now, why they would be encouraged to add to that potential the numbers of groups who might not make it, I don't know. The economics of that just don't make a lot of sense to me.

Ms. OLER. That is certainly a question I had, too. Well, one step further, you said if there were a performance royalty enacted—well, you would favor negotiations which would result in the consumer paying an increased amount to the performer rather than having the hamburger client paying for it. But he's getting the benefit of the radio program. He's getting the performer's performance. He's not buying the record, but, in a sense, I think you could argue that he should pay more than the record buyer should pay. Because he's getting a free——

Mr. NEWELL. He may or may not be getting the benefit. That's the problem. We really can't assess that. He may not be a radio listener. He might not listen.

Ms. OLER. Well, presumably, the hamburger manufacturer is advertising on that station simply because that sells his product.

Mr. NEWELL. There are a lot of people that don't listen to music on radio, for instance. There are substantial audiences to——

Ms. OLER. Well, they wouldn't be charged anything on the Danielson Bill.

Mr. NEWELL. Well, on the pass-along concept of cost, they still end up paying, in the purchase of their goods, those costs, those additional increments, which have come out in the radio stations' increase to the prices of their advertisers. I think that it's really a question of whether or not the Congress should pass legislation which, in fact, taxes the consumer, not for the product itself, but for those royalties. In other words, it causes and forces the general public to subsidize performers' increases when, in fact, the record buyer is the one that really ought to be in control. He ought to decide what that performance is worth.

Ms. OLER. Well, assume for a moment that the performer doesn't have enough power; certainly I wouldn't think they would, and, even collectively, it's subject to question whether they have the power to bargain for this kind of right from the record companies.

Is there any way that you could see, short of this type of proposed legislation, that would be acceptable to the broadcasters? I think that your position is that no kind of payment by the broadcasters is acceptable.

Mr. NEWELL. I'm saying that we adequately compensate them by the free air time that we provide them—more than adequately compensate them, and I don't see any compromise in this situation.

Ms. OLER. OK.

Mr. NEWELL. I think that we're doing more for them than they are for us. Again, that's a matter of opinion, and it's debatable, but if we priced out the air time that we devote only to playing of new records, not records that are already gold and have established themselves, I think you'd find out that we're providing them with, literally, billions of dollars worth of air time, and I think anything beyond that is excessive and unfair.

Ms. OLER. I have no further questions.

Ms. RINGER. Thank you. Mr. Baumgarten?

Mr. BAUMGARTEN. Mr. Newell, I think you've posed an interesting theory. You stated that the musical composition is that of the composer and publisher, and then everything that takes place after that with the performer, the producer, and, indeed, the broadcaster, is not creative contribution. I think it's something we have to think about, and I think I could poke holes in it from a technical point of view rather easily.

Mr. NEWELL. I think you could.

Mr. BAUMGARTEN. As I said, I'm not sure that's the answer. But what about the old days where you used to pay live performers? What's the difference between engaging in live performing and paying for that performer's efforts when presumably, you were promoting the performer and an opportunity for live performances elsewhere and playing that same performer's efforts; but this time it's embedded on tape or something else.

Mr. NEWELL. I think the difference is in the fact that your compensation is directly to the performer. He receives no further benefits, theoretically, from that performance. If you did not pay them, you would get nothing. Where, though you do not pay the recording artist today, he still gets plenty. I think there's embedded on tape or something else?

Mr. BAUMGARTEN. Well, I can see that, but I'm just not sure how it justifies when you should pay or not. I think you've given me something to think about. I have no further questions.

Mr. NEWELL. I guess his question is whether or not we're already paying, and, in the sense that their incomes are as considerable as I think they are, they exist because of air play, and that is tremendous compensation.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. Ms. Bostick?

Ms. BOSTICK. I've heard a lot about reaching the 18 to 34 market. What do you do in terms of music to reach the older or younger market? The man who's on his way home from work or on his way into work? What do you musically offer?

Mr. NEWELL. We have two different radio stations. KPOL–AM is what we term a middle-of-the-road radio station. Musically that means we play the more conservative artists, Andy Williams, Frank Sinatra, Perry Como, also some of the some of the more conservative contemporary artists, Helen Reddy, Neil Diamond, John Denver, plus we play Percy Faith and the Anita Kirsch singers and some of the larger orchestral groups. We're a moderate radio station on AM. Our target audience with the AM station is 35- to 49-year old, and we select the music that we believe appeals to those people the most. Perhaps a little over a year ago we were what was known as a "beautiful music station," and that would be a station playing almost exclusively full orchestrated instrumentals with virtually no vocal content. That music was designed and programmed to appeal to the 55 to 64 age group. We decided that that age group was becoming less important in terms of the advertisers, and that we wanted to reach a younger audience. So we evolved the music to have slightly younger appeal. So stations do, first of all, have access to a variety of kinds of music, although in the beautiful music business, variety is really getting very limited. We ended up literally hiring our own studio orchestra to produce our own music for a while there. We did some 200 selections of music. We just weren't getting enough from the record industry. Beautiful music stations do not generally sell the music the way a top 40 or a contemporary station does. They don't announce the artist, usually. They just play it, and that doesn't provide as much benefit to the record industry. It doesn't sell as many records, and, therefore, they produce less of it, and I think that's a primary example of—Ms. Oler raised this question—what they would do with the money. If it doesn't sell, if records aren't moving, the record industry does not want to spend a lot of time producing things that people won't buy.

Ms. BOSTICK. Well, isn't that a reason for at least paying a performance royalty with respect to those kinds of works? The beautiful music works? If they were getting some revenue from that, then maybe that would make them produce them.

Mr. NEWELL. I don't think those people have the choice. The record companies have the choice of whether or not to produce the record. And they will produce a record generally on the basis of whether or not they think it will sell.

Ms. BOSTICK. Or whether it will make money in some way. It would be making money if——

Mr. NEWELL. Making money for the record company.

Ms. BOSTICK. Well, the record producer would probably share 50–50 under the Danielson Bill, would share 50–50 from the performance royalties so that if there were some royalties accruing to them, maybe they would produce more of the Andy Williams, Helen Reddy, et cetera, kind of music.

Mr. NEWELL. I think we're talking initially about a one percent fee which, I gather, is subject to increase, but initially one percent, and I think that comes to something like 15 million dollars. Seven-and-a-half million of that is going to the record companies, and, to suggest that that might cause them to produce more beautiful music, for instance, because that would be nice for the performers, I think is a little idealistic. I really think that if they don't think that the records will sell, they're not quite so altruistic that they want to do everything for the benefit of the performers. The performers are more or less employees of theirs, and producing more beautiful music at a loss—because it does cost them something to produce it and distribute it—if it doesn't move, if the public doesn't buy it, they're not going to suffer those losses very long, and when those losses reach seven-and-a-half million dollars, I guarantee you they're going to stop.

Ms. BOSTICK. Well, I assume there might be some of those types of records that have some market, but maybe don't have very much of a market, and this might provide a supply. That would be necessary to get them——

Mr. NEWELL. There is some market for that music, but there's not a great deal, and that's why they've diminished their output on it. People are not making that type of music. The older listener is a more passive listener to music. They're less involved. They don't have their favorite artists. They turn the radio on. It's either nice or it isn't nice. Whereas, the younger listener says, "Boy, I really dig Peter Frampton," or Elton John or whatever. They're really tuned into what that artist is doing. The older listener isn't. In fact, they're referred to as background music stations, and they just don't buy as many of those types of albums, and I can assure you that if there were money in it, the industry would be producing them, and the fact that they're getting some performance royalties will not be enough inducement to produce more of them, I'm sure.

Ms. BOSTICK. Do you think that the listener market on the west coast is that different from the listener market on the east coast?

Mr. NEWELL. That depends on the market. It depends on that segment of the market that you're talking about. I think it's been fairly well demonstrated that the listeners for beautiful music stations have more or less the same case across the country. We've seen syndicated program formats developed that are placed on stations all over the country. There may be 15 different stations and 15 different markets playing the same selection of music, and all being successful in reaching an audience. You have to assume that the cases, therefore, in that market are pretty similar. When you get down into the younger demographics, again, into the 18- to 24-year-olds, you do find some distinct differences begin to arise. Bob Seeger is just a gang-buster act in Detroit, and he's just one of the biggest things around, but there are markets where you can't sell Bob Seeger at all. So there are differences, and how distinct they are would be a wild guess, but maybe 10 percent difference—in other words, 90 percent of the music that an 18 to 24 appeal station would play in Los Angeles would be the same music an 18 to 24 station would play in New York, and maybe 10 percent would be different.

Ms. BOSTICK. You've answered my question. Thank you.

Ms. RINGER. You mentioned that KPOL–AM is a middle-of-the-road station, and that—if I understood you correctly, that was the one that had been beautiful music and changed its format. What about the FM station?

Mr. NEWELL. We changed that, too. The FM was beautiful music, as well, and as I stated, there are too many radio stations in business today for all of us to really compete effectively. There were 10 beautiful music stations in the market at the time that we were doing that format on these two stations, and there just was not enough audience to go around. So we started looking at where the advertisers were placing their money, what kind of audiences they were looking for, and decided that they were younger audiences, and, as a result, we took the FM into contemporary music format, which is essentially a 25 to 34 appeal, with some overlap into the 18 to 24 age group. So we have two stations that have distinctly different appeals, but reach more or less adjacent demographics. In other words, we've gone for the older segment of the younger market and the younger segment with the older market in the other. It's a highly specialized business, and it's because there are so many stations in Los Angeles, a very fragmentized market, and we've accused one station of appealing to 19 year olds. It's gotten down that narrow. That's the target. If I can reach 19 year olds, I can be successful. It isn't quite that bad, but it really is to the point where we used to say, "Well, they have the lead in the 18 to 24 year olds." Well, now, you can go for the 18 to 24 year olds because the 24 year old doesn't have the same musical tastes as the 18 year old. So you have to divide them somewhere. And one station will go to the older ones and another one to the younger ones.

Ms. RINGER. I must say I've heard audiences described as 12 to 24, 18 to 24, 25 to 34, 35 to 49, and 55 to 64. I'm 52. Where do I fit in?

Mr. NEWELL. Well, the confusion comes in the fact that they're changing the demographics. It used to be 18 to 24, 25 to 34, 35 to 49, 50 to 64, and 65 plus, and now they've divided them into 10-year segments, and this is the government's doing this—except for the 18 to 28's which are not 10 years, but are still—18 to 24, so now we have 18 to 24, 25 to 34, 34 to 44, 45 to 54, and 55 to 64, and 65 plus, and the confusion is you get dropped there somewhere. You're still in a demographic. Don't be concerned.

Ms. RINGER. I have a feeling that that's why I don't listen to the radio at all. Doesn't what you've been describing bother you a little bit?

Mr. NEWELL. The competition?

Ms. RINGER. No. I grew up at a time when there was a good deal of idealism about radio, and what it could do, you know. This wonderful tool, and I still marvel at it—I think it's a fantastic invention, and it has a lot to offer that television doesn't have, and what's happened to it does bother me a great deal.

Mr. NEWELL. Part of what's happened to it is a result of a number of stations that have been licensed. There is no question about it. But that doesn't mean that I'm embarrassed by the medium or that I have any misgivings about being employed in the radio business. We've talked about music. But we do a lot of things besides music. We have on our station in the morning, our AM station, 20 minutes of news and information every hour during morning commuter time. We have five minutes of news on both the hour and the half hour in the afternoon. Radio can serve some remarkable functioins, and does. If you were in New York during the blackout, you realize that that city—as paralyzed as it was, was completely dependent on the transistor radio, and that radio provided a tremendous service, fantastic service——

Ms. RINGER. I'm not denying that at all.

Mr. NEWELL [continuing]. To that community. It still serves as a strong entertainment medium, but obviously it's hard to change its character.

I don't want to talk forever. I don't want to take your whole afternoon. But you mentioned a question—I came in on the last part of John Winnamon's testimony, or, actually, the question in which you asked what would have happened if, when stations seeing the advent of television, had gone into the recording business, what would have happened if they had had to pay for them.

Ms. RINGER. I was going to ask you that. Go ahead and answer that.

Mr. NEWELL. It's really hard to give you a specific answer. What would have happened if? I can only tell you that that was an error of—just prior to the time I got into radio and got into business in 1959. But I was well aware that I was going into a business that people said was dead, that really, literally, they were saying at the time that radio has been killed by television, and the fact is, was, that at that time you could buy radio stations at dirt-cheap prices because radio stations were losing a lot of money. They were having a terrible time being profitable. Those that were holding onto the entertainment that was

used on the networks were not holding their audiences, and stations were seeking ways in which to attract audiences as an alternative to the entertainment program which television was, frankly, just doing better. I don't know whether it was better. It was more attractive. It was the new toy. I think very possibly under those conditions that the radio industry could have been destroyed. Had the limited profits that existed in those days been attached by performer's royalties, I think possibly the industry could have gone under because I think it came very close to the edge of it. I came into it when it was just beginning to come up. I only started to go into television.

I had no desire to go into a dying industry, and somebody convinced me that I couldn't get into television without any experience, and the only place I could get experience was in radio. They'd hire anybody in those days. So I tried radio and, fortunately, I really enjoyed it at the time of its rebirth, but I think it could have gone the other way. I think had we paid—had to pay those royalties, it might not have survived, and I'm not sure that it would have been a more diverse, better medium, as you suggested. Radio did not play recordings just because they were inexpensive, although I won't contend that that wasn't a factor. Radio was looking for something that it could do that would be an alternative to television, and somebody hit on it. I don't know who the first one was, but there were stations, of course, that didn't have network affiliations in those days that were playing nothing but music. But then Gordon McClennan decided he'd go around and check the juke boxes and see what was being played the most, and he started playing those records instead of any records, and suddenly he started getting audiences, and suddenly, when he got audiences, he started getting advertisers, and that was really the advent of it. Let's find something that will get an audience. It happened to be recorded music.

Ms. RINGER. That's a useful answer.

We had testimony in Washington from the manager of WGAY, which is a beautiful music station there, whose main complaint was the lack of available music. That was, obviously, a part of your problem, too. You had too much competition in that field.

Mr. NEWELL. That wasn't the reason we changed. As I said——

Ms. RINGER. That was the reason you produced your sound, though?

Mr. NEWELL. Yes. But I cannot see that a royalty would cause record companies to start producing that product. It has been demonstrated that they aren't selling those kinds of records to people. The bulk of the record purchasing market is 12 to 25 years of age. And once you get past that, it's pretty limited, and most of the people that are over 35 that are buying records are buying them through record clubs. I don't know what that means, but they really don't spend that much time in record stores. They don't see the stores as being oriented to their needs.

Ms. RINGER. I have lived in Europe, and the situation is not all that different. People have similar tastes, but the broadcasting and record industries are quite different there, and radio is quite different there. Of course, there's government control and so forth. But I'm convinced that we do tend to look at things rather provincially here. You say there isn't the market and this and that, and yet in other countries throughout the rest of the world, you can find the markets and you can find the listeners, if you want to look for them.

Again, I'm not in any way putting down commercial radio, but there is a terrible grubby aspect to everything we've heard; that it's strictly a matter of profit and loss and give them what they want and give the advertisers what you want. And if you've got to change the programming, you do it because you have to find your market and so forth. I'm not saying that that doesn't have a role. That is—as has been said several times, the American way, but radio has another aspect to it, and I have a feeling, a growing feeling, that the basic problem we're talking about here, which is the lack of protection for a large segment that's contributing, the performers, has something to do with this disorderly and rather covert commercial and homogenous situation that we find ourselves with.

Mr. NEWELL. Well, I don't think of it as grubby. I hate to think of it characterized as grubby.

Ms. RINGER. I'm being frank with you, and I'd like you to be frank with me.

Mr. NEWELL. I don't think that's the broadcasting system. That is the system in the United States of capitalism and free enterprise. You can argue that that's grubby, too, but the function of business is to provide products which people use,

products which people need, and products which people want. Our job—a big part of our job is to find out what people do want to hear. Also a part of our job is to expose them to different ideas, to alternatives. We cannot only play that which is safe. Our FM station does virtually no research into the sale of records to find out what's selling. We listen very attentively to what the promotion people tell us about how the records are doing, and then we forget what they've said, and we listen to the music ourselves, and we decide whether or not that's something that our audience would like to hear, whether that's compatible with the sound of our station. We don't just provide music. We do a good deal of public affairs programming. We do traffic reporting, which is very important in a town like Los Angeles where so many people rely on their cars. We do provide services to the public that go beyond just entertainment, but I think that a system will fail if it does not serve the needs and the wants of the people, whether it's a broadcasting system or an economic system, whether we're talking about consumer goods or durable goods, anything that does not satisfy the need of the purchaser won't survive very long, and any country that tries to build an economy on goods that people don't want but that somebody thinks are good for them, is not going to survive very long, in my opinion, either.

Ms. RINGER. Well, this is your viewpoint, and I don't really share it, but I don't think there's any point in batting it back and forth.

Mr. NEWELL. It's a matter of opinion.

Ms. RINGER. I think so too. I do think that radio, television, and all of the mass media should do something more than just giving them what they want and providing profits to shareholders. I think there's a great deal more to it than that. I think you've got to agree with me.

Mr. NEWELL. I'm sorry to hear you say that you're not a radio listener.

Ms. RINGER. I used to be.

Mr. NEWELL. I think if you were and you spent some time going around the dial, you would find something on radio that you would find very satisfying and rewarding. It might not be on my station, but there are stations in large cities such as Washington that provide just about anything you want to hear. It's somewhere, and not everybody can provide the same thing, nor should they, and compete, but there is a tremendous diversity of offering, and that's really true of television, too. I admit that there's some television programming that I think is absolutely pap, but there is some extremely good television programming for anybody who wants to take the time to study the TV guide and find out. I'm talking about commercial television, not just non-commercial. If you study it and you're selective. I think you'll find some amazingly interesting and uplifting programming.

Ms. RINGER. But you've got to study it.

Mr. NEWELL. Certainly.

Ms. RINGER. Enough on that.

On the question—you've answered several of my questions. I think you've been an extremely articulate witness, indeed.

Just to pick up Jon's point about paying live musicians and so forth. Obviously, it's economically impossible to have studio orchestras, and the questions that I've asked along this line of a broadcast witness have indicated that this is just completely impossible.

Unthinkable.

Mr. NEWELL. The station that we owned in Detroit, I think was the last station to give up its studio orchestra in Detroit, and it happened about three years ago, and the orchestra by that time had become a three-man combo, I think.

Ms. RINGER. Suppose you came into a concert hall with your equipment and broadcast live or taped, and later broadcast a live performance of a group, let's say, or a symphony orchestra, anything. There's no question in your mind that you'd have to pay for that.

Mr. NEWELL. No question whatsoever. We've tried.

Ms. RINGER. You have tried? And you've done it?

Mr. NEWELL. No. We ended up not doing it.

Ms. RINGER. Because of the expenses?

Mr. NEWELL. Because the costs were higher than we could afford and higher than the advertisers would support. When I was in San Francisco with a beautiful music station, we had two hours of concert music on the air every evening and decided that as an experiment we would try to work with San Francisco Symphony Orchestra. In fact, we had quite a promotion planned to aid them

and to gain contributions to the orchestra and so forth. And we attempted to put together a live broadcast. By the time we got finished with what those performers' fees were going to be, we just couldn't afford to do the live broadcast.

Ms. RINGER. But you wanted to do it? Why did you not just go ahead and do it?

Mr. NEWELL. And suffer the financial consequences?

Mr. RINGER. What would they be? You're saying that there aren't any rights.

Mr. NEWELL. There are rigths when you broadcast a live performance.

Ms. RINGER. Why is it different? That's what I'm really getting at.

Mr. NEWELL. Because they are receiving direct compensation for that performance. There are no future benefits that would accrue to them from that performance.

Ms. RINGER. Let's just say they're getting the regular payment from the concert entrepreneur. There's an audience there. What you're doing is simply extending the audience and giving them some promotion. Why is it different?

Mr. NEWELL. Because once they're finished, there's nothing more that comes to them. Once that performance is over and they've been paid and they disband, that's the sum total of what they get. But, as a performance on a record, they continue to get paid month after month, year after year.

Ms. RINGER. Not the individuals.

Mr. NEWELL. Well, I'm not familiar with their contracts, but I think that they certainly ought to negotiate to be paid as long as the records sell, and, perhaps, on the basis of how many records sell. I mean, the unions apparently have not been very effective on their behalf. They haven't been able to negotiate something that would allow them the same benefits as the principal performers.

Ms. RINGER. We're talking about two different things. We're talking about selling records and performances. And you acknowledge that you cannot, without permission, transmit a live performance, which is an additional performance. It's expanding the audience for a performance. But you don't feel any slight twinge when it comes to transmitting what might well be pretty much the identical performance, if it happens to be recorded and issued on records. I'm not saying that I would expect in any way to suggest that the two are the same. I think you've tried to articulate why you think they're different. But I was trying to draw out the fact that you acknowledge that you have to pay and that you cannot retransmit a live performance. What I'm really gettting to is this—what you've got to realize is that radio has resulted in a vast technological upheaval, and you hardly have any live performances of the kind that we had in the twenties and thirties. And it's radio that has done this. There is simply no question about it. The impact has been fantastic, and you are, in fact, using recorded performances that are not paid for as performances that you were paying and employing musicians for back in the twenties and thirties, and, if you look at the labor statistics, they are pretty staggering. There has been an enormous technological dislocation. I can't think of anything in history that compares with it, really. It is an artistic part of our culture which has been impacted this way.

Mr. NEWELL. I wouldn't disagree with this, and, if we were to stop playing the music, there would be even more of that effect. Exaggerated to a greater degree.

Ms. RINGER. Suppose that instead of any payment, you're saying that the record industry wants you to perform. Let's say they won't permit it here, but they really want you to, they come in here and beg you to. And, presumably, the performers whose works are being used, as distinguished from the others, but are not recorded, and actually the musicians who are recording and are being paid upon the basis of the sale of records would like you to perform because it is—OK?

Mr. NEWELL. The musicians come to the stations themselves.

Ms. RINGER. Suppose——

Mr. NEWELL. To ask us to play their records and to thank us when we do.

Ms. RINGER. I've heard this enough to believe it. Suppose that instead of any payment being exacted from broadcasters by theater record producers of performers, that you gave them a veto power that the law said you can't get paid for this, but you can say no, you can withhold the right to perform this record on radio. Would you accept this?

Mr. NEWELL. Well, if the law said it, I don't think we'd have any choice.

Ms. RINGER. No. I'm saying would you fight that as a proposal? You're now before Congress and this is in a bill. What would you say to that?

Mr. NEWELL. Well, I think I'd have to challenge it on First Amendment rights. I don't think that the Congress would be a in a position to say who can perform what.

Ms. RINGER. A copyright has already been acknowledged in sound recordings. Sound recordings are identified as copyrightable matter in the present law. But no one is prohibited from playing, if they pay; correct?

Mr. NEWELL. Yes.

Ms. RINGER. There is a provision, Section 110—I won't get into the details—that creates a veto power with respect to certain types of music. Because there are no performance rights. There's a right against——

Mr. NEWELL. Yes.

Ms. RINGER. But there's no performing rights. That's what we're now talking about. There is a performing right with respect to music, and, in the case of music, under a particular provision there is a veto power, the copyright owner can withhold the right. You're saying that the record company and the performer would never dream of exercising this right. Try us. What I'm suggesting is not in the context of payment—it wouldn't cost you a dime. It's just that you wouldn't be permitted to play anything you wanted to. If somebody didn't want you to play——

Mr. NEWELL. Well, the record companies, I think, have that right now. There are pieces of music that are not cleared for broadcast performance. Whether it's the record companies or the publishers or whoever, there are pieces of music that we are not allowed to play.

Ms. RINGER. This is music. We're talking about records.

Mr. NEWELL. Well, I don't know. I'm talking about recorded music that is not cleared for broadcast performance. It may not be used by any radio station that wishes to use it. There is some veto power.

Ms. RINGER. It is obviously not the sound recording or the performance as such because there are no rights. It's the music and it's simply—it's dramatic because there is an exclusive right and there is the veto power and there certainly is ample authority upholding this right as against any First Amendment right. The First Amendment question is involved in the background of all of this, but I'm not sure that's really the answer.

Mr. NEWELL. I think that possibly you're getting me into an area that I don't quite understand. I'm a little in over my head, as far as copyright law is concerned and veto powers.

Ms. RINGER. Let me try to make it as simple as I can, if I may.

Suppose it didn't cost you any money, but, because of some law that—let's assume, for the sake of argument, is Constitutional and has been enacted. You can anticipate getting letters from owners of copyright and sound recordings saying you cannot play the following recordings on your radio station, period. Would this affect you, do you think?

Mr. NEWELL. Well, I don't think that—it depends on the degree. I don't think a single individual saying that is going to impact a radio station. If 90 percent of the music that was being produced we were not allowed to play, there would be a tremendous impact.

Ms. RINGER. All right. But it comes back to your basic argument that they would never do this because they are being benefited, and, if the only alternative that they, the copyright owners, the record producers and the recording performers, the only way they can promote their works is through exposure so that they would never dream of keeping it off the air.

Mr. NEWELL. Well, that's not the only way they can promote it, but it's certainly the most important. I mean, they could buy advertising time from us, in order to increase the amount of exposure to the music. They do buy television commercials. I'm not saying those have no impact, but I'm saying the predominant means by which the public is made aware of new music is through radio station play, and I believe that it would be totally self-defeating for them to tell a station that they could not play it. I think it would be insanity.

Ms. RINGER. So you're really saying—that's what I was trying to get at—that they wouldn't do it, so why would you worry about it in the case where the——

Mr. NEWELL. I think I'd worry about it because I haven't had a chance to study it. I think there are some very strong legal implications there that I haven't even contemplated.

Ms. RINGER. OK. I think you did very well.

A lot of your arguments I've heard in other contexts, juke boxes among others. But the broadcasters in the thirties when it was still—in the twenties and thirties when it was still not completely tied down with respect to the liability to music of broadcasting, radio broadcasting made all the same arguments. That

we're promoting it. That it isn't hurting them, and so forth and so on. The difference was that the law had already been enacted and had created a right. And what impresses me with all the broadcasting testimony is that this is not accepted. Nobody's thinking of going back and rearguing those things. The copyrightability of music, vis-a-vis this mass communications medium is accepted. The recorded performance has been capable of fixation only since the invention of the phonograph, obviously, and there are—I don't mean to get into the legal area with you, but there are cases upholding the copyrightability of the creativity of the performance and the recorded performance, the argument being that up until this, it was impossible to capture it, and, therefore, there was nothing to protect. Everything was ephemeral. It does seem very reminiscent of the same arguments, and, of course, the courts didn't accept them. Congress never accepted them. This was argued. Broadcasters are extremely reasonable people and have, I think—I didn't mean to be tenacious or put you down when I said that some of this impressed me as grubby.

I do think that there is a broader vision, and in many ways, broadcasting is doing a good job within the framework that it finds. It troubles me to see this argument drawn in the terms that you have drawn them. You're certainly, absolutely prototypical of the broadcasters that we've had. No way are you going to accept this as any possibility. Under no circumstances. That seems to be what you're saying, and yet I just—I find this a difficult argument to sustain beyond a certain point.

Mr. NEWELL. Well, it's a matter of principle and fairness. That's the way we see it. When you believe in something, when you believe that you are about to be mistreated, that there is a great degree of unfairness in what's being proposed, you take an adamant position. You don't take a compromise, I don't think, because you don't believe that a compromise is right. You believe that the present system is correct. I can't go back to the theories and talk about how broadcasters dealt with the copyright laws, if that's when they were first enacted. Certainly they must have been found Constitutional since then. I think that the position of the broadcasters with any legal knowledge has got to be that that is not a fair legal situation, that the Constitution originally intended not to benefit performers but to benefit creators, and that's about all I can say on it. But it's a different set of circumstances.

Ms. RINGER. Are there any other questions?

Mr. KATZ. Yes, I'd just like to follow up on one thing.

From listening to you, Mr. Newell, and Mr. Winnamon, I'm a little frightened. Not only does radio or the mass media generally tell me what it is that I'm going to like, what I'm going to go out and buy, but you can also, with your demographics, tell me when I'm going to go out and do it. I know when I reach my 30th birthday. There's a little bit too much predictability there.

Mr. NEWELL. Well, it isn't quite as predictable as I make it out to be. We are trying very hard to find out what you like so that we can play it for you. We want to satisfy your tastes. And we will begin to do some research. We cannot rely exclusively on our instinct as to what you want, and there is a substantial amount of research being done by radio stations—not to manipulate your taste, but to find out what you want. There is an organization that now provides a little card with every album that you buy, and you fill it in with your name and address and phone number, and a radio station will call you two weeks later and ask you what selections on that album you enjoyed listening to. They get enough people in your age group, and that's the age group they want to reach, saying, "I like those four cuts." Those are the cuts they'll play. We really want to know what you want. We're not trying to steer you. We're trying to be steered by you. That's fundamental to marketing. We're a little backward in that sense. Most manufacturers of a product today go out and find out what people want when they make it. Very often we've been playing it before we knew whether ——

Mr. KATZ. It's interesting that you raised that point because I can remember when I was in high school that it was a very important thing which radio station you listened to. You can get surveys like that, but if you weren't listening to the one radio station that played the certain kind of music or whatever, that had other effects in other areas.

Mr. NEWELL. Are you talking about peer group pressure?

Mr. KATZ. Yes, exactly, and I think a lot of that may be dictated by the mass media. But I don't want to go into that.

You raised a point, and I just wanted to counter on it. The other point that I did raise in your responses to most of the questions that I have been asking, as far as the record companies versus the broadcasters, and, with respect to compensation for performers and so forth, I suppose—well, all of us are prisoners of history, to a certain extent. It just seems to me that you kept talking about sales and record companies, that performers are compensated on their sales of records, and if record manufacturers weren't able to make records that sold, that they wouldn't make those records, and that's why there is a lack of a certain type of product today. Maybe it's not comparable, but the only basis that we have for judging between sales of records and the uses of those records are the royalties that are being paid to composers' BMI composers receive mechanical royalties, and they receive composers' royalties.

Mechanical royalties are based—as I'm sure you know—on sales of the physical object, but performance royalties are based on the use of them—how many times it's played on the radio, for example.

Mr. NEWELL. I'm not sure I follow that. OK. Now, wait a minute. Performance royalties are based on ——

Mr. KATZ. Composers.

Mr. NEWELL. OK.

Mr. KATZ. Composers presently possess a copyright interest.

Mr. NEWELL. The number of performances determine how much they're paid.

Mr. KATZ. They receive payments from two sources, at least. One is from the sale of the physical object containing their composition, and the other is generated from the use of their composition. And I think that's the only real basis that we have to make any fair comparison between those two sources, and it's my understanding—and I don't really have any specific figures on this—but it's my understanding that the royalties that composers receive from performances substantially outweigh the monies that they receive from the sale of the physical object itself. From the mechanical ——

Mr. NEWELL. I don't have any knowledge of that. I'm not sure, and I'm not an expert on how performers are compensated. Most of the major performers, recording artists are on a percentage deal, based on the sales of the records. If the lesser figures, the technicians and so forth, are paid on the specific job basis rather than on sales, I'm not sure that they're being paid promptly, and, possibly, they should be compensated. That's on sales, too. I think the better the record does, perhaps the better everybody participating in the production of it ought to do, but that's really for the unions to work out, for the record companies.

Mr. KATZ. Well, what I was really after was, really, derived from what Ms. Ringer was suggesting, as far as the logical developments have been concerned, and, if it's true that performances are a much more substantial source of income from these musical compositions, shouldn't that have some bearing on the various relationships of those involved in the transmittal of those works to the public? In other words, the performers and the record companies?

Mr. NEWELL. It becomes, once again, a question of whether or not the performer and/or record company is in the same position as an author or composer.

Mr. KATZ. I see.

Mr. NEWELL. I think I see them as different entities, and I see the means of transmission as being as important an element of the composing as the performer is. If you want to get right down to it, I put the radio stations in the same position as the performers. We are part of that today. It can't exist without our transmission of it. And I, frankly, don't think that we are the same as an author or a composer.

Ms. RINGER. Thank you very much, Mr. Newell. You've been a very, very effective representative of your industry and a very interesting witness, too.

Thank you very much.

Mr. NEWELL. Thank you for your kind attention. I appreciate it.

Ms. RINGER. I think that we can now adjourn this afternoon's session, and we'll meet in this room again in the morning at 9:30. The opening witnesses will be Stan Gortikov and James Fitzpatrick, representing the Recording Industry Association of America. They will be the morning witnesses, and Herb Alpert will be testifying in the afternoon.

Thank you very much.

[Whereupon, at 3:30 p.m., the Copyright Office Hearings re Performance Rights in Sound Recordings, Docket 77–6, were adjourned, to be continued at 9:30 a.m., Wednesday, July 27, 1977.]

Beverly Hills, Calif., Wednesday, July 27, 1977, 9:30 A.M.

Ms. RINGER. Good Morning. I'd like to open the second day of our California hearings in Docket 77-6. We had scheduled earlier witnesses representing the Record Industry Association of America for this morning, Stan Gortikov and James F. Fitzpatrick, and then this afternoon the witness was to be Herb Alpert, Vice Chairman of A&M Records, but we received telegrams last night from him saying he was unable to be here, so I think we will try to finish this morning and simply not have the hearings this afternoon. We couldn't move the other witnesses up because of this scheduling. If this is agreeable, I think we will go on, and we will try and finish this morning. But take as long as you need, Mr. Gortikov and Mr. Fitzpatrick.

Mr. GORTIKOV. Thank you.

I am Stanley Gortikov, and I am President of the Recording Industry Association of America, a trade association whose members make and market about 90 percent of the recorded discs and tapes sold in the United States. I am here, of course, to urge that the Copyright Office recommend to Congress the grant of performance copyrights to recording companies, musicians, and vocalists for the commercial use of their recordings. The statement that I present today supplements a written position paper which previously has been entered into the record.

I'm going to speak for about 45 minutes together with Mr. Fitzpatrick. The topics we will cover and sequence are listed on a topic outline, which I've handed you, so you can watch with mounting excitement. Please feel free to interrupt me for any questions or questions at the conclusion of my remarks.

I felt that the key issues in our presentation are actually very simple ones. The complexities, to the extent there are complexities, are related to the impact and to implementation, not to the principle that we are here to talk about. I'm urging that the Copyright Office clearly separate these three factors—principle, impact, and implementation—into distinct categories in your deliberations and in your Congressional presentation.

The factor of "principle" relates only to the "right"—whether it should be granted. "Impact," which I'll talk about later, is going to deal with the effects of the "right," and those are economic considerations that primarily can be answered by the amount of royalty granted. "Implementation" deals with strictly with matters of operation and execution.

First, as to "principle" there are two simple issues to be considered:

One, is it equitable for those who use sound recordings to pay for them?

Two, is a performance right Constitutional?

Apart from those principles and the arena of implementation, I'm going to speak later as to what should be a fair and equitable royalty structure. Second, what's the best mode for collection? And third, what's the best mode to assure equitable distribution?

So those problems are ones of implementation, and they can be worked out. Everyday in countries all over the world, including the United States, such implementation goes on. Complications must not be allowed to dilute the merit or justification for a performance right. If we can figure out how to charge and collect an income tax, telephone bills, pension payments and composer revenues, we can, of course, conceive a fair and workable scheme for performance royalties too.

A few moments ago I asked that you separately focus on "principles." Principle No. 1 relates to the fairness of a performance right. Would it be right and equitable to the users of copyrighted recordings as well as to the intended beneficiaries, who are the performers and the recording companies; and is a performance right morally right?

It is a fundamental of copyright that one who uses another's product for commercial gain should compensate the creator of that work. That basic element has been applied to every copyrighted product that is capable of being performed except one—the sound recording.

We feel we've been patient. We've waited long enough. During the last few years we were accused of being the potential "spoilers" of the Copyright Revision Bill, which was a reason for our being excluded from the benefits of that bill, but that kind of fear is behind us. We feel we deserve the right. We feel we deserve to get paid.

Let me make this principle of "equity" come alive with inconceivable scenarios.

Scenario No. 1: Suppose the now famous author, Alex Haley, had just completed his unprecedented television series of "Roots." Sales of his book are breaking records everywhere. Suppose, too, that the broadcasting network which aired the television series now comes to Alex Haley and says, "Alex, guess what? We have decided not to pay you, because the television showing helped your book sales so dramatically." That would be preposterous, of course. Now, here's another picture, only the payer and payee are different.

Scenario No. 2: Cable TV system XYZ in Buffalo, N.Y., has picked up some ABC Channel 7 in New York, the "Charley's Angels" show starring Farrah Fawcett. Says Cable station XYZ to ABC Channel 7, "We have decided not to pay you for the use of your copyrighted creative program. 'Charley's Angels.' We have decided to give your show a broader new audience in Buffalo; and the increased popularity and advertising exposure for your show and its stars should be compensation enough to satisfy you."

Both of those two scenarios are inconceivable. But paradoxically and in defiance of parallel logic, broadcasters talk differently to recording musicians, vocalists, and recording companies. Broadcasters ask copyright owners and recorded performers to forgo our particular form of performance right. Broadcasters rationalize the lack of income to us. "Broadcasters make a profit from new recordings," they say to us, "but you deserve no share of that." Tauntingly, they say to us, "We use the pulling power of your creativity and recordings to attract most of our audiences, but you merit no reward. We sell commercial time, we acquire advertisers, we build the equity value of our stations, all with your recorded music; but for all that contribution, you deserve nothing." Nothing. What kind of cockeyed logic is that?

That first principle of "equity" which I introduced, is further underscored in three further arguments which I would now like to make:

One, recording companies and performers make vital creative contributions to sound recordings.

Two, the crucial future impact of technology warrants the grant of the right.

Three, the link between broadcasters and cable TV offers a convincing parallel for our own position.

I'd like to expand on each of those three.

First, the performer's role in creativity.

A performer's interpretation of music and lyrics is no less a creative contribution and at least equals that of a composer. In virtually every kind of recorded rendition, skillful musicians and support vocalists intricately weave their artistry around the star performer, fortifying, enriching, complementing, underscoring, and accenting, making the performances even more definitive. Just as the composer deserves his performance royalty, so do these musicians and vocalists when their work is commercialized and employed for the profit of a user.

It is almost inconsistent that broadcasters would willingly pay the live orchestra on late night Johnny Carson show, which is one of the few shows with a live orchestra, but if that same group performed the same music on a recording, then the same broadcasters would be unwilling to pay for it. If Peter Frampton, the recording author, whose name was used here yesterday, were hired for a television show or a radio show, he and his support musicians would be paid without question, but if that recording was used in those same shows, the broadcasters would find it unthinkable to pay Peter Frampton. Recording companies, too, like composers and performers also make a unique creativity contribution to their copyrighted sound recordings. The creative role of the recording company begins when it sifts and selects the talent components that are ultimately consolidated into a finished recording. And, of course, one of the first creative tasks is to choose the recording artists for whom the company wishes to risk its capital and commit its capabilities.

The process then proceeds through many creative actions crucial to the finished product, starting off with determining or influencing the musical presentation or character of the key artist. What is he going to sound like? How should he present himself to the public in his recordings? Second, finding or assisting the "right" producer for the artist's unique talents. This is a very subtle collection process. Next, going through myriads, sometimes literally hundreds of potential songs for the artist to record and selecting finalists. Next, hiring or working with the appropriate musical arranger attuned to the uniqueness of the song and the artist. Next, the selection of support musicians and/or background singers who can in com-

bination most enhance the creative and commercially recorded result. Next, the selecting of a properly equipped recording studio, providing the talents of a sound engineer that might be ideal for the artist and providing the engineering talent and technical talent with the very complex activities today in multi-track recording, editing, mastering, over dubbing, and the complete range of highly sophisticated electronic procedures and discretions that mark today's inventive recording techniques. Even the development of album cover graphics and writings is an integral artistic component of the recording. And finally, instituting the manufacturing processes to maintain the integrity of the recorded work that was made in the first place.

So throughout all these processes, the recording company asserts its creativity to warrant the copyrightability of the sound recording it helps create. All the contributions constitute dollar benefits for broadcasters, helping to lure audience, helping to attract advertisers, and building station profits.

But all of that creativity in the sound recording today may be jeopardized by future technology. The sound recording itself at one time represented a quantum jump in technology during that era when live talent was in face-to-face encounter with its audiences. Yet, the recording itself may be imperiled by the technology from which it was spawned.

The consumer today who enjoys recordings is a pushbutton away from appropriating recorded music of his choice, capturing it on tape, and enjoying it as well. He makes his own choices as to music and sequence of programming. But this freedom and facility diverts literally millions and millions of sales away from those who take the risks and who provide the creativity for that recorded music in the first place. Some radio stations even encourage home taping by providing their listeners timings, sound levels, and recording schedules. I call that "rape-a-tape." It's going on all over the world. Recording industries and companies all have international concern over this phenomena. I understand one survey was undertaken in New Zealand where they found that the average reuse of a blank tape in home recording was 40 times, and in England the survey is showing that those who are purchasers of blank tapes buy at least one blank tape for every prerecorded tape.

But home taping is but a horse-and-buggy portent of things to come. We are not far away from in-home push-button recall from vast blanks of recorded musical repertoire. This is no Buck Rogers fantasy. Technical forecasters anticipate the day when a cable subscriber need merely press a few buttons to signal his desire to hear a particular album or selection. This could be a body blow to record buying.

Performers and recording companies are even more dramatically exploited by the broadcaster's own technology. Many stations are virtually fully automated. They buy and operate mechanical robots which are fed with special cartridges containing taped copies of recordings, interspersed with commercials, of course. Those mechanical leeches can spew out a straight 24 hours of canned broadcasting with no human in sight. The commercial time is paid for. The recorded performers are not.

Those technological omens and realities make more vital than ever the realization of performance rights and royalties. Income diversions occasioned by technological change may be beyond total control. Public performances are not. They are programmed. They are deliberate. They must be paid for.

So we ask the Copyright Office to assume the role of "visionary." We all know how technology keeps changing. Performance royalties can help performers and companies better adapt to the impact of such change.

Broadcasters recently encountered technological change in the emergence of cable television, but they demanded and got a performance royalty.

In hearings before the House in 1975 a broadcasting industry spokesman used these words in his testimony:

"It is unreasonable and unfair to let the cable industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America."

Those reasonable and well considered broadcaster words were used in support of performance royalties from cable systems for the use of copyrighted creative works in profit-making programs.

"Don't ride on our backs" they said, and they were right.

But, today, we too say to the broadcasters, "it's unfair to take our product, resell it, and not pay us a dime." We use those same broadcaster words. We are

entitled to that same broadcaster result—a performance royalty—just like the one they demanded and got from CATV, and for precisely the same reasons. If CATV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

Broadcasters "speak with forked tongue" when they argue so forcefully for a "performance royalty" when they are the intended receivers, and then object so forcefully when they are the intended payors. They just cannot have it both ways.

In my introductory comments and up to now I have been concentrating on our Principle No. 1, that of equity. Now I would like to turn to Principle No. 2, the legality and constitutionality of a performance right. The broadcasters maintain that there is no Constitutional basis for that right. That is simply not true.

But special focus will now be set forth by Mr. James Fitzpatrick, Esq., of the Washington law firm of Arnold and Porter.

Ms. RINGER. Thank you.

Mr. FITZPATRICK. I'm going to be very brief today, because I don't believe that the essential questions that are facing this panel are legal or Constitutional questions. I think they are much more directed to questions of equity and fairness and the reality of economic developments that have been advanced here and advanced to Congress. Nevertheless, I want to talk about very briefly what I call the Sam Ervin's Constitution Corollary, "if it doesn't look like a book or feel like a book, it can't be a writing."

We've filed a detailed paper today dealing with that shibboleth, an exhibit to the RIAA statement. If Senator Ervin is right, the Supreme Court has been wrong, Congress has been wrong since 1790, Jack Valenti had to look for a new basis for protection for movies, and our good friends at ABC should look somewhere else for protection from large sports telecasts that are taped and granted copyright protection under the revision bill.

I think it's important that before we discuss the merits here to talk about two fundamental points. First, we are not dealing with a performance right, whatever that might be. We're dealing with the sound recording, which is a copyrighted, copyrightable creative product, and the question is should that copyrightable product be denied a performance right, a right that traditionally adheres to a copyrightable product. That is the focus, I believe, on which the analysis should be made. Should the traditional presumption that a copyrighted work be granted all of the bundle of rights that are reflected in Section 106 be denied to a sound recording? Should the user now have to comply with that performance right?

The second fundamental point that one needs to keep in mind is that this particular definition of a performance right spells out in the statute the adequate shares that the contributors, the creative contributors will receive from the grant of that performance right. As far as I know, this is the only performance right in which the statute itself identifies the adequate share the various creators will receive. We understand in European countries that is spelled out by statute, but I don't know of anything else in our copyright law where that relative share is spelled out as a matter of statute, but that fact itself in our view does not create any special Constitutional or legal problems within the purview of this examination or Congress' examination or the courts' examination. I think yesterday it was described—the origin, the development of that particular statutory arrangement, and we'd be happy to comment on that point as well, but that particular distinguishing feature of this performance right does not create, we believe, any special legal problems nor does it create any special rub-off effect on any other existing performance right.

Now, I want to touch briefly and only briefly on four critical points that I spelled out in our legal memorandum.

First, we don't think that there can be any doubt that the sound recording itself is constitutionally protected. We've described in some detail the variety of cases that have spelled out the standards for writing and for authorship, and they have tested against those standards the creation of sound recording. We've reflected the fact that the courts have in the basic decision finding—sound recording is Constitutionally protectable—have recognized those creative elements. So we think that the Court's decision and Congress' decision, in terms of the fundamental protection of the sound recording itself, is virtually beyond any question. Now, given the fact that the sound recording itself is a writing of an

author, we do not feel that there is any Constitutional question as to the grant of one or another of the bundle of rights to the sound recording. That clearly can be a question of legislative policy or judicial interpretation under the 1909 Act. The courts, as a matter of legislative policy, denied a performance right to juke box. Courts in interpreting the 1909 law have denied to copyright owners a performance right vis-a-vis cable, but that was a matter of statutory principle, that was not a matter of Constitutional principle. We see nothing in our paper, nothing at all, especially in a Constitutional sense, which prevents Congress going ahead and granting to the sound recording the same bundle of rights that is granted, we believe, to every other copyrightable product.

The third point is that we don't believe that the cases support at all the concept that the courts will impose as a Constitutional hurdle or will review whether a particular grant of copyright engenders the art. I think the courts are clear on this, that to engender the arts has been interpreted as expansive, not as a restrictive dictum in the Constitution, and this has not been thought of in the cases as a hurdle that one has to get over for the courts to review or determine whether a particular grant of copyright potential in fact engenders the arts. Indeed, Holmes, in the case that we had set forth in our paper, talks about the fact that the courts ought to be very hesitant about looking through a Congressional judgment as to an appropriate recipient of copyright protection.

So we see that, and we spelled it out in our paper, that that provision is not a special Constitutional quirk. It certainly can be relevant to Congress' decision, and we've heard arguments here in terms of what benefits might accrue to creators from the recognition of this right. That is a matter of legislative debate; it is not a matter of Constitutional principle by our rights.

Finally, we believe that any First Amendment questions, which have from time to time been advanced here, have for all effects and purposes been resolved by the Human Cannonball case, where the case arose from a lawyer's point of view in a somewhat different context. There, as you well know, the question was the interplay of a state-created cause of action as against a 14th amendment freedom of the press protection. The Court analyzed and weighed those two competing values and came to a different conclusion than it had come in the early right of piracy cases where you had played off a state law right of piracy against the First Amendment and freedom of the press. In this case, in the Cannonball case, they analyzed and concluded that the perfromance right of publicity superceded any First Amendment or 14th Amendment questions, which might be posed in the inter-relations of state law and federal Constitution principles. So that case draws upon the copyright laws and copyright principles in pursuing the analysis of the state law. On both that question and the broader question of the writings of an author, this is one of those cases, I believe, that a lawyer would be happy to take on contingent fee. It seems to me that the law is quite clear that the present, the history and tradition clearly vests Congress with the power to make a decision that sound recordings are copyrightable and that the performance right should be granted as has been the tradition in the area of copyright protection. Our view, really, is the action is really with the issues of equity.

Ms. RINGER. Thank you.

You may resume.

Mr. GORTIKOV. I'm moving now beyond the factors of principle into the area of impact.

Recently the Copyright Office invited written submissions relating to the performance rights issue. At the time of this writing, 91 individual submissions from broadcasters have been made, articulating positions fostered by more than 1,500 AM, FM, and TV stations. In fact, there were about 33 different reasons that TV gleaned from all those submissions as protests against performance rights and royalties. Most of those 33 different arguments were repeated very few times.

But the broadcaster protests really clustered around only six key objections:

First, that a royalty would constitute an unfair, burdensome extra tax for a service already compensated by broadcasters through payments to ASCAP, BMI, SESAC.

Second, that air play exposure is essential to recordings and performers and stimulates sales of recordings.

Third, that a royalty would impose financial burden stations cannot afford.

Fourth, that performers are very well paid now without additional broadcaster revenue.

Fifth, that record companies and performers should pay broadcasters for air play.

Sixth, that record companies are adequately compensated from other income sources.

Clearly, those six objections are the greatest broadcaster concerns. I would now like to focus on these and offer our prospectives against theirs.

The most repeated broadcaster objection to the proposed performance right in 68 percent of the letters is their conviction that they are already paying for recording music, and that a second performance royalty would constitute a burdensome double tax. They believe they are being asked to pay twice for an identical commodity. Not true. The payments currently made by broadcasters to music composers and publishers through ASCAP, BMI and SESAC compensate for the use of the musical compositions alone.

The projected performance right and royalty which we discussed today relate to a completely separate and distinct creation of value—a copyrighted recorded musical performance—a performance that makes the original inert musical composition come to life in a form useable for broadcasting and public performance.

That shouldn't be too difficult for a radio station to understand. They certainly would not consider that the payment to a newscaster to present the news is a double tax or duplicate payment to their Associated Press newswire service cost.

Another major contention in 40 percent of the broadcaster responses was that recorded performers already are handsomely compensated. They make enough money, the broadcasters feel, and therefore do not warrant additional monies at the expense of the broadcasters. Sure, we do live in a world of superstars, but really there are amazingly few of them. The big name artists in our industry who are always visible and audible to the public generally have pitifully short professional life cycles, especially when it comes to recording. We literally run a turnstyle, dictated by the mercurial tastes of that public.

But I caution the broadcasters to look carefully and lovingly at those superstars. They bring in station audiences, too, and they sell commercial time, and build station values. The star vocalist or musician deserves to get paid no matter how rich he is. He performs a commercially valuable service, and he may not be doing it for long. The question is not how much money he makes, but for whom he makes money.

Can you name me one radio or television station owner in America who declines additional income because he has enough? Are executives and owners in the broadcasting industry, for example, willing to put a ceiling on their own income levels or sources? Yet, that is what they so glibly suggest for the talent who pay their salaries and create wealth and value for them.

Unfortunately, the broadcaster advocates appear to equate the thousands of vocalists and musicians working in recording studios across the country with a handful of superstars. They, too, have a right to compensation for performances which too long have gone unrewarded.

We emphasize and reemphasize that the projected performance royalties we discuss are not earmarked for superstars alone. They will share and share alike. If Elvis Presley, for example, were to record with 15 other musicians and three background singers, or a total of 19 recording artists including himself, then there would be 19 equal receivers of the performers' share of any performance royalties generated by that recording.

The National Association of Broadcasters, in testimony before the Copyright Office earlier this month, placed great emphasis on a study about performance income by Dr. Stuart of Hofstra University. Details, date, or basis of the study were not included, and they have been denied by NAB to RIAA for evaluation, despite our requests. Some of the conclusions stated are just not credible to us. At minimum, it appears that some income of recording artists who also are composers are ascribed to "Artists," which is a distortion; such income just as readily could have been attributed to "Composers."

We now understand that NAB just yesterday has submitted the study into the record, and, in any event, we urge that the Copyright Office encourage full availability of the Stuart study until the parties have full opportunity to evaluate and comment on the report in detail before any credibility is assigned to the NAB claims.

In 14 percent of their submissions the broadcasters protest that recording companies do not need still another source of income and that the performance royalties are an unnecessary avenue of further enrichment.

I know that a broadcaster would consider it irrelevant whether a given AM radio station chooses also to get into the FM radio business or into television or

to syndicate its programs to maximize its revenue from many legitimate channels. Similarly, it is just as irrelevant to negate multiple income sources that may be sought by a recording company. This is no different from a book author and publisher seeking multiple income from paperbacks, movies, magazines, newspapers, television and foreign rights.

Stability is an important factor here. Recording companies are dependent on the vagaries of talent. Individual bottom lines vary directly with the popularity of particular artists and recordings at any point in time. Performance royalty income could assist a higher level of stability. That stability is tough to achieve for most recording companies. Over 80 percent of 45 RPM single records and 77 percent of all popular LP albums that we released in the latest year of compilation failed to recover their costs. And broadcasters directly benefit from that record company risk-taking.

But neither broadcasters nor the Copyright Office has any mandate or obligation to protect the recording industry's economic basis. But neither has the Copyright Office nor the record industry the responsibility to protect or insulate broadcasters. We are talking here about the legitimacy of a right and whether a copyrightable work used for the commercial gain of another should be paid for.

In 20 percent of the broadcasters' submissions to the Copyright Office there was a conviction that recording companies should pay broadcasters for air play, not the reverse. That complaint does give opportunity to underscore the reality that recording companies are not just out for a free ride at the expense of radio and television.

But the recording companies of today are one of the major consistent users of paid broadcast advertising time to display recordings to the public. Industry estimates show that at least $100 million annually is spent for paid advertising in radio and television. That hardly puts us in a beggar's role. We are not looking for handouts. We recognize the importance of the media, and we put our money where our mouth is.

Our estimates of performance royalty annual yield to recording companies under the Danielson Bill formula would be about $6.25 million. That is a huge difference from the $100 million we pay out to broadcasters. There's no free ride being sought here.

One frequently-stated broadcaster reason for opposing a performance right is the accusation that it would lead to widespread payola—illicit payment to radio station personnel by those who wish specific tunes to be air played. Using that old "red flag" of payola is a McCarthy-like device designed to divert rather than focus on the issues.

The competition for air play could hardly be greater than it is today, with more than 1,000 recorded tunes released each week, and a given radio station only playing 30 best-seller tunes per week. Just as the market for radio time has grown, the market for recordings has grown three-fold in the last ten years. That added dramatic income rise has not increased proved instances of payola. The media have distorted payola unfairly and inaccurately. The U.S. Government conducted a four year intensive investigation and emerged with indictments against individuals in about three very small companies, certainly not those among the industry mass I represent here today. Therefore, the addition of a modest performance royalty resource hardly would magically increase the temptation to engage in crime.

So the payola fixation is purely a "red herring." If the broadcasters truly feel, however, that payola can be a serious problem and a serious jeopardy for them, they do have definitive control. Let's not forget that payola involves a giver and a receiver. When there is a receiver it is a broadcaster or broadcaster personnel. If broadcasters choose not to engage in payola and choose not to have their employees to participate, then the control is purely up to them. Broadcasters already have a unilateral monopolistic control over programming. Let them keep their own house clean as our companies are trying to do with a structured program.

In the most recent FCC payola inquiries this year, the focus was hardly on record companies but primarily on broadcasting stations and concert promoters. The reality is that the overwhelming majority of both radio broadcasters and record companies conduct their business legitimately. It is unfair to penalize either industry for the unlawful excesses of a few. There are criminal laws for that purpose.

In hearings yesterday, payola was described as pervasive, and, further, the statement was made that bribery, not choice, is producing radio programming.

I must respectfully but strongly question the accuracy of those statements. Both the radio and recording industries conscientiously conduct their affairs in a lawful and economical manner, and a fraction, of course, must be identified and routed out, but there are methodical processes to accomplish that, and we hope for fairness in how we all are characterized.

The one argument the broadcasters consistently underscore is this: Broadcasters should not pay performance royalties, because air play of recordings contributes to artist popularity and to the sale of those recordings. In their Copyright Office submissions, 63 percent held that view.

Yes, some air play does broaden public awareness of some records and, therefore, promotes some sales. Yes, record companies want air play but we fail consistently to get what we want. The record industry releases into the marketplace approximately 4,000 single records and 5,000 LP albums each year.

There is an average, too, of about 1,000 new recorded songs each week. Yet even the key major rock music radio stations in a metropolis will program no more than 30 different hits and best seller songs during a given week. And that Top-30 station will only add from two to six new recorded songs to its play list each week, six out of one thousand released by the industry. That's hardly a totally adequate sales and promotional service. Thus, most recordings released never get on the radio, receive absolutely no help from radio air play, and are dependent on a diverse variety of other forms of media exposure to bring them to the attention of consumers. Most records which do get on the radio already have shown signs they will be popular. They either feature already popular talent or they already have shown positive sales performance. That's why radio stations constantly are checking sales achievement with local record retailers, wholesalers, and record companies. Radio likes to go with our "winners." Those best attract audiences and advertisers.

Be aware of radio's timing factors, too, when they brag about their sales contributions. I speak now about the point in time when stations start the air play of a given new recording. Rarely is it on the day of release, except in the case of a few superstars who have an instant audience available the moment the recording comes out. All other recordings must first make their way into the hit category before these major radio stations will add them to their playlists.

So although some air play helps sales, much air play satiates listeners and deters record buying, having fully fulfilled the musical interest of listeners in a particular recorded performance. So air play gives but it takes away, too.

Broadcasters are guilty of overstatement about their promotional claims in behalf of recordings. If they are so successful in expanding our market, then why do classics and jazz fare so poorly in sales despite air play? Why do 77 percent of all popular recordings fail to recover costs and only six percent do really well?

About 75 percent of radio's programming is devoted to all recordings and most of those records that are so air played no longer sell very much. We checked out that air play reality recently by arranging for the Cambridge Research Institute to conduct a telephone survey of program directors of 267 radio stations in seven major markets. Sales just did not come from the recordings most broadly programmed by radio. The sales period even for a popular hit, from which most recording company revenues are derived, is extremely brief. The average "chart life" is less than four months, and when a hit has fallen from the charts, its ability to generate additional substantial sales is sharply reduced.

I think Alan Livingston was most convincing when he said: "Radio does not promote the sale of recordings. It merely programs their performance and thus exposes them. People buy what they want to own, whether they hear it first on radio, on a juke box, in a discotheque or elsewhere."

Much of what I have attempted to communicate to you was underscored in the testimony yesterday of Mr. Winnamon of KLOS. He confirmed that most of what radio programs already has demonstrated sales. And he told you how he, for example, first checks out retailers methodically before he programs a tune. He says, "We look at sales very heavily." And he further stated, "To pick up and play obscure artists is very dangerous."

In short, a great many factors and dynamic forces do go into the success of any artist or recording, but to state that artists are successful because of radio is an oversimplification. Our records are played as a byproduct of radio processes. Radio is not at our beck and call. They order their own programming choices. Broadcasters play a lot of records for their own self interest, not ours. Adver-

tisers buy time on programs featuring our records, for their self interest, not ours. Regardless of the limited and selective promotional contributions of radio, those records are copyrighted works, and they are being performed for the profit of the broadcasters and for the makers of automobiles, deodorant, and dog food. Those records deserve a performance right and royalty. Pay must follow play when that play is for profit.

I've now spotlighted several broadcaster fears and protests and our responses to them. One of their concerns merits a particularly thorough examination. In their submissions to the Copyright Office, 57 maintained that a performance royalty would impose an undue financial burden. We have undertaken extensive inquiry on this point, and a series of essential financial facts have emerged. Full detail is contained in our own written statement to the Copyright Office. I will only highlight the findings here today.

In here are those findings in eight quick observations, and they are all backed up by our factual data in our written submission.

1. Health: Radio is healthy. It can afford to pay for the recorded music it programs to its gigantic audiences. Every week radio reaches 95.4 percent of all Americans age 12 and over.

2. Audience: The audience for radio is not only large, but it is growing more rapidly than for other media.

3. Advertiser Value: A look at actual dollar figures also suggests that radio is a bargain for advertisers, more so than for other media.

4. Revenues: Between 1965 and 1975, radio broadcast revenues have more than doubled; and I just picked up from the trade papers yesterday an article that indicated that in 1976 radio revenues went up 15 percent over 1975.

5. Profits: Radio pre-tax profits have fluctuated tremendously, reflecting the impacts of inflation and recession. But profits cannot be viewed in total isolation. Station equity values and upward changes in those values must be simultaneously evaluated and treated as part of the results package. Also, radio profits, and lack of them, must be looked through, not just at. Station profit performance can be influenced or even controlled by multi-ownership factors—ownership links with other AM or FM or TV stations, peaking of losses or profits in one unit of multi-owned stations for tax considerations or write-offs, school or institutional ownership.

Six. Future profits: One good way to judge the quality of profits is to look at what the National Association of Broadcasters is portending for the future. In a recent report entitled "Radio in 1985," the NBA study predicted, "A return to historic profit margin levels established over a long period." The analysis showed not only continued good health, but improving health within the industry. This is true across the board, in every section of the country, in every size market.

Seven. Rate increase precedent: Stations could elect to pass on the cost of a performance royalty. Radio has raised its advertising rates repeatedly over the years. For example, between 1974 and 1975, radio spot advertising rates rose 6.8 percent, far more than the one percent increase that might be necessary if radio were to pass forward fully the proposed new performance royalty encompassed from the Danielson Bill. That 6.8 percent increase apparently did not cause it to lose any advertising business, for between those two years, spot radio revenues rose 7.6 percent, and radio revenues, as I just mentioned, rose 15 percent in the last year.

Eight. Advertiser and Consumer impact: If broadcasters raised their advertising rates to cover a performance royalty, the impact on advertisers' budgets, and ultimately on product costs would be negligible, and no appreciable effect would be felt on consumers' prices.

So having stated those eight broadcaster financial concerns and capabilities, I would like to devote special attention to one more. More than a decade of broadcaster protests against performance rights and royalties has been marked by cries of "poor me" and whines of economic distress. It should be incontestable, however, that the change in the equity value of a station is one fair measure of economic health. A steady growth in such valuation. certainly in excess of current general economic barometers, is firm evidence of prosperity, in spite of a station's claimed profitability or lack of it.

The price at which existing radio stations are sold has really shot up in the last nine years. According to Broadcasting magazine, the industry's prime trade journal, the average transaction price per trade of all radio stations rose

from $188,000 in 1967 to over $704,000 in 1976. Thus, between 1967 and 1976 the average transaction price rose 273 percent while the Consumer Price Index rose 83 percent during those years. Apparently investors consider that radio has good future prospects. They are valuing radio stations far in advance of their actual revenue and earnings growth.

In fact, in your Washington Copyright Office hearings, recently, one of the panel members asked, if so many stations are losing money, why aren't more attempting to sell? The answer is that they are very valuable properties.

If there is a problem it does not seem to be in finding prospective buyers but in finding station owners willing to sell, which is difficult to reconcile with the tone of broadcaster submissions to the Copyright Office. Broadcasting magazine of June 6, 1977, observed: "There are plenty of buyers, but we're running out of merchandise."

If radio stations use recordings for 75 percent of their programs, and if station values are as solid and growing as just demonstrated, then some of the credit must go to the recording musicians, vocalists, and companies which created those recordings.

Having considered the principal broadcaster financial concerns and capabilities, it is most critical to remember here, that the recording industry cannot be saddled with the responsibility for maintaining or guaranteeing the profitability of radio stations. We no longer can continue to be the "Angels" who subsidize their programs. Nor can the Copyright Office become the surrogate instrument to protect radio's profitability by fulfilling broadcaster expectations to withhold a performance right.

Radio's revenues and profits are not criteria by which to determine whether a performance right is justified. Not at all. Those economic factors, at best, can only influence the amount of performance royalty that may be considered equitable and justifiable, not the right.

Realistic broadcaster financial concerns will be influenced by the amount of a performance royalty. The proposed performance royalty schedule in the Danielson bill would not be burdensome to the radio industry. Total performance royalties that radio broadcasters would have paid under that schedule in 1975 would have been between $10.6 and $14.4 million, and the detail of what spread or reason for it is articulated in our written submission. The midpoint between those two numbers is, say, $12.5 million. Even with that added program cost, the proportion of our broadcast expenses going toward programming, based on 1975 data, would be less than in 1973.

If we reason that the smaller radio stations have the greatest profitability problem, we must also observe that the Danielson bill heeds the plight of the small station. Those with revenues of $25,000 and less are eliminated from any payment obligation. Those with revenues between $25,000 and $100,000 would pay an annual format rate of $250, or about $0.75 per day. Those with revenues between $100,000 and $200,000 would also pay a low annual flat rate of $750 or about $2 per day.

On one hand the broadcasters maintain that the performance royalty in the Danielson bill is too high and would be a burden. Then, from the other side of their mouth, they state that the royalty is too low to do anybody any good. In any event, the Danielson bill formula just may not be adequate enough, and it deserves a much closer economic analysis, hopefully by the new Royalty Tribunal. Certainly it is far below the parity with composers and publishers that is merited on straight relative creative contributions.

Most of the focus of this presentation has been directed so far to the performance right and royalties related to the broadcasting of sound recordings. Broadcasting is the primary source of potential income, the major arena of use, and the most aggressive source of opposition.

As in other countries, however, the performance right would also prevail on any public performance of copyrighted recordings used in commercial applications. These outlets and users would be no different from those now obligated to pay performance royalties to music composers and publishers. They would include, for example, nightclubs, discotheques, theaters, juke boxes, arenas, background music sources, stores, and other places utilizing recordings.

There has been considerable conjecture as to the impact of performance royalties on the character of future recording. Would there be more classical recording? More or less rock music? Experimental recording? I certainly cannot predict with any accuracy. So much depends on the amount of royalties generated.

I am comfortable in speculating, however, that additional funds could have the potential of loosening up some recording in areas of serious music where the return is now marginal; such as, classics, jazz, ethnic, folk, educational, spoken word, and experimental. Even now it is the profit from more popular records that subsidizes classical recordings—and that is because some companies feel a responsibility to nurture the arts and produce classics. That kind of support can be supplemented by performance royalties if cultural recording is to continue.

To add incentive to such recording and serious music development, the Board of Directors of the Recording Industry Association of America has pledged that five percent of their respective companies' performance royalty income would be channeled to the National Endowment of the Arts for those purposes.

The recording companies already encourage and subsidize live performance of diverse music forms. Last year about $13 million was contributed by our companies to employ 350,000 musicians to present 52,000 concerts in 550 American communities, all free and open to the public. And that was by the Music Performance Trust Funds which Mr. Davis talked to you about yesterday.

I hear of no such musical contributions from broadcasters. They seem only to take from recorded music, and it's now time for them to give.

The performance rights bills introduced in Congress so far have contained specific royalty amounts, usually varying with broadcaster station size. Equivatable royalties are intricate to determine—a host of economic and technical considerations are involved, as you well know. Previously, most Congressmen were quite baffled by the range of such difficult considerations. Any new royalty formula would be no less confusing to the Congress; and yet, superficial consideration could produce unfair results for payors and/or receivers.

In the Copyright Revision law, Congress created a permanent Royalty Tribunal and mandated to that entity the consideration and adjudication of complex, technical royalty matters. It would appear logical and reasonable, therefore, even for an initial performance royalty to be set by this Tribunal, rather than by Congress. An alternative would be for the parties to attempt royalty-setting by negotiation, with the Tribunal resolving disputes if the parties failed.

Thus, Congress could consign its deliberations solely to the granting of a performance right remanding to the Royalty Tribunal complex royalty-setting responsibilities.

Consistently, the principle advocates of a performance right have maintained that the royalties should be shared by recording musicians, recording vocalists, and the recording companies which are both copyright owners and creative contributors. Throughout the history of the quest for the performance right, the principal spokesman for the musicians has been the American Federation of Musicians; for vocalists, the American Federation of Television and Radio Artists; for recording companies, the Recording Industry Association of America.

Those three entities all support legislation on royalty sharing under which 50 percent would be paid to the recording company copyright owners and 50 percent would be shared by recording musicians and vocalists. That 50/50 sharing is completely consistent with the dominant pattern elsewhere in the world.

As to sharing among the musicians and vocalists, spokesmen for those constituents can best speak for themselves. Their intent is an equal share-and-share alike among star and backup performers.

Moving to implementation, the procedures and alternatives for performance royalty collection are matters of implementation, not critical to the issue of whether there should be a performance right. It is achievable and realistic for performance royalties to be collected in an equitable manner. That is proved every day in the operations of ASCAP, BMI, and SESAC, collection societies fully devoted to that task.

The collection of performance royalties for recording companies and performers would be fully parallel to the requirements of collection on behalf of music composers and publishers. For all recipients, the same recordings are involved.

Of all the collection alternatives, the ideal would be for the operation to be assumed by one or more of the existing collecting societies. Procedures and administration already are developed. Wasteful duplication would be avoided. Collection costs could be spread and shared, thus increasing the net take even of current recipients. Whether this could be accomplished would be a matter for future negotiation and determination by those organizations.

The alternative would be for a separate independent organization to be established. This is possible, just as it was possible once to establish an ASCAP or

BMI. Still another option would be to contract with an existing research and computer-oriented commercial enterprise to undertake the task.

Oversight for collection could be commissioned to the Copyright Office, as could basic rule-making. Disputes could be adjudicated by the Royal Tribunal.

Like royalty collection, the procedures for royalty distribution also are matters of implementation, not of principle to the issue. Identity of proposed recipients is absolute, the information routinely at hand. Every recording company is clearly identified on the label of each recording that would be played. Identification of musicians and vocalists—whether stars or background performers—is included in listings on recording session forms contractually and regularly required by both AFM and AFTRA. The simple formulas for sharing have been addressed in a prior section.

As with ASCAP/BMI/SESAC payments to performance royalty recipients, the distributions to recording companies must be based on statistically valid samplings. The techniques are classic.

As for distributions to vocalists and musicians, representatives of those groups can best speak to alternatives.

Again, as with royalty collection, the Copyright Office could develop essential oversight and rulemaking and the Royalty Tribunal could resolve disputes.

I've discussed factors of principle, impact and implementation in our presentation to you today, but in no way are we asking you to assume the role of "pioneers" in respect to performance rights. The performance right is neither new nor experimental. We can look beyond our shores throughout the world for ample precedent. 51 nations grant such rights to producers and/or performers of sound recordings. An additional four countries pay royalties to recording companies even though no formal statutory right has been enacted.

In countries where performance royalties are paid, nearly half divide the fees equally between companies and performers. In those countries where the royalties are not shared equally, the overwhelming majority pay the larger share to the record company. Thus, just as there is ample precedent for the performance right principle, so, too, is there international precedent for the 50/50 split jointly recommended by the RIAA, the American Federation of Musicians, and the American Federation of Television and Radio Artists.

Performance rights and royalties are particularly widespread in Western Europe where 15 countries either grant a performance right or recognize a contractual obligation to pay royalties.

Our neighbor to the north, Canada, threw out performance royalties in 1971. This was a nationalistic move, not one of principle. The essence of the Canadian action was twofold:

First, it was anti-American, since most Canadian air play and sales were of U.S.-oriented recordings.

Second, it was responsive to the absence of a U.S. performance right which would at least have assured reciprocity for Canadian recordings played in the United States.

The new Canadian Government Copyright Revision study, however, now recommends the reinstatement of the performance right. Again, it is nationalistic, since it proposes confinement of the right only to "Canadian sound recordings where the majority of the elements required to produce the recording are Canadian." Here is manifested one of the penalties that could again be suffered by American recording companies, vocalists and musicians through the absence of a reciprocal performance right in our own country.

The absence of reciprocity deprives American companies and performers of income from performance royalties generated from performances in certain foreign countries. Because there is no reciprocal U.S. right, only modest payments are erratically made, which is not only an injustice to the rightful beneficiaries but has a negative impact on the U.S. balance of payments.

My testimony this morning can be quickly summarized in seven brief statements:

One, there are no legal or Constitutional barriers to a performance right.

Two, fairness demands that the right be granted; too much time has elapsed for the sound recording to be the only performable copyrighted work without right and royalty.

Three, the publishers and composers deservedly enjoy the right, and their contributions are no greater than ours.

Four, precedent is universal; the right is commonplace internationally.

Five, the requirements of implementation are achievable; the complexities must not bar the right.

Six, any merit in any broadcaster argument could conceivably influence the amount of royalty but not the fact of royalty and not the right.

Seven, pay must follow play when that play delivers commercial benefits to the users. When broadcasters depended and got a performance royalty from cable TV, they used the same words in which we do, too, now reply: "It's unfair to take our product, resell it, and not pay us a dime."

It soon will be incumbent on the Copyright Office to present its views to the Congress. In view of the positions we have presented, we respectfully recommend the following actions by the Copyright Office.

One, recommend to Congress the adoption of a performance right for musicians, vocalists, and recording companies.

Two, recommend that the parties be allowed four months to negotiate fair and equitable performance royalties.

Three, if agreement proves impossible in negotiation, then recommend that the Royalty Tribunal be empowered to set performance royalties, after a full study of consideration of economics and equity.

Four, recommend that the Royalty Tribunal review the amount of performance royalties three years after enactment and every five years thereafter.

Five, recommend codification of the 50–50 sharing of performance royalties—50 percent to performers, 50 percent to recording companies—agreeable to principle representatives of the proposed recipients.

Six, recommend that the Copyright Office be empowered to adopt necessary regulations to implement administration, collection, and distribution of performance royalties.

Seven, recommend that recipients of performance royalties be required to establish an equitable system for administration, collection, and distribution of performance royalties, the system to be approved by the Copyright Office: in the event that the recipients are unable to establish acceptable procedures, then the Copyright Office can itself be empowered to start an equitable system.

Eight, recommend that anti-trust exemptions be created where necessary to facilitate voluntary negotiations and collection/distribution funds.

Nine, recommend that the Royalty Tribunal be empowered to adjudicate disputes over collection and distribution.

That constitutes our presentation, and I thank you for your patience.

Ms. RINGER. Thank you, Mr. Gortikov and Mr. Fitzpatrick.

I do think that we should compliment you on an extremely well organized presentation. It was very easy to follow your line of presentation. I think this will be helpful in the questioning.

Let's start with Richard Katz.

Mr. KATZ. You raised a point about the National Endowment to the Arts. that the record industry is prepared to contribute a certain portion of the wealth that they would receive.

Could you describe in a little bit of detail how you expect that would work?

Mr. GORTIKOV. There is no detail. It is merely an expression of an objective on the part of the companies represented by members of our board. How it would be utilized would have to be worked out with the National Endowment for the Arts. We certainly would hope that it would be confined to music orientation rather than arts in general, just because it emerges from a musical source.

Mr. KATZ. I'm a little more concerned about the contribution rather than the marketing of the fund.

Would this be a voluntary thing for each individual member of the RIAA?

Mr. GORTIKOV. It would have to be, unless Congress would choose to include it in the legislation. We would have no resistance to doing that at all. The members of our board who constitute the Presidents of about 20 different recording companies, including all the larger ones, have so committed. They can't speak either, nor can other members, for non-members. They can only speak for the industry mass, dollar mass, but there would be no resistance to that.

Mr. KATZ. When you were discussing the various risks that recording companies undertake, I was wondering if you could describe for me what factors these record companies take into consideration when they are trying to determine what the sales outlook is of a particular recording artist or particular tune; what kinds of things are considered before a record company wants to invest its money?

Mr. GORTIKOV. Well, I've never known a producer yet who didn't have implicit faith in what he was about to record or the artist he was about to sign. He sees a commercial potential in that artist. In today's market, he also realizes that rarely would it be known whether that artist is going to be a success after the first recording. It usually takes three or even four records before the true responsiveness or the lack of it definitively emerges. So there is a commercial potential in his mind and a creative uniqueness that he sees in the artist when the producer makes the decision to commit money and time.

Mr. KATZ. The point I'm trying to get at is: Yesterday, when we heard the testimony of broadcasters, they said the air play is a very crucial factor in commercial success, and the recording company says it helps a little bit, but it's not really that important.

It's hard to develop, really, an accurate picture about this.

If you can, can you tell me what role radio air play plays in the decisions to record?

Mr. GORTIKOV. Yes. Radio air play is highly desirable. There is no producer who would not like radio air play on behalf of the artists he records. There are all sorts of presumptions he tries to make when he makes a decision to record, including the viability of all forms of public exposure potential for that artist—is the artist agreeable to tour? Will he tour? What effect will he have on audiences if he does tour? Is it likely that he will be programmable by radio programmers? Will they like that artist and will they be willing to air play?

That's a subjective judgment in each case, but in direct response, yes, the record company or the record producer would like air play in behalf of that performance, and the more media that the artist can appeal to, the more public outlets, the more valuable that artist would appear to be. If he has motion pictures, too, that's an additional plus.

Mr. KATZ. Am I correct in characterizing it, that recording companies when they are making their business decisions are really attempting to get as close to a general public consciousness as they can?

Mr. GORTIKOV. Absolutely.

Mr. KATZ. It's not just any one particular method of exploitation?

Mr. GORTIKOV. Absolutely. Those 600 odd promotion men that were here yesterday, I don't know the accuracy of the number, but there are a lot more people besides that 600 who are together with those 600 people, through radio, through television, through all forms of media. Discotheques are now an important avenue of exposure. Any form of public exposure that it is possible to engage in, those 600 people with all the backups are out to do that.

Mr. KATZ. Would you then suggest it's fair to say that the broadcasters in general have taken the position that they have, only because they are restricted to one avenue that you utilize, and that you tend to go into many different areas that they are perhaps not aware of, don't pay attention to?

Mr. GORTIKOV. They are aware of them. They are very knowledgeable people about the recording industry, and they are aware of them. They tend to be understandably concerned with fair interplay between broadcasters and recording companies, but it is not an exclusive avenue of exposure. It is desirable, because radio reaches so many people. I don't deny it, and I don't mean to deny it either. It is important, but not exclusive.

Mr. KATZ. Would you suggest that live performances are an equivalent method to radio air play?

The broadcasters have suggested that live performances to some extent are dependent upon air play.

Mr. GORTIKOV. Live performances are very important with the younger people, primarily. The live concert audience is smaller than the radio audience, so, therefore, relatively it is less important, though important. Radio doesn't make concerts. There's a whole dynamic set of circumstances and information resources that contribute to the success of an artist, a recording, and a concert. Many radio stations are actively in the concert business. They actually promote and stage many of the concerts in many of the metropolises, too.

Mr. KATZ. Mr. Newell, who testified yesterday, raised what I thought was a very interesting suggestion. He presented the situation, more or less, as continual, that broadcasters play really, essentially, the same role in communicating a musical composition, for example, as performers do. They are just another step down the line in transmitting this.

Do you have any thoughts on his suggestion?

Mr. GORTIKOV. Well, I'll use the word "balderdash," and make a more precise response to that.

The difference is they don't make the creative contribution. They are not involved—they take very few out of a mass of recorded material and they present it. They are a conduit without adding an increment, without adding an audience. They don't add the audience. The performer and the recording really attracts the audience. It is not their air. It is our air as much as it is their air. They are the public custodians of that air.

Mr. KATZ. This is a question that I think I know the answer to, but I feel compelled to ask you, it's been brought up so often.

It seems that the record business is a very profitable business to be in. If, as you suggested, 77 percent of recordings fail to cover the costs, where does all the money come from?

Mr. GORTIKOV. The money comes from the 23 percent. The profits of most record company—and, of course, that 77 percent will vary from company to company. There will be some companies that have a higher percentage of success, and, of course, many with a much lower percentage. The profits and revenues are generated by a relative few of recordings and artists. That's not much different from any other aspect of entertainment. In the theater, in the book business, it's the few winners. I guess it's true in the pharmaceutical business and many others, too. It's the few winners that have to generate that profit and depend on the company's skill and selective risk taking.

Mr. FITZPATRICK. If I could just add there, I think it would be interesting to look back at the history of the copyright law and the presentations that were made by the recording industry, one in 1965, which traced the economic history of the recording industry from 1950 on through late 1964, and then a second presentation was made in 1972. It shows extreme variations in terms of profitability of the record industry. One should not start, I believe, with the proposition to the genesis one, that the record industry from front to back and top to bottom is a money-making machine. The record industry has been subjected to extraordinary risks and quite radical variations of risk, and I extend those studies to the panel.

Mr. KATZ. Just so I'm clear on the general picture, is it your basic premise that all of these economics aren't really important to whether or not a performance right should exist? It might be interesting to talk about, but it's not really——

Mr. GORTIKOV. It might influence the royalty schedule. It should not influence whether a right is justified.

Mr. KATZ. Mr. Fitzpatrick, I have a question for you.

I don't know whether it applies. Maybe it's just a lawyer's daydream, but to the extent that there is any common law protection for sound recordings, for performance rights, and I don't know whether there is or not, but if there is, do you feel that under the new law that becomes effective in January that any protection that does exist under the common law will be preempted by the new law under the equivalent rights provisions?

Mr. FITZPATRICK. Well, we have a Senator Goldstein and a Mrs. Goldstein's little boy's performance. I suppose that that is an issue that could be debated and resolved, and it would turn on the question as to how affirmative the Supreme Court would judge the inaction of the Congress, and I must say, as we move forward in the consideration of the performance right, we had looked primarily to the Revision Bill and amendments to that law as the focus to secure the performance right. One would have to look at *Goldstein* and see what is left of the potential of protection under a state common law. That's something that we haven't made any final judgments on.

Mr. KATZ. That's all the questions I have.

Ms. RINGER. Thank you.

Ms. Oler.

Ms. OLER. How could you properly read these First Amendment questions in view of the Supreme Court's repeated emphasis that there isn't any possibiilty for restricting the performance right? Cannonball was only asking for damages.

Mr. FITZPATRICK. This obviously is not a holding on the question of the interplay of a performance right and a First Amendment right, but it seems to me it is very suggestive that if the control that a performer has over publicity for his performance supercedes First Amendment protections, and I think that the court referred to a number of cases where historically First Amendment assertions have been advanced against copyright protection, and the copyright protection has protection of an owner over the performance, the dissemination of his product

has been held defenseless. So one in a lawsuit challenging a performance right on the First Amendment right would look heavily to the *Zacchini* case as inactive, as to the court's analysis.

Ms. OLER. So you think the result would have been the same had he tried to enjoin the performance?

Mr. FITZPATRICK. Had he tried to enjoin the radio station from performing, yes.

Ms. OLER. Following your breakdown of this whole problem, the equitable consideration, I think you are entirely right in segregating the performers' royalties on the performance right, but the Danielson Bill in that context, I think, raises some problems. First of all, as I read it, it doesn't really say who the copyright owner is, but I presume it would be, in almost every case, the record company.

Mr. FITZPATRICK. We think that the legal situation would be this: That the owner of the copyright in the sound recording would be the record company, and the record company would have the formal responsibilities for filing and for endorsing the copyright; however, there is a definition in the law as to the distribution of the royalties from one of the bundle of rights. It seemed to us that it's clear that under Section 114, as amended, the copyright would be in the record company, and there would be vested interest in the performers in one of those rights. It seemed to us that the simplest position is to follow that format, that the present copyright holder would have those formal responsibilities of registering and being considered the owner of the copyright. One could, in the alternative, simply leave out the definition of the royalty split and have that arranged as a matter of contract, as one has in the movie situation. We think that the particular history of this right is such that it would be inappropriate to exclude a specific definition of the performer's right to one half of the royalties from the performance right.

Ms. OLER. Well, of course, I think Congress' intent is clear in trying to protect the performer by assuring him the 50 percent split and then providing for inalienability. I think you may get into trouble with these royalty rights. What if, in the case of the situation raised by the House report, a company doesn't put in any copyrightable creative authorship, for example, stereo quad or something like that, how is that going to work out? What does the record company get in that situation? Does it still get 50 percent?

Mr. FITZPATRICK. Well, I think it would. I'm not sure that I really understand the particular technological change. If you have a record in a particular configuration that is the product of the record company's creativity and the performer's creativity, and say that Record 1 would be registered and there would be a split from that particular record, and then that record is somehow souped out in terms of its technological capabilities, it seems to me that the only person at that point who was making any further creative contribution is the record company, but if that is simply a rerecording of Record 1, exactly the same situation would apply, that that would be a copyrightable product and that the 50–50 split would still adhere. I don't see that that creates a problem.

Ms. OLER. That's why I asked if we could know some more about the technology of recording. Congress did say it felt there were situations where the performer would contribute something copyrightable but the record company would not. Do you admit that such situations exist?

Mr. FITZPATRICK. I don't think that there are any important situations. I suppose that one could theorize that there were situations where you wouldn't have performers where you would have mechanical situations. I don't believe that the Congressional statement in 1972 was intended to be any sweeping dictum about the relative role of the record company and the performer.

Ms. OLER. But I think it was a situation which they recall; it's one that brings this conflict between tying the two——

Mr. FITZPATRICK. In the one situation where you suggest where you are going from Format A to Format B, in terms of the quality of the sound, it seems to me that the only person that is making any additional contribution at that time is on the record side, not on the performer side. I must confess, I don't think that particular problem poses any serious question as to the fundamental issue where the copyright should rest.

Ms. OLER. Well, again, do you read the Danielson Bill as regarding the record company and the author as joint authors so that they would presumably fall within the same term, with this the extended term of ——

Mr. FITZPATRICK. I would think that the situation would be no different in terms of the Danielson Bill as what you presently have for the sound recording, which is granted, and like piracy and distribution protection. Whatever term is presently granted to a copyright sound recording—I presume that would be 75 years—that same term would adhere after the Danielson Bill. One would not get into the particulars here of the life and death of the individual performers. That has always been our view of the way the Danielson Bill would fit into the structure of the bill. If we're off base in that analysis, we'd certainly be happy to discuss it.

Ms. OLER. One other reading that disagreed in the Danielson Bill, and, perhaps I'm mistaken, you mentioned that the juke box owners and cable owners would not pay anything if the performance right were enacted.

I don't see it that way.

Mr. FITZPATRICK. We were looking at the bottom of Page 6 and top of Page 7 where for operators of juke boxes and for cable systems, the compulsory license rate should be governed exclusively by those sections and not by this section. Certainly, as far as juke box is concerned, historically under the old William amendment, you had an eight dollar fee going to composers, and you had a one dollar fee going to compensate for the performance right, and that now is stricken, and there is no express provision in the juke box section that would compensate for performers, and that was the basis of that concern.

Ms. OLER. Then let's go on to the distribution of royalty, the section under G, I guess where it says, "Relation to other sections."

Mr. FITZPATRICK. Just a second. G on Page 111.

Ms. OLER. Page 111?

Mr. FITZPATRICK. Right.

Ms. OLER. It says, "It's governed by Sections 111 and 116 respectively * * *."

Mr. FITZPATRICK. Well, if the Danielson Bill was intended to create a performance right vis-a-vis juke box owners, it could have done so, I think, with much greater clarity than the bill has done today. We claim no authorship in that particular section. We think that it's quite clear that a right and a royalty should be established vis-a-vis juke box.

Ms. OLER. But maybe this needs some redrafting on that.

Mr. FITZPATRICK. Yes, to clarify it. We thought it needed a redrafting to establish it.

Ms. OLER. One of your equitable arguments is based on the technological changes. I can't see how a performance right is going to have any effect on home taping.

Mr. FITZPATRICK. It seems to me that the condition of an effect on home taping, what we were talking about here, in terms of technological change, is a serious concern, looking out a decade or two decades, as to the potential for a radical change in the distribution system of our product, that one might have home taping as a significant alternative to the purchase of records, or one might have what Stan described as a not a too 'Buck Rogers' fantasy of cable system or other delivery systems bringing into one's home at the punch of a series of numbers a recorded afternoon of music.

That is the concern that we are expressing, but they are facing uncertainties in terms of technology and the way that we will get our product into the home, and we are seriously concerned that the technology, and, indeed, a lot of the technology of broadcasting can emerge as a substitute, as an even greater substitute for the purchase of records in the home, and we're not talking about it being a deterrent. If one needs a deterrent to home taping, it is going to come either in the application of the Revision Law that that prohibits home taping or in some amendment to the Revision Law. So it is not a suggestion that it is a deterrent, but it is clearly a suggestion that this well might be in five, ten, fifteen, twenty years out, the most important source of revenue, because the way our product gets to the public would no longer be the traditional means of distribution of records.

Ms. OLER. I have one minor question that has been raised earlier in the hearings: It's strange that one of your arguments is that air play does result in overexposure in many cases, and yet you favor a compulsory licensing—you think that's the only practical way to handle a system.

Mr. GORTIKOV. I think a compulsory license is a simplistic way of doing it.

Ms. OLER. And you feel certain the overexposure wouldn't be any worse than it is now?

Mr. GORTIKOV. It's impossible to control.

Mr. FITZPATRICK. Beyond that, I think historically, when some of these choices were made at a very early moment in the mid 1960's as to what the form of the right would be, it was considered somewhat inconsistent at that point that in terms of our relationship with the publishers, which was based on a compulsory license where we are securing a product that we should not be willing to distribute the product on the basis of the compulsory license, and that this has nothing, of course, to do with our relationship with pirates. This is not unconsented to distribution, but it would mainly be the distribution of our product through broadcasters. We felt that there should be some parity there. We also felt that that was the easiest way, as Stan pointed out, to make the system work. Now, it's clear that the new rights that were created in this Revision Bill have all gone the way of the compulsory license, the rights vis-a-vis cable, the rights vis-a-vis, I think, public broadcasting and juke box have all been a diminution of owners' rights through a system of compulsory licensing, and the Copyright Office has from time to time expressed concerns about that legislative trend toward the dilution of the owners' right, but we certainly don't think this is the bill to reverse that trend.

Ms. OLER. On the economic point, you filed a letter which said you were going to try to get together with the broadcasters to reach some figure which the two of you could agree upon as to the economic effect of the Anderson Bill. Has that gone anywhere?

Mr. GORTIKOV. I think the letter stated, acknowledged, first, what the difference in our translation, would yield versus what the broadcasters say, and that if it's imperative, from our point of view, to come to a more precise number between us which would resolve our differences in technical approach, we stood ready to sit down with the broadcasters, if you want us to.

Ms. OLER. I think it definitely would be helpful, and I think both sides in this issues have done themselves a disservice by picking and choosing economic statistics. Just for one example, today when you compared the radio revenues between 1965 and 1976, I think the radio broadcasting industry has been shown to be as fluctuating as the record industry. In addition, '75 was a poor year for broadcasting whereas '76 was not so. It does make it very difficult for one who is not trained in economics to get a realistic view of this whole thing.

Mr. GORTIKOV. We'll put our economists in the same room with theirs any time you want to.

Mr. FITZPATRICK. Our point in Exhibit 9VV clearly points out the ups and downs of the radio business. We also point out there haven't been many downs in the equity values but just ups in equity values over the course of the last decade, which as Stan pointed out, we think is the critical marketplace measure of the value of radio.

Ms. OLER. Is it not possible to make some of these economic observations on the basis of a median year in broadcasting? Must you always compare '70, which is a great year of broadcasting, with '73 and '75, which is a horrendous year?

Mr. FITZPATRICK. It seems to me there are some relatively narrow questions which it would be most useful to the Copyright Office to discuss such as the projected revenues from the Danielson royalty schedule, and we stand quite ready to do that. I would not be optimistic that we, our Congress and the broadcasters and their Congress are going to be able to stipulate a set of agreed upon economic views, because both of us have quite different economic perspectives, just as we were unable, after a decade, to come to an agreement with the music publishers or the relative economic facts. I just don't think that that's in the nature of a proceeding in which adversary parties take quite radically different views of the critical economic facts.

Ms. OLER. But ultimately you may come out in a worse position if there is an independent economist who doesn't have access to all these figures.

Mr. FITZPATRICK. I will anticipate that you will have your own economic studies that will be assessing some of our claims and assertions as will the broadcasters. Ultimately the tribunal is a form for sorting out quite differing and opposing economic contentions. We found that over a course of a decade Congress is not particularly well designed as an institution to try to sort and sift subtle and difficult economic facts and I would think ultimately, with the creation of the right, it would be the tribunal that will have the final responsibility. However, to come in with a set of agreed upon facts and approaches starting points and ending points—I can't imagine—I just don't believe that

that is in the realm of the possible. I think you are going to have to assess our economics and our economic case and compare that with the Stuart study, when it shows up. We'll make no apologies at all for the economics that we're presenting to this group.

Ms. OLER. Do you have any figures on how much money is coming to American performers from foreign countries at this point?

Mr. GORTIKOV. Not any good ones, no. The variables are so extreme. Sometimes it may be money paid to the foreign licensee of the U.S. company. I made some personal contracts with the international heads of several companies to get a feel, and it is so erratic and so marginal none of them seem to have it at hand. It's kind of a trickoff.

Mr. FITZPATRICK. I think in terms of the relative record production, domestically and internationally, one would project over the long haul that there would be a positive impact on the balance of trade coming from a reciprocal recognition of performance right, but to be specific and to quantify that is extremely difficult, as Stan says.

Ms. OLER. Then just one last question.

Is it really important to you to have the Copyright Office involved in the distribution if there is such a—why do you think the Copyright Office——

Mr. GORTIKOV. No, I don't think you would want to get involved in that; only in being the architects of the systems, if the parties fail to come up with a plan that would be acceptable to you. They are certainly not in it.

Mr. FITZPATRICK. In any distribution system, in any collection system, there has to be some outside party that would be responsive to the claims of those who say that they don't like the negotiated system, or in the event that there is no negotiated system developed, that could fall to the responsibility of the Copyright Office in terms of developing the framework or it could fall in the hands of the tribunal to develop the framework, but the administration system would be in the hands of the tribunal, not the Copyright Office.

Ms. OLER. That clarifies it.

Ms. RINGER. Thank you.

I think for the sake of the reporter, we should take a five minute break.

[Short recess.]

Ms. RINGER. I think we've lost some of my audience.

Mr. GORTIKOV. They were just my children.

[Off the record discussion.]

Ms. RINGER. Let's resume the questioning with Jon Baumgarten;

Mr. BAUMGARTEN. I'd like to pick up with Ms. Oler's question.

Why should the broadcasters pay our insurance premiums for what should happen in the future? If you can't get the FCC to keep the running time statements off the air, it is your problem.

Mr. GORTIKOV. Yes. If that bothers you as a reason, I urge that you reject that and base your decisions on the overwhelming evidence that we gave as our reason. There is ample reason in the other basis of what we foster here.

Mr. BAUMGARTEN. Are you agreeing that it's not their problem?

Mr. GORTIKOV. It is not their problem, per se, unless they are the conduit or cause of it.

Mr. BAUMGARTEN. Is that the relationship, that they are the conduit for causing it?

Mr. GORTIKOV. Well, they certainly are a strong conduit in respect to home taping. And when I hear a jockey give a time or even advise his listeners that he's going to air play the new Led Zeppelin album with such and such a time, and the reason for that is to advise the home tapers, that is a direct undercut to our interest.

Mr. BAUMGARTEN. There might be solutions to that other than to give you performance rights. They might simply outlaw the practice.

Mr. GORTIKOV. Yes.

Mr. BAUMGARTEN. Also, going back to Mr. Katz' question about Mr. Newell's theory, which I referred to yesterday as continual, I'm not going to let you rest on 'balderdash.'

You made some observations about the creative contribution of the record producer. You referred to the selection you engage in. They apparently engage in some selection of broadcasting for the audience for the best time of day. I myself spent my youth listening to two things on the radio. Yankee games and rock and roll, and they contributed to the sale in some respects of the recordings. So rather than just categorize your statement in a certain way, you can react

a little more—what about the act which gives some basis to the theory that the promotion is a part of the exploitation of the work which should not bear a royalty obligation?

Mr. GORTIKOV. Well, if promotion is a further creative contribution, then I should add another section that speaks to the promotion and commercial contribution, but I have stayed away from that completely, because I have not placed it within the creative contributions of the record company. I have tried to confine the recordings of the record company just to the copyright of the sound recording itself. Peripheral to that, there is a whole range of people employed, facilities created and dollars expended in all aspects of marketing, recording and distributions of recordings. And that is an entire creative aggressive arena of its own that recording companies engage in and part of the distribution function.

Mr. BAUMGARTEN. Tell us a little bit about that, about these ancillary activities that the industry engages in, apart from creating the sounds, what it does with the sounds once it's created.

Mr. GORTIKOV. Parallel to the recording itself, there is a whole strategy developed by every recording company as to how best to present that person or recording to the public.

It starts with the presentation, which is complex, the presentation of product and artist throughout the country, because they are highly diverse and even international in their vocation.

Secondly, there is the merchandising and presentation of the product to retailers and also to wholesalers, because there are different approaches to doing it to both. This involves all forms of graphics. It gets involved in the actual package of the product itself and often accompaniments to the package, posters, signs, strategies for getting in store displays, billboards, what forms of paid media are to be undertaken. Is it an ad in Rolling Stone? Is it paid radio spots? Is it a television sequence? Is it the late night television advertising? What is it? It's just a host of alternatives that are open. There are whole departments in record companies devoted to artists' touring and artists' relations. What can be done to support the career of the artist? Where can the artist be arranged to appear that will get him broken through and create a natural awareness to the record buying public?

Mr. BAUMGARTEN. If there was a continuum, then, I guess you stop the continuum when the sounds are recorded. and that's the end of the relation for copyright purpose, and then after that——

Mr. GORTIKOV. Creative works, I just stayed away from it.

Mr. BAUMGARTEN. What about Section 110(7)? Does that affect your station at all? That's the section that says if your record store plays a record—of course they are only dealing with the performance—does that have any part in this?

Mr. FITZPATRICK. I don't think it does. Although, in this extended discussion over eight years of the performance rate back and forth, I must confess that I don't recall ever entering into a discussion with friend or foe on that particular section of the Revision Bill. I think that we'd like to take a look at it. I must say that our views on that implication of that particular section aren't matured at this point, and if we have anything to say to you on that point we'd like to file it with the Copyright Office. Our first reaction is that it would not go to the point of denying this traditional right of public performance for a copyright product.

Mr. BAUMGARTEN. If you had the performance right, would you grant an exception in that area for the people to play this recording?

Mr. GORTIKOV. Certainly.

Mr. FITZPATRICK. Certainly.

Mr. BAUMGARTEN. Correct me if I am wrong, but in the days of the fight over the mechanical rate, was it part of the argument that the record industry put forward for maintaining the right in its existing status of fact, that the publisher, the composer, and the record company were all partners engaged in bringing to fruition the same product?

Mr. FITZPATRICK. We had a lot of arguments going back and forth, but I don't think the fellowship of men, the fellowship of creation was one of those. It was a straight economic argument in terms of the appropriate return that should be given to the creator of the musical composition.

Mr. BAUMGARTEN. If a performance right is enacted, should it start with sound recordings fixed after the effective date of the right or go back to 1971 recordings or go back even further?

Mr. FITZPATRICK. Well, the Danielson Bill sets the subject matter of the performance royalty in terms of the 1972 act. It seems to me that that is the appropriate mark point. From that point on you have a copyrightable product, and it will only be the performance of that copyrightable product after the enactment of the law that would constitute a conduct that would trigger a royalty. There are questions, I am sure, about a performance after the new sound recording, after the performance right is created of pre-1972 records, and I believe that that was the question that was faced in 1972 when we struggled with the scope of anti-piracy protection. Whether in that anti-piracy there were significant questions raised by the Copyright Office as to the public domain implications of creating anti-piracy rights in pre-1972 recordings. Certainly, the Danielson Bill sets a mark which no one should quarrel with.

Mr. BAUMGARTEN. You mentioned anti-piracy. How effective has copyright been in combatting bootlegging?

Mr. GORTIKOV. Well, bootlegging is a special—

Mr. BAUMGARTEN. Unauthorized duplication.

Mr. GORTIKOV. The law has been most effective. We really have secured a major handle and control on piracy within the United States. World wide it is still rotten. And the character of piracy changes within the U.S. For instance, there is a surge of counterfeited items now much more than before. But remarkable strides have been made in control traceable to the law and to the vigor of the enforcement agency. I think it will be an endemic thing we will never get rid of, but it's certainly far better than before the statute was enacted.

Mr. BAUMGARTEN. Could you tell us a little bit about how records are produced, not on the technical end, but if I go out and I buy an album and it has Capitol's name on it or any other name, is that company that I see the producer or is it produced by somebody else, an independent producer, and then brought to Capitol or whoever you have? What happens?

Mr. GORTIKOV. There is every conceivable variable that can answer your question, all the way from the record company employing an in-house producer who physically locates, finds the talent, binds the talent to a contractor and thereafter engages in intimately participating in the creative production process involving the career and recording of the artist on that company's labels. Some companies will sign only a distribution contract with an independent production company, and that independent production company may consist only of one artist or it may consist of a producer who owns that production company who has his own stable of artists and even his own label and literally buys service from a larger record company. Or a recording company may buy a finished master from some independent artist or producer. So there's every gradation of involvement of the distributing record company in records—from 100 percent involvement to a modest involvement.

Mr. BAUMGARTEN. Are the independent producers members of your association?

Mr. GORTIKOV. We have some who are associate members, but most of them are literary independents that go in and out of the business.

Mr. BAUMGARTEN. I asked the question yesterday about the use of preexisting sound recordings in motion pictures, and we were told by the broadcaster—I'm sorry—we were told by Mr. Livingston that he believed the motion picture companies would secure the rights from the record producers. If that's a post-'71 sound recording there is a legal basis for it. What if it's a pre-'71 recording?

Mr. GORTIKOV. Motion pictures that use post-1972 recordings do seek record company permission based on the anti-piracy statute. On pre-1972 recordings they also customarily sought permission, and that was based on a presumed civil liability under the principle of unfair competition. The permission was not granted by the record company until the motion picture company did, however, secure in advance the permission of the recording artists who were represented on that recording, and then it was a matter of negotiation between the record company and the motion picture company. It was individual, it was not formalized.

Mr. BAUMGARTEN. Is there much use of prerecorded works in motion pictures?

Mr. GORTIKOV. No, there isn't. I think you yourself pointed out an example, "American Graffiti", which had the juke box in the background playing songs of the fifties or forties.

Mr. BAUMGARTEN. I guess it would generally be, in that context, a movie about the south, if a juke box was playing country and western, but not with the overall soundtrack.

Mr. GORTIKOV. It is not very common. Very recently, there was one where an entire group of Beatles [inaudible]. Photography was used in the background in a major motion picture.

Mr. BAUMGARTEN. Is the reason for that simply because they want to score specific music to a movie?

Mr. GORTIKOV. I don't think it's a matter of economics at all. I don't think it's a matter of creative discretion that's exercised by the writer or the producer of the motion picture.

Mr. BAUMGARTEN. Television. How are sound recordings used in television?

Mr. GORTIKOV. That varies. In some cases there is like a disc jockey program, mostly in small communities, or again the recording is embodied as part of the ambiance, within the context of a TV presentation, or a recording artist is visually on television presenting his hit, but because they cannot on television recreate all of the electronic complexities that went into the recording, the artist will lip sync vocals along with the actual air play of the sound recording.

Mr. BAUMGARTEN. Is permission requested in any of those cases?

Mr. GORTIKOV. Yes.

Mr. BAUMGARTEN. Why?

Mr. GORTIKOV. Because there is an integral payment to the artists and to the musicians involved in the union.

Mr. BAUMGARTEN. Is the permission requested from the record producers?

Mr. GORTIKOV. The permission is requested from the record company, and then there's a payment flow through contractual arrangements.

Mr. BAUMGARTEN. So there is some performance right in television, not vis-a-vis copyright, but union obligations?

Mr. GORTIKOV. I honestly can't answer you in terms of what flows to the record company. I don't know. I know there is a payment that's required.

Mr. BAUMGARTEN. They had to actually get permission. It's not already built in. They have to go out and get permission.

Mr. GORTIKOV. Yes.

Mr. BAUMGARTEN. One other question on what happens in your industry.

How are singles released? Do the singles precede the albums or do the albums precede the singles?

Mr. GORTIKOV. Years ago there was a pattern where the single preceded. Now an artist may record a single and release it. Or in some cases a particularly important cut emerges out of an album, and it's deemed important enough to release it as a single.

Mr. BAUMGARTEN. Who makes that decision?

Mr. GORTIKOV. The record company.

Mr. BAUMGARTEN. Based on what?

Mr. GORTIKOV. Based on popularity, air play, demand, awareness factors, and commercial potential.

Mr. BAUMGARTEN. Does the audience have any say in that?

Mr. GORTIKOV. Always. Most artists have an awful lot of creative discretion and responsibility.

Mr. BAUMGARTEN. In your industry is there anything equivalent to the disputes we see in the motion picture area of who has the final cut? When they show it on television, the director doesn't have the final cut, "X" has the final cut. Once the thing comes out of the session, is that it as far as the performing artist is concerned or does the performing artist have some kind of continuing control about the way it is marketed?

Mr. GORTIKOV. It's usually an intimate joint decision of the record company and the artist. It would just be silly to do something that the artists wouldn't like, because you have to live with that artist and maintain good relations with that artist. It is a very touching and intricate process. After all, the record company undertakes a contractual relationship with the artist for his creative input and performance, and it would be nonsensical not to involve him in all aspects.

Mr. BAUMGARTEN. Once the performance has been completed——

Mr. GORTIKOV. I'm talking about the performance that gets into the record graph.

Mr. BAUMGARTEN. Once that's completed, does the performer exert any continuing control of the way it's marketed, the way it's exploited, the way it's——

Mr. GORTIKOV. He bitches a lot.

Mr. BAUMGARTEN. Does he have the contractual control? I imagine there are some performers, if they wanted it, that would get it?

Mr. GORTIKOV. Some performers don't have a definitive control over the marketing. Their involvement usually stops with the recorded performance and graphics. How the record is marketed is usually almost totally within the discretion of the recording company, and that's the expertise that the artist seeks from the contractual relationship with the recording company, but he may take exceptions or offer suggestions constantly.

Mr. BAUMGARTEN. The argument has been made by broadcasters that the whole problem of the persons who aren't getting paid or are inadequately compensated is not their problem. You and I were at a meeting last week where we heard the Screen Actors Guild voice the same concern about the market for live performances being eroded. In that case it was film; here it is sound. They have been taking care of their people by performing residuals. Why can't you people be more original and AFM be more successful and uncompensated side men would all disappear, and then it really doesn't have to be solved by copyright?

Mr. GORTIKOV. Well, AF of M and AFTRA don't worry about their capabilities of protecting rights of their constituents economically. They do very well. They are not without clout. And, of course, this is apart from the independent individual negotiating capability of the royalty artist himself. We are talking about the side man, background singers and side men musicians. They are all well represented, and there is a lot of clout, and their interests are well preserved. But we are not talking about the adequacy of payment to those side men from recording companies, because they have ample alternatives to go to if they feel they are not well paid, and they have a strike clout. They don't have strike clout with the broadcasting industry, and what they are complaining about here, and we are joining with them in support of their claim, is that they are not getting paid by those who use their recordings for their commercial purpose. We, the recording industry, are using them. If they don't like what we are paying, they have all sorts of resources to employ.

Mr. FITZPATRICK. I think, Jon, in terms of the Actors guild, that points out the difference between the situation we face and the situation that a movie industry faces. The movie industry does indeed have a performance right, and the method by which the money from that performance is translated, it is transmitted to the screen actors by the process of negotiation. The process by which that money would be transferred to the performers in the bill that we are talking about is pursuant to a statutory mandate, so it is—so the fact is indeed that the screen actors can take care of their members in connection with residuals and in connection with residuals and in connection with getting a chunk of the performance pie, because the pie is there. Our concern is that the pie isn't sitting on our table. It's quite clear, invoking once again the American way, that if there is any reflection of hard bargaining and the economic process at work, you now have it reflected in the face off between the unions and the record industry over the revenues that are presently flowing into the record industry. It's quite clear that the unions have bargained themselves to a point where they think they have secured maximum revenues from the recording industry. They have that power, and that is a free tough bargain, but to expect that that bargaining process would be responsive to more money from a right that the record industry doesn't have simply is unrealistic. The bargain is now drawn in terms of the relative economic rights that the parties have.

Mr. BAUMGARTEN. We used to have a section granting rights and nothing else, and now we have a section granting rights and 18 sections taking them away. And now we have not only a Copyright Office but a Copyright Tribunal and the commissions and everybody else.

Is copyright the only way to handle this thing? Maybe there are other ways. Maybe our radio manufacturers should be taxed, and the tax distributed to the performing artists. This is the way Germans copyright. The only way to go in this area with all its incidences, which now becoming a compulsory license with more bureaucratic machinery——

Mr. GORTIKOV. I would say we haven't creatively gone into alternatives. This is the only alternative we have in hand, and we felt that it was the most achievable way to approach it.

Mr. BAUMGARTEN. Our mandate is a little broader, and I think we are supposed to recommend whether or not it should be, and I think we can take into account alternatives.

Just to give you an excuse, what about the concept of a tax?

Mr. GORTIKOV. Of a tax?

Mr. BAUMGARTEN. Yes.

Mr. GORTIKOV. Well, I know internationally, there is now a broad effort being initiated to create, in response to the home taping phenomenon, a levy on both equipment and on tape. I think Ms. Ringer remarked that she doubted achievement of something like that. It would be highly unpopular and unachievable, and whether there would be enough income generated to offset the commercial losses by that form of diversion, I don't know. We just haven't gone into it.

Mr. FITZPATRICK. There is one clear disadvantage, if I understand. You are speaking about a tax that would be levied on manufacturers of radios. But that points up, it seems to me, an important principle. You stated yesterday that broadcasters sell audiences to advertisers, which is a very sharp way of defining the economic role of the broadcaster. If that is the case, then any system of compensation should be directed to levy that burden on the advertiser who is the beneficiary of the audience. When one is sorting through alternatives, it seems to me that principle ought to be kept in mind. Your hypothetical of a tax, which would be an added cost on the purchase of a radio, a portable radio that a kid would carry around in his pocket, is putting the money not where it should be. The thesis here is that the advertiser is the beneficiary of the audience is created, is drawn by the use of sound recordings. In fact, Mr. Winnamon, yesterday, when describing that they don't get very much involved in live performances or covering the local high school concerts said, "We are in the business of playing recorded music." That is their business. That is how they create the audience that they sell to the advertiser. So in developing, in shaping an economic instrument to compensate, it seems to me that a guiding principle should be to levy the burden, where it would be levied here on the advertiser, and that can be a critical principle in terms of selecting one or another of the principles.

Mr. BAUMGARTEN. I just want to get it straight, that I wasn't proposing it as a solution. I think you make a very persuasive argument. I'm just wondering whether the solution has to be a copyright solution. There are a lot of things going on in copyright. I wasn't posing the tax as a solution, just as a tax.

Mr. FITZPATRICK. It seems to me that for the extraordinary political questions that were raised at the time of the revision bill, it is perfectly in sync for a performance right to have been incorporated into the revision bill.

Mr. BAUMGARTEN. One final question, and I've asked this of a couple of witnesses, and, again, I'll ask you, and that is what the Copyright Office is really doing here. The Register mentioned earlier the very difficulty we find ourselves in. We've been branded.

What do you really see us accomplishing?

Mr. GORTIKOV. The specific request that we had of you was embodied in the final section——

Mr. BAUMGARTEN. Let me ask you again.

If you can ignore your own position and tell us what you think we can do to resolve the problem—I know it's difficult. You are a spokesman for an industry having an interested part, if you can go beyond that for a moment——

Mr. GORTIKOV. From the limited contacts that I have had within the Congress, I do think that your Office has built up a great degree of credibility. They seem to have leaned on you and respected your Office as a technical resource, and I would say that role should continue. You are not just something out there performing some administrative functions. They have brought you into the House and used you as an objective resource and a creative resource for the terribly complicated things that they must deal with, and I don't see any change in that, and I think that is a healthy role for you to fulfill in an advisory capacity. At times we have been beneficiary of your views and sometimes victim of them. I think it's a proper role because of the kind of exposure that you have. You are experts. And I think that the key thing that you bring is expertise, and I think that despite previous positions that Ms. Ringer has articulated, I think there is enough respect that if she says she's making a college try for you all to bring an objective judgement in the department analysis of this situation and embody all this in a report to Congress, which you are mandated to do, I think it will get a viewing as just that, a department analysis and a firm conviction based upon your best efforts. Here you've got an outside economist, you are not dependent on anything of ours that may have some warp on it. You are doing your best.

Mr. FITZPATRICK. Beyond that, I think from an institutional point of view, that Congress has a lot bigger fish to fry than the question of a performance

right and the devotion of the resources that your people have brought to this problem in the resolution of any legislative problem, the simple fact of assembling data, organizing data, trying to comment on it, and flagging where your comments might reflect your own predisposition, has all been valuable. You are indeed the Copyright Office and not the FCC making that analysis. Congress selected you to make that analysis. I think this is a very valuable role; the process of parties coming in and the process of making a detailed record, which will be extremely hard to secure in the Congress with the many, many competing claims on Congress' time. The fact that there will be a comprehensive record developed here with questions going back and forth will be an extremely valuable resource that the Congress needs to have as it approaches the problem, so I believe this is not an empty exercise by any means.

Mr. GORTIKOV. I think the process has been excellent when you compare the procedures that have gone on in these hearings here and in Washington with what goes on in the subcommittees. There is far more expertise reflected and sensitivity reflected in the scope of the questions, the opportunity for really getting into the nuances for answers and response both by us and the broadcasters. It is far better. It's a fairer opportunity for an advocate to do what you have been doing. I would feel far more comfortable with a result having gone through this process, having gone through it than if we were deprived of it.

Mr. BAUMGARTEN. Thank you.

Ms. RINGER. Charlotte Bostick.

Ms. BOSTICK. Yes.

I'd like to go into what kind of economic arrangements you have with your recording artists. I understand that many of the recordings are not successful, and I also understand that you recoup the costs of the recording where you can from the sale of the records before any royalties are payable to the recording artist.

First of all, what kinds of costs do you absorb yourself, and secondly, what kind of arrangements do you have with your recording artists for royalties for the sale of those records?

Mr. GORTIKOV. In the olden days when the guitar player walked off the streets into a record company seeking a contractual relationship, he was literally unprotected. He was at the whim of the record company in terms of royalties paid him and what protection there was for him. That situation I never hear of anymore. Virtually every recording artist, no matter how naive, is in the hands of a sophisticated attorney, manager or producer in his interphase with the record company at the time his contractual relationship is determined and the contractual relationship encompasses far more than the rate of royalty that is going to accrue to that artist. The rate of royalty is usually "X" percent of the retail price, less a packaging allowance. If the retail list price, for example, is $7.98, say $8, and the artist has a 10 percent royalty, that means 10 percent of $8 less a packaging allowance, which may be seventy-five cents, so let's say it's even $7, so it's 10 percent of $7. That would be the artist's royalty. So he would, therefore, get 10 percent of $7 or seventy cents on every album that was sold. It is true that when the recording is made there are costs accrued or incurred. To record an artist today for an album, the costs sometimes can be astronomic. They are rarely less than $35,000, and they can get as high as $200,000. They are very costly because of the electronic complexities that now prevail in a recording.

Ms. BOSTICK. You are talking about an album?

Mr. GORTIKOV. Yes. Now, the recording costs, whatever they are, are advanced by the record company in a contractual arrangement. If it costs $50,000 the record company pays out that $50,000 to cover the studio cost, the cost of recording, the technical processes, hiring the musicians, arrangers and so forth. That $50,000, if that is the cost, is owed by that artist to the recording company that put up the money out of first royalties. Out of the seventy cents, that $50,000 has to be paid back. That is not an exploitation provision, because what the artist is signed to contribute is a recorded performance. His sole reason for the relationship is for him to deliver on tape what he does. And if there is a cost implicit in that, then the artist has to pay for that. If there are no royalties or if there are less than $50,000 in royalties realized, then usually by contract the record company absorbs that as their loss. The risk is not on the artist. The repayment is only if there are royalties to repay from.

Ms. BOSTICK. So you are like an insurer?

Mr. GORTIKOV. Yes.

Ms. BOSTICK. So, now, of these royalty arrangements that you got, are they ever 50/50? Once you recover all these costs for a recording, then do you pay the recording artist 50 percent? Did you have relationships like that or is it more like 10 percent?

Mr. GORTIKOV. Well, of course, the $50,000 that I mentioned reflects only a presumed recording cost, that is the in-studio cost, the master recording. The other costs of distributing and manufacturing that product are not reflected in that $50,000, and those are not the responsibility of the recording artist. The recording artist royalty, percentile royalty, usually is just that. That is his only source of income. There are varying contractual arrangements. Sometimes the recording artist is also the composer, in which case he gets the mechanical royalty as well ,which makes it at least substantial on his recording. Sometimes the artist literally owns a production company and may be coming to the record company just for services. He may want the record company only to press the record or to press and physically distribute and market the record, in which case there will be a different royalty or payment. It may be royalty and payment. So there are complete ranges and differences of payments now, unlike a decade ago. Like in the motion picture business, there is every nuance of contractual relationship.

Ms. BOSTICK. But you pay promotion and you pay mechanical?

Mr. GORTIKOV. Record companies.

Ms. BOSTICK. That's what I mean, the record companies that you represent.

I want to ask another question about the five percent that your companies said that they will pay to the National Endowment of the Arts. Will there be any distribution on that? I understood you to tell Mr. Katz that you, of course, had not made any arrangements at all about it, but did you anticipate that there will be any distribution on the money given? For example, you would stipulate that it would go to musicians. Would you make further stipulations do you think?

Mr. GORTIKOV. I didn't say.

Ms. BOSTICK. I mean, for music benefit?

Mr. GORTIKOV. This would have to be a matter for conversation between our board or our association and the National Endowment. The string that I presently would like to see, and we have not developed this at all, the only string I would like to personally see is that the money is earmarked for musically oriented projects and that it doesn't get thrown into the pool of funds that might go for any of the other diverse art forms. I think because it would emerge from a musical source, it should expended into the development of music.

Ms. BOSTICK. I see. I was just concerned that the NBA might think that they perhaps were getting a slightly jaded benefit if there were prohibitive strings on it.

Mr. GORTIKOV. I don't think there should be strings on it other than in the musical orientation of the funds.

Ms. BOSTICK. I have a question for Mr. Fitzpatrick about the sound recording that contains copyrightable—well, first of all, assume that a sound recording was made in 1972, and then in 1973 you didn't call the artist back, and you just remix the sounds and contribute to copyrightable creative matter to it, but didn't ask for the artist to come back; therefore, the artist didn't contribute anything new to it.

Did I understand you to say to Ms. Oler's question, then, that you thought that was only the record company's creative work in that case?

Mr. FITZPATRICK. I certainly did not mean to suggest that new work would not carry with it the same 50/50 split. This is an area of technology I must confess that I'm ignorant in, but if there is the performance—somehow the initial performing is tuned up in one way or another, it seems to me that that is likely that that new disc is itself copyrightable, but that the share of any performance fee generating for the play of that record would go both to the performer who had initially created the sounds and the record company.

Ms. BOSTICK. Very good. That's the clarification that I wanted to get.

Are you at all afraid that the performance royalty might turn out not to actually be a benefit to you because the composers and music publishers might go up on their mechanical fees? For example, if they go up on the mechanical fees enough to recoup what you might have gotten by a performance royalty——

Mr. FITZPATRICK. The only way, in fact, that mechanicals could be increased significantly would be if Congress were to raise the mechanical royalty or the tribunal would raise that rate. Our data showed that most records were at the rate set by statute, and the instances where records were off the stated rate were specialized markets where both the buyer and seller of that composition had concluded that a new market was opened up by the sale of a composition at less than the stated rate; discount records, clubs, a whole series of secondary markets. We do not believe that you are simply going to have a transfer of dollars through this arrangement and that ultimately the copyright owners of musical composition must simply be able to recoup something that they presumably are going to lose in their own performance right from us. We detailed in our paper that we think that each of these steps of the BARD and KURLANTZICK model, each step reflected in the BARD and KURLANTZICK are not an accurate portrayal of what the economics in the industry in fact are.

Ms. BOSTICK. But didn't the rate just go up to two and three quarters cents? Are your contracts now at the high rate?

Mr. GORTIKOV. That's effective in January of 1978.

Ms. BOSTICK. Yes.

Mr. FITZPATRICK. There was extensive display in the record before the Congress last year that many contracts were being written now to state the new statutory rate or the prevailing statutory rate, so we can fully expect that in a majority of the contracts the economic behavior will be the same in the future as it was in the past, that the standard contract will be at the stated rate.

Ms. BOSTICK. But it's possible, I expect, for the rate to go up, at least discounting the special arrangements that you have.

Mr. GORTIKOV. What do you mean? Beyond what?

Ms. BOSTICK. Beyond what you are already paying now. It's still possible for the composers and publishers to come to you and say, "We want the full amount from you. We want the full two and three quarters after January"——

Mr. FITZPATRICK. It's legally possible that one would do so, but it's quite unlikely economically, we believe, because, as I say, that rate reflected a bargain between the composer and the record company that goods were being made available at less than the statutory rate to permit the exploitation, the expansion into a not previously available market. What will be off two and three quarters is going to be a matter of economic bargaining discussion in the specialized markets. But we'll have to just wait and see as to where that point is reached for the secondary markets.

Ms. BOSTICK. Are you afraid that the composers and publishers might decide that there is a pie theory and that they are not really getting as much as they thought they were going to get, and that they may want to go to the rate making agency and ask for an increase in the mechanicals?

Mr. GORTIKOV. That may be a possibility in the future. I think it was Bud Wolff who gave the analogy that just because a carpenter gets an increase on a construction job, it doesn't necessarily deprive the electrician of income.

Ms. BOSTICK. Earlier, you also exhibited yourself as well able to take care of yourself at the time the increase came.

I was slightly upset when you said that 25 percent of the audience were your children, because I thought perhaps some of them might be the performers. I thought maybe David Bowie had come in. I wonder—where are the performers? And when you consider creating a right for certain stipulated beneficiaries, you wonder about the absence of any one of them.

Mr. GORTIKOV. Well, you heard yesterday the spokesman. Most of us are here representing a vast array of industry and constituents behind us. I didn't bring any record companies with me either, nor did Hal Davis bring any musicians. We could have put on a dog and pony show for you, but we didn't feel, since we are dealing with principles and arguments, that that would necessarily be more convincing to you. When the hearings took place here in the House, there was quite an array of both vocalists and musicians, mostly not of star level, mostly of background singers and musicians, and they are most articulate and most convincing in their presentations to Congress. If we should ever get into the Congressional hearings of this thing, I think that would probably be appropriate again. We could do that for you, if you want, if you'd like to schedule a third series of hearings, but we didn't feel it would be anything other than cosmetics, and neither, apparently, did Hal Davis of the AF of M or Bud Wolff.

Ms. BOSTICK. My concern over the reason for their absence, and you have enunciated that all of you are here in a representative capacity, stems from when we were in Canada, and we understood that some of the performers were not very happy with the fact that there was a possibility of a performance right of sound recordings, because they thought it was going to upset the apple cart. Some of the performers and particularly the named French-Canadian group were quite happy with the royalty arrangements and decided they didn't want to rock the boat.

I've heard no dissent, so, perhaps, there is none as far as the performers are concerned in this country.

Mr. GORTIKOV. The only apple cart upsetting that I've heard of, and this is in the past, is when I had artists express to me an absolute fear that coming forward in a lobbying capacity or any presentation capacity would hurt them with broadcasters and that broadcasters might, therefore, refrain from giving them attention or air play or exposure, and they like all the exposure they can get from every avenue they can, so they were fearful of that.

I also had one potential witness from a record company say that he didn't want to be the only company that might make a presentation, because he felt that broadcasters might zero in and do something hurtful.

Ms. BOSTICK. That's interesting. Thank you.

Ms. RINGER. Thank you.

I think despite the fact that we are coming to 12:30, I would like to press on. I think I'm probably the last one who will have any extensive questions.

I do have a lot of questions in the economic area, but I don't think I'm going to ask them today. I think some of the matters that have been broached in the earlier questions have broken additional questions open, and I think we needed time to assimilate the various presentations.

You have here a recent study, the "Methodology of 1977 Radio Station Survey," Appendix D of your statement. Is that study itself available? This is apparently the Cambridge Research Institute. It's the last thing in your presentation.

Mr. FITZPATRICK. Barbara, I think that that describes the way the analysis was made, and I think that the results of the analysis and the analysis itself is set forth on Pages 59 and 60.

Ms. RINGER. I see. So this is it, everything there is.

Mr. FITZPATRICK. Yes. I think the combination, the study showing the stations and the way the numbers were derived as set forth in Exhibit 3 and Appendix D shows exactly how that was collected.

Ms. RINGER. I'm not thinking of running all this into the economic study that is being made. It has a due date of October 15th. I'm thinking very seriously of having an additional hearing after that study is available. We had very little time, because our Congressional mandate calls for our final report on January 3rd, but I think we might be able to do it, and I would hope that this would be beneficial.

Do you have any reactions to this?

Mr. GORTIKOV. Well, certainly we would like the opportunity to respond, even if it's in writing, to the study, but a hearing would be fine.

Ms. RINGER. There is a dynamics where everybody is in the same room listening to what the other side is saying, and that would contribute, perhaps, to more light and, perhaps, more tough questions. So I will skip that now with the thought that we will have just an economic hearing here in late October.

On the subject of payola or whatever you want to call it, and I guess that is the word, I brought it up several times, and I don't mean to belabor the point. I didn't mean it was pervasive in that it was the way of life, but there are areas in all fields when you can sense a great deal of sensitivity and unease when you bring up a question, and this is one, and I haven't brought it up with you. And in fact, I'm in no way convinced that the record industry as a whole or any major segment of it is anything but very antithetical toward this and I accept the fact that the targets of recent investigations have not been part of the organized record industry. In fact, one of my interests in the subject is whether or not it—an ugly fact to the extent it is a fact—may be the result of lack of protection in this area.

This has been a kind of hypothesis that I've been trying to test in one way or another. In other words, the fact that record companies and performers have to rely on sales of records, massive sales of records in order to get their principal income from recorded performances means that they have to go out and try to drum up air play in order to have these big killings, these very, very popular

platinum discs and so forth; if the whole way that recorded music reaches the public were different, if the whole structure were different, and if there were royalties or had been at the outset, my feeling is that this kind of flackery, and I think it has approached bribery in some cases, might not have reached the proportions that it did. Having said that, I do think that I should add that I was reminded yesterday in a cartoon, recently, that the implication was in the context of the Korean scandal, that if it was under $25, it wasn't a bribe, but if it was over $25, it was.

Anyway, I do think this is pertinent, and I don't do it in any sense other than that of inquiry.

I am very interested, though, in the history of the record industry and its relation to this whole problem. I'm aware that there was consideration very early for a performance royalty in sound recordings of one sort or another, and there was throughout the thirties and forties, when this was under serious consideration a good deal of reluctance on the part of the record industry as on the part of the musicians to push this. You had individual musicians, later on the big stars of that era who were actually pushing it and were rather successful in the courts up to a point. The record industry always seemed to hang back, and the hypothesis was thrown out yesterday, that the control of the record industry at that time was by the big broadcasters, and I wonder if you want to comment on this in any way. Neither one of you, I guess were involved in this on the thirties. Maybe you were, Stan.

Mr. GORTIKOV. No.

Ms. RINGER. You go back a ways, but not that far?

Mr. GORTIKOV. I've only been in the industry since 1960. When I was an executive at Capitol, I was very supportive of Livingston's efforts and helped raise money from record companies to support the representation that we needed in the early stages of that. I know that since the sixties there's been an ever-expanding interest and enthusiasm in participation, and right now it's rather unqualified from all recording companies.

Ms. RINGER. Well, it has been in the case of the recording companies since the Rome Convention, because there the American record industry seemed to be speaking more with the broadcaster voice than perhaps the record industry voice at that time, and was electing to see the U.S. push their own convention and take a more active role in it.

Mr. GORTIKOV. I don't know. Maybe Jim knows some more background on the pre-1960 position. Sometimes it is not attributable to any mysterious experience. It's the lack of leadership and the lack of aggressive action, and I know that is true in many of the things that we do. Until somebody gets off his rear and starts doing something and marshalling these terribly fragmented entities, nothing happens, not just in respect to this project, but almost anything.

Mr. FITZPATRICK. Barbara, I don't have any specific information in terms of the pre-1960 period or immediately after the Rome Convention. It was clear in the initial days of the hearings before the House in 1965 that there was a concern in the record industry, essentially with the economic impact of the mechanical royalty, and that at that point that clearly was the No. 1 focus as we appeared to testify in the summer of 1965. It was intimately involved in it.

Once one got past the subcommittee action and had some sense that the committee was not going to accept the publisher proposal for a four-cent rate or a five-cent rate or even a percentage rate, at that time I think there was a greater willingness to look at the copyright law, not only as a defensive exercise, but also as an offensive exercise, and an opportunity to get the rates that are recorded of any other copyrighted product. The critical point came when there was an agreement with the unions to join forces on this issue, and I was quite a new boy on the block, at least in terms of the decision to press for that particular right, but it was absolutely clear that the ability of Ernie Myers and some of the other leaders from our industry and Jerry Adler and Henry Kaiser and Hal Davis to come up with a package that both sides could live with, brought this issue into totally different focus than ever before. The unions spoke out strongly for our performance right in the 1965 hearings as did Livingston. I think the dynamics over the next 24 months—the nine broadcaster related record companies were joined by the record companies who had affiliates in the broadcasting industry and concluded themselves that their own economic health would be benefitted by a performance right and that all was packaged with the union, and this turned a dream into a viable legislative proposal.

Ms. RINGER. I think that's a fair statement, and I don't take issue with it, but what has happened since this turning point has been quite, maybe coincidentally, a revolution in the record industry, the type of music that's recorded, the profits, the volume, the structure, the business relationships have all radically changed since we first addressed these problems in the middle 1960's and I did read—this is another name or word term that makes people cringe in certain quarters—but I did read Clive Davis' book, and he claims credit for having revolutionized the record industry, the entire structure of the record industry, and takes a good deal of pride in it.

He mentions copyright. He was very much involved in the mechanical royalty back in the 1960's and, yet, he does not mention performance royalty at all.

What is the explanation of this?

Mr. GORTIKOV. I can't speak for Clive Davis. I just think it was not a pertinent, a live issue in respect to the key points he was making in that book, and, of course, it was a book designed—the content was designed to sell books rather than to be a chronicle of everything that took place within the record industry within his tenure, so I really can't answer. I'll ask him, if you want me to.

Ms. RINGER. Yes, I'd be interested, and I would have liked to have heard from him. But in any case, his basic thrust, as I read what he was saying, and I have no reason to doubt it at all, was that the record industry was founded on the shoulders of Mitch Miller, and this was not appealing to the people who are going to buy records, and he was aware somehow of what records people would buy—12 to 18 year old kids, girls—and that as a result, with this extraordinarily aggressive salesmanship and the air play syndrome, if you will, that he revolutionized the entire record industry, not just Columbia Records, but the entire record industry. I'm putting this out, more or less, to get some reaction from you, because you are obviously part of the industry, a major part of the industry that he's talking about having revolutionized.

Mr. GORTIKOV. Well, there's no question that Clive made some very definitive contributions to Columbia and to our industry, and he has been widely heralded and respected for those contributions, and he did have good sense, and since then he's shown some of those same sensitivities in the company he currently has, which has done quite well for an emerging company.

I will find out why there was no specific mention of performance. I really think it was because it was something that was on the shelf and a potential thing rather than part of the reality that he practiced.

Ms. RINGER. I think if it had been a part of his consciousness, if it was at the front part of his brain—well, I kept looking for it, and it never showed up in the book.

The point has been made, and I think Jon made it, and I'm going to reiterate, that we are not here having hearings on the Danielson Bill, we are here under Section 114 of the new Copyright Act of 1976, and, as a result, I feel that we have a completely horizontal mandate. We can look at the entire range of possibilities. I do want to ask some questions about the Danielson Bill, and just for the record, as much as anything else, briefly, where did it emerge from? Could you give us just a little rundown, for the record, mainly of its history, its origins in the Senate and so forth?

Mr. FITZPATRICK. I think that the bill has its roots in the Williams' amendment, an amendment that was introduced by Senator Williams of New Jersey in 1967, and the basic model that the current Danielson Bill reflects was reletively constant through that period of time. There was an initial proposal in 1967 that had a rate structure that was an attempt to compensate record companies and performers on the same basis as composers. There was a 3.5 percent rate base. That amendment went through hearings in the Senate in 1967, and there was a very thorough reexamination, technical reexamination of the Williams' amendment with the Copyright Office's input, and all other parties' input in 1969. And in 1969 the Senate Copyright Subcommittee reported out a bill which included in Section 114 a performance rights provision. That again was reported out. There was no action taken before the judicial committee. It was reported out again by the subcommittee in the summer of 1972. I believe, with very few changes. Then in the next section of Congress the performance rights provision was considered by the full judiciary committee at which time the rate level was cut in half, but the provisions of the bill were kept essentially the same. That provision then went to the commerce committee. And then on the floor in 1974 it was stricken from the bill. There were then further hearings in

1975 with Senator Scott. At each of these stages there was some touching up, is my recollection, of the technical details, and the Danielson Bill is a direct descendant of the Williams' Bill with 10 years experience and modification.

Mr. GORTIKOV. One thing to be added there about the last generation Danielson Bill is that we really were not a party to the fact or timing of its introduction. This happened almost as a surprise to us, not almost, and we would probably have thought of different approaches and strategies in it if we were consulted at the time.

Ms. RINGER. I do know that Representative Danielson feels very strongly in favor of this, and I think he just went along and introduced this bill again. This is my impression, also.

It is the product of a long evolution that started with the record industry draft. Isn't that essentially correct?

Mr. FITZPATRICK. No. The draft in 1967 was the product of the musicians and the record industry where the initial draft was carefully and thoroughly examined by both putative beneficiaries to the bill. It was not by any means a record industry draft. When one looks through it, you'll see a number—I assume they are still there. There are numerous guarantees in the draft of the integrity of the performers' position in terms of receiving royalties, and that was all very carefully scrubbed through with the unions at the time of the first draft.

Ms. RINGER. I'm not suggesting that the unions weren't completely in accord with it from the writing, but I did have the impression that with Senator Williams representing the state in which RCA has its headquarters, and with the fact that there was, I think, technical drafting work done by the record industry, this tended to identify it with the record industry at this time.

Mr. FITZPATRICK. I think it's quite clear that the bill that Williams initially looked at was one that was the product of joint record industry and union deliberation.

Ms. RINGER. The emphasis seems to have shifted a little, as you suggest. I'm trying to trace the progress of all of this and see where we come out in 1977. I guess the most important aspect of this is what's been touched on by several of the other questions. Again, like payola and Clyde Davis, in certain quarters you do have a very uptight reaction when you talk about protection of performers as such. You said, "Let's not talk about performers' rights. Let's talk about performance rights in sound recordings." I am sensitive enough to these nuances to realize this is a touchy thing with some people, particularly in the record industry, and particularly in the music performing rights area where there is this thing of the shrinking pie.

There was one time when there was great opposition to performers' rights. Let's not get them into the act. We have enough problems of our own sustaining the royalties. I guess one of the more gratifying things that's come out of all this has been the willingness of the record companies and the performing artist organized and otherwise to make common cause and to make a lot of concessions mutually in order to reach a common goal, and it is again gratifying, as you suggested, that the record industry is now thinking of itself as a copyright owner rather than a user or exploiter of other people's property. But there are, as you suggest, little bits and pieces in the Danielson Bill that have some troubling aspects. I think most people when they come on this issue first think that, okay, you could see the possibility of creative contribution by performers, but you are talking about all this money and effort and time that the record industry is putting in. Where is the creative element? Where are the things that create the Constitutional interstructure? And, yet, the Danielson Bill, as such, identifies the recipient of the copyright owner, and it's perfectly clear in context that this is the producer of the record company. And a performer, who is getting 50 percent, is not really identified as the copyright owner, and in context it seems that the performer is clearly not the initial copyright owner.

Now, the new copyright law looks at the author as the first copyright owner and the others take their copyrights from the author. It is semantical who is the basic fundamental owner, the fountainhead of protection. I have no axe to grind. It's looking at it from the view of copyright law that this seems artificial and perhaps unfair.

Mr. FITZPATRICK. Would this also bring to it existing rights for the sound recording as well?

One of the problems that we've had in terms of a rather simplistic view of the situation, the sound recording has a copyright, and that statute that creates

the sound recording copyright says it doesn't have a performance right, and what the Danielson Bill and any other bill is doing is taking out that clause. And at least to that degree you have a relatively simple proposition.

One way of solving the problem, which we do not suggest, would be to simply resolve the problem by statutorily granting performers one-half of the royalty. That is no solution as far as we are concerned. But if the problem was one that I have stated, that the record is a copyrightable product, and the case is established that the combination of the performer's contribution and the record company's contribution constitute the writings of an author, once that far-under a statute that denies a performance right, once one takes away that exception, you are left with the sound recording having the same rights that a movie has, that a play has or that any other work that could be copied or performed has.

In that context, I don't see what the problem is.

Mr. RINGER. Well, I don't mean to belabor the point. I don't think we've got time.

Mr. GORTIKOV. Internationally, 88 percent of the countries which grant performance rights grant performance rights to the producer, and 60 percent of those countries grant them exclusively to the producer, 10 percent of them grant exclusively to the performer. So the tilt is toward—internationally anyway—the producer.

Ms. RINGER. Well, of course, you know as well as I do, if you are talking in numbers, many of these are based on British tradition, and the British have protection for performers, but under criminal law, which is another alternative which we haven't discussed in this context.

I realize perfectly well what you are saying, and I'm not suggesting that whatever comes out of this should exclude the record industry as a beneficiary.

One of the complaints, one of the criticisms that's been leveled against the present piracy provision in the copyright law is it does not identify the beneficiary. I'm not suggesting that anything that emerges from this not identify the beneficiary, but it seems to me what this Danielson Bill does identify is the copyright owner as the record industry and then simply says the owners are entitled to 50 percent of the royalties without identifying them as owners of anything other than the right to collect royalties.

Mr. FITZPATRICK. This might be something that one would want to discuss in terms of the way the right is stated. We think that the way it is stated is perfectly sensible.

I must say, in terms of the economic debate that one has in terms of proprietary rights, I would presume that the formulation would in no way lessen broadcaster opposition if one were to formulate the right which we would propose to the whole right to the performer. I can't imagine that the broadcasters are going to change their position. What we are talking about is the architecture from a technical copyright point of view rather than the economical realities of the confrontation.

Ms. RINGER. I think that's enough on that point. I will throw this out.

I don't think that the only alternative is, as you seem to suggest, that you do what the present law does and leave it to bargaining which may result in the performer getting less than 50 percent. You could certainly identify the beneficiaries as the performer and the record company and require that the performer get at least 50 percent. I don't think there would be anything unconstitutional or illegal about that. This is one possibility.

We don't have time to go into the Rome Convention and international stiuation in any detail.

When the U.S. representatives came back from Rome, though, in 1962, 1961, I guess, the statement was made yesterday that the feeling was that the networks in the broadcasting industry as a whole had brought such pressure on the State Department that they were not able to go forward with ratification, and I think that's an oversimplification. I think that pretty clearly it was a combination of rather strong opposition from the networks, one in particular, and bringing the whole broadcasting industry with them, but in addition, the lack of any strong pushing from anybody, including the record industry and, at that time, the performers. The fact was that you had a lot of opposition and not a heck of a lot of push in the other direction, and I don't think that it could be said that the State Department made a final decision. It was waiting for reactions from the other side that never came, and I wonder if in the overall pic-

ture—which is by no means domestic entirely—on what we are talking about here, the industry and the performers thought about reexamining their whole position on the Rome Convention.

Mr. GORTIKOV. I can't speak to the historical routes. I'm not familiar with that. I think it was a matter of abdication and inaction rather than the deliberate decision to be uninvolved. They are now getting involved, literally, in national organizations. For example, I now sit on the IBF Board, and for the first time there are two additional Americans on the IBF Board. They previously had one from one company. So there's a greater awareness. There's a greater over-participation. And I would say increasingly we are involved in IBF affairs and objectives of which the Rome Convention is one. So I think politically it's futile to try to get the Rome Convention ratified by the U.S. unless some action is taken by Congress first on performance regulation rather than the other way around—political opposition may still impede us, but in the future there will be more aggressive effort by the industry and performers as well in this regard.

Ms. RINGER. There is an international meeting in December, in Geneva, on the Rome Convention. It's the biannual meeting of the Rome Convention, and I guess I will be going to that along with other copyright meetings, and one of the questions that will come up you referred to indirectly today, the Canadian report that you mentioned, which at least on the face of it deos not represent a government view. It's a little difficult to say what it does represent, but in any case it does take a very strong nationalistic turn where the authors of the report state that there is no international obligation under the conventions to give national treatment, which means that they have to protect foreigners without discrimination, if they are protecting the Canadians. In the case of Canada, they have to protect Americans to exactly the same extent. In those areas where they require this protection, they will do it. They are not intending to do away with their convention obligations, but in the area of this performance obligation, they say, "We are not obliged under the conventions to give this protection, and, therefore, we are entitled to discriminate." And I'm much disposed to raise these questions in at least the two forums that the United States belongs to, and I would hope that this would start a dialogue that would avoid the kind of disintegrating—I'm not sure you want to comment on this, but I'm urging you to follow it, if nothing else.

Mr. GORTIKOV. I don't know enough to comment, but what you say raises a red flag, and I'm going to see Stuart on Friday of this week, and I will very definitely bring this up and see what we can best do in that December meeting to perfect this, to foster that erosion of protection.

Ms. RINGER. Two more points I'd like to cover—actually three.

The questions that Richard Katz raised with respect to preemption: It's a very complex situation, but it does seem to me that it is something that somebody ought to explore further. Under Section 301 all rights in the nature of copyright under the new copyright law have got to be federal, all state laws that parallel those rights are preempted and done away with as of January 1, 1978, with several exceptions. One major one has relevance to us. This does not apply to sound recordings fixed before February 15, 1972, and we've discussed this in a more or less theoretical sense, but it does have relevance as far as a performance royalty is concerned. It's perfectly obvious that Congress put that exception for sound recordings fixed before 1972 in with having the presumption not apply with respect to the right to prevent pirates from making recordings, duplicative recordings of pre-1972 recordings, but if there are rights to prevent under state law public performance, broadcasts, than those rights are not preempted, as I read the statute. So that you have a very peculiar situation, to put it mildly.

Pretty clearly, performance rights are preempted with respect to post-1972 recordings, because under 301 the preemption is across the board and you don't have any rights under the statute. The only rights you can get with respect to post-1972 recordings are under the new statute, and those rights simply do not exist. *Goldstein* or no *Goldstein*, but that is not true with respect to pre-1972.

I'd just like you to comment on this, and I'm more breaking the question open for further comment, and I might say at this point that the record will be kept open until August 26th, and I would be very grateful if you could give us something in writing on this point. You can save your comments until then.

I guess I just want to make a comment on Jon's question with respect to the right for video tape, television programs. I think the reason that they are get-

ting permission from you and the unions and are paid is because they make tapes. They reproduce. It's not a performance right that they are buying, it's a reproduction right. It's the right to—let me call on Jon to ask this question.

Mr. BAUMGARTEN. That was my understanding, too. That's why I was trying to distinguish pre-1971. I think permission would have to be sought for the post-1972 sound recording, because the anti-piracy amendment was not limited to piracy.

Ms. RINGER. You might want to include this in your comment.

Mr. FITZPATRICK. I think Stan said that the basis there was the state law cause of action, the same state law that has provided the piracy protection for pre-1972 recordings state unfair competition laws that have protected against unconsented duplication.

Ms. RINGER. I'm simply raising the questions—let me come to the question of technological developments very, very briefly.

It is perfectly obvious that we have only seen the beginning of enormous changes of a technological nature in the way creative works reach the public. It is astonishing in some ways that home taping has not made more in records that have apparently been made in the record industry's market for the sale of records. The more tape recorders that were sold, the more records you sell in this country. And one conclusion, and the hypothesis I threw out, was that your industry is competitive, you have been able to keep the prices down, and unlike Western Europe where the prices have been in the last 20 years substantially higher on a unit basis than they have been in this country, and without the discounting that was common at least 10 years ago, and where there is very, very extensive home taping, and where the record industry has felt that there was a market impact, that doesn't seem to be the case here. Now, you seem to think that either technological improvements or lower prices are somehow more inducement to make home recordings. I'm not sure what your point was.

Mr. GORTIKOV. First of all, we don't know. To the extent it exists, it just seems reasonable that it does displace some sales. On the other hand, it might also, in reference to a play-back unit in the home, it might encourage purchasing as well. I can't factually tell you the impact. Eventually, we will survey this. I don't think that the creation of a performance royalty will impact the amount of home taping at all. I think the thrust of what we were saying in talking about technology is that we have to acknowledge the technological changes just as we have seen them in the more recent years, and that our industry has risks of suffering from those changes. Therefore, we are desirous of getting every inome source that is possible and reasonable to help offset any loss of income that may be traceable to technological change and may be beyond control. Like home taping, as of right now, what are we going to do about it? We can't stop it.

Ms. RINGER. Three of us in this room, including the two of us, Stan and I and Jon Baumgarten, spent last weekend in Virginia discussing off-air video taping, and I did have a couple of questions there.

I'm interested in knowing whether your organization is going to play a role in representing the owners of rights in the video tape area or whether or not this is going to go a different direction in this country?

Do you want to answer that first?

Mr. GORTIKOV. I think this is—I don't know how to answer. I think the organizations that will be involved in the rights will be highly fragmented, depending on who is the creator of the video item. If, for example, it is merely an audio type—a performance of today would be just an audio record that suddenly has a video component added, and a current record company makes that, then, of course, we and our members would be vitally interested in the bundle of rights that might be involved in that. Many video items, however, will be emerging from the present sources of motion picture and television programming in which some of our companies have an involvement in a corporate sense and some of our companies do not, so I think we are going to be involved and uninvolved in just an infinite variety of ways. It may turn out that our companies may be intimately involved in the distribution processes of video tapes and recordings regardless of their source, because we have such a massive distribution and merchandizing capability. We may be involved in the manufacturing processes, especially if the succeeding configuration tilts toward video record. So it's impossible to predict. And one reason I attended your conference is to increase my awareness so I know more options. I just feel ignorant and helpless at the moment.

Ms. RINGER. Well internationally, ITI changed its name to the International Federation of the Phonogram——

Mr. GORTIKOV. International Federation of Producers of Phonograms and Videograms.

Ms. RINGER. And there was a clear-cut policy decision that the international representation that they would purport to bring together under one umbrella would include videograms——

Mr. GORTIKOV. So far——

Ms. RINGER [continuing]. But there does seem to be, as you suggest, some fragmentation in this country, and I'm not sure this is to the benefit of the copyright owners as a whole. The fact is that you have them speaking with several different voices that don't always agree with each other, that don't always consult with each other.

My last question is really a question involving what happens in Congress once we've made our report. The statement has been made that if we come down against you, that will be it. I doubt that very much. I think that whatever we do here, it will not be unqualified, and I don't think that what we do would bring everything to a grinding halt, even if we came out against the proposals in the Danielson Bill or anything else. On the other hand, what does seem to be emerging from these hearings, which we are now coming toward the end of, is a pretty strong confrontation. I see not the slightest inclination on the part of the broadcasting industry to be willing to sit down and talk compromise at all, and, obviously, a compromise has to be bipartite; at least it can't be unilateral.

I guess my question is—Jon has asked part of the question, and I appreciate your answer, although I hope we're able to survive this.

Whatever happens, are you going to Congress with a showdown on the basis of raw political power? Because that's what I see coming out of this.

Mr. GORTIKOV. Our wish to achieve a performance right and royalty, and the legislative recourse is the only way we can do it; therefore, we have to fight as much as possible within the Congress toward that goal regardless of the profile of your recommendations in your report and regardless of the precise language in the Danielson Bill. As an ideal, I wish we could sit down in good faith with the broadcasters and representatives and negotiate a right and even remand a royalty to the tribunal. We attempted that after our admonition at one of those hearings, and, of course, the broadcasters have no interest of doing this. I can understand this. It's a pay-out of more money. They have the strong edge. The broadcaster from Omaha has a big voice with the Congressman from Omaha, but we stand ready to negotiate terms with broadcasters. We would like to do that. That's the superior way, to walk hand in hand into Congress with that. Failing that, we will seek legislative recourse. The more voices we have on our side on the merits, hopefully, the more Congressmen of good faith we can influence on our side. I think it is a different ball game from what it used to be, because now for the first time this Congress does not have to deal with the terribly complex matters of the amount of royalty and economic considerations, if it chooses not to. And, secondly, the cable precedent is a tough thing for Congressmen in good faith to have voted. So, I think, in those two ways it is a little different arena, and I think, too, that once the Congress recognizes the depths in which you are researching this thing, that should also convince Congressmen of good faith. However, you come out of that, there has been far more analysis than any of them are going to be able to give.

Ms. RINGER. Thank you. I really do appreciate the length of your testimony and the depth of it, and I would like to ask the panel if they have anything else.

Mr. BAUMGARTEN. I just want to tie down this sync thing a little bit. It's a little bit of history to several months before the bill passed. 114 referred to rights and duplicating the performing. And then we had a meeting, and we recognized this was an omission, so we added those words on the form of a motion picture or other visual work, and at the time I recall some people telling me, yes, it's a nice thing to put in the statute to clear it up but nobody ever gets permission for it. And when I asked yesterday, we were told they do get permission. If the sound recording was fixed after 1972, it's clear that the sync right or the dubbing right exists under the statute, unless there is a custom of doing away with it, but sync rights and performance rights are different concepts. I think we are wondering, when that sync right is cleared for post-1972 sound recording, do you also pay an additional increment for a performance right that's perhaps given by union negotiations?

Mr. FITZPATRICK. The "you," there—are you talking about both the record company and the union?

Mr. BAUMGARTEN. And for recordings before 1972, is there or was there a practice for getting permission?

Mr. GORTIKOV. We'll have to collect some facts.

Mr. BAUMGARTEN. I recall it hovering over this whole thing, the House report on the sound recording—there was very specific language in there saying educational broadcasters don't have to worry about this. There was a report in amendment of the statute which is now included in 114, so there seems to be some attention paid to television and what they were doing.

Mr. GORTIKOV. I'll try to get some more information about actual practice, because I don't know.

Ms. RINGER. I think this closes our hearing for today.

Thank you very much.

Beverly Hills, Calif., Thursday, July 28, 1977, 9:30 a.m.

Ms. RINGER. I'd like to open the third and final day of the hearings in Docket 77-6, Performance Rights in Sound Recordings, and open the hearings with the first scheduled witness, Thomas E. Bolger.

Could you come to the table, Mr. Bolger?

Welcome to the hearings. You are identified on the paper I have as representing Forward Communications Corporation as a licensee of radio and television broadcast stations.

Could you give your statement?

Mr. BOLGER. First of all, I'd like to thank you for the opportunity of speaking to you this morning. I've already filed my testimony with the committee, and, rather than reading the report verbatim, what I would like to do is just kind of highlight and gloss over what I feel are the pertinent facts and maybe respond to any questions that you might have.

As already has been stated, my name is Thomas E. Bolger. I'm from Madison, Wisconsin, and I'm presently President and General Manager of television broadcast station WMTV, in Madison, Wisconsin. But, also, I serve as an officer and director of Forward Communications Corporation. Forward has radio and television stations throughout the country. Radio AM and FM and television station Wausau, Wisconsin; an AM and FM station in Tallahassee; television stations in Peoria and Sioux City, Odessa, Texas, and Wheeling, West Virginia; and radio AM and FM in Great Bend, Kansas; FM station in Wheeling, West Virginia; and an AM, FM property in Kaukana, Wisconsin.

As you can see, they're not very large markets. So I think maybe that I'm giving a different perspective today in my testimony.

Basically, our stations, as I say, are located in very small markets, and, as you know, we already pay a copyright fee to the composers and authors. It's our position, really, that what we're paying now is very adequate, very substantial for our size stations. As I submitted in the testimony, we're paying $388.000 annually. This was the last year's figure to BMI, ASCAP, and SESAC.

Now, one of the other points that I'd like to discuss for a few minutes is what I understand the record industry has proposed as a percentage factor to supply gross sales or gross revenues of radio stations. The factor, of course, is a sliding scale, but, if gross revenues of stations are over $200,000, there's a one percent fee, and, in some of the material that I've read and seen in the trade press, it's been stated that the record industry feels that this is a very small amount of money for what they term a very healthy industry. I presented one example here, which I think is quite pertinent to that item; when you look at some of the stations that we operate. they're very marginal stations. One of our FM stations in Wausau, Wisconsin. WIFC-FM, had gross sales of $190,000 last year. Now, there would be a $750 payment currently with $190,000 of gross revenue, but, hopefully, you always hope for an increase in the following year, and, if we had just a ten thousand dollar increase in gross sales which isn't an awful lot—then all of a sudden, it goes from the $750 fee up to $2,000. And that $2,000 represents a considerable amount of what the after-tax profits have been for that station. The $750.00 would represent 11 percent of the after-tax profits, and, if we went to the two thousand dollar level of gross sales and the one percent factor were applied, it would amount to about 30 percent of the same tax profit, after tax profit. Now, when that happens with such a large percentage being siphoned off by this one percent, you could see that, obviously, adjustments would have to be made.

And the same holds true for our FM stations in Wheeling, West Virginia. Again, this is not a large market, particularly in the radio field, but, as you can see, our current music license fee payments are already double the station's after-tax profit of about $1,200. So, it's again, a very sizable amount that we're already paying, and when you go ahead and put on that additional one percent, it could be disastrous to the station. And, although I mentioned before that it's been claimed that our broadcast industry is a very healthy industry—I think it's a good industry—still, 50 percent or approximately 50 percent of all FM stations, AM and FM stations, AM and/or FM stations, almost 50 percent are not making money, and this is material that's been supported by the Federal Communications Commission. And they're economic studies that they do on an annual basis.

Also, I have noted in my testimony that the record industry says to the broadcaster, and to your committee, "Why not one percent?" You know, the broadcasters will go ahead and just move that over to the advertiser and collect the money from the advertiser. Well, I don't know how familiar any of you are with broadcasting, probably more so than I am, but I wanted to point out that it's just common sense that you don't raise your rates or easily charge clients more money. There has to be a justification for it. Now, if you have an increase in an audience or you're providing a different type of service, then you can go to the advertiser and, perhaps, raise your rate cards to get that money. But we're very competitive, and even in the smaller markets, you have a lot of media competition that you have to analyze before you have an increase like this. It's just not something that's automatically passed on. Even in the smaller markets, we're representative. You have the newspapers, and you usually have weeklies around the city. You've got shoppers, and you've got billboards, and you've got other radio stations and television, and, even in the radio stations, you generally have—in Kaukana, Wisconsin, there are probably 20 different good listenable signals coming into that market. So you can't just go ahead and say, "Look, I'm going to add on another one percent here," and, all of a sudden, the company's efficiency to the advertiser diminishes greatly.

So I don't feel that's really a good argument. But, then, I'm biased.

And then just briefly, I'd like to summarize. I think the way we feel at Forward Communications Corporation about this matter of a performance royalty is that we're paying quite a bit of money for the copyright factor. Also, if the performers feel that they need more money, I think it's kind of the American way for them to get it from the people they work for, and that's the record companies. And I think, also, that in our sized markets, one percent is a lot of money and cannot easily be passed on to the advertiser to recoup that loss of revenue. In some cases, as I pointed out, that one percent can be a rather large percent of the profit of the station.

I think lastly I'd like to just stress the fact that the broadcast industry and our company believe that we are continually giving a kind of in-kind payment to the record companies by playing their music. It's a very promotable type of thing, as far as they're concerned, I believe. It kind of reminds me of—In Madison, Wisconsin, we have one station that calls itself, "the concert station," and they are continually promoting and plugging the concert artists that come into our town, and—of course, being a university town, we get a rather large number of these, you know, performer concerts that come in. There's tremendous promotion and publicity that are given free of charge to these people for these concerts that come into Madison, Wisconsin. We have a colliseum that holds about 10,000 people. If you have Kiss or Heart or any of the current groups, the place is sold out. A lot of it, I think, has to do with the promotion and the publicity that the broadcast industry already provides the record industry. And I think that enough is enough. It's also enough for me, and I would welcome any questions.

Ms. RINGER. Thank you very much. That was a very well written, well presented statement.

Mr. BOLGER. Thank you.

Ms. RINGER. Let me start the questioning with Richard Katz.

Mr. KATZ. Mr. Bolger, this issue of in-kind payment for the air play that you give to the recordings: you suggest that if the performers need more money, they should get it from the people that they work for. Do you see any way that these performers whose recordings are used also work for broadcasters?

Mr. BOLGER. No, I don't envision that they're working for broadcasters, Mr. Katz, in that type of framework. I think, basically, though, they're working for

the record companies, and there really is no association as far as being a type of employee of ours.

Mr. KATZ. Well, not directly——

Mr. BOLGER. I know that. I think I know what you mean. There is no direct relationship.

Mr. KATZ. You see a clear distinction, then?

Mr. BOLGER. I think I do, yes.

Mr. KATZ. I see.

In the beginning of your testimony, you were discussing the suggested charges. If there were such a right acknowledged, and that were already a fact, can you suggest any alternative means, any other scheme that would be more equitable, that would be easier for the radio industry to bear?

Mr. BOLGER. For the radio industry to bear?

Mr. KATZ. Yes, for the broadcasting industry.

Mr. BOLGER. No, I don't really see it coming from the broadcast industry. As I said, I think I would more typically see it coming right from the record companies and through their own negotiations with the performers.

Mr. KATZ. I understand that. But, assuming that Congress felt differently, and that they decided that there was a right that performers and record companies had with respect to the broadcast use of sound recordings—I'm speaking now to the implementation——

Mr. BOLGER. I see. No, I really couldn't suggest an alternative because I wouldn't have one at this point. I wouldn't know another way of going about doing it.

Mr. KATZ. That's all I have.

Ms. RINGER. Ms. Oler.

Ms. OLER. Your statement is entirely directed towards the economic effect which, I realize, is the biggest thing from your point of view. But what about the equities of the situation and the legal rights involved? Can you see any legal basis for holding that the performer does—or should not have a copyright?

Mr. BOLGER. Well, I'm not an attorney, and I think, probably, the reason that my statement was mostly on an economic basis was that that's probably what I'm more familiar with. And I think as far as the legal right or the equities are involved, I think other people made presentations that I would agree to in front of this group, namely, the testimony of Mr. Popham that was made, I think, on June 7th, that went into a little more depth about the Constitutionality and this type of thing.

Ms. OLER. So you'd want to confine youself to the economics?

Mr. BOLGER. I would prefer to confine myself to the economic part of it and its effect on broadcasting.

Ms. OLER. Well, in going into that, for a minute, you talk about media competition, and, if a right were enacted with a pay schedule such has been suggested, that would presumably raise the advertising rates across the board, either in the radio industry or in the TV industry. So is that really going to have that much competitive effect on your——

Mr. BOLGER. Well, I think that the competitive effect is that when somebody's buying advertising time, they evaluate all the media. So it's just not broadcasting. They're looking at the newspapers, looking at shoppers, looking at direct mail. There are taxis, buses signs, and this is where the competitiveness, you know, would create its problem.

Ms. OLER. So it's an inter-media thing?

Mr. BOLGER. That's correct, yes.

Ms. OLER. We have had some testimony previously—I don't remember who gave it—that radio rates are the cheapest form of mass media advertising in relation to the persons reached. Do you agree with that?

Mr. BOLGER. Well, I think it's—no, I don't agree, necessarily, with that. I could not substantiate that because I really don't know the facts and figures, but I would seriously question it. But, of course, an advertiser also has to evaluate what type of service that broadcast property or direct mail is providing. For example, television—we often sell television on the fact that, they, we get sight and sound and movement and color and everything. In radio you're more confined to an oral medium, and its effectiveness itself demands that you pay less than for something like a newspaper that gives you ready access for referral back. A com-

mon thing would be a supermarket ad. Supermarkets are occasional advertisers on radio and television, but they sure stick on the back of a newspaper because they say people like to compare prices and things like that. So, you know, there's also that determination that's made in media buying by advertisers.

I don't know if that's in response to your question.

Ms. OLER. If you were forced to pay something like this, would you envision that it would result more in a cutback of programming, or would you try to pass the whole thing to the advertisers; and if it would affect your programming significantly, how would it affect it?

Mr. BOLGER. Well, obviously, when you look at cutting back, and, I think that if I were to take an operating statement of one of our companies and see where we're going to be able to break out of the red, you look at the things that are more controllable. You've got many fixed costs in any operation. You still have to pay the electric bill. You still have property taxes. Those never stop. They keep going on. So you look at things that are immediate; maybe, an additional newswire service that you've been getting at the station. You get AP or UPI. Well, maybe that's one of the things you cut out, which, I think, is a disservice to the people. I think you may go ahead and cut your news department down by one person. These are the things that are controllable. These are the variables that you can do something with.

Ms. OLER. It would mostly be in the news programming, then, right?

Mr. BOLGER. Yes, it would be in the news because in radio that's one of the greatest services that they have: their news and information areas. That's where most of the people are hired, and that's what you'd have to be very careful about.

Ms. OLER. Do you have any live programming now?

Mr. BOLGER. Any live programming? By live, what do you mean?

Ms. OLER. Live concerts. You told us about the concert station. Do they give any live performances?

Mr. BOLGER. Generally, what I was referring to was a concert station in Madison, Wisconsin. We only have a television station in Madison, Wisconsin. But, of course, you have live programming with your news. You have a lot of sports. You know, you have editorialization.

Ms. OLER. But not music?

Mr. BOLGER. Pardon?

Ms. OLER. As far as live music?

Mr. BOLGER. No, not much in the talents that we're in. There's not an awful lot of live music available.

Ms. OLER. I think you were somewhat mistaken in your statement about what effect the current legislation of the Danielson Bill would have on TV rates. There wasn't any one percent figure. It may have been a result of the trade presses. The rates were substantially lower.

Mr. BOLGER. I understood that. But at the time when our testimony had to be submitted, far in advance of this date, I couldn't find anything in any of the material where they made reference to television stations specifically. It was all broadcast stations or AM and FM, and I just didn't know. So I thought I'd throw it in at that point to see if there was, in fact, any difference. I've since learned that there is a difference, but I still don't know what the rates on television would be. I know somebody said it was significantly less, but I don't know what the figure is.

Ms. OLER. I think it's $700—well, stations grossing less than a million dollars are totally exempt, and stations grossing one to four million dollars would pay $750 annually, and those grossing over four million dollars annually would pay $1.500.

Mr. BOLGER. Of course, most television stations do not play records.

Ms. OLER. Right.

Mr. BOLGER. And, generally, the material that we buy in syndication, we get from networks and everything, and we already pay for and have fees attached to those which have been negotiated by the artists and fees involved.

Ms. OLER. Thank you.

Ms. RINGER. Jon Baumgarten next.

Mr. BAUMGARTEN. Mr. Bolger, since you've been the licensee of radio stations, have your payments to ASCAP or BMI or SESAC ever increased?

Mr. BOLGER. Have they ever increased?

Mr. BAUMGARTEN. The rates?

Mr. BOLGER. Not the what? I'm sorry. I didn't hear you.

Mr. BAUMGARTEN. The rates that you pay rather than the absolute payments.

Mr. BOLGER. The percentage factor?

Mr. BAUMGARTEN. Yes.

Mr. BOLGER. I'm trying to remember back,—right now we're in all-industry negotiations with ASCAP, and supposedly they're going to go up quite dramatically. At least this is the word we get from our negotiating groups. There have been increases, but I can't tell you the specific amount, and I can't tell you at what point in time they've taken effect, but I know that there have been periodic reviews by ASCAP and what we call our all-industry negotiating group, and I believe they've increased, but I can't substantiate that, sir.

Mr. BAUMGARTEN. Well, what if the rates go up? Will the stations start going out of business?

Mr. BOLGER. No. And I'm not saying, sir, that we're going to go out of business, either. We're going to continue to operate. But it's a question of how well you do it. Now, the industry has gone ahead and had higher revenues, but, of course, they've had corresponding expenses that have gone up, and I think that the way we're looking at it is what is at the bottom line, and that's the profitability, and, as I said a percentage of the stations are not making a profit now. Now, maybe if they hadn't paid those increased ASCAP fees, they would be making a profit.

Mr. BAUMGARTEN. Maybe if they hadn't paid their employees higher fees, there would be some newer equipment. Are you telling us that this just may be the straw that breaks the camel's back or, obviously, you haven't paid for all this time. So in your view, it puts you in a different category than increased payments for things you've been paying all along. But suppose the station feels that it will go out and purchase it, I assume, and I'm having a little trouble——

Mr. BOLGER. Well, we have to look at what the cost benefits are gonig to be for that type of thing, and, hopefully, you go ahead and buy automated equipment because it's going to help you save money in some other area. You've got some basic capital expense in any operation that you have to buy if you want to stay on the air. You have to buy certain items of necessity. But when you get to marginal things that may make it a little classier looking or easier to operate, you really have to sit down and study those in great detail to find out if there will in fact be a benefit derived from them at the bottom line.

Mr. BAUMGARTEN. You referred to the fact that you're in competition with other media—newspapers, billboards, weeklies, and the like, but when you compete and you make your sales presentation, what are you selling? Are you selling your program?

Mr. BOLGER. That's correct.

Mr. BAUMGARTEN. Doesn't your programming consist of something that someone else has created, namely the record companies?

Mr. BOLGER. Well, that's correct. It's something somebody else has created, and I think we're paying for that at this point.

Mr. BAUMGARTEN. You're not paying the record companies.

Mr. BOLGER. Well, I don't know if they could be classified as the creators.

Mr. BAUMGARTEN. OK.

Mr. BOLGER. I think record companies are kind of entrepreneurish.

Mr. BAUMGARTEN. I know some composers who are entrepreneurish.

Thank you.

Ms. RINGER. Charlotte Bostick.

Ms. BOSTICK. Yes. I'd like to ask you about your public service programming that you would be cutting back on. Would you consider yourself taking a great risk? Suppose somebody wanted to challenge you when your license came up for renewal the next time, saying that you had cut down your public service programming. Don't you have a duty to present things that are good for the public that——

Mr. BOLGER. Yes.

Ms. BOSTICK [continuing]. That serve the public? If the performance right for sound recordings happens to be instituted, and you have to pay those fees, and you cut down on your public service programs, wouldn't you be doing—you already said that you would be doing the public a disservice. Don't you also run the risk of losing your license?

Mr. BOLGER. We feel that we're very active in that area, and I guess it's a matter of degree. But we still feel that we would probably be accomplishing statistically what you should be doing for license renewal, but, as far as the degree, it could be cut back a bit.

Ms. BOSTICK. I see. You could do your public service programming from 3 to 5 a.m. or something?

Mr. BOLGER. Well, I don't know if I'd want to go from 3 a.m. to 5 a.m. I'm just talking probably not the quality but the quantity.

Ms. BOSTICK. All right. Are you saying that the rate is what you object to in the Danielson Bill so that if it were lower, you think you could pay that? Is it purely economics; you could pay a dollar?

Mr. BOLGER. No. Well, I suppose it's like anything else. I would have to see the foot in the door, and I think that if I had my choice—if you said, you know, would you accept a quarter of a percent or a dollar or something like that, I would still have to base it on the practice and not just on the economics of it, because, as I said in my testimony that I didn't cover when I highlighted it, it's going to be reviewed, and I think the testimony by the record industry just yesterday said that they really don't care what it is. At this point they just want to go ahead and get their foot in the door and see what happens from there. So I think that I would oppose it on principle and not just on the economics, but I draw the economics out because that's the way it's presently handled.

Ms. BOSTICK. I see. So you wouldn't want to come back and go through the whole thing again when the rates were up for consideration?

Mr. BOLGER. I would prefer not to, yes.

Ms. BOSTICK. That's all.

Ms. RINGER. Could I get some general idea of the nature of the broadcasting radio stations that your company controls? There are both AM and FM, and they are in Wisconsin, Illinois, Iowa, Kansas, Texas, and West Virginia. How would you characterize the markets, basically?

Mr. BOLGER. They're very small. Probably the largest market that we're in—and we don't have a radio station—is in Texas. That's just a television station.

Ms. RINGER. I see.

Mr. BOLGER. Probably the——

Ms. RINGER. I'm sorry. That's true in Illinois, Iowa, and, apparently also West Virginia.

Mr. BOLGER. We have an FM in West Virginia. Just an FM.

Ms. RINGER. I see. Go ahead.

Mr. BOLGER. I think I would characterize those markets as being communities that would vary from eight to fifteen thousand in population. Wausau is probably the biggest. The metropolitan area of Wausau is about 33,000. There are stations that are staffed by people with staffs from eight people up to twenty people. There are markets that are generally a combination of light industry and rural. The station in Tallahassee, which was our most recent acquisition last year, has a little different composition there—Tallahassee is about 18,000 people, so that would be our biggest. But we've only had that for about half a year, about six months. That's a little more urban, you know. You have a university there. You have state government there. But that would be the biggest outside of Wausau.

Ms. RINGER. I think it's useful to have a broadcaster like you before us just to get some kind of feel for the type of radio broadcasting that is going on in the country. We've heard from a lot of urban broadcasters, and there has been, obviously, since you came into broadcasting in '56, a trend toward format radio. How has this affected the kind of markets that you reach? Has there been this same kind of change, and, if so, what form has it taken?

Mr. BOLGER. Well, I think that a lot of it is that we've gone to format radio, but there's still the community involvement because, we know the people we're talking to, and I think the people know us a little closer than they do in the larger markets. It's more one-on-one radio. There's more community calendars, and there's more talk shows and call-in shows and recipe exchangers, and that probably wouldn't go too well in Los Angeles or New York or Washington, but in our markets, you know, that's very effective radio because it's one-on-one communication. Now, granted, we do format some of our stations. Some of them play the syndicated services like our FM stations, if you want to call it beautiful music. Some of our other FM stations are strictly formatted with a contemporary sound. But in the in-between towns, that's when I think we get a little closer to maybe what radio was a number of years ago.

Ms. RINGER. But no drama, no mystery, no variety, no comedy? The kind of radio that we really used to have before?

Mr. BOLGER. Oh, I don't think there's any question about that, but I think the people are looking to radio for a different type of service now. With television and the increase in movies, people are getting a lot of their drama and the mystery and this type of thing so readily available, that they're looking for a radio and a lot of people have called it the constant companion. You see kids in shopping centers with transistor radios.

Ms. RINGER. Well, there are people listening other than kids.

Mr. BOLGER. Pardon?

Ms. RINGER. There are listeners other than kids. And you say people. That's a rather general statement.

Mr. BOLGER. When you go ahead, though, I think, and look at radio; public broadcasting has, I think, done a good job in this part of their performance which is part of the radio program.

Ms. RINGER. Well, this is one point that's clearly emerging from these hearings, I think, that there is slack that public radio is taking up because the kind of programming that it supplies is not "commercial," and I think you've been admirably articulate and a marvelous witness. I wish all the witnesses were like you. But, nevertheless, you do reflect a theme that's run through a lot of the broadcaster testimony, which does imply that there's not much mission in radio broadcasting except the balance sheet.

Mr. BOLGER. Well, I don't know. It's kind of funny: When I got out of school, when I was in college, I really didn't know what I was going to do except I was very interested in radio. And when I finally got out of school, I wanted to be a communicator, though I didn't know anything about business at that time. I was a history major in college, and, it fascinated me, the idea of getting in front of people to somehow entertain them or instruct them or give them something they didn't have, and I wouldn't want to leave you here with the idea that I didn't think we were doing a lot of the things that we should be doing. We keep in very close contact with our public. You know, the FCC mandates that we go out and take ascertainment studies, and we've always done that. We did it in our company 20 years ago when the FCC never heard of ascertainment.

So we know what the people enjoy and want, and I think we're providing just one tremendous service really. Now, public broadcasting has maybe a different type, and you say, well, gee, that's great. Everybody should do that. How many different items should you have? Right now there's a big debate in the television industry over whether every station should have President Carter's press conference on the air simultaneously. Maybe just one station should have it, and that probably makes a lot of sense.

Ms. RINGER. How many of the markets that you serve have public radio also?

Mr. BOLGER. In Wisconsin, almost all of them.

Ms. RINGER. There are only two in Wisconsin?

Mr. BOLGER. Tallahassee has public radio and television, and the Wisconsin ones have public radio and television. Peoria, Wheeling, West Virginia. I cannot answer about Odessa. I cannot answer about Great Bend, Kansas.

Ms. RINGER. That's useful.

How many of your radio stations make a profit? Can you divide it up and give me an answer?

Mr. BOLGER. Yes. I think in the testimony, I would have to refer to the specifics. I think out of the nine, I said three were not making money and one was marginal. So that would be five.

Ms. RINGER. Does this have anything to do with the content of the broadcasting, or would you say it's strictly a commercial matter?

Mr. BOLGER. I think a lot of it is a commercial matter, yes.

Ms. RINGER. How many of your stations are automated?

Mr. BOLGER. FM in Wheeling, FM in Great Bend, Kansas, and FM in Tallahassee. The Kaukana stations, both AM and FM, are not automated. Wausau is not automated, either one. And the AM and FM in the two other markets are not. So I think probably three out of the nine.

Ms. RINGER. There is some beautiful music format in this?

Mr. BOLGER. Yes.

Ms. RINGER. I won't probe into this, but we've had some testimony from a beautiful music broadcaster—well, two, in fact. One had been reflecting a lack of available programming material. Have you felt this, also?

Mr. BOLGER. No. I'm not actively in the programming, but, from my conversations and discussions, I have not felt that there's been a definite lack.

Ms. RINGER. You haven't had to go out and try to make your own tapes; you buy syndicates?

Mr. BOLGER. That's correct, yes.

Ms. RINGER. As far as you know, the syndicates are not hurting.

Mr. BOLGER. No, I do not.

Ms. RINGER. Who are the performers on the tapes you buy?

Mr. BOLGER. They're a wide variety, whether they are Montovani or you know——

Ms. RINGER. Are there names or is it all anonymous European musicians?

Mr. BOLGER. Oh, no. I think probably most of it is U.S. produced; they are anonymous, though. You don't basically know who is——

Ms. RINGER. I don't mean to press you. I think we have some testimony on this already, but, if you know, do you have regular announcements at certain stated intervals on those stations identifying the performers?

Mr. BOLGER. In some cases.

Ms. RINGER. Not in others?

Mr. BOLGER. Yes. That's what I would believe.

Ms. RINGER. What are the intervals? Do you happen to know?

Mr. BOLGER. Well, generally, we break probably every 10 minutes or every 15 minutes. It's basically uninterrupted.

Ms. RINGER. In your AM-FM, it's only the FM that's the automated——

Mr. BOLGER. For example, in Wheeling, West Virginia, you almost have to go automated, because it's a very overpopulated market. You know, you've got Pittsburgh coming in there and you've got a lot of Ohio stations coming into the river, and you have Stubenville and St. Clarenceville, and, really, that's about the only way that stations could exist, with automation. Also, you might be interested to know in talking about programming that most of our stations are 24-hour-a-day stations in these small markets.

Ms. RINGER. What are the advertisers buying on those stations?

Mr. BOLGER. A lot of them buy sports or they buy news or they buy disc jockeys.

Ms. RINGER. Well, no disc jockeys on the beautiful music?

Mr. BOLGER. That's correct.

Ms. RINGER. They're really buying an audience that is really listening more or less as a background music; isn't that essentially it?

Mr. BOLGER. My kids call it dentist-office music.

Ms. RINGER. That's what it is.

Do you know or have you any contact with Representative Kastenmeier who is the reason we're here?

Mr. BOLGER. Yes; I do.

Ms. RINGER. Are you aware that he was a broadcaster at one time?

Mr. BOLGER. Yes. I 've talked to Mr. Kastenmeier on a number of occasions.

Ms. RINGER. Do you know one of the appointees of a tribunal who is also a Wisconsin broadcaster?

Mr. BOLGER. Marylou Berg? Right.

Ms. RINGER. Is she affiliated with——

Mr. BOLGER. No. She was a broadcaster. Also she was very active in the Democratic party in the State of Wisconsin.

Ms. RINGER. I know that.

Tell me, was this why you were chosen or——

Mr. BOLGER. No. Actually I wasn't the one that was originally chosen. The president of our company was, but right now we're having our annual stockholders' meeting in Wausau. I felt he felt I was expendable.

Ms. RINGER. OK. It was your president who was chosen?

Mr. BOLGER. Originally.

Ms. RINGER. Do you think that was why he was chosen?

Mr. BOLGER. He's from Wausau. That's not in the same district. But, actually, when the copyright legislation was first talked about a couple years ago, we worked hard on this issue of performance royalty. So when this came up, it wasn't that it was necessarily new to me or to our company. Our company has always felt that we have an obligation to work on industry problems, and so I think that obviously from what we've done in the past, it's merely a carry forward.

Ms. RINGER. I thank you very much.

Do any of the other members of the panel have additional questions?

Richard Katz.

Mr. KATZ. You do have television stations?

Mr. BOLGER. Yes, sir.

Mr. KATZ. In your television programming, do you do a lot of your own production of the programs that go out on the air?

Mr. BOLGER. Yes.

Mr. KATZ. I assume that you claim copyright protection for those programs that you can?

Mr. BOLGER. We've never claimed any copyright protection, but we've never had any real problem.

Mr. KATZ. What I'm really getting at is if you were involved in this, and something like the Sony Betamax came along where people could record directly off the air the programming that you had produced, how would you feel about that?

Mr. BOLGER. Well, I think it would be a question of what they reproduced and how it was used. You know, I really don't think we have enough information on how the public will use that type of equipment, and as far as pirating of programming and then rebroadcasting—not rebroadcasting, but replaying it, I really don't know if that's going to be a major problem, and I don't know how I would react. I suppose I would have to wait and see how it develops.

Mr. KATZ. You're really not sure that poses a potential threat?

Mr. BOLGER. Well, potentially; I think the film production companies have started some type of action against Sony because of it. So they apparently feel it's a threat, as far as their industry is concerned. But I really don't think that I have evaluated that as a problem at this point.

Ms. RINGER. Any other questions?

Mr. BAUMGARTEN. Mr. Bolger, when you buy syndicated programming, how is that paid for? Is it a flat rate, or do you pay a percentage of your audience?

Mr. BOLGER. It's usually a flat rate. You're talking about radio syndicated programming?

Mr. BAUMGARTEN. Yes.

Mr. BOLGER. It's usually just a flat rate. It's usually based on market size.

Mr. BAUMGARTEN. Who are the people involved in the syndication? Is it an offshoot of another industry or is this——

Mr. BOLGER. No. Generally—well, as I say, I'm not in radio programming, specifically. So, you know, I don't want to get too far afield here because I have so little expertise, but the way I understand it, people who put the service together are not an adjunct to another company here.

Mr. BAUMGARTEN. Is this a recent development or has this been going on for a while?

Mr. BOLGER. It's been going on for five, six years. One service that we buy most of our stations is called the Shulky sound. It's the name of the man, Mr. Shulky, who has the service, and he sells it. So it's called the Shulky service.

Mr. BAUMGARTEN. OK. Thank you.

Ms. RINGER. Just one last question prompted by what Richard asked you.

Jon and I were at a meeting in Early, Virginia, last week—and Mr. Popham was there, the assistant general counsel, I believe, of NAB, and there was the whole question of video taping, I think you're going to be hearing a great deal more about this, and, for your information, the broadcasters are taking a very hard line as copyright owners in this context, as exclusive licensees of copyright owners, the motion picture producers.

Mr. BOLGER. In television, of course, we spend a tremendous amount of money on programming rights, even in our market of Madison, Wisconsin. Mary Tyler Moore programs are going for $900 an episode, which is a lot of money, the highest it's ever been. So when you start making those commitments, I'm sure you have to look and be protected if it gets to be the increasing problem you suggest.

Ms. RINGER. Realize how we react to that up here. There is an inconsistency. It's very hard, it seems to me, for you—you can give us answers, but the distinction is lost on me.

Were you involved in the cable copyright wars? You've had some contact with the Revision Bill, apparently.

Mr. BOLGER. I was involved in a limited fashion with this same portion of the copyright, yes.

Ms. RINGER. And the broadcasters' attitude there is then familiar with it; it is that somebody is taking a free ride on it and we've got to do something to protect our property.

Mr. BOLGER. But I think we have to go back to the fact that basically we feel we're already paying for the rights of playing the music that we do on radio.

Ms. RINGER. Are you paying record producers and performers?

Mr. BOLGER. Well, we're not paying them, but we're paying the composers and the authors.

Ms. RINGER. OK. I understand your position perfectly, and it is absolutely consistent, as far as I'm able to gather, with every other broadcaster's position in this country, and I don't in any way dismiss this. It's a fact which I think has to be considered. I just wish you had better reasons than the dollars and cents ones that are consistently presented.

Mr. BOLGER. Well, I think that other people have given other reasons, too.

Ms. RINGER. They've all ended up as dollars and cents, though, in my opinion. It's a matter of fairness, but the fairness is a matter of money, and this—I understand your reaction completely, but——

Mr. BOLGER. Well, I wonder, though, if the service that we're providing the record companies and the artists can be so easily written off.

Ms. RINGER. As I said to Mr. Popham, this is, I think, the best argument that you have.

Mr. BOLGER. And that's outside dollars and cents. That's just a very practical service that we're providing these people. And they don't seem to recognize it, either.

Ms. RINGER. Thank you very much.

The next witness is Joe Smith, President of Elektra-Asylum Records.

Welcome to the hearings, Mr. Smith.

I go back to the days when there was an MGM movie called "Joe Smith." I guess you've heard of it.

Mr. SMITH. I've lived with it for a long time. With all the logical, "How do you check in hotel room?" questions and so on.

I would apologize, ladies and gentlemen, for not having a formal statement. I don't do that very well. So, therefore, what I might testify to this morning could come out less than cohesive and somewhat fragmented. As long as I'm apologizing, I would say that in terms of the legal and financial aspects of all the implications of this copyright legislation, I am one of your best witnesses. However, from a personal standpoint, I think I have a perspective on this matter that's rather unique.

For 12 years I was a broadcaster—as a disc jockey, a sportscaster, and a program director in both small and large markets and on college radio as well. And for the last 16 years, I've been involved in the record industry as a record promotion executive, and for the last several years, as the head of a company that has a considerable impact in the industry.

If I might, I'd like to run down some history that we're all aware of. I had a unique seat watching it. I started my own broadcasting career in the fifties. Prior to that, recorded music had very little priority in the broadcasting world. Most of radio was the things Ms. Ringer referred to as drama, live shows, live concerts, live bands in the studio, the network with their Jack Bennys and Red Skeltons and so forth. As I entered the system at that point, the process of broadcasting television had made its impact. The networks were flexing their muscles, and there was great panic in the radio world as the value of a license decreased in such a degree that the doom-sayers were saying that broadcasting was through, it would serve only as a news function, and the value of radio would change considerably. At which point, the most inexpensive method of providing broadcasting for 18 or 20 hours a day was recorded music. That became more refined in the fifties, as chain broadcasters like Todd Stores and Gordon McClendon developed what is now called Top 40 Radio, which became practically a juke box with very little in between except commercials, and they refined the music to play only hits on the theory that more listeners would be involved in hits, that there was a tune-out and tune-in time, that people didn't listen for longer than an hour at a time, and all they wanted to hear was hit music. Coincidentally, when this recorded music came into the broadcasting world, we in the world industry had developed marketing techniques through WAC jobbers that expanded the exposure of our music from the normal record stores to drugstores and the supermarkets and locations where music had never been available. That along with the exposure that radio provided started the boom of the record industry. And we for many gears mutually used each other to great advantage.

In the sixties, FM became an industry, and we were involved with more outlets that were involved in music. Over the years, the relationship has been beneficial to both sides. We've provided tons of free entertainment that occupies the great bulk of the broadcasting day for the great bulk of broadcasters in this country. They, on the other hand, were offering us their 5,000 watt signals to expose our music to the audience that was becoming very deeply involved in music in the late fifties and sixties.

Well, we are still mutually using each other. It seems, however, to me that the financial burden of this partnership is solely a one way relationship at this point. Radio stations have fragmented their music. There are some, as Mr. Bolger referred to, automated stations that are strictly existing on recorded music products and making very little input in terms of their own investment of people and creative broadcasting .There are the wall-to-wall stations that play lots of music without ever identifying it, and they still are requiring the music and complaining that we don't make enough of that music to satisfy the broadcasting needs. We still provide on the average of 7,000 free copies of every record album we release to radio stations. They cost us 50 to 60 cents just to produce, to manufacture and to put a jacket on, in addition to all the mailing costs.

I don't want to get into a lot of figures. I'm sure there have been people here—Mr. Gortikov and others, who have overwhelmed you with statistics. But we're bearing this financial brunt of developing new artists, which has become enormous over the last few years; the technological developments, the breakthrough in recording techniques, the cost of keeping musicians alive and supporting and subsidizing them during the recording process. We're involved in an enormous amount of investment, research, and development. And the economics of our industry are such that we have to maximize our profits on our winners to continue to sign new people to offer the opportunity to new musicians and new writers, new artists, to make their music available. The radio stations, on the other hand, have gone through a process in the last 15, 20 years of restricting the exposure of new artists. The formats have shifted to the so-called tight play list as the ruling philosophy in radio broadcasting at this point, and the radio stations for the most part are only looking for the winners. When that artist or that record has become established in whatever way, we are able to establish some interests; at that point they are interested. They are reluctant to expose new talent, and certainly it's their prerogative to program as many or as few records as possible. But, in the interim, we have had to develop alternatives to radio to expose artists. There is no question that the broadcasters still remain our major source of exposure.

But, on the other hand, we have found that personal appearances create a sense of excitement about an artist and a word of mouth. That was very much the case in the 1960's when the important contemporary music artists like Jimi Hendrix and the Grateful Dead and Led Zeppelin and Black Sabbath and many others established their popularity with little, if any, radio exposure at all. There was a limited underground. There was the rock press, the Rolling Stones, The Cream, and some of the consumer press that had young people doing reviews that were transmitting a sense of excitment about new talent. That was never reflected in either AM or FM radio at that time. We have had to spend and I'm sure the figures have been laid out before you, millions and millions of dollars in buying radio advertising. We have developed our contacts in the press. For us to send an artist or a band on the road to the major media centers, is anywhere from thirty to fifty thousand dollars to subsidize one band, one artist to take his equipment, his musicians, and play for four days in Washington, three days in Boston and three days in New York and so forth.

We're also involved—and deeply, in where music is going. Radio broadcasting waits for the lead to be established. Whatever new has come along in terms of jazz music, in terms of rock music, has been our initiative, and our dollars have been spent. Companies lose a great deal of money. The money we make from our winners subsidizes our ability to fund this new music. To fund less well selling music.

I have a company called "None Such Records." It's a classical music label. It's very special. It's highly selective. We don't record the obvious classic favorites. The label is not a success financially. We feel our responsibility to continue to offer to that segment of the musical world, those composers and those performers the opportunity to make records, which can only be made because of maximizing our profits from groups like the Eagles and Linda Ronstadt and Jackson Brown

and Queen, all of whom have been established in a long process wherein radio has played an enormous part, but well down the line, well after we started. We have our next Eagles, and we have our next Fleetwood Mac, and we have our next Paul McCartney sitting out there somewhere in the industry, and it's necessary for us to use all these alternative methods of exposure to—Mr. Bolger was asked by Mr. Katz if these artists work for the radio stations? Well, obviously, they don't. However, they don't hesitate in the broadcast world to buy billboards in their locations, and have Olivia Newton-John and Barbara Streisand say they play their music. We are asked to provide hundreds of thousands of giveaway albums for radio promotion. We're asked to provide artists to make station identifications. So, in fact, while no artist is being paid, which is, of course, I guess, the gist of all this from a radio station, their services are very much in the hire of the broadcasting world. And while on paper we remain partners, we have little, if any input in what and how many records radio stations play. Our operation is no license to steal money. We have companies that lose millions of dollars. ABC Records two years ago lost twenty-eight million dollars. Twentieth Century-Fox Records has lost millions of dollars.

We're a great risk, and we're under no illusion that if they were shown that by reading the Koran they would attract a great many listeners, these radio stations would drop our music in a minute and go to reading the Koran. I abhor the fact that we're having a confrontation with the broadcasting world. I don't like that at all. We have been mutually dependent for a number of years. It just seems that the relationship has shifted an enormous financial and creative burden on us to serve whatever needs the broadcasting world feels they have. I would say that would represent my statement at the moment.

Ms. RINGER. Thank you very much, Mr. Smith.

Let's start the questions with Richard Katz.

Mr. KATZ. Mr. Smith, you said that it bothers you that you're at loggerheads with the broadcasting industry over this. The issue is not whether or not one or the other of you can survive without the other. Do you feel that broadcasting plays such a crucial role in the recording industry that if this problem ever got so serious that you would——

Mr. SMITH. I would think that if 67,000 radio stations in this country tomorrow sold their turntables and didn't play any music, that we would spend a lot of time wondering how to get music to the people, but I think—there's no question that business would be severely shattered. There's no question about that.

On the other hand, there is the other side of the coin. I don't know how many radio stations could, in fact, provide 16 to 18 hours a day of programming material were it not for recorded music. So they are definitely interdependent.

Mr. KATZ. A lot of the broadcasters seem to feel that through the air play of recording industries' product, that enables performers—record companies—to lay out the fifty thousand dollars to send them on a live tour. How do you respond——

Mr. SMITH. I'll respond to that. They are playing the music for their own self interest. Most of their listeners—and whatever the demographic targets are, want that kind of music. The moment they stop playing that music and they let their disc jockeys talk for an hour or they brought in some other form of programming, the economic consequences to them—they're built rather fragilely on the basis of the fact that here's recorded music and they pick and use those records they want to play. They don't want to know about the new process.

I don't want to get into that again. Certainly, they're assisting us, but they're not out there working for us and calling us and saying who are we hot with this week, what would you like to have exposed now? It seems to me that in this self-interest that there's some obligation of theirs, too, to be part of the process.

Mr. KATZ. So you feel that while the air play that broadcasters give to your product is very valuable to you, it does not necessarily reflect the complete picture, and it's not all that you need to be successful?

Mr. SMITH. Oh, no. It's a piece of the puzzle, and our puzzles are still in the realm of such subjective unknowns. How much does an interview with John Wagwell of the New York Times mean? How much does the cover of Rolling Stone mean? What about posters and billboards and T-shirts and all the crazy things we do in this industry, what effect do they have? They do have impact, and they are means of exposure.

Mr. KATZ. Would you say that it's a fair characterization, then, to suggest that the exposure that broadcasters provide to the record companies and per-

formers is more of an incident to the medium itself, rather than anything particular or unique that broadcasters as an industry have performed?

Mr. SMITH. Mr. Katz, it's historically clear that there are radio stations that have changed their formats. They were playing their music, and when they couldn't compete for whatever reasons, their ARB's and their Nielsons and their polls were not sufficient to maintain an economic survival in the market. They became all news, all talks, all automated, just played classical music, cut back their options. It's what suits the broadcasters' individual needs, and they know there's a certain kind of music and a certain kind of audience that can deliver a certain kind of listener, and that's the tool they use. As I said, if it came to dropping ashtrays and that was a very popular sound, they would drop ashtrays. It's incidental that we are in the record business. And they are using whatever is necessary to attract audiences.

Mr. KATZ. That's interesting that you mentioned that. I remember several years ago listening to Marcus Johnson dribbling a basketball.

Have you felt any impact in Elektra-Asylum, any real impact that you can identify from the availability of home taping equipment and blank tapes?

Mr. SMITH. That's an enormous impact, but, you must understand that, first of all, that the problem is not of some young person recording an album of ours. We had an organized operation in a room this size that was representing—I mean all across the country, that was representing two hundred and fifty million dollars' worth of bootlegging on an organized operation. I know Ms. Ringer is aware of that, and we finally got legislation in '72 and spent a great deal of time with the Justice Department trying to get anybody interested in doing anything about it, and finally we had stopped a growth of that so a tolerable consequence is the home recorder. Now, in Europe, it's a disaster, and in other countries in the world, it's a disaster. The German radio announces they're going to play the new album by whoever, and there are 200,000 young Germans recording the album at no cost. We're really in a quandry, but we've spent so much energy and time and effort to impede the organized part of illegal duplication, that we haven't even addressed ourselves to anything technical. We talked about putting a shill in the record. I think that's an enormous consequence to the artist. In this case, record companies survive, but the artist who has a very brief period of time, when you take—I remember the Grateful Dead was an act of ours from San Francisco, very idealistic, very "why are we charging so much money for these records," and things like that.

When we gave them some figures on how many tapes of theirs had been pirated, they immediately wanted to go to the FBI and break down doors in an illegal search. Because it just represents stealing money and so that was the problem we faced, and the individual taping is certainly a growing problem for us, but one that we're still able to handle with some degree of intelligence.

Mr. KATZ. Mr. Fitzpatrick yesterday made the point—I'm beginning to think almost too quietly, that in 10 or so years, a public performance of sound recordings, things that you produce could be the most substantial source of income, if not the only source of income.

Mr. SMITH. There is a good likelihood. That's like a doomsday prophecy, "oh, my God, we won't have anything," but there is a very real possibility that music can be reproduced so easily with some technological breakthroughs. If some cable system decides to get mechanical, and you have the facility at home, the black box that gives you the movies now, you could tape albums. build up a library of tapes with no problem whatsoever. And we're providing the free record for the cable company. Because of the easily reproducible nature of what we do. Now, the motion picture people just went berserk because they realized somebody was knocking off their movies, but that's a problem we've lived with for years and years now, and are finally breaking down some of those swap meets and some of those little shops that have those illegal records.

Mr. KATZ. When do you feel that a performance right is an answer to some of your problems, as far as that's concerned?

Mr. SMITH. First of all, I think the performance right is an obligation right of the broadcaster association, and, secondly, to some extent it can provide us the income to continue to operate as we are. Then you really get into their not being able to operate the radio stations. They're never going to be able to give us those hundred and fifty thousand dollars to develop new talent. The consequence will be that we'll be able to stay alive but with much less experimentation. It is a major factor.

Mr. KATZ. Thank you.

Ms. RINGER. Harriet Oler.

Ms. OLER. How did you estimate how many of the Grateful Dead albums were on tape?

Mr. SMITH. There are certain musical organizations which sell a certain percentage of their music on tape. You find the rock groups have a great percentage of tape sales to record sales, more than Gordon Lightfoot or Barbra Streisand or Frank Sinatra, the reasoning being that a person who loves to hear that music loud, and that's the way most people like to hear it, cannot do so at home with a disc. But when they get in a car with a tape machine, they turn it up very loud. At any rate, the sale of tapes with rock groups is generally 35 percent of disc sales, 40 percent of disc sales. It was easily identified that the Grateful Dead sold "X" amount of records and 35 percent of that figure should have been tape sales, and when they were way down, then you had some kind of idea of what they were losing. Then we—through confiscation and some rates that local officials made and so forth, we had an idea of how big it was.

Ms. OLER. Then you're just talking about the piracy, now. You're not talking about home taping?

Mr. SMITH. No. We have no conception. You know, I guess if somebody really checks on how much blank tape was sold—I mean they're not taking blank tape to record lectures in schools—you'd have an idea of how big that problem is. At this point, I don't think—anything I say would be speculation.

Ms. OLER. Except that there is a problem—well, I guess this is a little idealistic, but some of the blank tape recording is certainly going into recording classical albums which are no longer available through the record stores?

Mr. SMITH. I wouldn't deny that exists, but I say, Ms. Oler, it would be a very small part of it. Most of it—they announce they're going to play the new Paul Simon album tonight and everybody gears up.

Ms. OLER. I'd like to ask you for just a moment what your relationship is vis-a-vis the RIAA. We've heard a lot of promises from them during the course of this testimony that, for example, they're going to give five percent to the National Endowment of the Arts for creation or betterment of music. What pressure would you feel as a moral obligation to follow their lead or do you happen to belong to the RIAA?

Mr. SMITH. We're members of the RIAA. If that is what the decision of the Board of the RIAA is, we would accept it. I would imagine the overwhelming number of record companies who provide the overwhelming amount of music and sales would all adhere to that.

Ms. OLER. OK. In your None Such Records, for example: if there were a performance royalty, one of the arguments of the record industry has been that more money would be put back into the re-creation of classical recordings, but you say that None Such is already operating at a loss. Do you really think that any performance royalty is going to have enough effect, that it's going to make you devote more money to this nonprofitable——

Mr. SMITH. Well, you know the answer to that—Ms. Ringer mentioned that everything seems to be breaking down to dollars and cents here, and the fact is that if we derive income—I'm prepared to stay with None Such Records as a policy decision until it became unbearable. You know, if we were unable to continue as an organization, I would continue with that company, but to the extent that we get outside income, that would, for me—the Eagles subsidize themselves, and, at this point, are subsidizing None-Such Records. I haven't earmarked what amount of money would be going from their performance royalty. I know that the ability to continue to fund None-Such or some jazz music is dependent on our income, and, if this is in fact a source of income for us, then that enables us to do this but I do know that we play a very chancy game, and we're gambling lots of money, and at the point that we make enough wrong decisions, None-Such is threatened, and the ability to maximize our suggestions and fund the None-Such Records is a consequence of and coming from this copyright. I mentioned that I'd never see it replacing sales of records. We'll never do that. I've never thought how much money we would make on this, and what I would do if we made it, but I'm certain that one use of it would be to fund Non-Such Records. It would seem that this does not come as a direct consequence of sales, and that I could take money like that and continue with None-Such.

Ms. OLER. Thank you.

Ms. RINGER. Thank you. Jon Baumgarten.

Mr. BAUMGARTEN. Mr. Smith, seven years ago there was a group called Tom Ball and the Laser Brothers, who I'd forgotten. At least to my knowledge they disappeared for awhile. Then somebody put Tom Ball and the Cowboy Hat and put them on an album that was a fantastic album. And Jessie Colter started recording the outlaw sound, and the radio stations tried to promote this great antipathy that was between Austin and Nashville, and a whole new area of music was created which is doing extremely well. I happen to like it.

Mr. SMITH. I go along with you.

Mr. BAUMGARTEN. Isn't that an example of how—you seem to suggest that this partnership that once existed between the record companies and the broadcasters has changed from a partnership to the broadcasters using the record companies. Yet in the area typified, for example, by——

Mr. SMITH. Mr. Baumgarten, there's currently a record by Waylon Jennings that's a major hit. Do you know how long it's taken before the great bulk of the broadcasting world has recognized Waylon Jennings? He has——

Mr. BAUMGARTEN. Without——

Mr. SMITH. All those years RCA Records has managed Waylon, he has been struggling as a country artist. He played the traditional country music. The moment he and Willie Nelson and others shifted into the more Austin kind of progressive country—whatever the title is, they met enormous resistance at the traditional country music radio stations that just don't want to know about this. Now radio is part of the process, and very reluctant early on to get involved in it. Now, there is also the country music connection between the artist—the artistic end and the broadcasting end. There's a sense of family that's all emanated out of Nashville so it hasn't been as difficult, but for many years Willie Nelson could not get a breakthrough at all.

Mr. BAUMGARTEN. As a performer? As a writer?

Mr. SMITH. As a writer. Well, the songs as interpreted by someone else, but Willie represented something that was not appealing at that time. You'll hear Luckenbock Tex on WABC in New York and BBGC in Washington and the RKO radio chain and all those who wait for the winter, and that's certainly their prerogative.

Mr. BAUMGARTEN. You've just mentioned the point that, perhaps, they waited for the winter.

Mr. SMITH. They wait for the winter.

Mr. BAUMGARTEN. That's not the picture we're getting from the broadcasters.

Mr. SMITH. When we issue in this industry close to a hundred and fifty LP's a week and more single records than that, and radio stations in a major market—this is the contemporary music station, for instance, has a play list of 30 records, 28 records—and they survey the record stores constantly for what's selling best, and the best they'll add to their play list, which is three records, four records in a week. That's hardly promoting a great deal of young talent. There has to be an interest. Artist Bruce Springsteen, the rock press started an onslaught because they really believe in this artist. He made an historic statement, and his name is Bruce Springsteen, and it became a fire storm in the industry of—it was a hype. I mean—that's the word we apply to it, but it was legitimate. Then radio said, wait a minute, because his records weren't being played.

Jimi Hendrix—I remember taking Jimi Hendrix' records into radio stations. They threw me out of there. What is this? Well, this is a fellow from Seattle who lives in England whose revolutionized guitar playing, and he's what rock and roll will look like. I had seen him in Monterey. I had seen him in England. So we had to promote him with what was then called the underground. It was through copies of his albums surreptitiously passed hand to hand somewhere in the darkness, but radio was uninterested in listening to it. It was something new, and it was a breakthrough, and I'm saying that whatever is going to happen two years from now, radio's going to get on it two years from now. They're certainly not into it now, and we're funding it and supporting it.

Mr. BAUMGARTEN. I guess it has to do with the relationship between singles and albums. A couple of weeks ago I was driving home from the office with wonderful visions dancing in my head of cable television and what we're dealing with today. And Jennings was played, and I liked it, but I didn't go out and buy the song; I went out and got an album. I tend to do that. I buy an album for one cut. Can the broadcasters argue that this is a greater contribution? In the past they would go out and buy the 45. Now they play a single cut and somebody goes out and buys a lot more—

Mr. SMITH. If I may say, the broadcaster's contribution to the change in buying habits of the record audience is zero. The fact is that in the late fifties and 1960's, a different kind of music began to emerge. Up until then, I'm 12 years old, I'm old enough to run away. The lyric content of popular music and the musical content of it was never very serious, and it was very trendy. You hear a lot of stupid records. But with the sixties and all the sociological impact of race and civil rights and the war and drugs, music became more serious, and I don't think anybody questions that to the young person who's grown up in that period, that music represents a far greater impact in their life than it did for me back with Eddie Fisher or Tony Bennnett. There is a dedication and a devotion. That's responsible for the success of this industry. Musicianship has improved so greatly. You get some young kid who's got a great set of earphones and some marvelous equipment, and he puts down an album by Jimi Hendrix or Eric Clapton. or Stevie Wonder, and he can soon copy every one of his notes. If he's good, he goes from there. Well, because music became so important, the song was no longer the very important thing—it was the artist. If I announce tomorrow there's a new album by an artist, and there are a lot of people who enjoy his kind of music, we will know we'll sell 700,000 records. If I announce Joni Michell's new album—Joni Mitchell has established a dialogue with he audience through personal appearances, through writing, for 10 or 12 years—they buy Joni Mitchell and if her record wasn't on the radio, we'll sell it. People now regard the artist as a totality. They want to hear all his music.

People do so much with music now. There is not a college dormitory room in this country, there is not a barracks, that doesn't have an Elton John, a McCartney or a Beatles record or something because music represents such an important part of the economic life of a young person, and I say, "young." We're talking—Elvis Presley's been around for 22 years so that somebody who was a teenager then on 5th Avenue in New York, I see advertising people, I see young business people who are buying the new records because music has meant more. Very seldom would you buy a single record unless it weren't available in an album form because you love Waylon Jennings and you enjoy him more than the Luckenbock Tex cut. You want to hear Waylon Jennings, and anybody who's involved in contemporary music now has that attitude, and that's happened with the bright black musicians. That has been an outgrowth of what's happened to music.

Mr. BAUMGARTEN. When that single was played on the air, who made the decision to take that cut off the album and give it air play, rather than another cut?

Mr. SMITH. We have had to make our own decisions about what single we would release because most of these radio stations that you listen to will only play the single cut. They're not playing anything else but that. They have a hit record syndrome, and that's their philosophy. If there weren't Luckenbock Tex on there, you would never hear Waylon Jennings. Some of the more progressive take the album and play it, but the decision was basically ours, to select a single from that record.

Mr. BAUMGARTEN. When you select a single, are you saying you also release a——

Mr. SMITH. No. We release an actual 45 because that's our only way to reach so many of those broadcasters who will only play single records.

Mr. BAUMGARTEN. That's all I have.

Ms. RINGER. Charlotte Bostick.

Ms. BOSTICK. I'd like to ask you about your contractual relations with, for instance, companies who also release your records. You're aware that in some of the foreign countries, they do have this performance right in sound recordings. They also have the public performance right, and I wondered whether in any of your contractual relations with these foreign companies for publication of your record, you recoup any of the performance rights that they get. Do you get any performance rights, say, from England or from——

Mr. SMITH. Yes.

Ms. BOSTICK. Could you give me any idea how much?

Mr. SMITH. I don't know how much. We own our own companies, and it's only in the last three to five years that we've established our own operations internationally. Up until that point, we were licensed through other companies; BMI, Polydoor, and some of the others. And whatever they receive, it was very difficult in an accounting method to break down. They were releasing records from many American companies, and in our negotiations with them for licensing, if

we negotiated a three-year contract, we would put a fixed figure that would come to us as a share of this performance money out of that pool. Now, to the extent that we're in our own companies, I don't know exactly what it represents, but now that money flows through our English company, and is transmitted to us on a percentage basis—how many records of ours were sold or played or performed—and we then account internally to ouselves and our artists on that.

Ms. BOSTICK. I see. So you do pay your artists, as well?

Mr. SMITH. Yes.

Ms. BOSTICK. You have contractual relations with your artists for that?

Mr. SMITH. It's billed into an artist royalty. We maybe add extra points because, again, it's extremely difficult to break it down. It will require such logging to gather information from state radio in Germany and Italy and Japan, so that we billed in a factor in the royalty that would cover performance monies.

Ms. BOSTICK. I see.

That's it. I have no more questions.

Ms. RINGER. Picking up that point, is most of the music that you record or that you issue on None-Such produced abroad originally?

Mr. SMITH. No. At one time it was. I would say probably 80 percent of our music is now recorded in this country.

Ms. RINGER. It's a wonderful label.

Mr. SMITH. Thank you very much. We're very proud of it, too.

Ms. RINGER. I had noticed that there had been a shift. So you are having actual recording sessions here?

Mr. SMITH. Yes.

Ms. RINGER. And on a fairly large scale?

Mr. SMITH. They're very expensive, which is part of the problem, obviously. To record classical music is not a trio in a cocktail lounge. It's rather involved. And all through the technical aspects of it, because of the nature of the music, we try to be meticulous. It becomes a rather expensive process.

Ms. RINGER. Why have you shifted to that? In other words, there was a period where there was very little classical recording being done in this country. The artists were going abroad.

Mr. SMITH. Well, what was happening, really, is that the music we were getting from abroad we were getting on a license basis. First of all, we could only sell it in the United States, and, secondly, we were not very much in control of it. We have a very wonderful women named Tracy Stern who is the head of our None-Such label. And she felt that she was better in control if she did it all here and we control those records world wide. If there were a world-wide market, we would have that.

Ms. RINGER. So it's rights——

Mr. SMITH. No question about it.

Ms. RINGER. When you license abroad, well, give me some—just a general picture of your licensing arrangements. The structure.

Mr. SMITH. We have very little licensing now because in probably 85 percent of the world, we have our own companies. But the general structure was that we would get a guarantee of certain amounts of money per year. They would advance us twenty thousand dollars a year, against a royalty of maybe 15 percent of retail price, which we, in turn, would split with our artists. We would have to pay the AF of M if we recorded in this country, and of the remainder, our licensing arrangements were always to split 50/50 with our artists. Now, artist's royalties have been increasing in our industry over the last several years because there is a realization of how much a major artist means to us. So the artist really takes the lion's share of the money now. We didn't do this out of the goodness of our hearts. It became an economic necessity. And now if we get fifteen percent, the artist may get eight percent of it, and out of the fifteen percent we're paying one and a half percent to the American Federation of Musicians, and the artist receives the lion's share of that.

Ms. RINGER. Well, let me—OK. I think that's really answered that question. But you mentioned the expensive home taping of popular music, of rock in Germany. There is a so-called tax on the home tape recorder that is intended to take care of that. Do you really feel that you realize any money out of that?

Mr. SMITH. None. Not at all. I mean I would imagine that if you sold a one or two hundred dollar tape recorder, and there was a tax of a few dollars on it, if they taped two albums, that would negate that right away.

Ms. RINGER. OK. This is my question: How do you account for the fact that there is so much home taping in Germany, of essentially the same music, and not so much here, in terms of impact on record producers?

Mr. SMITH. Well, first of all, the Germany radio is much more controlled. It's a state radio. You know, they have one radio station that generally—it's like BBC, it covers the whole country, and things are much more centralized. So if an announcer says, "Tonight we will play a new record," the entire country gears up to do it. Secondly, what is happening in this country is certainly a movement toward that, rather than any lessening of it. Radio stations don't tend to because that's non-commercial. Radio stations don't have to break every three minutes to deliver a commercial. They can play an album in its entirety. Now, there are very few radio stations in this country that are going to run 35 minutes of music without an interruption, and it's, I assume, much more difficult to be taping in this country while somebody's screaming in between or they don't know what's coming up and so forth, but the Germany radio seems to be making it a point of a service. They tell their listeners that they're going to give them this opportunity to tape this music. That hasn't happened in this country. We were getting the FM radio stations proclaiming they got a copy of the new album by the Beatles, and they were going to play it that night. We've tried desperately to discourage that or do something because that has a devastating effect on us. Also, in this country, we're so much bigger. We're four times the size of Germany and we don't feel it. People are bleeding us, but we don't feel it. That same kind of impact that tape piracy had in this country would destroy the Germany recording business had it been going on then. In this country, we all survived. and you go on.

Ms. RINGER. In line of the questions that we asked earlier in these hearings, we are trying to consider other alternatives, and the fee on the machine is one of them. And, apparently, the West German performing rights societies that control these pools and payments feel that this is the solution. You're really saying that you don't realize anything out of that, and, if the same kind of patterns emerged here, you'd really be in trouble?

Mr. SMITH. Serious trouble. You know, Im not at doomsayer. I've tried not to say woe is us, but I feel that if there were anything like a national network and they were to say, "We're going to play these records tonight," we would.

Ms. RINGER. What's preventing them from doing it?

Mr. SMITH. I'm saying commercials are in between. I'm saying that they are not organized and coordinated. Time zones differ here—those countries are so much more homogenized in their broadcasting facilities and in their time zones and the one announcer who's a national figure, who can say anything. We don't have anything like that.

Ms. RINGER. OK. Enough on that.

The other possibility that you hinted at was jamming or putting some kind of signal into the record that would not interfere with reproduction on a hi-fi, but that would come out if you were taping. Isn't this forbidden by the FCC?

Mr. SMITH. It is forbidden by the FCC. When I say it, it's rather esoteric to me at this time.

Ms. RINGER. It's not James Bond in the video area?

Mr. SMITH. Well, if our engineers were to develop a system that would work, I would then ask the industry to go to the FCC and explain our rationale for this and ask for some kind of exclusion if we presented this as not a scatterbrained thing, not something where someone is going to lose their arm if they put on a tape recorder.

Ms. RINGER. First of all, the reaction that bred this situation in our discussions of video taping last week was one of horror over the politics of jamming and the fact that broadcasters react vigorously to any kind of interference and suggestion. You would, in fact, be preventing people like educators from taping, who feel they have a duty to tape for their students, that sort of thing. Whether this is right or wrong, they really feel that way. I'm not trying to get you to agree with me, but a conclusion I've drawn is—at least in this country, this is just about unthinkable. If you went to the FCC and said do this. the result would be that the disc jockey programs would stop because—or would they?

Mr. SMITH. What I foresee is something that breaks up a signal frequently on any kind of reproducing thing. Now, if educators wanted to use some of our music, I would assure them that we would issue them a copy without any signal on it. I don't know if educators are especially interested in the new Peter Framp-

ton album or something that represents our bread and butter. We certainly have no objection. We provide records for educational purposes. We stock libraries all over the world with free records, and, as I say, at this point we still have not addressed ourselves to the problem of the individual duplicating. But one day that's going to overwhelm us, and I think that, technically, that's the only way we can break through. I don't know of another way that doesn't impinge on somebody's real freedom.

Ms. RINGER. Some of what I'm saying, I've said in earlier parts of these hearings. You are a remarkably articulate and informative witness. We are groping for solutions here, and one reaction I've had—and we have no convictions at all—the Danielson Bill approaches too little and too late, and we are on the verge of additional technological developments. There seems to be no question about that. Marvels are just around the corner. And, obviously, this is all very unpredictable. But in truth, of the various possibilities we've been discussing, none of them seem to offer any real answer. To what extent do you think that the Danielson Bill would be a bulwark in the face of what seems to be a loss of control over your market?

Mr. SMITH. Well, future shock has had an enormous impact on me. What is the one thing you know about what it is that it's not going to be. And that in your wisdom here in the middle of 1977, we try to apply some kind of application, some kind of cure to the problem. Now, in some laboratories in Japan, somebody's coming up with something that just scans the air and picks off all the sounds. We're in serious trouble. I know our government is concerned about the Russian ability to monitor telephone calls in this country. Well, now they're addressing themselves to a problem that was before. They thought they had privacy covered with all the legislation that they needed. Now, they're facing a new problem.

I think the Danielson Bill answer to a situation that does exist now and answers a number of inequities that do exist, and I tell you, I don't like being here as an adversary of the broadcasting industry. I have a very warm feeling for it. Part of my life is there, and I have a great interest. And I certainly have no interest in causing economic upheavel in the broadcasting world. I feel there is an inequity, and the broadcast industry is not answering to it. And, naturally, they're scheming. But that doesn't deal with the problem of inequities in this relationship. It's kind of one-sided.

Ms. RINGER. I guess what I'm trying to say, though, is the problem does seem to be much broader than the constant——

Mr. SMITH. You certainly know the difficulties of getting anything through legislation and all the special interests that get involved. So this seems to be Step 3—Step 3, 4, whatever it is, and I don't know what it will be in 1978.

Ms. RINGER. This is my question. It is a step or is it just a flea bit to the broadcasters?

Mr. SMITH. I think it's a very serious philosophical statement that, hey, listen, you would pay for using the services of someone and something under all the circumstances, and just because that has grown topsy-turvy over the years without any kind of compensation, does not mean it's right, and that if it's necessary now in 1977 to correct it, well, you really should, and then what happens from here, I don't know. If it becomes an economic burden and broadcasters are feeling like flies around wayside, then somebody's going to do something about it. But I think this says something from a philosophical standpoint. It says, hey, listen, you use this. This is important to you. It's our right and you really should compensate somebody for it.

Ms. RINGER. Just one other observation in that context. I think this is probably what carries the broadcasters. This is my impression, that if this has any meaning, then it has to represent a philosophical chain of the base on which you operate, that there is going to be recognition of performers and record producers' rights in this area, and that obviously, you're not going to end with a quarter million dollars of whatever would come out of this. I guess the basic question I have is whether the record industry and the performers have conceded control, that they're really only asking for money. And maybe this is the only way to go. I'm sure that is the profound conviction in the industry, that we've lost the ability to control.

For historical reasons, it's just gone. But is it? I have no idea one way or the other, but it doesn't seem to me that money is going to solve your basic

problems here because what we've seen in this technological impact of technology communications, technological copyright, is a simple inability of the copyright owner to control his market. It's just gone, and unless there's some kind of legal statute for that—and I'm not sure money provides it—then it is very hard to foresee for the future.

Mr. SMITH. Well, I don't know if it—in the future there may be television channels dedicated to music. They're going to be playing like radio stations. Who knows if that can come about? Their economics are different. The use of the copyrights in television can represent a far more significant economic move than in the broadcasting. But, first of all somebody has to say you have to pay for this. I mean, you really have to pay. You have a right, and you're using it, and you have to pay for it. And I think what this answers to——

Ms. RINGER. That's what the Germans did, and it really is too little, too late.

Mr. SMITH. No question about it, and whatever technological breakthrough, whatever idealogical changes are made, we can't legislate for that at this moment. I don't think.

Ms. RINGER. OK. Rather than keep on this high plane for a minute, I'm going to come down. But you've hinted, and I've heard other hints from people in your industry about new models. I've heard about a system called PEDOM. Do you know anything about that?

Mr. SMITH. No.

Ms. RINGER. I thought that's what you were describing with your Japanese.

Mr. SMITH. No. I just know—I have posed the problem to some engineers around the world, and said, listen, you're screaming here in Germany. It's becoming a major problem in Japan. Certainly there's something that we can do that can take that twenty-eight dollar Sony cassette player and not allow it to knock off our album. And they've talked about it. They can build in something right now in a radio, but it becomes very disruptive in other ways. It can't be controlled. Obviously, we could never have anything that couldn't be controlled.

Ms. RINGER. No. I'm talking about the opposite.

Mr. SMITH. Somebody can tape——

Ms. RINGER. That is available.

Mr. SMITH. Ms. Ringer, it's like dragons at the door. I don't know what it looks like or what it sounds like, but I know it's out there, and it's going to bite the hell out of us soon.

Ms. RINGER. I hope that we'll be around to read this 20 years from now.

Mr. SMITH. I hope so.

Ms. RINGER. Let me come down for a moment.

I would like to get some—an actual record company executive with a lot of experience—some feel for the business relationships between record industries and performers. We had some testimony on this yesterday, and I would like to review it a little bit. Give us a profile of a typical contract that you have with the middle level popular star.

Mr. SMITH. A middle level artist, forget signing a new artist. Say an artist who sells reasonably well. We make money with him. There is a fund for recording. We may give him or her or them a hundred thousand dollars per album, from which they make their record.

Ms. RINGER. That's negotiated?

Mr. SMITH. It's negotiated. And then they received against that a percentage of the sales. Based on the retail price. If we give them a 10 percent contract, it means it breaks down to 62½ cents a record. I forget how we arrived at that. If they sell a million records, they make six hundred and twenty-five thousand dollars. If they are very successful, they tear up that contract; the company tears it up and adds commitments. We commit them to anywhere from six albums to ten albums in a contract. Beyond that you don't get. I have an artist. Linda Ronstadt. She's a very popular young singer. She made a long-term contract back in 1972 with Elektra-Asylum Records at what was then a realistic royalty rate for an artist of her stature. She hadn't really achieved her full popularity. Even though she owes four or five albums in the country and that, effectively, for Linda is four or five years' it is our feeling that she deserves more of the pot. It takes less money to promote her and sell her. So she could get 13, 14, 15 percent royalties. 16 percent. The artist gets a very good chunk of it.

In addition to the writing money, if they unite, and the performance monies from the publishing that they get. That's a successful artist. Unfortunately, artists—like other performers, make all their money very quickly and are gone, and the tax consequences are enormous, and they all try to get invested and

have business managers. But when you're hot, you're hot, and when you're hot, you've got to get everything going that you can, and that's the answer to someone telling us how much money Linda Ronstadt makes. Well, they're not going to be playing their records—I hope they'll play the records for 25 years. The reality is there are an awful lot of young people whose careers are over as record sellers, and I think they should be entitled to all they could get when they were there and somebody was using their picture on a poster and announcing they were going to play records and that was the shill to get people to listen to their radio station.

I'm off the point because I'm propagandizing now. You must remember that for most of our artists—of 80 percent of the people that make records, we don't get our money back at all. So that 20 percent can make an enormous amount of money because of what happens to an artist—and we're just talking economics of an artist—if a Linda Ronstadt is most successful in selling a million, million and a half, two million records, that triggers the cover of Time Magazine, which triggers sell-out audiences around the country, at Pine Knob and various outdoor festivals where she's going this summer. So the record success is very critical to the entire success.

Ms. RINGER. There are vast variables and unpredictable factors, I realize. But essentially you're saying that you negotiate a basic advance, if you will?

Mr. SMITH. An advance.

Ms. RINGER. Then you also negotiate a percentage royalty based on sales, and I take it this does not include the distribution of the free promotional records? It's only on stuff that money is coming from?

Mr. SMITH. Yes.

Ms. RINGER. At what point do you determine whether it's sold or not, under this limited return?

Mr. SMITH. Well, records are very trendy. Usually after a six-month period, you've got all back that you weren't going to sell, then, of course, some records have on-going sales, and an artist is paid. We're sending royalty statements to artists who've long since left the company, but their records have some catalogue value. So the artist continues to have an interest in the record sales. They are paid for that.

Mr. RINGER. As Jon said. "One hearing at a time, please."

I'm really asking questions in a dozen different contexts, as they deal with the mechanical royalty, but it does have some bearing, and do you keep reserves for artists?

Mr. SMITH. Yes, we keep reserves for returns which are usually liquidated in a cent royalty.

Ms. RINGER. It works pretty much the same with respect to the music publishers?

Mr. SMITH. Right.

Mr. RINGER. Suppose I have an artist who doesn't pay back the, say, a hundred thousand. You don't require them to refund?

Mr. SMITH. No. It's a non-returnable.

Ms. RINGER. Is this contractual or is it just——

Mr. SMITH. Contractual.

Ms. RINGER. Because in the book publishing industry, this has very strong parallels there, whether you have the advances. The tradition has been that you don't require them to repay, but there has been a couple of cases lately where they did get them to repay and went to court, and the court said no, there was no contractual obligation not to.

Mr. SMITH. There is nothing as indigent as a musician who has not made it. But to try to collect twenty thousand dollars from a guitar player up in Laurel Canyon would be very interesting.

Ms. RINGER. But I take it that it's written into your contract?

Mr. SMITH. It says, "recoverable but not returnable."

Ms. RINGER. What does that mean?

Mr. SMITH. Recoverable from royalties.

Ms. RINGER. What happens when a performer simply isn't able—for psychological or medical or emotional reasons—to fulfill the additional obligations? Do you carry them?

Mr. SMITH. We are only allowed in the State of California to enter a contract enforceable for seven years. It's never been really tested, but we never wanted to test it. So if the seven years went by and for whatever reason, either through recalcitrance or through inability to make the record, our only recourse would be if on the first day of the 8th year they immediately signed and made records.

Elsewhere, we might have recourse for damages for profits lost. If they owed us three albums it would be easily discernable how much profit we've lost, and we would sue for that.

Ms. RINGER. That's in terms of their obligations?

Mr. SMITH. Right.

Ms. RINGER. But under the kind of disorderly situation that seems to prevail in this whole industry, there are situations where they've simply run out of money. You mean they're going to be able to record from you later and you actually do carry them, you put out for them, even though you don't owe them?

Mr. SMITH. There are constant advances. You're investing in so amophorus a thing that this young man or young girl is going to be able to sit with a blank sheet of paper and write some great songs and make a record of it. That's all we have. We don't have Chevrolets that we turn out, that we know what they're going to look like. We have no idea what's going to happen every time they go into a studio. And they're terribly insecure. They're facing a standard to set, another plateau to reach. So if they need ten thousand dollars more or twenty thousand dollars more, and, then, if you really believe, in your judgment initially, that they have in them the ability to make these marvelous songs and music come alive, then you must do it. That's part and parcel of the record company economics.

Ms. RINGER. Doesn't this trouble your stockholders occasionally?

Mr. SMITH. Only if at the end of the year it shows up in the overall, and obviously when a major company—the stockholders very seldom get into what went into the figures. It's what the figures are. So whatever we did—selling off the furniture or something like that, if we can keep it going, the stockholders don't object.

Ms. RINGER. I'm curious, since we've got you here, you mentioned the WAC jobbing and that whole change in the merchandizing patterns. Nobody seems to have mentioned clubs. I think the word was mentioned, but in passing.

Mr. SMITH. Record clubs are not a very profitable thing for the people that operate them. There are two and possibly three that still exist. What we find is there's a very fixed group of people that will buy through the club because with a discounting of records around the world, it's very uneconomical to pay full-list price. It's only for people who couldn't find records or didn't care to go to stores and shop. Well, now that records have been available in thousands of locations across the country, and every shopping mall has a record store or a department store or something that stocks records, it became less of a need. They provide something. That's not going to change the mountain that's going to be in the way. But if we bring more records out to the people, then there's less need for the club. It represents a very small part of our economic income. My own company is affiliated with three of them. It seems it's a decreasing, diminishing market at this point.

Ms. RINGER. Well, this is my point, that in the remarkably jagged lines that this industry has known in the last 10 years, the clubs seem to have arisen and then completely collapsed, and I realize there are a lot of factors involved in this, but there was a time—and I remember this very vividly, when we were involved with revision in the sixties. I remember a record industry executive telling me about the Columbia Record Club and the fact that—I think his example was that if they brought out a record called "Barbara Ringer's Greatest Hits," that it would sell a hundred thousand records automatically, and was that true?

Mr. SMITH. No, that was not true. They gave away a load of them as part of their free policy. We had to agree that they could give away one for every one they sold, something like that, and the royalty rate was so low that we in the end split it with our artists; we were winding up with that much of the pot. Whereas if we could sell only one record for every ten that the club sold, if we picked up one of those sales for a legitimate operation, we'd be ahead of the game. Their economics are such that they can't give any more than they gain, and Columbia Record Club prospers because they use their pressing plant. They use their manufacturing plants to make their records, and they provide a profit through there. It's very hard to make a profit. The fulfillment problem is enormous, and our advertising costs are staggering, as well. We found out that that, in fact, was never true. If "Barbara Ringer's All-Time Hits," were No. 1 on the charts and sent to the retail stores, you could sell a hundred thousand.

Ms. RINGER. His point was that the person might have had absolutely no talent and nobody ever heard of them before, and yet you could sell them.

Mr. SMITH. Not at all.

Ms. RINGER. This was wrong?

Mr. SMITH. Not at all. It's demand. Some were very uniquely adapted to the club. The club demographics seem to be a more mature artist, artists like Ray Coniff. Somebody who didn't enjoy all that sales activity at a retail store would sell through the club. But even that's over now.

Ms. RINGER. Do you see any trends in merchandizing? Obviously, this has gone through radical changes. What's happening now?

Mr. SMITH. Strangely enough, it's come back to the retail stores, and you see great chains of stores opening. They can do it relatively inexpensively, and with the economics of our business, we're in a Peter Pan world. If you open a record store, and you want to stock it, we'll all give you records. You don't own any of them. You can return them all on Thursday, if you want to.

Ms. RINGER. Well, to come way down to the bottom; the grubby subject of payola, would you want to comment on this?

Mr. SMITH. Yes. I feel very strongly about this. My wife feels more strongly than I do. The fact is this: In Newark, New Jersey, for every four years now, there's been a federal grand jury sitting doing an exhaustive research into this industry spending millions of dollars. They have subpoened many witnesses; financial records are coming out of their ears. They have looked to the press. During this episode in 1973 when the President of CBS Records was dismissed, and in the four years that those investigators have been touring the country, they've come up with such a miniscule amount of hard evidence that this is a factor in our business. There have been several small companies which have absolutely no impact in this business, and when it came down to what we were talking about, it' so low. You're talking about some plane tickets and some suits of clothes, and this is an industry that's approaching three billion dollars. The fact is—and I was once on CBS television saying that the companies that control this industry, that provide 98 percent of the music do not do business that way.

There are very strict criminal laws. Most are involved with corporations that have great responsibility to the government. Many are involved with broadcasting entities, CBS, ABC, NBC. And while I can't sit here and tell you that no employee of mine has ever provided marijuana or money to a disc jockey, I can tell you that at my company everybody has for years signed a pledge. There's never a question. It's instant dismissal. We survey expense records, constantly and consistently looking for any aberrations in that, but, as a matter of policy in this business, I would just firmly—I remember during the great fuss about payola in '73 and '74, Senator Buckley from New York saw a great deal of publicity to be garnered and I don't blame him. He is political. He held a number of press conferences. We were going to debate on the Johnny Carson Show. He chose not to. I guess against a United States Senator, I didn't have much of a chance but that is not the way we do business in this country. There is all the romance that goes on in the business world. There are lunches and dinners and openings, and inviting them to the Rams football game. There is all of that. There is all of that give and take. But the thought that anybody that represents CBS, A&M, Warner Bros., Atlantic Records, Twentieth Century Fox Records, walks in and goes in the back room and gives somebody a hundred dollars to play a record—it doesn't exist. It is not the way we do business. And in four year that particular grand jury and any number of other FCC investigations, local District Attorney investigations have turned up just about nothing. There's always the opportunist who finds a weak spot and does something, but it's not the way we do business, and I can't stress that strongly enough.

Ms. RINGER. I appreciate that.

I think we've covered most of the questions I had.

Let me ask if the panel has anything additional. Jon?

Mr. BAUMGARTEN. What would happen if I was an agent rather than a copyright owner and I represented one of your leading artists, and it was time to renegotiate our contract and I wanted "X" number based upon air play. Would you throw me out?

Mr. SMITH. No. I would have to factor that all in somehow in the equation because there is a point beyond which I can't pay money. The cost of our operating, the cost of manufacturing the record, the cost of paying the publishers, the cost of paying the unions, the cost of general overhead, advertising and so forth. There's a point beyond which it does not make sense to pay you. And, at that point, I'd have to say, "Mr. Baumgarten, it's been wonderful. Take your artists and go." But that represents a potential because you agents and you managers are going to come to us if you see another source of income, and you're going to negotiate for it. And somewhere along the line, all of our contracts of the last

few years have been keyed to copyright revision of the publishing that's coming in January.

Mr. BAUMGARTEN. That's mechanical?

Mr. SMITH. Even though that is not in existence. When the crop turns, then we got to turn with it, and I would say if you came to me and said you wanted a percentage of air play, that I'd have to think about it very seriously if I were being paid for it—if the entire pot is six million dollars, I can't give you a lot of money for it. But it's impossible, and I can't deny that we would accept it, and I want to thank you very much asking for it because one of these guys is going to print it, and I can hear the onslaught in the next few months.

Mr. BAUMGARTEN. Maybe I'll become an agent.

You mentioned that you spent a considerable part of your professional life as a broadcaster. At that time, did you have any participation in the debates over the performance right?

Mr. SMITH. No. Not at all. I don't think that was a consideration at all. And we were all just starting to dance with each other, the record and the radio world, and it was wonderful. We were all able to use each other's facilities pretty well.

Mr. BAUMGARTEN. Do you think that you could say any of your comments today if you were a broadcaster? Are you still speaking——

Mr. SMITH. I'm trying to speak—obviously, my vested interest is in the music business now, but I'm trying to relate that. I've worked in news stations all over the country, and I can't believe the way this legislation is structured. Petersburg, Virginia, would be out of business, and Johnstown, Pennsylvania, is going to have to cut their newsmen out of the office, and because I think the overriding thing is—and I get back to it again—is that it's just right that this thing be done.

Mr. BAUMGARTEN. In your contracts the Register asked you about, is there a certain level at which no further sales are being made, and the performer can get the master and——

Mr. SMITH. There are some contracts that have master reversion even if it's still selling. If a major artist were to negotiate a contract today, he could probably build that in after a certain number of years with a sell-off, that it would revert to him. On the other hand, in the cut-out market that we have that inventory, we don't give the masters back. They have almost no value. We sell them at cost pretty much to people. You used to see them show up in stores at 99 cents and so forth——

Mr. BAUMGARTEN. In the case of master reversion, can the artist, if the circumstances are defined in the contract, and he——

Mr. SMITH. Absolutely.

Mr. BAUMGARTEN. What happens to the record company's contribution that we've heard about so much?

Mr. SMITH. We have ostensibly realized all of that. It doesn't go back in 20 minutes. We're talking about years that we have to sell their record. You only master for five years, and you can sell off your inventory for two months. It is not, first of all, very prevalant in the industry. And only a major artist, Neil Diamond or somebody like that of that stature, could negotiate that kind of deal because what it does to the artist, of course, is give him some equity. He now has the things he can go sell. Record companies, of course, discourage it because our entire assets are wrapped up in master tapes. But there are some cases where we just give it back to him and he can go elsewhere. Then it's up to us to——

Mr. BAUMGARTEN. When the master reverts, do you lay a continual claim to it so that if he takes it someplace, you still have "X" dollars?

Mr. SMITH. No. It's just part of negotiation that we have been able to sell the fruits of all that, realize the fruits of all that effort from both sides. After a reasonable amount of time when the bulk of the sales were made, he has the opportunity to take them and go elsewhere.

Mr. BAUMGARTEN. On the other side of that coin, there were some cases—and I guess they're still coming out in New York, at least—where a recording artist would find that a label he earlier recorded for has gone back, and taken some of the old demonstrations, concerts, and some of the others and started releasing them. The artists have been very upset about it. and they went to court, and in most cases they were successful in non-competition grounds. How does that relate to the provisions——

Mr. SMITH. Well, the unfair competition would really be based on how that was presented. And if I had an artist—if Bill Cosby were to start recording

again I would have no compunction about taking his earlier records and releasing them and repackaging them or whatever. As long as I clearly identified that they were old records, "The Best of Bill Cosby," or something or other. But what had happened in those cases was that somebody had one master or two and some very bad tapes they had picked up here and there and put it together purportedly as a contemporary album by that artist, and it was in the advertising and packaging that the objection lay.

Mr. BAUMGARTEN. Does the artist have any protection in his contract against that type of thing?

Mr. SMITH. Once again, it's the payola question. You're dealing with companies that are not really the mainstream record companies doing that. So that the artist may have some protection, but the contract is not generally honored. He'll never get paid for it. They could sell hundreds of thousands. There could be a token payment, and you'll be facing all the problems of theory with those people that get hold of those tapes.

Mr. BAUMGARTEN. One final question. Do you produce your own records or do the purchasers come to you and sell you a finished product?

Mr. SMITH. We have a staff of producers who record many of our artists. We're very much involved in the creative process in casting an artist. Carly Simon is one of our artists, and she's going to make a record this fall, and we're now debating which producer would be best for her. Elsewhere we then mutually decide who'll produce whose record. So that's a process we go through.

Mr. BAUMGARTEN. Do you ever buy finished products?

Mr. SMITH. Sometimes, very seldom, though. Very, very seldom because nobody can really afford to make a record album on a spec basis by themselves anymore.

Mr. BAUMGARTEN. The question may be meaningless because it's so unusual, but in the case where you go buy a finished product, is your contract solely then with the producer who comes to you or do you incur obligations to the performer?

Mr. SMITH. If it's a production company, "Baumgarten Enterprises." I make a contract with you, but I get a cover letter from the artist that in the event my relation with you breaks down, they're still obligated to you.

Ms. RINGER. I do want to thank you, Mr. Smith. I think you've made a very real contribution to this record, and I think future historians of the entertainment industry should benefit from your very, very full testimony. For their sake, just one last question.

Could you give us the history of how your company came to be named Elektra-Asylum?

Mr. SMITH. Well, they were both the products of two small talented individuals. A man named Jack Holsman started Elektra and spelled it, for some reason, with a "k." But he formed this company while he was still in college, and—as a folk company, and Theodore Bikel was one of its first artists, and many of you might be familiar with some of the great things Jack did for the company over the years, and Warner Communications acquired the company from Jack when he sold in the early seventies. Coincidentally, without a young man named David Geffen, who was an agent. Now, what happened was Holsman, Jack, retired or wanted to retire to other things, and we had this company without a leader, and we thought we'd merge them together. Asylum happened to be there at the moment, and we are now Elektra-Asylum, and David Geffen became the chairman of the companies.

Ms. OLER. Well, it has all kinds of classical and Freudian interpretations. Thank you very much.

Ms. RINGER. We have one more witness scheduled this morning, but could we ask you, Mr. Boyd, to come back this afternoon and—you'll not be able to come back?

Mr. BOYD. Mine will be a very brief statement.

Ms. RINGER. All right. We'll take a brief break, first, and then hear from you, Mr. Boyd.

[Brief recess.]

Ms. RINGER. Our last witness this morning will be James D. Boyd, Vice President of F.E.L. Publication, Ltd.

Welcome to the hearings, Mr. Boyd. You have a statement which you may read or speak to, as you wish.

Mr. BOYD. All right. I'll just read it. Thank you.

Thank you, ladies and gentlemen of the hearings committee, for giving me the opportunity to be heard. I represent F.E.L. Publications, Ltd., a small closely held religious music publisher of both recorded and printed music.

We feel very strongly that the copyright owners and recording firms and composers/authors-artists and performers must all have a legally protected interest in performance rights of music from copyrighted sound recordings. We also feel that unless the copyright law provides for some kind of compulsory payment for use of copyrighted recordings used in live, radio, TV or other performances, it will be very difficult to negotiate realistic views with the networks, stations or other sponsoring organizations even through perforcance rights organizations such as ASCAP, BMI, or SESAC.

As a member of ASCAP, we receive a substantial sum in relation to total income from use of our more popular copyrights, "They'll know we are Christians by our love," "Allelu," "Sons of God," "Love one another," et cetera. Obviously, we feel we must continue to have this revenue to survive in this business. Artists and composers must receive their share also. It is about time all of us begin to participate in playing of sound recordings by radio and TV stations.

We can see no serious harmful economic effect on juke box companies, or radio and TV broadcasters who have had free use of recorded music to date and only a beneficial effect from music composers, performers and copyright owners, et cetera. It would in fact, assure broadcasters the right to use previously recorded songs or tapes for broadcast performances as long as fees are paid for usage by stations, et cetera.

Since there is a heavy investment in producing a sound recording along with the expenditures for promotion, et cetera, it does seem only fair that the record producers share to some extent in performance rights for which they have materially contributed to create the demand for a particular recorded song. Perhaps 50 percent is a fair share. Maybe less. There could be a 30 day "free use," from release date for a new recording as promotional time prior to fees going into effect for station news.

In general, it seems unnecessary to involve the Copyright Office in collection and distribution of performance fees except as a last resort. If ASCAP, BMI or any of the other performance rights associations can continue to audit, enforce and collect fees and are able to distribute approximately 80 percent of the total revenue after expenses to its members, that is certainly preferable to use of taxpayer funds to administer and distribute these use fees.

Thank you.

Ms. RINGER. Thank you very much, Mr. Boyd.

Could I start the questioning with Mr. Katz.

Mr. KATZ. Yes. I have no real questions, Mr. Boyd. I would just like to comment that this suggestion for free use periods is a very interesting idea, and I think this might bear some very close consideration.

Mr. BOYD. Well, it seems that this whole issue has sort of come down to a confrontation between the record producers and the radio stations who have the most at stake, and there is some question of what is the value of promoting the sale of the records by playing it on the air and so forth. It's just a thought that these might be that sort of thing.

To add just a little bit, F.E.L. being a religious field, of course, it is primarily concerned with the many religious radio stations. I quote that, that of religious oriented programs. And they use recorded music just all day long. From the various religious record companies and the music publishers. And, of course, we never see a fee of any kind. Unfortunately, anything that's connected with religion, many people want to add the connotation that it should be free because it's all for the glory of God. Unfortunately, there are realistic problems of survival and paying the bills, and it's very inhibiting to artists and to composers not to be paid. So my point is that if a new religious record is issued, I think we would feel that for 30 days from that release date, we would be more than happy to have the radio stations play any songs that they would like to— I'm talking about the religious stations. But after that date, when they continue to use records and play songs—for instance, "They'll Know We are Christians by our Love," is probably played every day on every religious station in the country. And we never see a dollar from it. And they're getting the use of it, and it really doesn't do anything to promote our sales at this point. The song has been out for eight or ten years. So that's sort of the fact that we're talking about.

Mr. KATZ. Thank you.

Ms. RINGER. Ms. Oler.

Ms. OLER. In the testimony of the previous gentleman from Elektra-Asylum Records, he was talking about the time and money involved in promoting a

record. Would you see this 30-day period coming at a later point, or would you do it right after the record's released, is that really what——

Mr. BOYD. Well, when you say release date, I'm not talking about the day that it's pressed, that it comes out of the pressing plant. I'm talking about the—from the time it really reaches the marketplace. I think there is some difficulty in exactly determining the specific date. But this is just a thought that it might sort of solve the problem of—in promotional times and the value of it. It perhaps should be something like that.

Ms. OLER. Does the typical religious song have a longer life than most popular music?

Mr. BOYD. Yes, it does. And, of course, it doesn't sell like popular music in the—once in a while you get a song like "Bridge Over Troubled Waters," or the George Harrison song, "Our Sweet Lord," which is a hit right to the top, but those are very unusual for traditional religious music. By the way, our music is not so traditional. It's mostly folk music, the guitar type of thing where the churches want to put on the guitar masses or the folk groups and youth groups want to use that because the kids like the sound. In almost every Catholic church in the country and many Protestant churches today, they have folk masses or folk services, and you'll find that they're almost always the most fully attended, mainly because they like the sound. Of course, we've been xeroxed and photocopied and self-printed to death, and they've used our songs in virtually thousands of churches and parishes throughout the country without any kind of payment or acknowledgement. We're probably one of the few companies that's known outside the religious field, mainly because we sued the Catholic Archdiocese of Chicago recently, and that is still being heard. It's a very tough deal to take on the largest Archdiocese in the country in your principal market, and sue your best customer.

Ms. OLER. Was that on the basis of xeroxing or photocopying?

Mr. BOYD. Yes. We found that two-thirds of the churches in the Chicago area were using homemade, self-printed or xeroxed hymnals, using our songs without permission, without license. Unfortunately, Cardinal Cody didn't feel they wanted to make any kind of financial restitution, feeling that the church was somewhere above the law, that they could use anything they wanted to in religious worship. I don't understand that exactly, but that's his position.

Ms. OLER. Well, I take it then that in at least the recording end of your business, a performance royalty would be economically more important than it would even in the normal record company, which is based on sales?

Mr. BOYD. It really would because it has a much longer life. Of course, it doesn't get the frequency of play that you have, obviously.

Ms. OLER. But play is more important in sales?

Mr. BOYD. Of course it is. It's just the idea that we feel we should get something for it. We feel the people who have performed on the record should also receive something for it.

Ms. OLER. Thank you.

Ms. RINGER. Mr. Baumgarten.

Mr. BAUMGARTEN. Did I understand you correctly that your company is both a music publisher and a record producer?

Mr. BOYD. Right, and one of the reasons for that is that the only way we could get performance rights and so forth is being a publisher, having the copyrights owned by the company.

Mr. BAUMGARTEN. Could you explain a little bit more what you meant when you said you used recorded music to promote the sale of printed material?

Mr. BOYD. Yes. To begin with, F.E.L. started out, 10 to 12 years ago in the Chicago area, and didn't even start out as an essentially music company. It started out as a group of people who were anxious to get the Catholic liturgy into English, and that's what the name of the three initials stands for, "Friends of the English Liturgy." So that then, it sort of took off in that we were doing all traditional masses, and it was strictly 100 percent Catholic market. But then we had some people who submitted to us some songs of a folk nature, guitar sound, and the company decided well, let's see what it would do. Unfortunately, people had no idea what a hymn would sound like played to a guitar in a church service. So the only way you could really do it was to record it, put it on a record. So people could hear what the sound that they wanted to achieve in their own worship service. And so by getting the sound on a recording, people heard songs and said, "Oh, gee, we'd like to have that sound in our 11:00 o'clock liturgy," and so forth.

Then we started with the printed music, providing the guitar book and the hymnals for the congregation, and they can actually make the same sound. They can get the same feeling that they're hearing on the record.

So that's essentially the reason we use records and got into the record business. It's not a lucrative business. We don't make any money on records, frankly, and we have to look at them almost as a promotional type of thing. We try to get our money back, but it takes a long time.

Mr. BAUMGARTEN. You pointed out that a number of religious songs have crossed over to the popular charts. "Take the Hand," for example. And Johnny Cash released albums entirely devoted to a religious theme. Joan Baez, too. When religious songs are cut by a name artist, are they generally your artist or is it a cover made under a——

Mr. BOYD. We've never been in the position to afford a name artist. Being a small company. And, by the way, there are probably about 50 of the small religious publishing companies throughout the country. There must be 20, 25 of them at least that are associated with the Roman Catholic market. There are probably that many, maybe more, in the Protestant market. A number of our songs, such as "Christians," have actually had acceptance in both markets, and we have even licensed other publishers to use our material. Our songs. And on records as well. For example, we have a large licensee. We made Sadler Textbook Company in New York that publishes a religious education series. Well, they've sold a lot more records than we ever have. They use about 25 of our songs on those various records. The reason they sell them is because they sell them in connection with their textbook sales to schools. It's a market that's very difficult for us to get into. We generally sell to the church, the liturgy, the director, the assistant pastor who is in charge of the music in the liturgies in the various services for the church.

Mr. BAUMGARTEN. What did you mean—several times in your statement when you referred to the performance right as helping composers?

Mr. BOYD. Well, in our particular case, they're often the same person. Because it's very difficult for the individual to get the sound or something original, and in most cases they're doing their own rendition of the song. We just did a new record with a young fella here from San Pedro, Ron Griffin, and he does the actual performing, as well as composing the songs.

Mr. BAUMGARTEN. I'm somewhat familiar with your case, and I follow it in the trades more than anything else. I remember when you first broke, you were standing in the halls of Congress, and some music publishers were upset by the fact that you went ahead and sued at that particular point in time. As I understand, that litigation is based solely on your authorized reproduction and not performance——

Mr. BOYD. That's correct. Nothing to do with performance.

Mr. BAUMGARTEN. Under the new Copyright Act, Section 110, that performance of your music, talking to you as a music publisher, that the course of the hymnals is exempt, but could you see the same exemption for the sound recording during the course of the service?

Mr. BOYD. I think so. Although I have to qualify that. We worked out a special arrangement with churches when we found out there was no way to really police them and keep them from using our materials. There really isn't any way to enforce 22,000 Roman Catholic churches throughout the country and many thousands of Protestant churches. There isn't any way on a church-by-church basis you can go in and say you're using our material. It's just impossible, the logistics of it. So what we worked out was a permission license which says to a church that for a hundred dollars a year, less than two dollars a week, you can use as much of our copyrights as you wish in any form that you would like. You can produce them yourself. You can print them. You can play them. Whatever. And we'll give you this unlimited license. But it's limited to your particular church or parish. You can't transfer it and use it someplace else.

Mr. BAUMGARTEN. Is that a license for reproduction or just performance?

Mr. BOYD. This is a license for both, really. They can reproduce or they can print it or they can use it on a tape. You know, whatever they want to do. And we feel a hundred dollars a year is a reasonable enough fee that no church should balk at. And, as a matter of fact, since we filed the suit in Chicago, our licenses have almost tripled—the number of churches that have availed themselves of them.

Mr. BAUMGARTEN. Did you oppose this position of the new law which permits the performance in the course of services without fee?

Mr. BOYD. We really weren't heard on it. We didn't express an opinion one way or the other. We were a little alarmed at the thought that there is also another provision in the law which provides for reproduction of one copyright work a teacher and in certain instances, they can make copies if they can't buy copies. You are probably aware of the law more than I am. The free use. We were a bit concerned by that, but then the provision—there was actually another section of the law that provided they couldn't do it in order to avoid this sort of thing. And it was limited to sort of emergency situations. We've had a few schools and churches who sort of said that okay, wait 'till the new law goes into effect. We're just going to use whatever we want. We sort of had to put out a little bulletin to the effect that hey, wait a minute. The new law is even tougher than the present one. You're going to have to watch what you're doing.

Mr. BAUMGARTEN. Are you aware of any persons or associations who've gone around in churches in the metropolitan area demanding to see their hymnals and representing themselves as representatives of the F.B.I.?

Mr. BOYD. No, I've never heard of that.

Mr. BAUMGARTEN. I have. I've had phone calls. Thank you. That's apart from this hearing. I just thought I'd take the opportunity.

Ms. RINGER. Charlotte Bostick.

Ms. BOSTICK. Actually, I just have a couple of small questions.

I'd like to know whether you receive substantial mechanical royalties for licensing the recording of your work. Is it substantial or is what you're saying that you sell sheet music more than you license for recording?

Mr. BOYD. Well sell both, and licensing is a fairly substantial part of our income now. Mechanical licenses, of course, which provide for the two cents per copy per song, are not a big factor because the rate is pretty low. In religious music you aren't producing a million copies of something, like you might with Peter Frampton. But we do license both on a reprint basis to other publishers, and also for records, and so we obtain a certain amount of income from the recording license.

Ms. BOSTICK. You're sort of a unique witness because so far I don't think we've had any group or any person representing composers per se who have supported the performance rights for sound recording.

Mr. BOYD. Well, we are sort of, and, actually, the president of our company has done a lot of compositions of his own. But I must say they're more of the traditional religious music nature, and the folk music is really not our own compositions. We own the copyrights now, but the composers themselves were not part of the company. But we do sort of wear two hats in that we've both the music publisher and a record publisher, and we also get into licensing. That's just because, you know, we look anyplace and every place we can for revenue. When you're small and struggling, you just do whatever you can. So this opens another door to us, and we feel, you know, it's justified. This performance right.

Ms. BOSTICK. All right. Thank you.

Ms. RINGER. Thank you.

Most of the questions I jotted down have been asked and answered. But could you comment a little further on the status of the case. A complaint was filed, and where does the thing stand now, has it been to——

Mr. BOYD. It has not been to trial.

Ms. RINGER. Have there been any pre-trial actions?

Mr. BOYD. Oh, yes. There have been a lot of motions and so forth. About the only significant factor has been in answer to our complaint. We asked the judge and the federal district court in Chicago to require the archdiocese of Chicago to collect and submit all homemade self-printed hymnals from all of the churches in the diocese. Cardinal Cody elected to take a sort of retaliatory act and say we're not only going to collect those that are illegal and homemade. We're going to collect anything that has any F.E.L. material, no matter what, and nobody is going to sing F.E.L. songs in the Chicago diocese, which created a great deal of consternation among a number of parishes. We've had letters from people. Can't you do something? Let us use them. But we are not permitted to do that. Now, what he did was he collected over half a million hymnals or song books, 14 trailer truck-loads, I think it was, which he delivered to the law office warehouse. We then went—had to hire people to go through and sort all this out as to what was legal and what was illegal, and we finally got this done and found out that

something like 270,000 copies were illegal, and so the rest of them we returned to put them back in the church, and he said, no, we're not going to do this.

So, to make a long story short, we informed the church of what he's done and all this extra cost and extra work and everything, and the church blasted the archdiocese very, very unmercifully. They said that it was an absolute excessive use of power and retaliation, and that he had far exceeded what his order was, and it was very clear that he was ordered to return only the illegal homemade hymnals, and he'd picked up everything, and they had to realize that they were not above the law. They were going to be treated as any other defendant in the case. Which sort of shocked them. But they haven't come around to where they've even talked any kind of settlement or being conciliatory.

Ms. RINGER. Well, it was the point of this kind of boycott—if that's the proper term, that I was getting to. I have read something of this in the trade papers, and it has implications way beyond your particular case. The photocopying issue has something to do with respect to this. If a customer—you call this diocese your main customer. One of your largest customers.

Mr. BOYD. Well, they were.

Ms. RINGER. They're reacting to this sort of thing by saying, okay, we're going to stop this, but we're not going to ever buy anything from you again. This has very serious implications.

Mr. BOYD. Yes. It was a very hard decision for us to make, and it required long consideration. But when we reached the point where, even though we had made available to them at what we felt was a nominal fee, an annual copy license, so that they could legally use the music and the songs that they wished to, only one percent of the churches of the country were taking advantage of this situation. The rest of them were using works illegally. We felt we had to do something. So we, yes, we did go to court. Now, Cardinal Cody went a little beyond. He sent it out to all of his other bishops as much as saying essentially this was what they were doing in Chicago. Strangely enough, only in two or three cases have we heard of similar attitudes on the part of the bishops, and I think you have to realize they are men of the cloth, and except for an occasional one, who in this particular case happens to be Cardinal Cody, and a few others like him, for the most part, they want to do what's right, and they don't want to do what's illegal, and I think if we can reach the other bishops in the other diocese, and we're in the process of doing that, by the way, and ask them to work out an amicable settlement, we don't want to go to court. The last thing we want to do is sue somebody, particularly the church. But we felt it was sort of a last resort situation, when two-thirds of the churches were using our music and one percent of them would pay for it.

Ms. RINGER. The point you make is certainly well taken. The people in the educational community that have been doing this photocopying are extraordinarily emotional about it, and they take a rather extreme position in that they feel they're being driven to the wall. This is perhaps the most extreme I've heard, but it's not completely uncommon.

Just for the sake of the record, the new law, as you suggest, in this area does contain a fair use provision which is flushed out—if that's the proper term—by guidelines that are printed in the report and which deal specifically with the photocopying of music, and I think it does have some bearing, as you suggest. It does not have the force of law, but it does have the endorsement of Congress as being an appropriate interpretation of fair use.

Mr. BOYD. Well, we're using those guidelines as a basis for saying you're still not able to photocopy anything you want to, carte blanche.

Ms. RINGER. Your company apparently had a completely Roman Catholic clientele, originally. Was it denominational in its origin, or was it strictly a commercial service aimed at that market?

Mr. BOYD. Well, when it originally started out, it was pretty much denominational, and it was a group of people who were actively working for a cause, but, as I say, then it sort of mushroomed and kept growing and got over into the music publishing field because nobody else would publish it—they didn't want to publish something like that.

Ms. RINGER. It's in no sense a non-profit organization?

Mr. BOYD. Well, no. It's close to it, at times.

Ms. RINGER. It's a no-profit organization?

Mr. BOYD. It isn't planned to be, but once in a while it's been a little touch and go.

Ms. RINGER. You're a member of ASCAP. Are you affiliated with any of the other national or international organizations, RIAA or——

Mr. BOYD. We're a member of National Music Publishers Association in New York, and there's a local group of independent music publishers here in Los Angeles that we're participating in.

Ms. RINGER. Is there any religious oriented organization? I know there's an Evangelical Publishers Organization. Are you a member of anything like that?

Mr. BOYD. No, not really. There's a sort of a loose association of liturgical publishers who get together once a year at a national liturgical convention. It has to do with the bishops—but that's about as close as it comes. We've been unable to completely work out anything cooperative with other publishers. We're in the forefront of trying to work out a joint publisher license which will say to a church, okay, now you don't have to go to half a dozen publishers to get the songs you want. You can go to one, and the one will represent all of them, but it's got a few pitfalls in it, and it still hasn't been worked out, and some of them are afraid of it, although at this point we have about four or five that have agreed to participate in a joint license.

Ms. RINGER. Well, I guess that kind of answers my next question. You're really at your own initiative?

Mr. BOYD. Oh, yes.

Ms. RINGER. You're probably speaking for others similarly situated, but you were not singled out to represent others?

Mr. BOYD. Not officially. But I just felt that maybe a company of our size and in our industry—which is a little different from the big operations like Twentieth Century-Fox or Warner Brothers or other large music publishers—should have perhaps a little input. Because we're vitally affected.

Ms. RINGER. But your consciousness was raised by the activities in the photocopying area, and I think this has made you aware of what is happening elsewhere or what could happen, and I think that's tremendously interesting.

You suggested that you don't have the wherewithal to get stars, but who are the performers that you deal with?

Mr. BOYD. As I say, in most cases they're the composers. What happens is an individual with some talent, hopefully, submits to us some religious songs that he's written, and sings on some kind of a tape that he submits for our review. If we find one that we think has the right kind of sound, why we'll sign him to a contract and have him do a record and then publish his material and print it for him. And that's the name of the game.

Ms. RINGER. How large is the group of performers that you normally use on the record?

Mr. BOYD. Well, we usually have one name lead performer who is probably the composer. Not always, but generally, and then we will back that up with regular studio musicians and singers. It just varies from song to song. We might have a whole chorus on one song, a back up group of 20 singers. On the other hand, on another song it might be nothing but the guitar and the composer-artist.

Ms. RINGER. I'm trying to get at your contractual arrangements. Are most of your contracts, aside from the ones with the composer artist, union contracts?

Mr. BOYD. Oh, yes. We use union studios.

Ms. RINGER. All together. And whose facilities do you use for recording? Does it vary?

Mr. BOYD. Yes, it varies, depending on where we can find studio time—when it's available.

Ms. RINGER. I get the picture. OK.

On this 30-day suggestion, I think it does strike a chord with some of us up here because something very close to that suggestion had been thrown out in the radio-taping area. Do you feel, though, that your situation is so unique that it wouldn't work in the broad commercial pop-rock area?

Mr. BOYD. Well, I think it might work more, because, in general, they have a much shorter life. A song hits the market and it's popular for a relatively brief period of time.

They make all their money. I'm talking about the regular commercial record companies. And, you know, it sort of dies and drops off the charts. But in our case, why, a song or a record will go on for years and years. It's just that, when the record is new, you like to have air time. You like to have it played and you like to have exposure, but I think there has to be some kind of a wait.

Ms. RINGER. I agree with the other members who have said that it is a very interesting suggestion and it's the first time that, in this context, this suggestion has been put forward, and we are grateful to you for it and for your very interesting testimony.

Are there any other suggestions from the panel?

Mr. BAUMGARTEN. I don't think we have any broadcasters from RIAA. I'd like to find out their reactions to that 30-day suggestion.

Ms. RINGER. Well, they'll read the transcript.

Mr. BOYD. Thank you very much.

Ms. RINGER. It's 12:30. Could we make it 2 o'clock, Mr. Read?

Let's adjourn until 2, and I think we can finish them by 3:45, which is when we have to finish.

[Lunch recess.]

AFTER RECESS

Ms. RINGER. I'd like to call to order the last session of the current series of hearings on Docket 77-6. Our remaining witness is Mr. Cecil Read.

Would you come to the table, Mr. Read, and identify yourself?

Welcome to the hearings.

Mr. READ. Thank you. Thank you, Ms. Ringer, and members of the panel for the opportunity to make a statement and to testify in this hearing.

My name is Cecil Read. I reside at 9415 Olympia Boulevard, Beverly Hills, California.

In testifying before the panel, and in furnishing certain documents and other information, my only purpose is to provide a complete historical account of the circumstances, events, policies and conflicts which musicians at the Musicians Union experienced between 1930 and the present time. This was a period of drastic changes in the lives, employment and prospects of musicians as a group and as individual human beings seeking a good life.

In reviewing the problems, policies and actions of the Federation in trying to cope with the drastic changes brought about by technological progress, it is not my intention to open up past conflicts between Federation and many of its members, primarily the Los Angeles group, or rehash problems culminating in the trust fund lawsuits and the Musicians Guild of America in the 1950's. Those conflicts have been long settled and should be laid to rest. My purpose is, one, to provide the panel with information and statistics which may be useful in arriving at its recommendations to Congress with respect to performance rights for sound recordings. Two, to give an accurate and personal picture of the adverse impact on musicians' employment caused by the unauthorized and uncompensed use of sound recordings. Three, to give the background for the apparent change in the Federation's position with respect to performance rights in the fifties or sixties. Four, to show the difficult dilemma faced by the Federation in trying to reconcile the interests of its members who make the sound recordings and the members who have been denied the opportunity of musical employment as a result of the unauthorized use of the sound recordings. And five, to show the steps taken by the Federation in trying to meet the problems resulting from the undevelopment, use, and misuse of sound recordings.

I've been a professional musician, trumpet player for over 50 years. I was one of the few who, through talent, hard work and, perhaps, luck, survived in the music business. First I worked in Chicago in theaters before there were sound movies, then in radio stations before there was an NBC or CBS network, and in hotels and dance halls before live musicians were displaced by juke boxes and wired musical services. In 1947 I moved to Los Angeles, where I've worked for network radio programs, before this employment disappeared. For phonograph records, on network video tape television program. In a motion picture and in TV films. I have lived through and experienced as a playing or performing musician all of the changes in musical employment from the inception of sound recordings. I've known the impact on musician employment and lives caused by these changes. In 1955 as Vice President of Local 47 AM of F, I became the spokesman for the Los Angeles Recording and Film Musicians, and leader of the revolt against the AFM trust fund policies established under the leadership of James C. Petrillo, then president of the Federation. From 1956 through 1964, I was chairman of the Musicians Defense Fund which prosecuted and financed the litigation seeking changes in Federation collective bargaining policies and the music performance trust funds.

From 1958 through 1961 I was president of the Musicians Guild of America which for three years replaced the Federation as the certified bargaining representative of musicians in the motion pictures and television film industries in Los Angeles and a few California based phonograph record companies. From 1962 through 1968 I was the representative of the Los Angeles Recording Musicians Advisory Committee, and participated in all Federation negotiations with recording, film and television industries. Between 1964 and 1972, I was the special-claims agent for the receiver, Crocker National Bank, appointed by the Superior Court of California to assist the receiver in the processing of claims of musicians and the distribution of some three-and-one-half million dollars resulting from the settlement of the trust fund lawsuits. From March 1974 until April 1st this year, 1977, I was employed by Local 47 as the administrator of all AFM national recording and film agreements. I've worked in the Los Angeles area. I'm now president of Cecil Read Associates, a new venture, organized to act as consultant and advisor in the television, film, recording, motion picture and other recorded and filmed industries.

I have furnished to the panel, to Ms. Oler, a copy of the appeal of Local 47 before the International Executive Board dated January 1956, a copy of the economic study prepared by Facts Consolidated, also dated January 1956, which provided the factual data and statistics incorporated in the appeal of Local 47, as well as additional statistical data. And I would also like to file with the panel a copy of the letter dated September 5, 1961, from Herman D. Kenin, then president of the American Federation of Musicians, addressed to me as president of the Musicians Guild of America, setting forth the terms of agreement between us, which resolved the conflict between the Federation and the Guild and reunited all professional musicians in the Federation.

I ask that these documents be considered as part of my testimony and included in the record of these hearings.

I repeat that the introduction of these documents and my testimony is not to rehash old conflicts, but to provide a complete historical record. The legal, constitutional, and economic objections to the establishment of performance rights in sound recordings have been answered by the statements of the Recording Industry Association of America and by others. The questions of equity and morality of the situation which has developed because of the lack of copyright protection of sound recordings is not necessary "to promote the useful ciation and the statements of individuals, the record companies and the performers unions. I endorse and support all of these statements. I would like to address my remarks to two other issues or arguments made by those opposed to this legislation. First, the statement that the union should protect its members' employment and economical welfare by contract with the record companies and other users of the performers services. Second, the claim or argument that copyright protection of sound recordings is not necessary "to promote the useful arts and sciences."

I believe that I can also fill in the gaps on pertinent subjects that have not been covered in previous testimony, such as the sound track regulations in all past and current AFM labor agreements and Federation policies regarding new use and reuse of musician services, the genesis, structure, and operation of the musicians special payment funds, phonograph and motion picture, supplemental rights and paid TV and home cassette provisions in the current AF of M agreements covering films, television film, and motion pictures, and the current practice in the reuse of sound recordings and film clips in new productions.

In point of time, the first and most obvious problem of displacement of musicians came with the advent of sound movies in the late twenties and early thirties. As President Davis testified to, I guess it was yesterday or the day before yesterday, overnight 35,000 musicians working in pits in theaters in this country lost their employment. This loss of employment had a deep and lasting effect on the thinking of the Federation and its members, and probably was the controlling influence on Mr. Petrillo's policies as president of the Federation between 1940 and 1958 in attempting to deal with recording, film, and network broadcasting.

The next big loss of employment was concurrent with the inception and development of the juke box industry and its use of records. This replaced a great many musicians working in small bars, in clubs, in hotels, and places of that sort. That was a dramatic adverse effect on actual and potential employment.

With these two situations as a background, the union was aroused to try to do something to stop or to limit the inroads of sound recordings on the live employment of musicians.

Let me take up the claim that the union should protect its members' employment and economic welfare by contract. To my knowledge the AF of M has tried consistently and continually to do just this in all of its labor agreements and it has failed. The Federation efforts to protect employment opportunities and to stop the unauthorized and unrecompensed use of the sound recordings of its members have been counterproductive. I believe that history and the record will show that there was a basic error in policy under which the Federation, that is, Mr. Petrillo, tried to solve the problem by the union's economic strength and by contracts with employers rather than advocating and pursuing a policy of performance rights in sound recording for the musicians. It is my belief and conviction that Mr. Petrillo, from the time of the 1940's, was suspicious of, and did not want to attempt to operate through, any legal rights for individuals. I have been told, and I believe, that the reason that the composers were never included as members of the union, was that most of them have been members as leaders or conductors of music, and the fact that arrangers as such are not covered by our labor agreements was because they had individual property rights under copyright protection. Mr. Petrillo was long suspicious of law, of lawyers, and of resorting to these areas for health or protection. He grew up in an area in Chicago of violent labor disputes and problems of labor trying generally to become established.

He was what I would term a very effective old-time, old-style labor leader. In all of my investigations and research on him, I have found no indication that he was dishonest in any way or that he was operating in any other way except in what he considered to be the best interests. But he gave the impression of being a strong-arm dictator, and laid himself open to all kinds of adverse publicity and character assassinations and anti-union objections that the musicians union has never recovered from, to my way of thinking. The Waring and the Whiteman cases in the late thirties or early forties produced court decisions that made it impossible for the union to endorse the terms of its collective bargaining agreements with the record companies set forth in the familiar phrase printed on all phonograph records prior to that time in large letters, "Not Licensed for Radio Broadcast." This immediately opened the door for the unrestricted, unauthorized and unrecompensed use of phonograph records on radio stations, with the corresponding loss of employment of live musicians, in network programs, stations and local radio stations.

I recall very well that the Fred Waring Organization had a weekly radio program. I don't know what it was paying, maybe twenty thousands dollars a week at that particular time. At the same time, you could tune in a disc jockey who played the Fred Waring records and didn't even announce that it was records being played, but said, "We will now have a program sponsored by Joe Doaks Company, featuring the Fred Waring Orchestra," and there it was, which was as good as the live program that somebody was paying a lot of money for.

The same thing happened to Whiteman. This was in the early forties. It produced impossible, unfair competition, and I believe that was the first mistake, procedurally, that was made by the Federation in failure to follow through on those adverse court rulings all the way to the top, and try to reverse them. I really don't know how far they went, but I do know they never went as far as the United States Supreme Court, which, I feel, they should have. Perhaps the atmosphere and the knowledge of mechanical rights and the problem of mechanization or technology were not as obvious at that time, but I believe that the musicians of our union were the first victims of this phenomenon that we have all come to accept.

The union solution, Mr. Petrillo's solution, was to stop phonograph recording by members of the Federation of Musicians. He sent out notices to all the record companies that the union had permanently and irrevocably abandoned this type of employment and would no longer sign an agreement with anyone to produce records in the United States or Canada. That lasted for 27 months, 1942 through 1944, and at that point, there was an agreement worked out with Decca Records, the first one to try to come up with a solution to provide for royalties on records sold, payable to the union.

That was the inception of the original recording and transcription fund which I believe Mr. Kaiser and Mr. Davis mentioned in their testimony. The royalties

paid to the union were used to provide employment and wages to musicians who had been displaced by the use of the records. It did not benefit the musicians who made the records. I think when you have the opportunity to study all the background in this appeal of Local 47, it will give you a better historical perspective and knowledge and information of just exactly what we're talking about at this time.

During the forties and fifties, the unions' main concern under the leadership of Mr. Petrillo was to use his bargaining agreements to try to compensate members who had been or were being put out of work by the commercial use of sound recordings. The whole weight of the unions' official position was to try to help people out, which was a very good social goal, but it played havoc with the activities and opportunities and work of the actual professed highly skilled professional recording musician and has continued to since that time.

Mr. Davis and Mr. Kaiser referred to the Lea Act. Now prior to the passage of the Lea Act, the Federation had attempted to protect the employment and opportunities for employment of musicians in radio stations by economic pressure and contract provisions in network and local labor agreements. They also attempted to limit the use of military bands and amateur organizations because that, too, took so much of the time available for live music. I happened to be working on the NBC staff in Chicago at that time. So I'm well aware of what went on. The broadcasters and the anti-labor press had a field day lasting for many years based upon Mr. Petrillo attempting to stop their children from being heard on the air. There was a big-to-do about the interlock and music camp interlock, and it's all past history, but it was, as Mr. Kaiser indicated, it was a very effective job of character assassination for Mr. Petrillo and for the rest of the union.

Well, the Lea Act was passed in 1946, and made it a criminal violation for unions to attempt even in negotiations to force any employer who came under the FCC provisions, I think—the Federal Communications Act—to force any employer to use more musicians than he felt he wanted. In other words, you couldn't negotiate for a staff orchestra on any station, or strike to secure payment for services not to be performed which would be the reuse provisions of the network broadcasts and things of that sort. Well, that effectively put a stop to a great deal of the union's efforts to, rightly or wrongly, protect members and to provide employment. Then the Taft-Hartley Act in 1946 closed the remaining doors of the union's powers. The provisions of this act made the Federation's royalty fund from records illegal, and there was another strike for a year, the year 1947, which was settled in 1948 by a provision approved by the Attorney General of the United States that the fund would be called the Music Performance Trust Fund, would be set up by the employers without union participation or control, and under the direction of a trustee recommended by the employers and appointed by the Secretary of Labor. For all practical purposes, it was a continuation of the prior radio and transcription fund. The royalties were the same as had been negotiated to begin with, and the manner of distribution of funds, which was on a pro rata basis to each local. They didn't call it the local with the new funds. They called it areas that just happened to coincide exactly with the jurisdiction of 700 locals in this country, but they got so much money, depending on what was in the pot to be distributed, and they were supposed to use it to provide free concerts, band concerts, something to stimulate or promote live music.

Theoretically, the fund or funds—because there's other funds—which came in later were not under the control of the union, and were not supposed—they were supposed to come out of the profits of the employers. In actual fact, as this appeal documents, it came out of procurable benefits, wage raises and reuse payments that could have been and should have been procured for the musicians who made the sound recordings. At that time, in 1956, the record totals amounted to about three percent of the union membership, and I doubt if there's any more today, actually, in percentage to the entire union membership of 330,000 membership.

This fund was Mr. Petrillo's solution to the problems of unemployment, and he used all of the economic powers at his command to increase the royalties or payments to the fund. He was not content with royalties on records, and when television finally became a new field, he didn't know what to do with that, and consequently from 1946 to 1951, in a time when the television film industry was developing, no employer could hire a union musician to play music for a television film. He forced the industry to learn how to get along without us for the five

years when they were developing, and then Mr. Petrillo put in a provision for payment to the trust fund, the so-called five percent royalty provision of station time charges or several formulas at that point, that made it economically impossible for anyone to hire musicians to play in television films, with the result that, by 1955 or '56, when this whole battle came out in the open here, 95 percent of all television films produced in this country were done with track or foreign recordings or something of that sort. There was no employment for musicians. At the same time, because of the changes which Mr. Smith described this morning, there was no more radio business. So we were out of the radio business, and we had no television business to compensate for it.

Along about 1953, Mr. Petrillo negotiated a provision with the motion picture industry—incidentally, he was a very forward looking man. He foresaw problems. He just didn't know how to handle them. And he foresaw as early as 1946 the problems of motion pictures being released on television, and they wrote into all contracts with the motion picture industry a provision which said they were restricted and could not release any motion picture containing recorded services of members of the Federation, under Federation agreements to television without coming to some further agreement with the union. They made it stick so that it not only covered all pictures produced after 1946, but all pictures produced before 1946 back to 1930's when they first had contracts. So he was very smart and aggressive in tying this thing up.

Well, the first time that the industry wanted to release motion pictures to television sometime in the fifties, he made an agreement with them by which the musicians who had worked on those pictures would get a small reuse payment for—or new use payment for this transfer to a new medium. Twenty-five for a side man, fifty dollars for a leader—it's spelled out in our field here. And for several years the musicians out here in Hollywood, where 97 percent of all motion pictures had been produced, were benefitting from this. The major studios at this point had not released their films because of the problems they'd had with the distributors; the exhibitors were terribly concerned about the impact of films on television on the motion picture theater attendance, and so that was a conflict there.

Well, in 1955, when the contract basically, in effect, called for these payments, these $25 payments, at the convention, Mr. Petrillo—someone, I guess Mr. Petrillo, proposed and the convention adopted a provision giving him the authority to change those agreements in the future so that all the monies from reuse would go to the trust fund rather than to the musicians. He already had a provision for a five percent royalty payment, which was tremendous, going to the trust fund. Well, that was the last straw that sparked the revolt out here in Los Angeles. The trades were full of the situation of Warner Brothers during the release of a thousand pictures to television. RKO was releasing 750 of the pre-1949 pictures. Every major studio, there were 800 and some—I don't know how many there were. Some of these musicians who had been working in the studio since the 1930's virtually saw amounts up to $25,000 apiece just being taken out of their pockets overnight at a time when they were in an economic slump themselves. And the atmosphere out here was just unbelievable as far as stimulating resistance to the Federation. We found also that, in 1954 phonographic record negotiations with the industry, that Mr. Petrillo has tried to increase royalties to the trust funds, which had been resisted successfully by the industry, and the industry was willing to pay an increase in wages to the musicians.

It was still the same in 1954 and the contract that Mr. Petrillo negotiated and the producer signed continued the $41.25 rate through 1958 but provided for additional payments on the trust fund based on a percentage of the musicians' salaries, not on records sold, and this was 10 percent for two years and 21 percent for three years. So that went to the trust fund. Those two areas became the substance of the trust fund lawsuits. And that got sparked. As a result of what happened, that's when the musicians in Los Angeles got together, and we attempted to make an appeal, which you have a copy of, which was turned down by the Federation. And in toto. They thought this was an attack on the trust fund and on the policies, and it was rejected. The musicians revolted. We set up a musicians' defense fund to raise money to prosecute any legal action to protect our rates, to protect our members. We knew that under the Federation constitution, the local couldn't do it, though the local was 100 percent behind this movement. The Federation via telegram overnight could take over the local and cut off any funds that would come through the local itself. So we set up an independent fund which prosecuted lawsuits and paid the lawyers.

And that's history, and we can get into that from here. As it turned out, it was successful history. We won in the courts, and the lawsuits were finally settled, which restricted and limited the powers of the union to do as they wanted to with what was negotiated in the collective bargaining.

About the same time, there was a strike, or in 1958 there was a strike in the motion picture studios here. That is also past hitsory. There are many contributing factors and causes for the strike, but, as a result of it, it looked like the musicians here were losing their complete employment in motion pictures, as they had lost employment in TV films to overseas areas and to soundtracks and things of that sort, and in desperation we started the Musicians Guild of America. And despite all—what shall I say, opposition and unrealistic feelings and hopes on our part and the fact that nothing like this had ever been successfully done before, we did exist and we won an election and became the bargaining agent in the major motion picture studios. And we existed until about three years, until such time as we were knocked out two years later in an election by a very few votes, but that also is not part of this discussion, and we stayed alive and finally in 1960 or—no, 1961, the Federation approached me and my vice president of the Guild. We were in New York trying to get the support of New York musicians for further FMBA elections and the record industry. And we had a long conference with Mr. Kaiser, who you met here the other day, and we discussed the mutual problems, and we agreed that the musicians would be better served by uniting again in one union so we wouldn't be whipsawed between employers, and, as a result of that, the Guild, on certain recommendations and commitments by the Federation as to what they would and would not do in the future, voted to dissolve and everybody go back, and that is contained within this paper which I have filed with you, which provided for the inception and the setting up of the special payments fund in the recording industry.

That was negotiated between me and Mr. Kenin and Mr. Kaiser in 1961, and was then implemented at the negotiation with the record industry in 1964. As part of this commitment, they agreed also that any procurable rate raises which had reuse or residual payments would go to the musicians working in the industry rather than to the trust fund or for some other purpose, and that the musicians who worked in the industry for the first time would have the right to ratify the agreements under which they were going to work and to participate in the actual negotiations.

So that is quite a bit of the history of how that was solved, and the basic dilemma that Mr. Petrillo faced. It was a dilemma, a very difficult dilemma as to which way to go. Where was the responsibility, where was the moral and legal responsibility of a union official to rule between the best interest of the people who were being displaced by automation and technological process and the interest of the people who are making the records and the sound recordings. It was a difficult problem, and the change took place in the sixties as far as the performance rights. Mr. Petrillo resigned as president of the Federation in 1958 at the convention. About that time the actual court case was taking place here in California. By this time, the playing musician had more of a say in what was going on in the union. You must remember that the actual professional playing musicians, particularly the recording musicians, are a small part of the membership of the union and the union structure is set up in such a way that the ultimate authority is with the International Executive Board of the Federation and sustained by the annual convention where the professional musicians and the big locals are just the complete minority in the decisions there.

By this time with the best efforts, the best interests of the playing musicians at heart, and with Mr. Kenin and Mr. Kaiser doing the negotiating, the union's powers to protect the members had been seriously weakened, if not almost wiped out, by the Lea Act, by the Taft-Hartley Act, and by the technological progress in recording and films and tapes. So that actual strike action or threatened strike action had no real meaning as far as being able to stop a network or a show or a motion picture company or anybody else to get this brought out. It could be difficult or embarrassing or maybe not as good, but there was no way that the union by strike action or anything else could actually bring any effective pressure to bear. That was a completely different situation than that which existed when Mr. Petrillo's policies were developed in the thirties and forties, when you called out the musicians, and that stopped the clock in every industry in this country that needed music.

Well, the unions tried desperately. They're still trying today. We've seen a steady lessening of employment in all the industries that make sound recordings

since the 1950's. I've been actively involved since 1960 when I went back. I participated in all the negotiations. I went to all of the network negotiations where we would see as recently as 1950—no, it was 1960, '62, I think was the first network negotiation I attended. New York had 65 men on every staff. There were staff orchestras still in Boston, in Detroit, in St. Louis, in San Francisco, and in Los Angeles. Chicago had 40 men on each one of the network staffs.

The whole thrust of those negotiations by the networks was to see how many staff musicians they could eliminate and from what cities at that time. And during negotiations we saw the steady whittling away until a this point there is not a single staff musician employed, nor has there been in the last four or five years that I know of, in any radio network or radio station in this country. They use programs and video-type programs which are produced primarily out here in Los Angeles by independent producers for network release, and more recently for syndication, but there are no steady jobs, and the biggest product that is being used on the television stations and networks today are TV films, and unlimited reruns of those where we used to make 39 shows in a year. Now we're lucky if we make 22 shows, and the rest of them are reruns or preempted for some reason or another. There is no residual payments for musicians in TV film. The flood of theatrical motion pictures is taking up a tremendous amount of air time, both in independent or syndicated stations and on the networks, and while we do participate to a small degree per the theatrical motion picture special payments fund that was negotiated I think in 1964 or 1962 when the Federation went back into the—but they never were out of the networks. This was negotiated with the motion picture and TV film producers. So we participate in a royalty basis in those areas.

That covers only motion pictures produced since 1960. When it comes to the supplemental rights that are in the agreements today, that covers only pictures produced since 1972 for home use pay television, community antenna use, things of that sort which may very well be a big market in the future. But at the present time it's minimal as far as the money is concerned. The phonograph record special payments fund, incidentally, because of the tremendous increase in recordings and sale of records, has produced a great deal of money for the actual recording musicians. I think since its inception—I saw something the other day, an announcement that it resulted in some seventy-five million dollars since 1964 and was being distributed to whoever made the phonograph records. The figures that were given out by the Federation that they were going to some 40,000 members of the Federation, I don't question their figures, but I don't think it gives a fair picture because those—the way the fund is distributed today, anyone who has made a single record five years ago would still get a payment this year, a small payment, but a payment. So on that kind of basis, it does not indicate how many musicians were actually engaged in recording this year for the phonograph record companies. Some of them may have been in and some out. Some of them may have done one record. The people who have been very successful and greatly employed in the record industry have cleaned up. No question about it.

I think that's one of the problems, or arguments that has already been made about the bad cats in this industry, that if performance rights are granted in sound recordings, that only a few people will benefit from them. It may be true to a certain extent. I think that examples that were quoted and cited are incorrect. They talk about a Peter Frampton or Elton John and the rest of them. But that does not indicate the number of musicians who may have been involved in those recordings, the aide men who were never mentioned and who could benefit from these payments if they are successful. Also there's the argument that exposure is good for the musicians, exposure on the radio stations is good for the musicians. It's true for the star, but not for the man who's making the record sell. His name is never even mentioned, and I know that is true on most of the FM stations that I listen to around this town, I assume it's the same way around the country. They don't even indicate the orchestra who's playing the music. If it's an Elton John record or one of the top, that's a different matter. But those benefit only the artists themselves or the name performer. So I don't know what the answer is on that. I've heard all the arguments and reasons that have been given to try to account for the illogical and immoral fact that work for musicians has declined in direct proportion to the increased availability and quality of musical performances enjoyed by listeners through records, tapes, radio, television and the theaters. And if we compare the total revenues of the

users of our recorded film performances, the juke boxes, the radio, TV stations, the networks and so forth, with the amounts filtering through to the musicians whose talent and work produces these records, films and tapes, the picture is still more unjust and more heavily weighted against the musicians.

It has been getting worse for 40 years, and today it's intolerable. The Federation blames the Lea Act and the Taft-Hartley Act. The musicians blame the Federation, or if they are not recording or film musicians, they blame the musicians who make the records and the films. Everybody blames the record companies or the networks or technological progress. Well, I think that all must share in some degree to a greater or lesser extent, depending on who's assessing and distributing the blame, but I'm convinced that the underlying and overriding cause is the lack of legal protection for the performance of sound recordings. I know it wouldn't solve all the problems. There are too many differentiations in the talent, abilities, drive, and willingness to work for musicians today, and there's just not enough work to go around. It's disheartening to see talented young people trying to get into this business, and they don't stand a prayer. They give up after a while, go into some other line of business, and it's just too much.

I'm not too familiar with all of the provisions of the Danielson Bill, but I would earnestly recommend that all forms of sound recordings be protected by copyright legislation, and that the rights be spelled out as the legal right of the performers to protect him and his fellow performers against unauthorized use of his recorded performance, and not be vested in record companies or any other such agency. I believe that if such were the case, it would give the union and the guilds that represent the performers some kind of a legal basis for negotiating for the protection of their members. And what the ultimate outcome would be and who would benefit the most from it, I can't even guess at this time. But I do know that the other methods that have been used have failed dismally, and that the picture of the music industry and music as a profession today is limited to a very small number of very highly successful, highly qualified people.

We have musicians here in Hollywood today. They've come here from all over the country because work has practically dried up in New York, which used to be the center. Nashville is making records today. Chicago has nothing but a few commercials and light employment. It used to be a big center, when I worked back there in the forties. New York doesn't have a single—I think they've got one regular television show coming out of there and one TV film that is supposed to be made back there. They are no longer the center of the phonograph recording industry. I think they still are the center for commercials, spots and jingles, but the work has come to Los Angeles through no particular effort of ours except the availability of studios and talent and technicians out here. It seems to feed on itself and go that way, and the work out here is limited to a comparatively few skilled musicians. I would say that at the present time there's—as Mr. Kaiser and Mr. Davis pointed out, there's the greatest collection of musical talent in this town available to work in the history of the world or any other place in the world today. I know from my own personal experience that we could put together, if there was studio space available in this town, 10 or 12 100-piece orchestras with a top professional in every single chair. But there just isn't that much work around today. Some of the musicians in this town, it's true, are making great salaries that were never dreamed of 15 or 20 years ago or even 10 years ago. They're working very hard. They're working around the clock. They're very much in demand. They're extremely well qualified. I was a very good trumpet player in my day. I would have to come into today's market. That's the way I feel about it.

I haven't tried in the last 20 years, but I wouldn't want to start up again, even if I were 15 years younger.

Be that as it may, it's a situation that I think demands some kind of help, more than we have been able to get so far. Otherwise, I'm sure that there will always, no matter what happens, there will always be some musicians that will be working at this industry and probably will be well paid for the work that they do. But the tremendous wealth of talent, all these young people that are going to music schools, that are practicing and getting training, they've got no place to go. No place to go. I understand that from the people that I talked to, a lot of friends that have traveled around to the different colleges, giving exhibitions and so forth, some of the fine jazz musicians have gone around. They tell me—and I believe it's true—that the college orchestras, you know, the student orchestras in this town are fantastic. They can sit down and play in a way that

the big bands of the forties that I was familiar with couldn't even touch. These are the amateurs. And they've got no place to go. No place to use their talents. This is a waste, and it should be corrected.

Thank you.

Ms. RINGER. Thank you very much, Mr. Read. That was an exceptionally illuminating and eloquent statement, and it expressed, in fact, what I've felt for many years. You recounted a great tragedy, a real American tragedy in a sense, one of the worst I know of. I might say that we are all from the Copyright Office, and over the years, we've seen the progression of musicians, trained, talented musicians, who wanted to stay in music and tried to find work and simply were not able to find jobs in music. We have musicians working in the Copyright Office instead of practicing their art, which I've always felt was a tragic situation. I also very much appreciate having a recounting of what obviously is a painful history in the music industry, and I do feel that you've cast a great deal of light on some things that have puzzled me over the years.

Let me start the questioning with Richard Katz.

Mr. KATZ. Mr. Read, you seem to indicate that it was your very firm belief that, really, the only thing left now is the institution of a legal right to protect the situation.

Mr. READ. Yes. Thats' correct. I'd like to amplify on that, if I could for a moment.

It's true that the Federation has in their labor agreements what we call sound track regulations and restrictions, with the employer that hires the positions in the first place. It's in phonograph records. It's in motion pictures, television, all the rest of it. But because of the way the business is working today, the Federation has no legal contact with many of the producers that use these records. The new productions take clips and use them from old motion pictures or old films. In other words, the contractual restriction that is defined and agreed to by the original producer of the music does not follow the product when it gets used by somebody else, unless there's a direct relationship between the ultimate user and the original producer. I hate to tell you what percentage of cases there's no connection between them. The Federation seems to be helpless to proceed against somebody when they've had no contractual relationship with them in the first place. I'll give you examples. It's happened in the big motion picture industry in the last three years. You're all familiar with the picture "Shampoo." But that picture was made exclusively with phonograph records, some from this country, some from England. But it was produced by an independent producer, I guess Warren Beatty's company, and he was not a signatory to any AFM music agreement. He had some kind of an agreement with Warner Brothers—I think it was Warner Brothers Pictures—for finances, but he had absolute artistic control.

A lot of these young movie producers and so forth, they're trying to break away from the old Hollywood tradition. They refuse to use the facilities of the studio. They will not let the studio tell them what to use. They won't use their sound stages. They won't use any of their recording equipment. They want to go on their own. All they want to get is the money and the distribution thing after the picture is completed. Well, they went ahead and they tracked this whole picture with phonograph records. We do have agreements with Warner Brothers, so after the picture was completed, we were able to collect payments for the musicians on the records, at least those records made in this country, for use in the motion picture. That happened with Warner Brothers, in more recent affairs that I've been involved with in the union prior to my leaving there on April 1st. Selling music is the last thing that happens in these pictures, unless they're musical pictures. The pictures are all cut, ready, completed to go. Then the music comes in. So it could be two years producing a picture, and they don't even bother talking to you at that period of time. He's going to use it or a clip from another motion picture.

Because of the nostalgia craze and because of the fact of this "American Grafitti" picture and so forth, we ran into a flood of pictures wanting to use phonograph records on clips from old pictures, and in almost every instance in my three years in this office trying to stem this tide or find out what happened to it, we found that the people that were using the clips or records had no agreement with the union, and refused to sign an agreement with the union, and unless you could go to a parent company, like a Warner Brothers or Paramount or something like that, and insist that they make payments, why, you

got no protection whatsoever, and there was no new employment. See, one of the big problems we have here is if they are going to use old motion pictures and old clips of something, what happens to the employment of the guy who's trying to make his living today in the motion picture business? He's got no employment. So the federation policy has been that in return for permission to use clips which they feel strongly they have the right to do, the producer has got to guarantee so much new live employment for the people today. But when they use the whole clips and they go ahead and get it done before you even have a chance to talk to them, that aspect is gone. Then we've run into a situation where some motion picture companies have taken a very interesting position, saying that they're not responsible. They have what they call a negative pickup. The picture is completed before they get into the act.

Ostensibly. I doubt very much if it is completed before they get into the act. Because the major studio has got to be involved in preliminary financing. Nobody goes off and does a three, four, five million dollar picture on their own without getting financing and some kind of a distribution deal in front, but here we're into one other legal problem. There's no right in the musician in his record to disuse, legal right, the Federation contract right is then challenged and it would take a tremendous—and you can't do it every time it happens on something like this. It's very rough.

Mr. KATZ. Then your feeling is that the situation is more clear than the situation of just direct broadcasting in sound recordings?

Mr. READ. Yes. It's a very tough situation. Theoretically, the Federation is supposed to be able to control these things under their contract. Practically, unless they're dealing with a very honorable and responsible producer that's doing the reuse, they have an awful time making that.

Mr. KATZ. A lot of the parties that have opposed this idea suggested that if the musicians aren't being compensated enough, they should look to the record companies or those who employ them. Do you feel that the unions have really achieved all that they can achieve——

Mr. READ. Oh, yes.

Mr. KATZ. By way of the record companies?

Mr. READ. Yes. The record company scales are the highest scales in the industry today, highest pension fund, highest expense contracts, everything. And the highest scales. And it's not the record companies. We feel that we have adequate scales from the record companies. We just don't have protection against the illegal use of the records, either in performances or in reuse of other areas. Now, some of the record companies have been very careless, giving permission to use records many times, and theoretically a producer wanting to use a record will get in touch with the record company and get a synchronization license and things like that. I think that testimony came out somewhere along the line, and the record company—whomever he talks to at the record company, maybe he knows the legal implications and maybe he doesn't. And we've run in our annual situation here just within the last year. There was a case where an entire film, again, was scored with records from Mercury Records, a big company in Chicago, without any prior consultation with the Federation, without any permission, and I don't think they've collected a penny on it yet—the musicians who made those records in Chicago. I ran into another situation where record companies in the promotional end of their work have been guilty of making film clips and performances lasting anywhere from three minutes to ten minutes.

Then last year, about a year ago, I came across a situation where the sponsor in this area, Two Guys Stores—you probably see them on the radio all over, but record producers, distributors, as well as some other items—they entered into an agreement with some producers. They got permission and clips of performances of hit records, some from the man who testified this morning, Elektra-Asylum. They got Linda Ronstadt and some of the other ones from eight major record companies, including RCA, Mercury, Capitol, Warner Brothers. They furnished them with visual clips, television radio tape clips, embodying the music of the phonograph record, and those clips were put together for a one hour musical special that appeared on television here, and no musician got paid for it. Now, this is the abuse we're talking about. This is the problem. And the record company—I don't know what the outcome of that has been. The whole thing was reported to the Federation and turned over to them. They have so many of those problems now, trying to catch up with the abuses and illegal uses of their members' music that anything that can be done to give us a better legal

hold on the recorded medium or commercial use exploitation, has got to help. There's no place else to go, no place else to go.

Mr. KATZ. Are you really saying no place else to go? Does that also include the performer, the stars who use 15 or 20 backup musicians and singers and so forth?

Mr. READ. The stars, if they really are stars, can protect themselves through their agents, as Mr. Smith indicated this morning. They may have a very short professional life, but if they're good, if they make hit records, things of that sort, they clean up, they incorporate themselves, they get companies, and they make fantastic amounts. The record business is like the motion picture star business was 20 years ago. That's where the big money can be made. I wouldn't say by a fluke but immediately. It's nothing for a really top star to wind up with a contract that shows a gross of ten million dollars over a period of five or six years. They protect themselves by contract pretty well on those things.

Mr. KATZ. Yes, I know those figures have been suggested to us before, in terms of Peter Frampton and the Rolling Stones and so forth, but my question is whether or not the musicians, support musicians, studio musicians and so forth can look to these people?

Mr. READ. They get no piece of the action whatsoever.

Mr. KATZ. There's no bargaining power——

Mr. READ. No. The only thing they get is a chance to work if they go out on the road or if they're going to make another record. The way the record business goes today, so many of these records are laid down in basic tracks, particularly if it's a new song or something like that. And then they may take a month to get the right sound with dubbing and over dubbing, using one musician or trying something else. The only time you get any substantial backup studio musicians is if they decide to add winds or horns or strings at the last minute after all the work has been done. Okay. One of these stars makes an album in a year. The maximum employment in a recording for the backup studio musicians, and I think for what you call the traditional vocal backup groups, may be three sessions a year from one of the top performers. Now, if they will go on the road with them, they'll get paid for that kind of work.

Mr. KATZ. So there is no contract between——

Mr. READ. There's no contract between them.

Mr. KATZ. And any star for a particular album?

Mr. READ. One of the particular abuses that have been developed in some of these groups—maybe there has been an artist or a small group that is a cohesive group and is participating in all the profits. If they carry a small backup group with them, anywhere from maybe two to four to five, a rhythm section or something, which goes on the road with them, the arrangements for these people are so loose that they are constantly being ripped off. The musicians are so hungry for a job. It happens. I see a lot with the talented young colored musicians. They get with a group, and they're going to go on the road as a backup. Somebody offers, we'll give you three hundred, four hundred dollars a week, and we'll pay your transportation. You pay the rest of it.

OK. Theoretically, the union has provisions that they're not supposed to go to work on this kind of thing unless the company or the entity that is hiring them—be it the artist and his company or some management company—signs an agreement. We have regular agreements with the union covering that both for travel in this country and for foreign travel. Most of the musicians who take this kind of work never even heard of these agreements. They're very seldom covered by them. The agreements provide for pensions. They provide for notice. They provide for additional payments if they're going to do television shows or make records, in addition to their live performances, and it's just what happens. A natural practice is unbelievable. A man could be laid off almost without notice. Our board out here at the local is constantly having—some musician comes in and most of the time they wouldn't even come to the union for help until they lose their job. They'll put up with almost anything, as long as they still have the job or they're going to go out with the band next week. You hear about it six weeks later, and so there is really no decent legitimate contractual arrangement on those things. It's a word of mouth thing, as long they they need the fellow's services and he's willing to go out and travel for what they will pay him. I'm not suggesting somebody like the Woody Herman Band does that—they have good agreements and it's tough to make it with those bands that go out that way. They're more legitimate, but the smaller groups, the ones where the groups

are trying to make it and break into the business and traveling, the backup musicians with them lead then a miserable life.

Mr. KATZ. If I could go on to another point.

You suggested that if any legislation is enacted that it should specify that the performers are the owners of the right.

Mr. READ. Yes.

Mr. KATZ. Are you familiar with the employment for hire provisions of the copyright law?

Mr. READ. Just vaguely.

Mr. KATZ. Well, basically it means that if you are on salary, if you are an employee rather than an independent contractor for a specific occasion, that the employer that owns the copyright, he then has the——

Mr. READ. I understand. Yes, I'm familiar with some of the litigation going on with the composers and lyricists guild with the industry, and it must be in other areas, as well, and I know the basic conflict it could be. Because the union insists that the musicians are the employees of somebody who is supposed to pay their pension and their health and welfare and be responsible for their salaries, and that's in conflict with the idea that the man has any individual personal rights and does not have an independent contract. We try to keep our musicians completely out of the independent contractor classification because we found that that has been very destructive to the wages and benefits and rights. For example, if a man is not listed on a contract as an employee, and the company does not pay his pension fund, and he makes records, he does not participate in the record—in the royalty provisions of that because his name is not listed, and he never goes into the computer as an employee of that record company.

Mr. KATZ. So that something to rely on the employer for hire provisions in the copyright would not be an adequate solution?

Mr. READ. In my opinion that would not. It might lead to more problems than it would solve. I feel very strongly that whatever rights are eventually spelled out should be the rights that belong to the individual. If he chooses at that point to assign them to a collection agency, that's one thing. That was a big problem with the composers. They wanted to work in the studios. They had to agree that they had no rights in their music. This conversely is still going on with the composer, and the lyricist guild, where they are losing hundreds of thousands of dollars in fees, where the composers are trying to retain their rights in their product that they have done, extensively for hire.

Mr. KATZ. If it is specified that these rights are to belong to the performer, should they be made not assignable to recording companies?

Mr. READ. I don't know what the actual impact of that would be, or—what to do.

Mr. KATZ. It's not an easy problem, I don't think.

Mr. READ. I don't know.

Mr. KATZ. I have one last question. It's of a historical nature.

I believe in the 1950's. late 1950's or, perhaps, early 1960's there were several bills before Congress which attempted to make illegal the use of foreign sound recordings in conjunction with television or motion pictures. I'm not sure if there was a distinction that they were illegal unless there was an announcement to that effect. Could you give me a little bit— —

Mr. READ. I don't know about that bill. I do know that there have been several hearings—I don't know through which—as a matter of fact, in 1961 I went back to Washington along with the Federation, just after the Guild dissolved, to testify before a committee headed by John Dent at that time, having to do with the importation of track. I think it had to do with the question of import duties where they charged the import duties on the value of the blank piece of tape rather than on the enormous potential value of what was on the tape and how it could be used. And there was some talk—I remember Charleton Heston was there, the Motion Picture Producers Association was there. I have very interesting pictures of me sitting alongside of Mr. Kenin. I believe there were others at the same time. That was a means that was being used or hopefully a way to stop the importation of track in this country. Now, what we call library track or wild track, which some of the companies have, was the bane of our existence in television film. It still is the bane of our existence in cheaper films, none—you know, not commercially viable things, and there is a great flood of this type of material. We do not record knowingly in this country that type of track for unrestricted use over and over again. The track libraries

get the copyright. They try to record their own material and hold the copyright, of stuff written for them, probably by our members unbeknown to us.

Theoretically it's supposed to be recorded overseas, but I'm sure that a lot of records are recorded underground. They control it and give licenses to producers to use it in their product because they can control it through their copyright as publisher and author of the music. But we've tried to stop that. That's a problem. Everybody seems to think that if you own a piece of track or a tape or a record that is your property, you can do anything you want to do. Put it in another film. And somewhere along the line, that thought has got to be changed. I see people unwittingly do it. I've come across young people just working out of college, working out of some project that has been a film or a video tape show or a documentary, and the place is just flooded with this type of operation which the schools are promoting. Their only source of music is records, tapes, and then all of a sudden, it gets to a point where it could be commercially viable. Then all of a sudden here they are. They've got the music of the Philadelphia Symphony Orchestra that they can't afford to pay for. And what's the union going to do on that particular point? It becomes a very difficult problem. I've heard of so many of those things. Those young people. Trying to break into the business, trying to utilize their talents and just picking up what they can. And it's rough.

Mr. KATZ. I have no more.

Ms. RINGER. Thank you. Ms. Oler.

Ms. OLER. I'll try to make this short.

I think you have a unique view, and in many cases, it's different from that in which we've heard from AFM representatives. Your experience has been impressive and I wonder if you'd give us just a brief rundown on the unions' involvement with the bargaining rights conventions, and perhaps, also the change in the record companies' attitude around 1965.

Mr. READ. I was not a member of the musicians union from June 1956 until January 1962. So I know very little, except what I might have read in the trades, as to what their attitude or participation was. I was really surprised to hear Mr. Kaiser's statement that the musicians union was present at the Rome Convention. I knew about the Rome Convention. We were the only performers that were there. I didn't even know that. I don't know what happened between that there. I know that the only one I know about is. I guess, it was 19—were there some hearings in Washington in 1967 or '66? I think the Federation presented a very definite position at that point. I've seen the pamphlet printed by the Federation musicians with regard to laboring rights, and they made a very strong presentation. I don't think they went into the details as to the extensive impact recorded music has had on our livelihood. I'm sure—I think most musicians and most of the Federation, maybe the publishers, know the problem. I don't even think that our union officials have the slightest idea of what has actually gone on and what's happened. I just don't think they know. Maybe because they feel that there's no chance of anything because of the history of this—the problems that they've had. It may be that they're so tied up with community affairs that they just don't have the strength and the energy to take on something like this, which is a very involved tough problem, that would require a great deal of push. I don't know.

I really was surprised at the record companies' change of attitude. I was not aware of that. I was deeply gratified for Mr. Alan Livingston's—I know that a lot of the record producers and the people that the musicians have been in contact with as friends working in the studios have expressed a lot of sympathy over the years. Still those people have come on up to get into positions of responsibility, like Mr. Livingston and Mr. Smith today. On those things, I think that the entire climate is different today. This type of a hearing, I don't think could have gone on five years ago. I know it couldn't have gone on 20 years ago.

Ms. OLER. You've spoken about Mr. Petrillo's turn away from legal rights in the favor of bargaining rights. And we talked about that last night, and also, attitudes toward the performance fund, which inured to performers in general and not to the individual working musicians. There's been a proposal here which, apparently, has been reached as an agreement between the record companies and the unions to give five percent of the record companies' share, if they were to receive 50 percent of the performance royalty payment, to the National En-

dowment of the Arts, either for general artistic purposes or more promotion of musicians in general. Would that be repulsive to you in the sense of what you've gone through in the past and your fight for giving the payments to the individual performers, to the working performers?

Mr. READ. Well, as I understand, that five percent will come out of the record companies share. I have no argument or objection to the record companies participating on a 50/50 basis with the performers. I would assume that the other people who make such a great contribution to the records, which are the engineers and the producers, would look to the record companies for their share and not try to get in on a performer's share. I would object to that very strongly. Because I think that the 50 percent is going to be small enough to go between the singers and the musicians. I'm not quite sure of the formula on which it was going to be based. I think it said something about per capita basis. So that everybody would participate individually regardless of how much they contributed, theoretically, to the value of that record. And that would serve to spread it around a great deal more. So I can see nothing wrong with that, and I think that it requires concerted effort and support to get any legislation of this kind through in the face of opposition from the broadcast industry and the juke box industry and everybody who's been having a free ride for 40 years.

Ms. OLER. The union alliance with the performers is OK by you?

Mr. READ. I see nothing wrong with that.

Ms. OLER. One last thing I would like to ask is in connection with what we were discussing last night. Would you give us some of your experience with the distribution of these monies and the records that are available to the unions?

Mr. READ. First of all, I first got experience in this as a claims agent for the receiver, Crocker Citizens National Bank. It was necessary for me to find out what records were available, to find out who was entitled to participate in these monies, and then work out an equitable solution. So I'm quite familiar with the records that have been kept by the union, at least back in the early days, and I am also familiar with the records that are being kept today because of my work in the last three years. The method of distribution that we worked on—I'll separate the different cases, the Anderson case, which was the 21 percent wage increase, which had been diverted to the trust fund. That was caught by a restraining order of temporary injunction impounded with the receiver, Crocker National Bank out here, and we caught up with most of that money, though, I would say that some of the companies have gone out of business and never did pay it. We never could collect that. On that basis, we actually filed—we made the distribution on the basis of the musicians' actual earnings in the record industry during those periods, of the money that we collected by court injunction. Which was July 1, 1956, through December 1, 1958. Those were the amounts that we actually got. I went through contracts of all the recording sessions here in this country, all over the country, to anticipate and file an individual claim for each musician, showing what his actual earnings were at scale during that two and a half year period.

Now, we didn't get into the question with the big major companies. There are too many sessions involved. It would have been counter-productive at that particular point. Instead we used a musician's income tax returns, or other evidence of that kind, showing earnings from a record company at that particular time. That became his pro rata share of the pot that was available for distribution. We used a similar method in the Atkinson case where we had a—that had been released to television since 19—by 1964, when the order became final. As luck would have it, and I'd say luck, I went into all the records—to the local here, and this is the only local that kept records of this kind. I checked the records going back to 1933 of all members, covering all work that they'd performed, any work that was local, including a bar mitzvah. Now, the reason for that was—if you'll bear with a little history—when sound pictures came in, and this turned out to be an area for employment in the motion pictures, everybody that went out of work or thought they could play, descended en masse on Los Angeles to get into the motion picture business, with the result that the Federation put in a restriction that anybody transferring or coming in from other locals could not work in the picture studios for one year until they had resided here for a year, which slowed the things down completely, and the local put on restrictions as to how much work anyone could do in the studios for any one week. That covered radio at that time and motion pictures.

There was no TV film at that time. There was no television at that time. So in order to enforce the quota system as to how much work anybody could do,

to spread the work, because of the influx of musicians, they had to keep records, so they had records here from 1933 on up until about 1958, at which time the mere process of keeping individual records became so tedious that the local discontinued it. Records prior to 1960 are completely in Local 47 in all areas. Since that time, no way. Since 1960, and as far as the other locals are concerned, I think personally, the officers of Local 802 in New York had been smart enough and forward thinking enough to have the local segregate and hold all these phonograph record contracts from July 1958 through '66, but that was it before, and afterwards, nothing or very poor. National had nothing. San Francisco furnished some. Chicago furnished records. The problem we had in Chicago was that a lot of recording had been done there by the color musicians before the amalgamation. They kept no records. So it was a hit or miss proposition. We had to find all kinds of evidence and affirmations and so forth to try to honor claims. That became a basis, but we distributed the money on the basis of pro rata share of the pros based upon identifiable proof of earnings and the industry during the period it covered. More recently we worked out a distribution on "That's Entertainment Part I and Part II," which covered MGM Pictures going all the way back to 1930.

So in some instances, you'll have records. On some you won't. The thing that bothers me, I think I spoke to you about it last night, is that the records kept by the Federation and the pension fund, if they are processed correctly, and filed correctly which, in most instances, with the major companies and most instances are done correctly, while the contracts themselves may show the titles of the company that are worked on in that particular section or sections. That information is never put into a computer or segregated anywhere else. If you're going to try to find out a particular song—to find out how many people worked on the thing, you'd have to go through every contract filed that year unless the record companies themselves keep that information when they are producing the shows. It's part of the project because this is part of their bookkeeping in connection with the right of the cost of the sessions against the artists royalty. So they keep a complete file on every artist and on every record, and they can tell you the sessions and the dates. Now, if you're going to go back pretty far, and as I understood, you're going back to 1972.

Ms. OLER. Right, post-1972.

Mr. READ. I don't think it would be too difficult from that point on. If you go beyond that, it would be a real problem. In some of the beautiful oldies. I don't know where you would find anything on those. I think if this goes through, provisions should be made that should be thought ahead as to how to provide this information in advance so you don't have to go looking for it after the fact.

Ms. OLER. Thank you.

Ms. RINGER. That's very useful information. Unfortunately, we're going to have to wrap this thing up in about 15 minutes. So, with that admonition, what questions do you have?

Mr. BAUMGARTEN. I only have about 3,000 questions.

Mr. READ. I will make myself available at any time.

Ms. RINGER. I think that enough has emerged in this hearing with respect to the historical background and the whole factual framework of this and that we should dig into it deeper. I don't know that hearings are the way to do it, and we're considering getting a contract under which a rather extensive study would be made, and I would hope that if you could, you could provide additional and more detailed information.

Mr. READ. I've got legal files at home just full of material.

Ms. RINGER. Let me ask you, do you have any—is there any book or monographic study or anything that you know of that recaps all of this—I don't know of any, either. There have been a couple of law review articles.

Mr. READ. These two appeals give more information up to that point of what the situation was, and I believe in the consolidated thing, they referred in the rear to certain studies that had been made by the Federation research as to the connection of the 20 percent entertainment tax and things of that sort, where you might find something. There's also information in two Congressional hearings on this. I've testified twice.

Ms. RINGER. The Dent hearing that you mentioned?

Mr. READ. Besides the Dent hearing, there was the subcommittee of the House Labor Committee that met out here in Los Angeles, and then I testified before

the Senate Committee, subcommittee, that the late John Kennedy chaired in 1958, and my testimony, and a lot of information is in both of those records, and I have been unable to locate my copies of those voluminous records.

Ms. RINGER. Well, we work in the Library of Congress. We should be able to find them.

I do want to thank you personally for volunteering to come. As you know, this more or less emerged accidentally, and I feel that we lucked in on that score.

Jon?

Mr. BAUMGARTEN. I've been infringed of my question. One very quick question. The Register mentioned before that this is obviously a painful history.

Mr. READ. Yes.

Mr. BAUMGARTEN. And, regardless of having disclaimers, I imagine there are still scars of this whole wound?

Mr. READ. Very definitely.

Mr. BAUMGARTEN. It seems to be, though, that in all the testimony referred to here and in Washington, everybody admits broadcasters, producers, talent—the basic problem is that the broadcasters are paying nothing. And have paid nothing since broadcasting began. In that respect, it seems to me that's history and should we get to the point where they are paying nothing is relevant? I'd like your reaction. Is history important now? Or shall we just deal with the moral and legal arguments we've heard already?

Mr. READ. I think that—as I tried to indicate in my testimony, I think there was a basic mistake in policy in the Federation's position. I'm talking just about the musicians. And Mr. Petrillo's policy. I tried to account for it by the fact of the environment in which he came into power, and the problems that he faced before he came into power, and as he was coming into power, and, to that extent, maybe my testimony was critical or condemnatory. I think he did the best he could under the circumstances. He had no guidelines to go by. He didn't know where to go. It was a tough problem. He was a very, very smart man, who had no formal education whatsoever, but was a brilliant speaker. A most entertaining man. People think that I'm supposed to hate him because I fought him so hard. I find him to be a very engaging, charming, competent man who made a very bad mistake, and then—because of the structure of the union and his position as a "dictator," or he had absolute powers in the union—he either got wrong advice or was unable to accept advice from other sources. I think that, as late as 1956, when I presented this appeal before Petrillo and the executive board in New York, they could have made a change at that time. They were 20 years late at that point. But are we 40 years late now? But I think the history is important, and we're constantly faced with that argument in all negotiations. I've heard it in the last two days. Well, this is a historical event. We can't unring the bells. We can't go back now. We couldn't do this. We've built our industry on this other area. Well, I just don't buy that. I don't care how bad the thing is, and how long it's been going one. Somehow it's got to change. The longer you put it off, the worse it gets.

Mr. BAUMGARTEN. Thank you.

Ms. BOSTICK. Yes. I want to personally also tell you that I think your testimony was quite moving. I'm a former music teacher, and I faced a problem trying to recommend to my students what they should do with their promising musical careers, and I found your testimony very, very interesting from that standpoint. I'd like to ask you—I've heard about the interest of the composers and the music publishers as opposed to the interests of the record producers and performers. I would asume, then, that the arrangers would follow on the side of the composers, but recently I've heard that the arrangers, indeed, members of your union, that their salaries sometimes are geared into or have some relationship to the payment that the musicians get.

Could you illuminate a bit on what the particular position of the arrangers is?

Mr. READ. There's a fine technical difference between an arranger and an orchestrator. An orchestrator merely does not contribute anything of value creatively to a composition. An arranger does. The arranger's work is copyrightable. The orchestrator's is not. The orchestrator is covered by the musicians' union terms and conditions. As a matter of fact, today, practically all of the composers working in this industry, with the exception of the new breed of composers, that I would say are, as performers mostly in the recording field itself, but the studio people, people who work in motion pictures and television, they are composing, arranging and orchestrating—all the same person.

They make a package deal with the studio for those services. To compose the music, to arrange it, to orchestrate it, and to conduct it. Now, their conducting and orchestrating comes under the Federation of Musicians union. Their composition comes under composer and lyricist guild provisions. When you hear about an arranger's being concerned, it's primarily because they're composers as well as arrangers. Their concern is that they are afraid that any new right established is going to take money away from them that they've had a hard time getting. Do you understand that?

Ms. BOSTICK. Yes. I have nothing further.

Ms. RINGER. I think it should be noted for the record, and I think it is extremely fitting that one of the witnesses in the thirties' copyright hearings, when I think this question was addressed, has joined us in this room. Rudy Valle, who was one of the stars of the kind of radio that we have spoken nostalgically about during this hearing, has maintained an interest in the subject. I feel a sense of history at the very close of these hearings.

I would also indicate to you, Mr. Read, that I would hope that we could take advantage of the enormous background that you have, and I do appreciate——

Mr. READ. If you can wait a year, I may have a book ready by then. But I don't think you could wait that long.

Ms. RINGER. I have a feeling that the solution to this problem will not have taken place within the next year.

Mr. READ. As I say, either by correspondence or anything else, anything that I know, I will attempt to put at your disposal.

Ms. RINGER. Thank you very much.

I would like to announce once again for the record and for anybody else that can carry this work forward, the record of this hearing will be open until August 26th, and we'll welcome any additional observations on the testimony that's already been given. We'd be most grateful to have anything we can. And let me say also that I'd like to reiterate—I've said it before—I don't think that we should feel bound by any proposed solutions that have been offered. I think that we have covered a good deal of ground in these hearings, but that there are additional possibilities that should be explored, and, as a result, I don't think that I'm as interested in detailed comments on specific proposals or royalty schemes as I am in general observations on how one might deal with this problem in the next 10, 20, 30, 40 years. It is, obviously, something that is going to be with us. I have heard people who had very little to gain from this proposal, the basic principle of it, say that they felt it was historically inevitable that performance rights would be recognized, and I'm inclined to agree with that, but without any real clearcut idea of how this can be accomplished.

The history that you've recounted today is a history of terrible error made in the best of good faith, which is the definition of tragedy, I suppose, and, yet, the one other lesson that comes out of this is the fact that, at the root of this was the unwillingness of people who were in the policy making, decision making area to use law for their benefit. They treated it as an enemy rather than as a friend, and I think this is always the root of disaster when people do this, and I'm hoping in whatever comes out of this, that law can be used as a positive rather than a negative force.

Thank you very much. I declare these hearings closed.

[Whereupon at 3:45 p.m., the Copyright Office Hearings were adjourned.]

APPENDIX—COMMENTS (DOCKET 77-6-B)

COMMENT LETTER NO. 1

MS. HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: Please consider this correspondence the undersigned's comment elicited pursuant to Notice of Inquiry dated November 2, 1977 pertaining to performance rights in sound recordings.

For many years it has been recognized that users of copyrighted material be required to pay performance right royalties. Most users who fall in this category (outside of the mass media) are proprietors of businesses which utilize copyrighted works in the furtherance of their business. In the past, the Copyright Office has determined that rather than look to the performers of the copyrighted works for such royalties, that the holder of the copyright look to that

person who employs persons to perform such works. After all, it is the employer of the musicians who is ultimately economically benefitted by such performances. In those situations, musicians utilize the copyrighted works but inject their own talents and abilities into the performance of such works.

The new revision of the copyright law has recognized that authors and artists should be compensated by way of royalties for the use of their performance on jukeboxes. This constitutes a performance royalty in sound recordings in which the artist's original, fixed performances are compensated.

In the recent past, the "disco" phenomenon has descended upon us in not only the United States, but throughout the whole world. This has given rise to free-lance disco operators who charge a fee for their services and do nothing but play records. They do not inject their own talents into the performances but instead utilize the performance as fixed on the sound recording exclusively. It seems highly inequitable to allow such persons to utilize said recordings in this manner and not be required to remit a royalty for such use. Furthermore, the advent of such free-lance disco operators has the effect of competing with musicians for the entertainment dollar. While these two interests are competing, there is a sharp distinction to be made in that free-lance disco operators utilize a given artist's performance for their own economic benefit while a musician must utilize his own performance, a performance which necessarily requires his own interpretation of the work.

Therefore, the undersigned wishes to go on record as endorsing the establishment of a limited performance right in the form of compulsory license for users of copyrighted sound recordings for economic gain.

Thanking you in advance for your consideration of this matter, I remain,

Sincerely yours,

F. T. RATCHFORD, JR., *Attorney.*

COMMENT LETTER NO. 2

BROADCAST MUSIC, INC.,
New York, N.Y., November 21, 1977.

Re S 77-6-B

HARRIET L. OLER, ESQ.,
Copyright Office, Library of Congress,
Arlington, Va.

DEAR MS. OLER: Our position on performance rights in copyrighted sound recordings was set forth in our letter of May 27, 1977 to the Copyright Office in which we stated in part: "Thus, while prepared to support legislation that will properly compensate the performer, we can do so only if we are assured that the position of BMI writers and publishers will not be adversely affected".

We do not consider it appropriate to comment on the economic effects of royalties for performers and record companies.

We do consider it very important, however, to be afforded the opportunity to comment fully on any proposed administrative systems if and when the legislation is considered by Congress. The report (at Page 84) suggests three alternative systems: "Parallel, Augmented and Substitute Systems." Each of these would have a significant effect on the operations of BMI and the other performing rights societies. Accordingly, we would consider it important that at the appropriate time hearings be held on this subject at which BMI and others could present their positions on this matter.

Respectfully submitted,

EDWARD W. CHAPIN,

COMMENT LETTER NO. 3

MORTON & ROBERTS,
Washington, D.C., November 22, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: Pursuant to the request for comment about performers' rights mentioned in 42 F.R. 21527 and reproduced in Number 353 of BNA's PTC Journal, I submit the following suggestion as of potential interest.

As you know, there is currently under litigation the relationship between the copyright laws, present and future, and the SONY "Betamax" videotape recording device for plucking TV programs off the air, and like devices, or course, for example, that are currently being promoted by Zenith.

Without involving the Copyright Office in this debate at the present time, I would like to suggest that sooner or later such devices are going to come into much wider general use than various forms of purely-audio tape recorders now enjoy and are going to have a very substantial impact on the ordinary, i.e., pre-Copyright Act of 1976, expected income from the public performance of phonorecords and sound movies. It follows that, it seems to me, the only way for performers and recorders (including movie makers) to come even is to require broadcasters to pay them a sufficient sum to compensate for the loss of income to be anticipated from the private recording of broadcast performances of their records and films.

I realize that merely to mention "Betamax" and its implications raises a touchy subject, but I do think that it puts a new dimension on the problem of performance rights potentially to be owned by recorders and performers involving the public performance of phono-records and films not presently substantial. In other words, anticipating jukebox use and normally unrecorded radio broadcast use, I think performers can manage, and have managed, adequate compensation for the making of phonorecords. It is quite probable that in the present economic environment, with "Betamax" at a minimum, public performances by broadcast or in a jukebox of phonorecords actually enhances, rather than diminishes, the market for additional phonorecords purchased by private listeners. However, when "Betamax" becomes essentially a universal gadget, the exact opposite may become true and I think that this possibility should be plowed into any study.

I understand from my phone conversation with you of November 21, 1977, that the Ruttenberg study does not advert to the "Betamax" phenomenon.

Very truly yours,

W. BROWN MORTON, Jr.

COMMENT LETTER No. 4

LAGRANGE, GA., *November 19, 1977.*

Re Notice of Inquiry Performance Rights in Sound Recordings
MS. HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: In response to the above captioned notice, this is a for the record statement of objection to the proposal providing royalties to performers and record producers for the public performance of their copyrighted sound recordings.

Federal Communications Commission financial data will show, there are substantial number of radio broadcasting stations operating at a financial loss, and/or on a marginal basis. Further, many of these same stations give on-the-air exposure to many recording artists while the same lesser known talent on recordings does not get "air play" in major areas.

Radio sells records. If it was not to the advantage of the recording artist and the record companies to get radio exposure they would not send free copies in the hope of broadcast use. In fact, radio stations would be justified in charging commercial rates for this service.

Still more logic: Broadcasting stations are already overburdened with paper work. To furnish detailed information on what records are used would be a monumental task.

In behalf of these stations (clients of mine), WLAG, and WWCG, LaGrange, Georgia; WRLD Lanett, Alabama; WELR Roanoke, Alabama; WDWD, Dawson, Georgia; WFRD, Manchester, Georgia, I request that the Copyright Office and the United States Congress reject any proposal to impose royalty payments on the broadcasting industry for using records on the air. I would be willing to appear before the Copyright Tribunal should public hearings be held.

Cordially,

EDWIN G. MULLINAX,
Broadcast, CATV and Public Relations Consultant.

COMMENT LETTER NO. 5

WESTERN TEXAS COLLEGE,
Snyder, Tex., November 21, 1977.

MS. HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: One aspect of the copyright law that is causing a great deal of concern is the right to purchase recordings and then using them as background music for educational packages that are to be used by educational institutions on their own campuses and not for sale.

Another aspect is the fact that all campuses do not use turntables across the campus but use cassette players and that disc recordings must be copied on cassette tapes so the material can be used. The original is not used for circulation, but used only to make a copy for circulation.

Yours very truly,

JAMES E. TULLY,
Dean of Learning Resources.

Attachment.

The following statement was made by one of our instructors:

"After reading the spec's on this item, I do not think that the amendment is referring to the right to reproduce recordings but rather is regarding the current imbroglio over band director's rights to perform or rearrange music for performance at games or other public gatherings. (I refer you to a Chronicle of Higher Education article of about a month ago on the topic of royalties and its effects on school budgets.)

"If however, I am mistaken and it does indeed refer to simple recording of audio materials, I should like to see an exemption for educational institutions that allows one entire duplicate made without prior permission from the publisher for the sake of preserving the purchased original. The current policy of allowing recording of only excerpts would to a music teacher be tantamount to allowing me to show only details of works of art in art history."

COMMENT LETTER NO. 6

WESTERN TEXAS COLLEGE,
MUSIC DEPARTMENT,
Snyder, Tex., November 17, 1977.

HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: Looks like the publishers are trying to boost profits under the false premise that this bill will benefit the composer and/or arranger. In order for the artist to market his works, he must go through a publishing company. In order for a director to perform music, he must buy from a publishing company. If the publishers were concerned with the artist's rights, they would offer a larger percentage of the total sales.

If this bill passes, I'm starting my own publishing company.

Sincerely,

GUY GAMBLE.

COMMENT LETTER NO. 7

WESTERN TEXAS COLLEGE,
MUSIC DEPARTMENT,
Snyder, Tex., November 17, 1977.

HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: If I read this notice correctly, it means that the performance of any popular songs that have been recorded for commercial distribution would be a "derivative work" based on sound recordings, even if prepared from published

sheet music. If we performed any current hit, even from sheet music, it would be similar in style to the current recording of that same tune.

This being true, it would paralyze school performances of current hits, because of the financial aspect and especially because of the time involved in securing performance rights.

If this pertains only to reproducing copywritten material for sound recordings, the applications to our situation is less crucial.

Sincerely,

JANE WOMACK.

COMMENT LETTER No. 8

BURTON & DOOR,
Denver, Colo., November 22, 1977.

Re performance rights in sound recordings.

HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MS. OLER: As a practicing copyright attorney I have had occasion to deal with numerous artists' recording contracts, I feel compelled to submit two comments regarding the proposed performance rights in sound recordings pursuant to the inquiry of the Copyright Office regarding the Economic Impact Analysis.

1. The figures revealed in the report which reflect the small percentage of performers who receive royalties on an on-going basis and the even smaller percentage of their annual income which such royalties comprise can only be attributed in part to the terms on which most recording artists are signed to recording contracts. Specifically, only major artists who have obtained "superstar" status are able to command a recording contract which does not specify that nearly every expenditure by the record company is to be deemed an advance on royalties. For example, if the royalty rate in a recording contract is 12 percent of the retail selling price, every conceivable recording cost, advertising expenditure and other "expenses" are considered advances against an artist's royalties, rarely if ever totally less than $100,000. One needs no mathematical precision to realize the volume of sales required to recoup such advances! Such practices are unquestionably due, in large extent to, the unequal bargaining power between recording companies and the individual artists involved.

I wholeheartedly endorse the concept of a performance right in sound recordings, but based upon the realities of contract negotiations feel that any such performance royalty would be ineffective unless the congressional mandate included a requirement that any such sums be divided fifty-fifty between the artist and the owner of the copyright in the sound recording. Otherwise in all likelihood the performers would see little if any revenues from such a royalty. Such is clearly indicated by the numerous contracts currently being executed which include an assignment of the performance rights to the record company when and if created by Congress with no provision for the performers to receive a percentage of the income!

2. As evidenced by recent litigation settled out of court regarding some well known performers, recording companies have a tendency to be rather slow in payment of royalties and often do so only upon a forced accounting. Hence, not only should a fifty-fifty division be mandated by the Copyright Statute, but the Copyright Office should undertake its method of payment similar to that practiced by BMI and ASCAP. Specifically, rather than relying upon the recording companies to make payment of such performance royalties and give them a greater opportunity to recoup all "advances against royalties," the Copyright Office should make payment of these sums directly to the performer in his appropriate percentage and to the recording company directly. Admittedly, the low revenues which may be initially derived under such a performance royalty may seem to make such a practice prohibitive, but absent such a method of payment, in all likelihood few if any artists would realize financial benefits from such a royalty. The only other effective means of insuring that the performer would receive a share is to prevent such royalties from being utilized to reduce the "advances" outstanding against the performers' account.

Very truly yours,

CHERYL L. HODGSON.

COMMENT LETTER No. 9

NOVEMBER 25, 1977.

Reference to: Performance Rights In Sound Recordings.

To Miss or Mrs. Harriet L. Oler:

Just a few remarks on Performance In Sound Recordings.

I agree with the consideration of Congress being in favor of a limited Performance Right in compulsory license and should be reminded in reference to performance and (text of letter illegible) are concerned. This I know will require quite a complete and thorough study, before making a decision on (text of letter illegible) can cut down on certain costs (text of letter illegible) the stations I feel a great desire to be saved.

Being a writer as well as a performer I know I can speak for other performers would like to record more often.

In whatever the Congressional and copyright office decision turns out to be, I'm sure it will be good for every one who is involved, which I am truly grateful for. This should make everyone happy.

HAZEL MANLEY,
Singer-Writer.

COMMENT LETTER No. 10

ARNOLD & PORTER,
Washington, D.C., December 1, 1977.

HARRIET OLER, ESQ.,
General Counsel's Office,
Copyright Office, Crystal City, Va.

DEAR MS. OLER: In response to the Notice of Inquiry recently promulgated by the Copyright Office in the Federal Register, I am enclosing, on behalf of the Recording Industry Association of America, Inc., five copies of written comments on the economic impact analysis of a performance right in sound recordings.

Sincerely yours,

CARY H. SHERMAN.

Enclosures.

COMMENTS OF RECORDING INDUSTRY ASSOCIATION OF AMERICA ON "AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE IN THE COPYRIGHT LAW," A REPORT SUBMITTED TO THE COPYRIGHT OFFICE BY RUTTENBERG, FRIEDMAN, KILGALLON, GUTCHESS & ASSOCIATES

The Recording Industry Association of America (RIAA) has reviewed the study prepared for the Copyright Office by Ruttenberg, Friedman, Kilgallon, Gutchess & Associates. That report is an independent data-based analysis of the economic impact of the creation of a performance right in sound recordings. Significantly, it rejects the inherently implausible claim that radio broadcasters would be unable to pass along to advertisers the modest cost of the royalties being proposed. Most importantly, the study conclusively determines that radio broadcast stations have the financial capability to compensate the creators of sound recordings for the commercial exploitation of their work.

The report also addresses the credibility of a theoretical study which has been critical of a performance right in sound recordings—the article co-authored by Professors Bard and Kurlantzick.[1] The Ruttenberg report rejects Bard and Kurlantzick's predictions about the ultimate impact and implications of the legislation. Like the RIAA, the Ruttenberg report concludes that the underlying chain of reasoning in the article is unfounded and the assumptions which form the basis for the economic model are erroneous.

IMPROVEMENTS IN THE LEGISLATION

In the course of analyzing the Bard and Kurlantzick article, the authors of the Ruttenberg report propose two modifications to ensure that the legislation will have its intended effect.

First, they point out a potential "loophole" in the legislation under which it would be possible to defeat the 50–50 royalty split intended to be mandated.[2] That

[1] Robert Bard and Lewis Kurlantzick, "A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It," 43 George Washington L. Rev. 152 (1974).

[2] See page 115 of the Report.

is, as presently worded in H.R. 6063, the royalty split provision applies only to funds in an account maintained by the Register of Copyrights. If a private, nongovernmental entity were established to collect such funds, the 50–50 split provision would technically be inapplicable.

RIAA fully concurs with the suggestion that the legislation be clarified to provide that the 50–50 royalty split is applicable to all license fees collected pursuant to the legislation, regardless of which organization collects the funds.

Second, the authors of the report express some concern that a record company could "recoup" some share of the performers' royalties—not in the manner, or for the reason suggested by Bard and Kurlantzick, but by discouraging certain performers from registering as claimants for royalties. More specifically, they suggest that a record company could reword recoupment contracts to require a performer to pay some of his or her recording costs to the record company out of performance royalties. By limiting the royalty claimants to those who have such provisions in their contracts, the report states that a record company could recoup a significant portion of the revenues intended for the performers.[3]

Here too, RIAA concurs that safeguards should be provided to ensure that the performers' share of royalties accrue to the performers, and only the performers.

Of course, a provision requiring that half of the royalties be paid to certain of the participants in the creation of a copyrighted work represents a departure from traditional copyright law. The prevailing rule is that royalties accrue exclusively to the copyright owner; any division of those royalties is based on trade custom or the relative bargaining power of the parties. Thus, for example, composers and publishers typically split mechanical royalties on a 50–50 basis because it has become customary to do so, not because that arrangement is required by statute.

Nevertheless, the organizations representing the record company copyright owners and the performers (the musicians' and performing artists' unions) have agreed that the royalties that are collected as the result of the creation of a performance right should be shared 50–50 between the record companies and performers. This arrangement is consistent with the prevailing practice in most other countries where performance royalties are paid. RIAA believes this arrangement to mean that recording costs not be recouped from the performers' share of performance royalties. Hence, RIAA has no objection to the development of statutory language, legislative history or regulations prohibiting such recoupment.

CONCLUSION

It is noteworthy that the findings of this fully documented economic report are principally derived from the broadcasters' own financial reports. Hopefully, the debate over the creation of a performance right in sound recordings can now proceed on the basis of facts, not fears.

COMMENT LETTER NO. 11

McKENNA, WILKINSON & KITTNER,
Washington, D.C., December 1, 1977.

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.
(Attention of Harriet L. Oler).

DEAR MS. RINGER: On behalf of various radio and television broadcast station licensees (as set forth in Appendix A to the attached document), I submit herewith an original and four copies of their further comments concerning performance rights in sound recordings.

Respectfully submitted.

NORMAN P. LEVENTHAL.

Enclosures.

[3] Of course, record company influence over the number of claimants to the performers' share of royalties will have no effect on the royalties to be paid to the record company. As copyright owner, the record company will receive 50 percent of the royalties; the number of individuals sharing in the remaining 50 percent will not affect the amount of the record company's share.

FURTHER COMMENTS OF RADIO AND TELEVISION BROADCAST STATION LICENSEES

The radio and television broadcast station licensees identified in Appendix A hereto (hereinafter "Licensees"), by their attorneys, hereby submit the following further comments in response to the November 2, 1977 Notice of Inquiry issued in the above-referenced proceeding.[1]

PRELIMINARY STATEMENT

1. The instant Notice seeks comment by interested parties on a study recently concluded by Stephen M. Werner of the firm Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, entitled "An Economic Impact Analysis of a Proposed Change in the Copyright Law."[2] Ostensibly, the Werner Report attempts to evaluate the potential economic impact which a proposed change in the Copyright Law instituting a performance right in sound recordings would have on the radio broadcast and record industries.

2. At the outset, Licensees emphasize that their ability to review the underlying factual validity of the Werner Report has been severely curtailed because of the unavailability of the FCC financial reports which form the foundations of the Report's data base. FCC radio broadcast financial reports (Forms 324), as the Report points out (pages 2, 38–39), are considered confidential and are not generally made available to persons outside the Commission. Equally significant, the Copyright Office's public notice noting the Werner Report's availability for review by interested parties did not appear in the Federal Register until Tuesday, November 8. Since it required several days before Licensees were able to obtain copies for review, Licensees have had barely two weeks in which to analyze the 179 page report and prepare meaningful comments. Manifestly, this is a totally inadequate amount of time in which to review a complex report of this nature, particularly one which carries with it important public interest ramifications.

3. As Licensees demonstrated in their earlier filings in this proceeding,[3] the absence of any showing in the record of this proceeding that the general public welfare will be advanced by the institution of a performance right in copyrighted sound recordings relegates the case for a performer's royalty solely to one of economics and fairness.[4] The Werner Report seeks to address only the economic aspect of this problem; it does not even purport to address the overall equities of the performance royalty proposal in terms, for example, which would include proper consideration of the substantial benefits received by recording artists and record companies from valuable broadcast exposure.[5] Ignoring, for the moment the limited scope of the undertaking, the Werner Report misses the essential thrust of the broadcaster position in this proceeding. Moreover, its analysis is deficient in a number of critical respects.

THE WERNER REPORT MISUNDERSTANDS THE PRINCPAL BROADCASTER POSITION IN THIS MATTER

4. The Werner Report's principal conclusion is found at page xii:

"In general, the above *suggests* that radio broadcast stations would be able to pay a record music license fee without any significant impact, either on profits

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[1] Hereinafter cited as "Notice."

[2] Hereinafter cited as "Werner Report."

[3] See Comments and Reply Comments of Radio and Television Boadcast Station Licensees, filed May 31 and June 15, 1977, respectively.

[4] The principal objective of the Constitutional Copyright power—and legislation enacted thereunder—is to "promote the progress of science and useful arts"; in other words, to increase creativity and productivity for the general public welfare. See *Twentieth Century Music Corp* v. *Aiken*, 422 U.S. 151, 156 (1975) and *Mazor* v. *Stein*, 347 U.S. 201, 219 (1954). Clearly, in the absence of some public benefit, there is no justification for copyright protection of any kind. As we note briefly above, no documented evidence has been submitted to support the proposition that a performance royalty in scund recordings will encourage creativity and thus benefit the public welfare. The Werner Report essentially confirms our conclusions in this regard:

"It is not clear that enactment of the performance rights amendment will result in any increase in the amount of serious music recorded nor an increase in the production of other forms of non-rock music, as some industry spokesmen would suggest." (p. 111).

[5] In addition, the Report acknowledges that the data used in its analyses "does not permit a comparison of profits in the radio broadcasting industry to those in the record industry" (p. xiv).

or the number of stations in operation. In addition, there is *evidence* that the radio broadcasting industry would be able to pass on any increase in the costs of operation to the purchasers of advertising time without loss of business or revenues." [Emphasis added.]

Notwithstanding the obvious uncertainty surrounding the factual base upon which this conclusion is premised, the essential thrust of the Report is directed solely to the question of whether the imposition of a performance royalty will require broadcast stations to "go off-the-air", i.e. cease operation. While the unavailability of FCC financial forms does not permit us to evaluate the adequacy of the Werner study's analysis of radio station profitability, it is clear that the study has misunderstood a very significant aspect of the broadcasters' claims in this matter.

5. Few, if any, broadcasters have asserted that the imposition of the proposed royalty fee would cause them to cease operations. A review of the record herein will show that the principal contentions are that the imposition of a second music license fee would be most unfair when viewed in the context of today's music industry and would require radio broadcasters to implement certain operating adjustments and other cost saving means to offset the additional costs incurred. As suggested by many of those participating in the hearings, such measures would include cutbacks in news services, public affairs and other program areas that are generally not highly profitable. (While these adjustments would not necessarily be tied to a station's profit level, stations in a poor financial condition could be expected to implement such cost saving adjustments much more quickly than their "richer" counterparts.) The Werner Report fails to address this crucial issue.

6. The Report also makes certain basic "theoretical" assumptions concerning the demand and supply of radio broadcast time which are plainly contrary to reality. These faulty assumptions appear to underlie the study's principal findings that some broadcasters may not be profit maximizers and thus that broadcaster claims of financial hardship are exaggerated. As we show below, only the most fragmentary evidence is offered to justify these findings. In Licensees' view, the Report certainly has not proven that the radio industry would be able to absorb an additional music license fee, nor has it adequately demonstrated that the imposition of a second use fee would not adversely affect the industry, particular stations, and the public they serve.

THE WERNER REPORT'S ERRONEOUS CONCLUSION THAT FCC REPORTS DO NOT ACCURATELY REFLECT BROADCAST STATION PROFITABILITY IS PREMISED UPON FAULTY EVIDENCE

7. One of the "major findings" of the Werner Report is that "contrary to theoretical expectations, in many cases, the same radio stations report losses year after year without leaving the industry, thereby casting doubt on the claim that profits are the primary concern of broadcasters and that in their absence, firms would leave the industry." [6] This finding forms the foundation of the Report's conclusion that radio industry claims of poor profits are exaggerated and that radio stations will be able to pay a second music license fee. The basis of this hypothesis is founded principally in the Report's analysis showing that some 20 percent of the sampled stations lost money in at least four out of the five study years, thus "suggesting," according to the Report, that broadcast station profits as reported on FCC financial reports either did not accurately reflect the income of the station or, in the alternative, that continued losses would not lead the stations to leave the industry.[7]

8. The Report's conclusion that the profit picture of the radio broadcast industry is less severe than the broadcast parties have previously suggested is premised principally upon data showing continued losses without exit from the industry. This fact alone, however, does not support a conclusion that these reported losses are not, in fact, truly representative of the stations' financial

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[6] Werner Report, p. x.

[7] Werner Report, p. 44, Table 4. Importantly, in this context, the report tends to ignore its own finding that an additional 128 stations would have lost money over this period if a second music license fee had been imposed (pp. 47–48). Significantly, the study's findings indicate that of the 60 percent of the radio stations reporting losses during at least one of the five years in the study period, a substantial portion reported profits and losses in alternate or non-sequential years (p. 42), thus lending credence to a conclusion that the radio broadcast industry does not fail to report true operating losses and profits, as the study suggests.

posture. For example, the study fails to recognize a salient characteristic of the broadcast industry—station licenses are not readily surrendered. Station operators who continually lose money will not often cease broadcast operations and surrender a valuable license to the FCC; rather, it is much more probable that the operator will sell the station at a reduced market price, one reflecting the station's loss situation. The Werner Report fails to address this far more frequent occurrence.

9. Moreover, the study fails to quantify the number of situations in which the loss category station is, in fact, being "carried" by a co-owned broadcast property or other media outlet (such as a local newspaper), or to determine how many of the stations in the sample loss category are in a start-up phase of operation (during which such losses would normally be absorbed). These facts—had they been developed—would likely have substantially altered the Reports' findings concerning the validity of industry profit figures. Even assuming that the study properly concludes that some station operators are not profit maximizers, thus bringing the use of their financial data as a basis for industry claims into question, the study inappropriately assumes this to be the case for all loss category stations. Reality suggests, however, that there are likely to be just as many loss category station operators who are profit maximizers as are not.

10. In attempting to "deflate" the claims of poor profitability by the radio broadcast industry, the Report excludes from the profit calculation those items on the FCC financial report which represent "payments to principals" and "other general and administrative" expenses.[8] The Report seeks to justify the exclusion of payments to principals on the grounds that there "is strong evidence that many stations are owned and managed by the same individuals," [9] and that, because of the double taxation of corporate income, it may well be to the manager/owner's advantage to report no income at all and to take his "profit" in the form of excessive salaries, commissions and fees. There are several fundamental errors in this analysis:

(1) The study fails to quantify the number of stations which have such manager/owners.

(2) The study fails to acknowledge that in many cases a manager/owner need not "hide" profits in this manner because he can legitimately avoid the double taxation of corporate income by making the licensee company a Subchapter S Corporation; the study has not attempted to quantify the extent to which manager/owner stations are in fact structured in this fashion.

(3) Finally, the study fails to address the very likely proposition that in many, if not most, instances owner-operators will not want to "hide" profits in the fashion suggested, since these same loss category stations will most probably want to be able to show as good a financial picture as possible to lending institutions and prospective purchasers.

11. Significantly in this respect, the study recognizes that some payments to principals are "very likely legitimate costs".[10] Nevertheless, in an effort to increase the paper "profitability" of the radio industry, the study excludes all such payments in its analysis. In exactly the same fashion, and again recognizing that other general and administrative expenses "include legitimate costs of operation", the Werner Report excludes the entire category of such costs from its analysis.[11] No attempt is made in either case to quantify the extent to which such costs are properly included expense items.

12. The Report also suggests that reported profits are misleading because some multi-media owners "may charge joint production costs solely to their broadcasting operation" and that operators who can exercise discretion in charging expenses "may feel that the threat of competition from would-be operators is lessened by reporting low or no profits." Werner Report, page xi. There is absolutely no evidence submitted to support this hypothesis. Indeed, standard accounting practice and IRS review would, in most cases, preclude widespread use of such techniques.[12]

[8] Werner Report, pp. 48–51.
[9] Werner Report, p. 49.
[10] Werner Report, p. 49; emphasis added.
[11] Werner Report, p. 51.
[12] It is noteworthy that while the Report concludes that radio industry losses, as reported in FCC financial reports, are unreliable, it nevertheless utilizes this very same data—as if it were reliable—to justify special consideration for classical music stations (pp. 53–55). There is nothing offered in the Report to demonstrate that classical station owners are profit maximizers but that other format station owners are not.

13. In summary, the foregoing paragraphs show that the Werner Report has not demonstrated that FCC financial reports do not accurately reflect the relatively poor financial state of the radio broadcast industry and that broadcaster claims of economic hardship in the face of a second music license fee have not been shown to be exaggerated to any significant degree.

RADIO AIR TIME IS NOT INELASTIC AND THE REPORT'S CONCLUSION THAT IT CONFLICTS WITH REALITY

14. In apparent anticipation that its assertions concerning the relative well-being of the radio broadcast industry would not be borne out, the Werner Report also attempts to show—in demonstrable conflict with testimony offered by broadcast station operators—that the cost of a performance royalty fee could readily be passed on to advertisers at no additional expense or impact upon broadcasters. The essential point here is summarized at page 25 of the Report:

"All statements therefore regarding the ability of broadcasters to 'pass on' a rate increase can be judged in terms of the extent to which they provide information concerning the demand for radio advertising. If it can be shown that the demand for radio advertising is relatively inelastic, or that demand is increasing, the impact of the bill will be negligible. If, on the other hand, it can be demonstrated that demand is inelastic, then the impact will not be negligible."

The Report concludes that "the demand for advertising via radio is relatively insensitive to price changes." [13]

15. While the study postulates that price increases for radio advertising resulting from the additional costs imposed by a music license fee would not affect competition within the radio industry, the study does not appear to address the equally important question of the impact of a second music license fee on multimedia competition. In other words, what effect on radio advertising sales (demand) would result if advertising rates for radio had to be increased to recover the costs of a music license fee, and advertising rates for competing local media such as newspapers, magazines and the like, remained stable? This is an indispensable component of the economic picture which the Werner Report chooses to ignore.

16. Importantly, in this connection, the Report acknowledges that its "results are not conclusive" and that the data merely "tend to suggest" that demand for radio advertising is relatively inelastic; that is, there are not good substitutes. The Report thus concludes that if this is, in fact, the case "radio broadcasters should be able to pass on some, if not all, of the cost increase onto advertising sponsors." [14] The inconclusive nature of the Report's findings in this regard should be of utmost concern to the Copyright Office and Congress. Certainly, when one views the Werner Report as a whole, it has not proven its critical conclusion—that demand for radio time is inelastic and, thus, that broadcasters can readily pass on the costs of a performance royalty to advertisers.

17. A fundamental element of the Report's general analysis is its treatment of the demand and supply functions in the radio broadcast industry. (Werner Report, pages 6–25.) The theory of demand and supply applied by the Report's author, however, is valid only in truly competitive situations where no outside contraints operate to restrict the theoretical market mechanism. Here, however, there is an abundance of regulatory constraints (licensing, power limitations, etc.) which severely limit the relevancy of the "general theory of supply and demand" to the radio broadcast industry.

18. As the Report also notes, "the convention is adopted that stations vary the amount of time available for sale in response to variations in the price by advertisers" (page 13). This assumption is plainly in conflict with reality. As a general proposition, radio stations will offer the industry standard of not more than 18 minutes of commerical time per hour irrespective of the price paid by advertisers or the state of the demand curve. Since air time is a commodity which is lost if not sold, it cannot be treated in the same manner as economic theory

[13] Werner Report, p. xii!.

[14] Werner Report, p. 67; emphasis added. The Report's analysis of historical trends in radio broadcast revenues and advertising rates (pp. 68–71) is similarly inconclusive. For example, it is stated that "radio broadcasters should be able to pass on some of the increase in the cost of doing business to advertising sponsors without necessarily suffering losses in reported profits."

would calculate the effect of demand on the decision to manufacture or not manufacture additional quantities of a given commodity. Contrary to the assumptions in the Werner Report, the standard economic theory of the firm is not directly relevant here.

CONCLUSION

The Werner Report would imply that the Copyright Office should recommend, and the Congress should enact, a performance royalty in sound recordings that the Report itself fails to show conclusively would not be severely adverse to radio broadcasting. We do not believe that this is a risk which the Congress should prudently undertake. In view of the fundamental flaws in the Werner Report and the admitted inconclusiveness of its findings. Licensees do not believe that it can be utilized as a proper factual economic base upon which the Copyright Office can appropriately recommend legislation to Congress in favor of a performance right in sound recordings.

Respectfully submitted.

By JAMES A. MCKENNA, Jr.,
NORMAN P. LEVENTHAL,
Attorneys for Radio and Television Broadcast Station Licensees.

APPENDIX A

KAGM, Klamath Falls, Oreg.
KAGO, Klamath Falls, Oreg.
KAKC, Tulsa, Okla.
KALE, Richland, Wash.
WXTV, Paterson, N.J.
KASH, Eugene, Oreg.
KAYO, Seattle, Wash.
KAZY, Denver, Colo.
KBAR, KSAX, Burley, Idaho
KBOX, Dallas, Tex.
KCAU-TV, Sioux City, Iowa
KCEY, Turlock, Calif.
KCOG, Centerville, Iowa
KCRC, Enid, Okla.
WXRA, Alexandria, Va.
KDLG, Dillingham, Alaska
KDMA, Montevideo, Minn.
KDTV, San Francisco, Calif.
KEDO, Longview, Wash.
KENE, Toppenish, Wash.
KENR, Houston, Tex.
KERI, Bellingham, Wash.
KEUT, Seattle, Wash.
KEWI, Topeka, Kans.
KEWT, Sacramento, Calif.
KFAB, Omaha, Nebr.
KFAX, San Francisco, Calif.
KFSM-TV, Fort Smith, Ark.
KFTV, Hanford, Calif.
KFUN, Las Vegas, N. Mex.
KGHO-AM-FM, Hoquiam, Wash.
KGMS, Sacramento, Calif.
KGOR, Omaha, Nebr.
KGOT, Anchorage, Alaska
KGUN-TV, Tucson, Ariz.
KIAK, Fairbanks, Alaska
KIVI-TV, Nampa, Idaho
WXLI-AM-FM, Dublin, Ga.
WWRW, Wisconsin Rapids, Wis.
WWQM, Madison, Wis.
KKIT, Taos, N. Mex.
KKOS, Carlsbad, Calif.
KKUA, Honolulu, Hawaii
KLCO-AM-FM, Poteau, Okla.
KLTV, Tyler, Tex.
KLUE, Longview, Tex.
KLVX-TV, Las Vegas, Nev.
KLYK-FM, Longview, Wash.
KLZ, Denver, Colo.
KMA, Shenandoah, Iowa
KMEX-TV, Los Angeles, Calif.
KMEZ, Dallas, Tex.
WWKE, Ocala, Fla.
KMHL-AM-FM, Marshall, Minn.
KMHT, Marshall, Tex.
WWCA, Gary, Ind.
KMPS, Seattle, Wash.
KMTV, Omaha, Nebr.
KMXT, Kodiak, Alaska
WVOV, Huntsville, Ala.
WVOJ, Jacksonville, Fla.
WTVO, Rockford, Ill.
KOGO, San Diego, Calif.
KOME, San Jose, Calif.
KOMW, Omak, Wash.
WTUP, Tupelo, Miss.
KORO-TV, Corpus Christi, Tex.
KOSA-TV, Odessa, Tex.
KOTZ, Kotzebue, Alaska
WTUG, Tuscaloosa, Ala.
KPVI, Pocatello, Idaho
WTUE, Dayton, Ohio
KQHU, Yankton, S. Dak.
KQIC, Willmar, Minn.
KQRS-AM-FM, Minneapolis, Minn.
KRAK, Sacramento, Calif.
KRBE, Houston, Tex.
KRIB, Mason City, Iowa
WTRF-TV-FM, Wheeling, W. Va.
KRUS, Ruston, La.
KSEM, Moses Lake, Wash.
KSFM, Woodland, Calif.

KSND, Springfield-Eugene, Calif.
KSWT, Topeka, Kans.
WTOK–TV, Meridian, Miss.
KTRE–TV, Lufkin, Tex.
KTSB–TV, Topeka, Kans.
KUAC–TV–FM, Fairbanks, Alaska
WTMT, Louisville, Ky.
KVGB–AM–FM, Great Bend, Kans.
KVOB–AM–FM, Bastrop, La.
WTAM, Gulfport, Miss.
KWAC, Bakersfield, Calif.
KWEX–TV, San Antonio, Tex.
KWLM, Willmar, Minn.
KWNC, Quincy, Wash.
KWSL, Sioux City, Iowa
KXLE–AM–FM, Ellensburg, Wash.
WSLG, Gonzales, La.
KXON–TV, Mitchell, S. Dak.
KXXX–AM–FM, Colby, Kans.
KYAK, Anchorage, Alaska
KYUK–AM–TV, Bethel, Alaska
WAFB–TV–FM, Baton Rouge, La.
WAHR, Huntsville, Ala.
WAJF, Decatur, Ala.
WAKR–AM–TV, Akron, Ohio
WAQT, Carrollton, Ala.
WAWA–AM–FM, West Allis and Milwaukee, Wis.
WBIP–AM–FM, Booneville, Miss.
WBKB–TV, Alpena, Mich.
WBMB, West Branch, Mich.
WBMJ, San Juan, P.R.
WBOP–AM–FM, Pensacola, Fla.
WSIL–TV, Harrisburg, Ill.
WCCW–AM–FM, Traverse City, Mich.
WCFT–TV, Tuscaloosa, Ala.
WCIU–TV, Chicago, Ill.
WCMA, Corinth, Miss.
WCMB, Harrisburg, Pa.
WCMI, Ashland, Ky.
WCOE, La Porte, Ind.
WCOR–AM–FM, Lebanon, Tenn.
WCRY, Macon, Ga.
WCSM–AM–FM, Celina, Ohio
WCTV, Thomasville, Ga.
WDAM–TV, Laurel, Miss.
WDBC, Escanaba, Mich.
WDBL–AM–FM, Springfield, Tenn.
WDDO, Macon, Ga.
WDIO–TV, Duluth, Minn.
WDXN, Clarksville, Tenn.
WEKR, Fayetteville, Tenn.
WSIL–TV, Harrisburg, Ill.
WFDF, Flint, Mich.
WFHR, Wisconsin Rapids, Wis.
WFIC, Collinsville, Va.
WFIX, Huntsville, Ala.
WFYN–FM, Key West, Fla.
WGCM, Gulfport, Miss.
WGUS, Augusta, Ga.
WSHO, New Orleans, La.
WHIE, Griffin, Ga.
WHNB–TV, New Britain, Conn.
WICD–TV, Champaign, Ill.
WICS–TV, Springfield, Ill.
WIFC, Wausau, Wis.
WINE, Brookfield, Conn.
WJMI–FM, Jackson, Miss.
WJNJ–AM–FM, Atlantic Beach, Fla.
WJOR–AM–FM, South Haven, Mich.
WKAU–AM–FM, Kaukauna, Wis.
WKEM, Immokalee, Fa.
WKIZ, Key West, Fla.
WKKE, Asheville, N.C.
WKNE, Keene, N.H.
WKNX, Saginaw, Mich.
WKPT–AM–FM, Kingsport, Tenn.
WKRG–AM–FM–TV, Mobile, Ala.
WLEQ, Bonita Springs, Fla.
WLMD, Laurel, Md.
WLNR, Lansing, Ill.
WLOI, La Porte, Ind.
WLTV, Miami, Fla.
WMAD–FM, Middleton, Wis.
WMAG, Forest, Miss.
WMDD–AM–FM, Fajardo, P.R.
WMER, Celina, Ohio
WMFQ, Ocala, Fla.
WMKC, Oshkosh, Wis.
WSHF, Sheffield, Ala.
WMTV, Madison, Wis.
WSFM, Harrisburg, Pa.
WOKJ, Jackson, Miss.
WONE, Dayton, Ohio
WONS, Tallahassee, Fla.
WPIK, Alexandria, Va.
WSEL–AM–FM, Pontotoc, Miss.
WQIN, Lykens, Pa.
WQST, Forest, Miss.
WRAB, Arab, Ala.
WRAG, Carrollton, Ala.
WSAU–AM–TV, Wausau, Wis.
WRAU–TV, Peoria, Ill.
WRKI, Brookfield, Conn.
WRKR–AM–FM, Racine, Wis.
WRUS, Russellville, Ky.
KFOG, San Francisco, Calif.
KOA–AM–TV, Denver, Colo.
KOAQ, Denver, Colo.
WGFM, Schenectady, N.Y.
WGY, Schenectady, N.Y.
WJIB–FM, Boston, Mass.
WNGE (TV), Nashville, Tenn.
WRGB(TV), Schenectady, N.Y.
WSIX–AM–FM, Nashville, Tenn.
KEZX, Seattle, Wash.
KJIB, Portland, Oreg.
KWJJ, Portland, Oreg.
WBMG–TV, Birmingham, Ala.
WDEF–AM–FM–TV, Chattanooga, Tenn.
WHEN, Syracuse, N.Y.
WJHL–TV, Johnson City, Tenn.
WNAX, Yankton, S. Dak.
WNCT–AM–FM–TV, Greenville, N.C.
WSLS–TV, Roanoke, Va.
WTVR–AM–TV, Richmond, Va.
WUTR–TV, Utica, N.Y.

COMMENT LETTER No. 12

McKENNA, WILKINSON & KITTNER,
Washington, D.C., December 1, 1977.

(Attention of Harriet L. Oler, Senior Attorney, Office of the General Counsel.)

MS. BARBARA RINGER,
Register of Copyrights, Copyright Office, Library of Congress,
Washington, D.C.

DEAR MS. RINGER: On behalf of American Broadcasting Companies, Inc. I submit herewith an original and four copies of their further comments concerning performance rights in sound recordings.

Respectfully submitted.

NORMAN P. LEVENTHAL.

Enclosures.

BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS, WASHINGTON, D.C. 20559

IN THE MATTER OF PERFORMANCE RIGHTS IN COPYRIGHTED SOUND RECORDINGS

S. 77-6-B

To: Register of Copyrights.

FURTHER COMMENTS OF AMERICAN BROADCASTING COMPANIES, INC.

American Broadcasting Companies, Inc. (hereinafter "ABC"), by its attorneys, submits the following further comments in response to the Notice of Inquiry issued in the above-referenced matter on November 2, 1977.[1] The instant Notice seeks public comment on a study recently concluded by Stephen M. Werner of the firm Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, entitled "An Economic Impact Analysis of a Proposed Change in the Copyright Law."[2] The Werner Report purports to evaluate the potential economic impact on the radio broadcast industry, performers and the recording industry, of a proposed change in the Copyright Law which would institute a performance right in sound recordings.

Preliminary statement

1. In its earlier comments in this proceeding,[3] ABC demonstrated that:

Performers and record companies do not provide a sufficiently unique contribution, cognizable under the Copyright Law, that is not already adequately compensated;[4]

In view of the fact that broadcast stations represent the principal promotional device leading to the success and well-being of recording artists and companies, the proposed performance royalty would amount to an unfair (and burdensome) tax on the broadcast industry;[5] and,

Creation of a performance royalty, contrary to the intent of Article I, Section 8 of the Constitution, would likely produce disadvantages to the public welfare and would not stimulate artistic endeavor.[6]

Importantly, in this particular context, it is the absence of any showing that the general public welfare will be advanced by the institution of a performance right in copyrighted sound recordings which relegates the case for a performer's royalty solely to one of economics and fairness. The Werner Report addresses the economic aspect of this problem only; the study does not even purport to address the overall equities of the proposal in terms, for example, which would include proper consideration of the substantial benefits received by recording artists and record companies from valuable broadcast exposure.[7] Notwithstanding the limited scope of the undertaking, the Werner Report, in ABC's view, misses the essential thrust of the broadcaster position in this proceeding. Moreover, its analysis is deficient in a number of critical respects. Importantly, in this context,

[1] Hereinafter cited as "Notice."
[2] Hereinafter cited as "Werner Report."
[3] Comments of ABC filed May 31, 1977 and Reply Comments of ABC filed June 15, 1977.
[4] See ABC Comments, pp. 9–13; ABS Reply Comments, p. 6.
[5] ABC Comments, pp. 14–16; ABC Reply Comments, p. 5.
[6] ABC Comments, pp. 5–9; ABC Reply Comments, pp. 3–4.
[7] In addition, the report acknowledges that the data used in its analyses "does not permit a comparison of profits in the radio broadcasting industry to those in the record industry" (p. xiv).

the overall tone of the Report is "slanted" in favor of the performance royalty proposal. It is apparent that the purpose of the Report is to rebut the arguments presented against the performance royalty proposal rather than present an independent and objective analysis of its merits.

2. At the outset, we emphasize that our ability to review the factual and statistical validity of the Werner Report has been severely curtailed because of the unavailability to us of the same FCC financial reports which form the essence of the Report's data base. As the Report points out,[8] FCC radio broadcast financial reports (Forms 324) are treated on a confidential basis and are not generally available to persons or entities outside the Commission. In addition, there is no meaningful way to conduct a proper evaluation of the Report without access to the back-up statistical data, computer tapes, specifics of the employment survey, and the like. Significant also in this respect, the Copyright Office's public notice indicating that the Werner Report was available for review by interested parties did not appear in the Federal Register until Tuesday, November 8. Several days expired before ABC was able to obtain copies for review. ABC has had barely two weeks in which to analyze the 179 page report and prepare meaningful comments. This is a totally inadequate amount of time in which to review a complex report of this nature, particularly one which carries with it important public interest ramifications.

The Werner report fails to address the principal broadcaster position

3. The essential conclusion of the Werner Report is found at page xii: "In general, the above *suggests* that radio broadcast stations would be able to pay a record music license fee without any significant impact, either on profits or the number of stations in operation. In addition, there is *evidence* that the radio broadcasting industry would be able to pass on any increase in the costs of operation to the purchasers of advertising time without loss of business or revenues." (Emphasis added.)

Notwithstanding the fact that the conclusion itself recognizes the inconclusive nature of the factual base upon which it is premised, the entire thrust of the Report appears to be directed solely to the question of whether the imposition of an additional music license fee will cause broadcast stations to cease operation. While we are unable, because of the unavailability of FCC financial forms, to evaluate the adequacy of the Werner study's analysis of radio station profitability, it nevertheless becomes clear that the study has misunderstood a very significant aspect of the broadcasters' positions in this matter.

4. In the comments submitted in response to the earlier notice and in testimony submitted in the hearings this past summer, few, if any, broadcasters asserted that the imposition of the proposed tax would cause them to "go dark", i.e., cease operations. The principal contentions—as a review of the record will show—are that the imposition of a second music license fee would be unfair when viewed in the context of today's music industry and that it would require radio broadcasters to make certain judgments concerning the implementation of operating adjustments and other cost saving means to offset the additional costs incurred.[9] As suggested by many of those participating in the hearings, such measures would include cutbacks in news services, public affairs and other program areas that are generally not highly profitable in their return to the broadcaster. The Werner Report does not even purport to deal with this crucial issue.

5. In addition, the Report makes certain basic theoretical assumptions concerning the demand and supply of radio broadcast time which are plainly contrary to reality. These faulty assumptions appear to underlie the study's principal findings that some broadcasters may not be profit maximizers and that demand for radio air time is generally inelastic. These findings are used to support the study's conclusion that broadcaster claims of financial hardship are exaggerated. As we show below, there is insufficient support for these findings in the Werner Report and only the most fragmentary evidence is offered to justify them. Further, the Report is fundamentally flawed in that it attempts to relate industry-wide data and trends to the demand and supply characteristics of individual stations. This extreme assumption, that radio stations are equal in all

[8] Werner Report, pp. 1, 38–39.

[9] These adjustments would not necessarily be tied to a station's profit level, although stations in a poor financial condition could be expected to implement such cost saving adjustments much more quickly than their more profitable counterparts.

respects, is a major defect in the Report's analyses. In our view, the Report has not proven that the majority of radio broadcasters would be able to withstand an additional music license fee and that the imposition of a second use fee would not adversely affect the industry, particularly stations, and the public they serve.

The evidence offered to support the conclusion that FCC reports do not accurately reflect broadcast station profitability is faulty

6. According to the Werner Report, one of its "major findings" is that "contrary to theoretical expectations, in many cases, the same radio stations report losses year after year without leaving the industry, thereby casting doubt on the claim that profits are the primary concern of broadcasters and that in their absence, firms would leave the industry." [10] This finding is utilized to demonstrate that radio industry claims of poor profits are exaggerated and thus that there is sufficient ability to pay a second music license fee. The basis of this hypothesis is founded in the study's analysis showing that some 20 percent of the sampled stations lost money in at least four out of the five study years, thus "suggesting", according to the Report, that broadcast station profits as reported on FCC financial reports either did not accurately reflect the income of the station or, in the alternative, that continued losses would not lead the stations to leave the industry.[11]

7. Again, due to the unavailability of the base data, we are unable to evaluate the accuracy of these findings. Importantly, however, the Report itself finds that an additional 128 stations would have lost money over this period if a second music license fee had been imposed.[12] Significantly, the study's findings indicate that of the 60 percent of the radio stations reporting losses during at least one of the five years in the study period, a substantial portion reported profits and losses in alternate or non-sequential years,[13] thus lending credence to a conclusion that the radio broadcast industry does not fail to report true operating losses and profits, as the study suggests.

8. As noted above, the Report's essential conclusion that the profit picture of the radio broadcast industry is not nearly as severe as broadcast parties have previously suggested [14] is premised principally upon data showing continued losses without exit from the industry. This alone, however, does not support a conclusion that these reported losses are not, in fact, truly representative of the stations' financial posture. The study fails to recognize a salient characteristic of the broadcast industry—station licenses are not readily surrendered. Station operators losing money year after year will not generally halt broadcast operations and surrender a valuable license to the FCC; rather, the operator is much more likely to sell the station at a reduced market price, one reflecting the station's loss situation. The Werner Report fails to address this far more frequent occurrence.

9. In addition, the study fails to determine how many of the stations in the sample loss category are in a start-up phase of operation (during which such losses would normally be absorbed) or to quantify the number of situations in which the loss category station is, in fact, being "carried" by a co-owned broadcast property or other media outlet such as a local newspaper. All of these facts—had they been developed—would likely have substantially altered the Report's findings concerning the validity of industry profit figures. Even assuming that the study properly concludes that some station operators are not profit maximizers, thus bringing the use of their financial data as a basis for industry claims into question, the study inappropriately assumes this to be the case for all loss category stations. The plain fact of the matter is that common sense suggests that there are likely to be just as many loss category station operators who are profit maximizers as are not.

10. In its further attempts to "unexaggerate" the poor profitability of the radio broadcast industry, the Report excludes from the profit calculation those items on the FCC financial report which represent "payments to principals" and

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[10] Werner Report, p. x.

[11] Werner Report, p. 44, Table 4. The suggestion that FCC financial reports do not accurately reflect station profitability is pure hypothecation without any basis in fact. It also ignores the fact that the integrity of information supplied to the Commission is a basic premise of a station licensee's responsibility.

[12] Werner Report, pp. 47–48.

[13] Werner Report, p. 42.

[14] As ABC noted in its reply comments (see p. 5, footnotes 2 and 3), for example, the radio industry has experienced continually declining profit margins and that virtually 50 percent of all radio stations lost money in 1975.

"other general and administrative" expenses.[15] The Report attempts to justify the exclusion of payments to principals on the grounds that there "is strong evidence that many stations are owned and managed by the same individuals," [16] that because of the double taxation of corporate income the goal of the manager/owner may not necessarily be to maximize profits but to maximize personal income, and that it may well be to the manager/owner's advantage to report no income at all and take his "profit" in the form of excessive salaries, commissions and fees. There are several critical errors in this analysis. First of all, the study fails to quantify the number of stations which have such manager/owners. Secondly, the study fails to acknowledge that in many cases a manager/owner need not "hide" profits in this manner because he can legitimately avoid the double taxation of corporate income by making the licensees company a Subchapter S corporation; the study has not attempted to quantify the extent to which manager/owner stations are in fact structured in this fashion. Further, the study fails to address the very likely proposition that in many, if not most, instances owner-operators will not want to "hide" profits in the fashion suggested, since these same loss category stations will most probably want to be able to show as good a financial picture as possible to lending institution and prospective purchasers.[17]

11. Significantly in this respect, the study recognizes that some payments to principals are "very likely legitimate costs" but that "it is reasonable to assume that at least some of the amount would have gone into profits." [18] Nevertheless, in an effort to lessen the severity of the radio industry's loss situation, the study excludes all such payments in its analysis. In exactly the same fashion, and again recognizing that other general and administrative expenses "include legitimate costs of operation", the Werner Report excludes the entire category of such costs from its analysis.[19] No attempt is made in either case to quantify the extent to which such costs are properly included expense items.

12. It is interesting to note that while the study concludes that radio industry losses, as reported in FCC financial reports, are unreliable, the study goes on to utilize this very same data, as if it were reliable, to justify special consideration for classical music stations.[20] In our view, it is inconsistent to urge, as does the Werner Report, that loss category stations may not be profit maximizing firms and then use the contrary assumption for special treatment for classical music stations on the grounds that they are profit maximizing entities. There is nothing offered in the Report to demonstrate that classical stations are profit maximizing and that other format stations are not.

13. Summarizing the foregoing paragraphs, the Werner Report has not demonstrated that FCC financial reports do not accurately reflect the relative financial state of the radio broadcast industry. Broadcaster claims of economic hardship in the face of a second music license fee have not been shown to be exaggerated to any significant degree.

The report's conclusion that demand for radio air time is inelastic is unrealistic and in conflict with reality.

14. In conjunction with its assertion that the poor profitability of the radio broadcast industry is not as severe as claimed, the Werner Report attempts to show that, in any event, the cost of a second music license fee could readily be passed on to advertisers at no additional expense or impact upon broadcasters. (This is in demonstrable conflict with testimony offered by broadcast station operators on this point.) The basis for the Report's conclusion in this regard is that "the demand for advertising via radio is relatively insensitive to price change." [21] The essential point here is summarized at page 25 of the Report:

"All statements therefore regarding the ability of broadcasters to 'pass on' a rate increase can be judged in terms of the extent to which they provide infor-

[15] Werner Report, pp. 48–51.
[16] Werner Report, p. 49
[17] There is absolutely no evidence submitted to support the report's suggestion that reported profits are misleading because some multi-media owners "may charge joint production costs solely to their broadcasting operation" and that operators who can exercise discretion in charging expenses "may feel that the threat of competition from would-be operators is lessened by reporting low or no profits." Indeed, standard accounting practice and IRS review would, in most cases, preclude widespread use of such techniques. Werner Report, p. xi.
[18] Werner Report, p. 49.
[19] Werner Report, p. 50.
[20] Werner Report, pp. 53–55.
[21] Werner Report, p. xiii.

mation concerning the demand for radio advertising. If it can be shown that the demand for radio advertising is relatively inelastic, or that demand is increasing, the impact of the bill will be negligible. If, on the other hand, it can be demonstrated that demand is relatively elastic, or that demand is decreasing, then the impact will not be negligible."

15. While the study purports to address the effect of a music license fee on competition among radio broadcast stations (and postulates that price changes resulting from additional costs imposed by a music license fee would not affect competition within the radio industry),[22] the study does not appear to address the equally important question of the impact of a second music license fee on multi-media competition. That is, what effect on radio advertising sales (demand) would result if advertising rates for radio had to be increased to recover the costs of a music license fee, and advertising rates for competing local media such as newspapers, magazines and the like, remained stable? This is an indispensable component of the economic picture which the Werner Report chooses to ignore.

16. Importantly, in this connection, the Report acknowledges that its "results are not conclusive" and that the data merely "tend to suggest" that demand for radio advertising is relatively inelastic; that is, there are not good substitutes. The Report thus concludes that if this is, in fact, the case "radio broadcasters should be able to pass on some, if not all, of the cost increase to advertising sponsors."[23] The inconclusive nature of the Report's findings in this regard should be of utmost concern to the Copyright Office and Congress. Certainly, when you view the Werner Report as a whole, it has not proven its critical conclusion—that demand for radio time is inelastic and, thus, that broadcasters can readily pass on the costs of a performance royalty to advertisers.

17. Another fundamental element of the Report's general analysis is its treatment of the supply function in the radio broadcast industry. (Werner Report, pages 13–25) As the Report notes, "the convention is adopted that stations vary the amount of time available for sale in response to variations in the price paid by advertisers" (page 13). This assumption is plainly in conflict with reality. As a general proposition, radio stations will offer the industry standard of not more than 18 minutes of commercial time per hour irrespective of the price paid by advertisers or the state of the demand curve. Air time is a commodity which is lost if not sold. Thus, it is patently fallacious to treat broadcast commercial time in the same manner as economic theory would calculate the effect of demand on the decision to manufacture or not manufacture additional quantities of a given commodity. Contrary to the assumptions in the Werner Report, the standard economic theory of the firm, at least to the extent it is applied to the supply function, is not directly relevant here.

The Werner Report confirms that the fundamental purpose of the copyright law will not be met by institution of the performance royalty

18. The principal objective of the Constitutional Copyright power—and legislation enacted thereunder—is to "promote the progress of science and useful arts"; in other words, to increase creativity and productivity for the general public welfare.[24] Clearly, in the absence of some public benefit, there is no justification for copyright protection of any kind. No documentation has been submitted to support the proposition that a performance royalty in sound recordings will encourage creativity and thus benefit the public welfare. The Werner Report essentially confirms our conclusions in this regard:

"It is not clear that Enactment of the performance rights amendment will result in any increase in the amount of serious music recorded nor an increase in the production of other forms of non-rock music, as some industry spokesmen would suggest." (page 111)

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[22] Even in this case, however, the report improperly assumes that industrywide data can be readily applied to individual station situations. This is a fundamental error for it ignores the fact that the demand curve for broadcast air time will vary by time of day, station, format, market size, programing, and a host of other considerations.

[23] Werner Report, p. 67; emphasis added. The report's analysis of historical trends in radio broadcast revenues and advertising rates (pp. 68–71) is similarly inconclusive. For example, it is stated that "radio broadcasters should be able to pass on some of the increase in the cost of doing business to advertising sponsors without necessarily suffering losses in reported profits."

[24] See ABC Comments, pp. 6–7; ABC Reply Comments, p. 2; *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) and *Mazor* v. *Stein*, 347 U.S. 201, 219 (1954).

19. In this connection, the Report also makes it apparent that even the ostensible objectives of those favoring the performance royalty will not be met by enactment of a second music license fee. Given the dollar amount of money to be obtained as a result of the proposed performance royalty and the probable high transaction costs involved in its distribution[25]—and once the record companies have taken their 50 percent share—the amount of money ultimately to be received by the back-up musicians, background singers, sidemen, etc., is likely to be negligible.[26] Yet the Report would imply that the Copyright Office should recommend, and the Congress should enact, a performance royalty in sound recordings that the Report itself fails to show conclusively would not be severely adverse to radio broadcasting. We do not believe that this is a risk which the Congress should prudently undertake.

Conclusion

In view of the serious deficiencies in the Warner Report, the fundamental flaws in its conceptual approach, and the admitted inconclusiveness of its findings, ABC does not believe that the Werner Report can properly form the factual economic basis upon which the Copyright Office can appropriately recommend legislation to Congress in favor of a performance right in sound recordings.

Respectfully submitted.

AMERICAN BROADCASTING COMPANIES, INC.,
By EVERETT H. ERLICK.
MARK D. ROTH.

Its Attorneys:

JAMES A. MCKENNA, JR.
NORMAN P. LEVENTHAL.

DECEMBER 1, 1977.

COMMENT LETTER NO. 13

LIBRARY OF CONGRESS,
Washington, D.C., December 1, 1977.

In the matter of performance right in sound recordings.

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS WITH RESPECT TO "AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE IN THE COPYRIGHT LAW"

The National Association of Broadcasters (NAB) hereby submits its comments regarding the study prepared for the Copyright Office, entitled "An Economic Impact Analysis of a Proposed Change in the Copyright Law" (hereinafter cited as "study"). NAB consistently has opposed establishment of a performance right in sound recordings and herein will comment to the extent possible on various conclusions stated in the study which appear at odds with several of NAB's arguments against establishment of the new copyright. Given the severe constraints imposed on interested parties by the shortness of the comment period and the lack of access to raw data, however, NAB reserves the right to prepare and submit a more extensive analysis of the study directly to the appropriate Congressional subcommittees as well as to the Copyright Office. Furthermore, NAB's present failure to address any specific findings or conclusions stated in the study should not be construed as agreement by NAB with such findings or conclusions.

It is readily apparent from even the most superficial analysis that the Copyright Office would be acting in an arbitrary and capricious manner if it embraced the study's conclusions as fact. Despite the implications of firm conclusions based on hard facts in the study's "Summary of Findings and Conclusions,"[1] the study reaches conclusions based on opinion, interpretation, and suggestion. For example, the study generally concludes that FCC broadcast financial data is inadequate for purposes of an economic impact analysis, but, then, proceeds on the basis of that data and unsupported and unwarranted assumptions to state conclusions it believes are suggested by the data regarding potential economic

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[25] See Werner Report, p. 89.
[26] Significantly, the report gives no indication that the funds received from the performance royalty would go to those in need of it.
[1] Study at ix–xiv.

impact of the performance right on radio broadcast stations. Thus, the study falls far short of being the precise and thorough analysis of economic impact which the Copyright Office presumably envisioned. In fact, the study itself often admits its own failure to provide fully definitive conclusions.

The study is inadequate not only in terms of its stated purposes, but in a larger sense as well. Nowhere does the study directly address the public interest loss which would result from stations' reductions in program service in the face of higher music usage costs. Nor does it address NAB's fundamental equitable argument based on the substantial economic benefits accruing to record producers and performers as a result of airplay of their recordings.

NAB urges the Copyright Office to recognize the serious shortcomings of the study and to refrain from relying on its highly speculative conclusions in preparing its report to Congress.

I. NAB's ability to rebut opinions stated in the study is severely handicapped by constraints of time and confidentiality of raw data

NAB has been placed at a considerable disadvantage in terms of responding to the study. The study states several opinions which tend to contradict NAB's assertions regarding the impact of H.R. 6063 on the broadcast industry. Ideally, fairness would dictate in such circumstances that NAB and other broadcast interests be given a reasonable opportunity to conduct a thorough analysis of the study in order to rebut the conclusions it suggests. However, in the present inquiry, NAB really has been provided only a minimal opportunity to respond in terms of time and access to data upon which the study was based.

First, NAB's ability to analyze the study is circumscribed by the lack of access to broadcast stations Annual Financial Reports (FCC Form 324) upon which the study's entire analysis of impact on broadcasters is based. Broadcast financial reports traditionally have been considered confidential information and are not made available for public inspection under the rules and regulations of the Federal Communications Commission. 47 C.F.R. § 0.457(d)(1)(i). This is particularly aggravating to NAB because the study's suggested conclusions are based largely on the allocation of costs to two specific reporting categories on the financial reports. The study suggests that costs allocated to these categories may constitute "would be" or "hidden" profits, the existence of which render unreliable conclusions based on analyses of reported profits. Without a more rigorous analysis of indivdual station reports, however, it is impossible to show whether the study's interpretation of these cost allocations is valid.[2] Its interpretation hardly is beyond question. The study's suspicion that such "hidden profits" exist is premised on the ability of some stations to remain in operation despite consistent losses. Yes, stations may be able to remain on the air despite consistent reported losses for a variety of reasons other than their alleged reliance on "hidden profits." (The other possible explanations for continued operation in the face of consistent losses are described in Section III, infra.) Suffice it to say for present purposes, the study itself did not attempt to confirm its interpretation with further analysis, and NAB cannot possibly even attempt to achieve the "full understanding" of the data which escaped the report without access to data which cannot be made available to it.

Second, the raw data collected by the Department of Labor was utilized to assess the impact on performers has not been appended to the study or otherwise made available to interested parties. This lack of ready access to raw data similarly frustrates NAB's efforts to comment meaningfully on the study.

Third, the time allowed for analysis of and response to the study is wholly inadequate. The study is— to say the least—lengthy and complex. It is based on data from thousands of stations and the active members of five unions. Furthermore, the study is flawed and its conclusions are based largely on speculation, conjecture and opinion. Yet, the parties have been given less than a month to prepare responsive comments.

NAB in no way wishes to suggest that the Copyright Office is at fault with respect to either the confidentiality of FCC broadcast financial data or the brevity of the response period. NAB realizes that the Copyright Office cannot dictate FCC policy and is fully aware that the Copyright Office itself is subject to a rapidly approaching deadline with respect to its report to Congress on the performance right in sound recordings.[3]

[2] Id. at 49.
[3] Public Law 94-533, § 114(d).

On the other hand, the Copyright Office's acceptance of the conclusions suggested by the study would contain an element of unfairness. Congress, after all, has directed that the Register's report describe the views of major interested parties. While, perhaps, unavoidable, the shortness of time and lack of access to raw data preclude interested parties from fully expressing their views concerning the study—a particularly unfortunate circumstance considering that the study falls short of expectations in terms of thoroughness and accuracy.[4] Furthermore, a more reliable and useful study may have been forthcoming had the Copyright Office permitted interested parties to assess and comment on the feasibility and methodology of the study before it was undertaken. Now, it has only succeeded in obtaining a study which reaches no firm conclusions and fails to provide any really reliable or useful information—and interested parties are foreclosed from preparing an appropriately substantial response. In view of the severe disadvantage at which broadcast interest find themselves, NAB urges the Copyright Office to refrain from unfairly embracing the study's very speculative conclusions.

II. In confining its analysis to whether stations will remain on the air, the study ignores the far more pervasive and ultimately more detrimental possibility that stations will reduce the quality or quantity of their program service

One of the study's most serious inadequacies is its failure to address the most probable effect of requiring broadcasting stations to pay performance royalties, i.e., qualitative and quantitative reductions in broadcast program service to the public. While NAB has held out the possibility that some stations might be forced off the air as a result of the added expense of performance royalties, the thrust of NAB's arguments concerning the effects of performance royalties has been the high probability that large numbers of stations will divert funds away from other program services to pay the additional royalties for broadcast of recorded music. The program services which would be subject to reduced funding generally would be news, public affairs and other "community responsive" program types which usually are not profitable in themselves. The study, nonetheless offers no speculation, much less any firm conclusions, with respect to this element of economic impact on stations (or the resultant public interest loss). By restricting its analysis to the ultimate viability of stations and ignoring the vitality of their programming, the study is less than thorough. Therefore, its value to the Copyright Office in preparing its report to Congress appears very limited.

III. The study's conclusion that "hidden profits" must account for stations remaining on the air despite consistent reported losses is hasty and speculative and totally ignores the numerous other valid explanations for their continued operation.

The study touts as a "major finding" the fact that some radio stations consistently report financial losses, but, nonetheless, do not leave the air.[5] This fact, the study concludes, cast "doubts on the claim that profits are the primary concern of broadcasters and that, in their absence, firms would leave the industry." [6] The study goes on to opine that broadcast owners derive income from other than reported profits. Thus, based on that opinion, the study states that it is inappropriate for broadcasters to base economic impact arguments solely on reported profit figures.[7]

NAB, however, stands by its previous analyses based on reported profits and submits that the study fails to raise substantial doubts about NAB's conclusions. Initially, the study makes no hard findings about the reasons stations remain on the air while consistently reporting losses. It does no more than state an opinion which it believes is suggested by the data and bases its determination as to the propriety of broadcasters' claims on that opinion. Thus, the study really only suggests one of the alternative explanations of continued operation in the face of consistent losses and states no firm conclusion.

Second, the study is limited to a five-year period which may or may not be representative of actual trends of station's annual profits and losses over time.

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[4] Notice of Inquiry, 42 Fed. Reg. 48226.
[5] Study at x.
[6] *Id.*
[7] *Id.* at 62.

Third, the proportion of stations reporting consistent losses is not necessarily significant, especially in view of the wide variety of reasons (other than "hidden" profits) why stations may remain on the air despite consistent losses.

Fourth, the study itself admits that some portion of the costs allocated to the suspect categories do constitute legitimate expenses.[8] Thus, its subsequent analyses of station by station profit and loss statistics when those categories are excluded from overall expenses are highly imprecise and unreliable.

The most critical deficiency in this portion of the study, however, is its failure to consider the numerous reasons truly unprofitable stations may remain on the air at least during a five-year period comparable to the period of the study. In other words, reporting stations may actually lose money consistently but remain on the air in a variety of circumstances. First, the study looked only to annual financial reports, not balance sheets. A station which lost money consistently during 1971–1975 might simply be borrowing money to sustain its operations during a "lean" period. Second, the study apparently failed to include any investigation of whether any of the reporting stations were sold. Losing stations often are sold to new owners, who may take several years to turn a station around, thus resulting in reported losses over the five-year period. Third, the study failed to consider that stations may have been operating on their start-up phase during all or part of the 5-year period. Because stations may not achieve profitability for a matter of years, reports of consistent losses by new stations would not be unusual. Similarly, many FM stations may have been phasing in new programming (in lieu of "simulcasting" a sister AM station) in anticipation of more restrictive FCC limitations on program duplication.[9] This would increase operating costs significantly and result in reported losses in initial years of operation with separate programming. Finally, as the study itself suggests, stations which consistently lose money may be "carried" by profitable commonly-owned stations or group broadcasters. Whether groups would continue to carry losing stations over the long haul might be doubtful, but it would not appear unusual for stations to be carried as losers for a period of five years.[10]

Finally, the study's eagerness to point to "hidden profits" at stations which report losses is inappropriate and its conclusions suspect in two respects. First, it is not necessary for station owners to disguise profits as other cost items to avoid taxation.[11] Double taxation is easily avoided by small, closely held corporate licensees who take advantage of Subchapter S status. Larger publicly held corporations are subject to SEC regulations which effectively preclude disguising of profits. Second, consistently reporting losses is not, as the study suggests, advantageous to broadcast stations.[12] Because the financial report is confidential, potential competitors would not have access to them as a basis for a decision on entering a particular market. On the other hand, consistent reporting of losses would be disadvantageous to stations in their relationships with present creditors and potential lenders (who would demand that the station furnish its financial reports).

NAB submits that the study's failure to accord due consideration to the numerous above-stated reasons for stations' remaining on the air despite consistent reported losses renders its conclusions unsupportable, unreliable and useless. The study could have concluded just as easily that the losses reported by station were real losses which stations were willing to incur during a 5-year period for a variety of sound business reasons.

IV. The Study's conclusion that broadcasters will be able to pass on increased costs is not supported either by experience or by Data cited in the Report itself

The report concludes that, in economic terms, the demand for radio time is inelastic, so that radio broadcasters will be able to raise rates charged for commercial time without suffering a loss in revenues.[13] This conclusion is based on an hypothesis that there is little cross-elasticity between radio and other advertising media, i.e., that radio rates can be raised without driving advertisers away from radio to other advertising media like television and newspapers.

[8] Id. at 49.
[9] 47 C.F.R. § 73.242.
[10] The group might well be seeking to improve the station's performance with increased expenditures, which, of course, could produce reported losses for some time.
[11] Study at 49.
[12] Id. at 51.
[13] Id. at 64.

To suggest that radio is not subject to strenuous competition from other media—including price competition—is to ignore the behavior of both buyers and sellers of advertising time. For example, one of the most important and expensive media research projects of recent years was the All Radio Marketing Study (ARMS), conducted under the auspices of the Radio Advertising Bureau (RAB), the sales arm of the radio industry. One of the main objectives of this study was to obtain data on multimedia use—information on radio listening, television viewing, and newspaper use that could be used to compare individuals' use of these media. It was then possible for RAB to cross-tabulate this multimedia information to show the advantages of substituting radio for other media in advertising campaigns, and to compare the cost efficiencies of various media "mixes". (Some examples of the material prepared by RAB to promote radio in competition with newspapers and television are included in Appendix 1.)

Further, even a casual reading of the business and trade press indicates how, in competition between media for advertising, changes in the rates of one medium can encourage advertisers to shift their advertising to other media. For example:

"*New York.*—For years S. C. Johnson & Son has heavily plugged its Raid insecticide, Pledge furniture polish, Johnson wax and other products on television. In fact, more than 95 percent of the Wisconsin-based company's advertising dollars have gone into TV.

"But, beginning in the 1977–78 TV season, things will be "materially changed. There will be much greater use of magazines, radio, outdoor advertising and possibly even transit advertising," says A. B. "Gus" Priemer, director of advertising services for Johnson.

"The reason is simple: the high cost of advertising on the three major commercial networks.—Wall Street Journal, Jan. 25, 1977, p. 48.

"The sharp and highly visible mounting of the cost of TV ads is prompting some sponsors to do more than just weigh the alternatives . . . Procter & Gamble, meanwhile, has reportedly asked each of its ad agencies to put 17 percent of its budgets into magazines, while Champion Spark Plug went even further, with a smaller budget: it completely dropped television from its '77 advertising plans.—Barron's, Sept. 5, 1977, p. 6.

"*San Francisco.*—Advertisers are being 'turned off by the recent out-sized increases in television" helping to make this a great year for newspapers, declared Jack Kauffman, president of the Newspaper Advertising Bureau.—Advertising Age, July 25, 1977, p. 3.

The evidence cited in the study itself to support the contention that the demand for radio time is inelastic is, at best, weak. The examination of national rates for radio advertising time[14] relies on the fact that costs per thousand have not increased as rapidly in the radio industry as in other media. While this is true, it does not necessarily indicate that there is no substitutability between radio and other media. At any point in time, advertisers make decisions on which media to use that are based on several factors—estimates of the media's effectiveness, media costs, and even the relative costs of placing ads on the media. At one point in time, the relative costs per thousand represent an equilibrium that reflects these factors. The fact that relative costs-per-thousand change through time does not mean that there is not substitutability between media, however—it may simply be due to changes in any of the factors just cited. The effectiveness of one medium may actually increase—for example, the effectiveness of television commercials has increased as the percentage of homes owning color television sets has risen. Advertisers' perceptions of effectiveness may change—for example, because new research data (like the ARMS study) is produced. Stations or station representative firms may offer new ways to buy time on their medium that make it more convenient or less expensive (in terms of staff time and administrative costs required by the agency and advertisers) to buy the medium. The fact that the relative cost of radio time has fallen, therefore, may be more an indication of the declining ability of radio to compete with other media than it is evidence of lack of substitutability.

The empirical data used in the study to test the sensitivity of radio advertising expenditures to changes in the relative costs of radio and other media[15] is, as the study says, not conclusive. The second stage of the regression analysis in Appendix 4 is based (through no fault of the author's) on a very small number of observations, so it is not surprising that the analysis shows that radio revenues are not significantly affected by changes in the relative costs of media. Further,

[14] Id. at 65.
[15] Id. at Appendix 4.

although it is not possible to tell from the report whether network or spot rates are used, the analysis apparently attempts to use relative national costs of media to predict total radio industry revenues. As the study points out subsequent to its discussion of the results of Appendix 4, approximately three-fourths of radio industry revenues come from the sale of time to local advertisers, so one may question the validity of using national rates to predict revenues that are primarily local.

Even if the results of Appendix 4 are taken at face value, however, those results are not inconsistent with the notion of competition among media—as suggested in the comments above, the declining cost of radio relative to other media may well reflect changes (either real or perceived) in the relative effectiveness of media, in the relative costs of placing ads, or in a number of other factors.

Recognizing that a major portion of radio industry revenues come from local advertisers, the study also attempts [16] to examine changes in local rates and revenues. The validity of this analysis, and the conclusion drawn from it, are doubtful for several reasons.

First, the rates published in "Standard Rate and Data" do not necessarily reflect actual rates. The study recognizes that rates are often discounted, but makes the questionable assumption that the percentages discounted remain the same over a five-year period. This assumption does not reflect the realities of selling local radio time. Time is sold at a discount—"off the rate card"—for a variety of reasons, only one of which is the volume of time sold to an advertiser. As a station's ratings fluctuate, the effectiveness of its sales force varies or the health of the local economy changes, a station will feel pressure to sell time for less than its published rates to avoid large amounts of unsold time. Some stations will do this; others, as a matter of management philosophy, will refuse to do it. The variation in practices from station to station (and at a given station through time) makes comparison of published rates of limited value. Beyond this, the rates quoted in "Standard Rate and Data" reflect changes in stations' formats and audience composition that should be taken into account when considering changes in rates.

Even if the information on rates were completely valid, however, it does not indicate, as the author claims, that the demand for radio time is increasing in any meaningful sense. The information in Table 19 [17] indicates that radio revenues increased at about the same rate as radio rates from 1971 through 1975. (On an unweighted basis, the averages for all regions in Table 19 show that revenues increased by 26 percent, and advertising rates by 27 percent.) These increases, which are slightly less than the rate of inflation for the period, simply reflect the increase in the price of goods and services that occurred from 1971 to 1975, and do not indicate any increase (in real terms) in the demand for radio advertising time.

Virtually all of radio advertising is for goods and services sold at the retail level, and changes in the cost of living must be considered when using rate and revenue data to determine whether demand is increasing. The study may be correct in stating that use of the Consumer Price Index or GNP price deflator is not appropriate if the purpose is to examine radio industry profits, but the purpose here is to determine changes in demand for radio advertising time. By failing to take into account cost of living changes, the report takes the implicit position that, if the cost of living had declined from 1971 to 1975, the data in Table 19 should be interpreted in the same way as it is interpreted in light of the inflation in the 1971–75 period. In real terms, therefore, it is clear that the data in Table 19 show that demand is not increasing.

The authors also examine the increase from 1971 to 1975 in the number of radio stations in operation, on the theory that the demand for radio station licenses can be viewed as being derived from the demand for radio advertising. FCC data [18] show quite clearly that the number of stations increased between 1971 and 1975, and that the number of stations with revenues over $200,000 similarly increased. As we have indicated above, however, radio industry revenues increased very little (in real terms) during that time, so the entry of new stations can hardly be considered to be evidence of increased demand. If anything, the fact that the number of stations in operation increased 10 percent from 1971 to 1975 without bringing about a similar real increase in revenue suggests that demand has not increased.

[16] Id. at 68.
[17] Id. at 70.
[18] Id. at 73–76.

V. The study fails to demonstrate that performing artists would actually benefit from the proposed payments; it suggests, in fact, that little money will be left for distribution to performers after administrative costs are paid

In examining the impact of the proposed payments on performers, the study quite properly attempts to determine what costs will be incurred in collecting and distributing the money to be paid by broadcasters. Three different systems for administering the payments are considered in the study, and the discussion of each system raises questions either about the feasibility or the cost of the system.

The study recognizes that the "parallel" system is likely to cost more than the total amount of money that is collected. The "augmented" system, which would require the cooperation of BMI and ASCAP, is discussed only briefly in the report. There is some doubt whether ASCAP and BMI would be willing, or legally able, to cooperate in an "augmented" system. Even if their cooperation were given, however, the costs would be substantial. Combined ASCAP and BMI costs in 1976 amounted to more than 4 million dollars.[19] Even recognizing that some of these costs are not directly attributable to collection and distribution of royalties, the magnitude of the costs suggests that a society representing performers that participates with ASCAP and BMI in a cooperative system would have to use a large portion of the money collected from broadcasters simply to pay administrative costs.

The third system, the "substitute" system, would require a very substantial change in the operation of the music licensing societies. It would also require the development of new technology, and the report itself recognizes that whether such a system is a realistic possibility is "purely speculative."

Considering the questions raised about the costs and feasibility of the three alternative systems that are examined in the report, there must be some doubt about whether any more money would remain for performers after payment of administrative costs. Certainly the doubts are substantial enough to suggest that anyone claiming that performers would benefit substantially from the proposed payments must demonstrate that administrative costs will not require most of the money paid by broadcasters. The report makes no such a demonstration.

VI. The study fails to show that establishment of a performance right in sound recordings would have the intended effect of promoting record production

NAB has seriously questioned whether a performance right in sound recordings would enhance the public good by promoting record production or just enhance one industry's economic position at the expense of another. If the latter were the case, there would be no public policy, nor Constitutional justification for establishment of the new copyright. Consistent with NAB's position that establishment of the performance right would not, in fact, promote record production, the study contains no showing that enactment of H.R. 6063 would have this intended effect. In response to arguments of those favoring establishment of a performance right in sound recording, the study states: "It is not clear that enactment of the Performance Rights Amendment will result in any increase in the production of other forms of non-rock music as some industry spokesman would suggest.[20] In view of the Constitutional basis of the copyright law of this country (U.S. Const. Art. I, Sec. 8), NAB urges the Copyright Office to recognize this critical shortcoming of the performance right proposal.

VII. Conclusion

In view of the foregoing, NAB submits that the study in question reaches unsound and unsupported conclusions, particularly with regard to the economic impact of the performance right on the radio broadcast industry. Thus, NAB urges the Copyright Office to refrain from arbitrarily and capriciously (and unfairly in view of the constraints on preparing appropriately responsive comments) accepting the conclusions stated in the study as fact.

Respectfully submitted.

NATIONAL ASSOCIATION OF BROADCASTERS,
ERWIN G. KRASNOW,
Senior Vice President and General Counsel.
JOHN A. DIMLING,
Vice President and Director of Research.
JAMES J. POPHAM,
Assistant General Counsel.

[19] Id. at 85.
[20] Id. at 111.

A CROSS-TAB ANALYSIS FROM

ARMS II

ALL-RADIO MARKETING STUDY

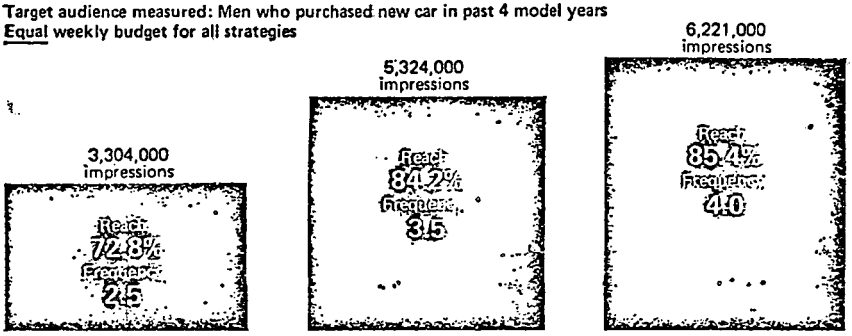
COMPARISON OF 3 MEDIA STRATEGIES TO REACH...

NEW CAR BUYERS

HOW 3 MEDIA STRATEGIES COMPARE IN TOTAL IMPRESSIONS DELIVERED AS WELL AS REACH AND FREQUENCY

STRATEGY 1	STRATEGY 2	STRATEGY 3
ALL TV BUY COMBINING NETWORK AND SPOT TV	NET TV REMAINS SAME, 50% OF SPOT BUDGET IN TV, 50% RADIO	NET TV REMAINS SAME, 100% OF SPOT BUDGET IN RADIO

Target audience measured: Men who purchased new car in past 4 model years
Equal weekly budget for all strategies



HOW 3 MEDIA STRATEGIES COMPARE IN DELIVERING NEW CAR BUYERS WHO ARE LIGHT, MEDIUM AND HEAVY TELEVISION VIEWERS

NEW CAR BUYERS REACHED WHO ARE:	REACH	FREQUENCY	IMPRESSIONS	% IMPRESSIONS GAINED WITH RADIO
• LIGHT-VIEWERS OF TELEVISION				
Strategy 1—Network Tv & Spot Tv	51.3%	1.5 times	476,000	+221%
Strategy 3—Network Tv & Spot Radio	77.9	3.3 times	1,526,000	
• MEDIUM-VIEWERS OF TELEVISION				
Strategy 1—Network Tv & Spot Tv	76.9%	2.3 times	1,110,000	+101%
Strategy 3—Network Tv & Spot Radio	86.9	4.1 times	2,228,000	
• HEAVY-VIEWERS OF TELEVISION				
Strategy 1—Network Tv & Spot Tv	89.2%	3.2 times	1,718,000	+ 44%
Strategy 3—Network Tv & Spot Radio	91.4	4.5 times	2,467,000	

DETAILS OF 3 MEDIA STRATEGIES AND CUSTOM TAB COSTS

In each strategy the network Tv schedule was 9 participations in prime and late night. A $22,600 weekly spot budget was used in the New York ADI. Strategy 1 is spot Tv in early and late fringe and was an actual buy by an automotive advertiser. In Strategy 2, $11,300 of original spot budget remains in Tv, $11,300 goes into morning and afternoon drive Radio. In Strategy 3, Radio gets total $22,600 spot budget. In Tv 30's are used, in Radio 60's. Further details available from Radio Advertising Bureau Research Department. Cost of reach/frequency analysis only (top half of page): $35. Cost of full analysis including light, medium and heavy viewers breakdown (entire page): $100.

A CROSS-TAB ANALYSIS FROM

ARMS II
ALL-RADIO MARKETING STUDY

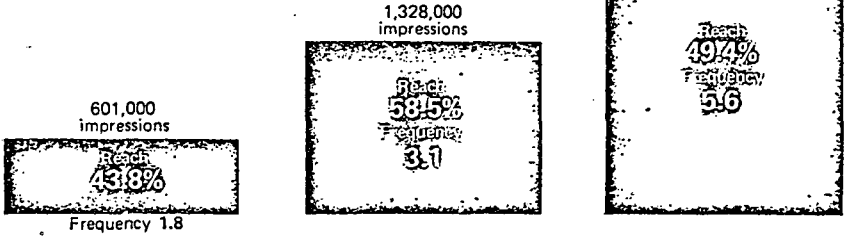
COMPARISON OF 3 MEDIA STRATEGIES TO REACH

GROCERY SHOPPERS

HOW 3 MEDIA STRATEGIES COMPARE IN TOTAL IMPRESSIONS DELIVERED AS WELL AS REACH AND FREQUENCY

STRATEGY 1 — ALL NEWSPAPER | STRATEGY 2 — ½ NEWSPAPER, ½ RADIO | STRATEGY 3 — ALL RADIO

Target audience measured: Women spending over $50 a week on groceries
Equal weekly budget for all strategies



HOW 3 MEDIA STRATEGIES COMPARE IN PERCENT OF AUDIENCE REACHED AT VARYING FREQUENCY LEVELS (FREQUENCY DISTRIBUTION)

Grocery Shoppers reached	STRATEGY 1 — ALL NEWSPAPER	STRATEGY 2 — ½ NEWSPAPER, ½ RADIO	STRATEGY 3 — ALL RADIO
1 or more times	43.8%	58.5%	49.4%
2 or more times	28.6	34.0	38.7
3 or more times	4.7	22.9	31.3
4 or more times	4.0	16.6	25.8
5 or more times	–	12.1	21.3

Figures above show how the Media Strategies differ in "frequency distribution." Strategy 1 (All newspaper) reaches only small percentages of customers more than 2 times weekly. All Radio does far better.

DETAILS OF 3 MEDIA STRATEGIES AND CUSTOM TAB COSTS

A $15,000 weekly budget was used in Los Angeles ADI. Strategy 1 is 2 insertions each in women's section of Los Angeles Times and Herald Examiner. In Strategy 2, $7,500 of original budget remains in newspaper. $7,500 goes into morning and afternoon drive and housewife Radio. In Strategy 3, Radio gets total $15,000 budget. Radio strategies based on 60' announcements. Further details available from Radio Advertising Bureau Research Department. Cost of reach/frequency analysis only (top half of page): $25. Cost of full analysis including frequency distribution (entire page): $85.

A CROSS-TAB ANALYSIS FROM

ARMS II

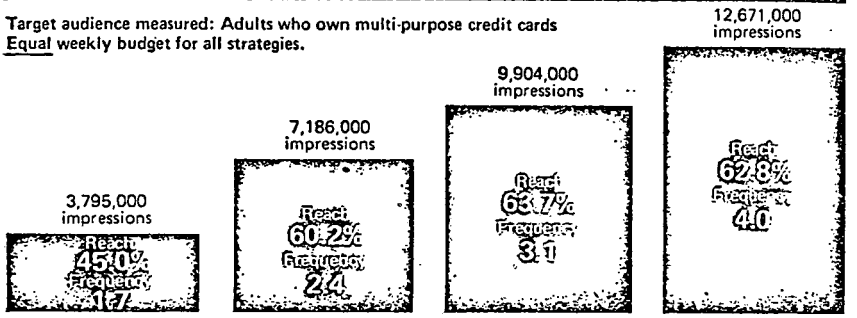
ALL-RADIO MARKETING STUDY

COMPARISON OF 4 MEDIA STRATEGIES TO REACH CREDIT CARD OWNERS

HOW 4 MEDIA STRATEGIES COMPARE IN TOTAL IMPRESSIONS DELIVERED AS WELL AS REACH AND FREQUENCY

STRATEGY 1	STRATEGY 2	STRATEGY 3	STRATEGY 4
ALL TV	2/3 TV 1/3 RADIO	1/2 TV 1/2 RADIO	ALL RADIO

Target audience measured: Adults who own multi-purpose credit cards
Equal weekly budget for all strategies.



HOW 4 MEDIA STRATEGIES COMPARE IN PERCENT OF AUDIENCE REACHED AT VARYING FREQUENCY LEVELS (FREQUENCY DISTRIBUTION)

Credit Card Owners reached	STRATEGY 1 ALL TV	STRATEGY 2 2/3 TV 1/3 RADIO	STRATEGY 3 1/2 TV 1/2 RADIO	STRATEGY 4 ALL RADIO
1 or more times	45.0%	60.2%	63.7%	62.8%
2 or more times	18.8	35.1	44.3	48.0
3 or more times	7.5	20.2	29.9	36.1
4 or more times	2.3	12.1	20.4	27.0
5 or more times	0.7	7.1	13.8	20.2

Figures above show how the Media Strategies differ in "frequency distribution." Strategy 1 (All Tv) reaches only small percentages of consumers more than 2 times weekly. All Radio does far better.

DETAILS OF 4 MEDIA STRATEGIES AND CUSTOM TAB COSTS

An $18,000 weekly budget was used in New York ADI. Strategy 1 is Tv in early and late fringe and prime and was actual buy by a credit card advertiser. In Strategy 2, $12,000 of original budget remains in Tv, $6,000 goes into morning and afternoon drive and daytime Radio. In Strategy 3, Radio gets $12,000, Tv $6,000. In Strategy 4, Radio gets total $18,000 budget. In Tv 30's are used, in Radio 60's. Further details available from Radio Advertising Bureau Research Department. Cost of reach/frequency analysis only (top half of page): $50. Cost of full analysis including frequency distribution (entire page): $160.

A CROSS-TAB ANALYSIS FROM

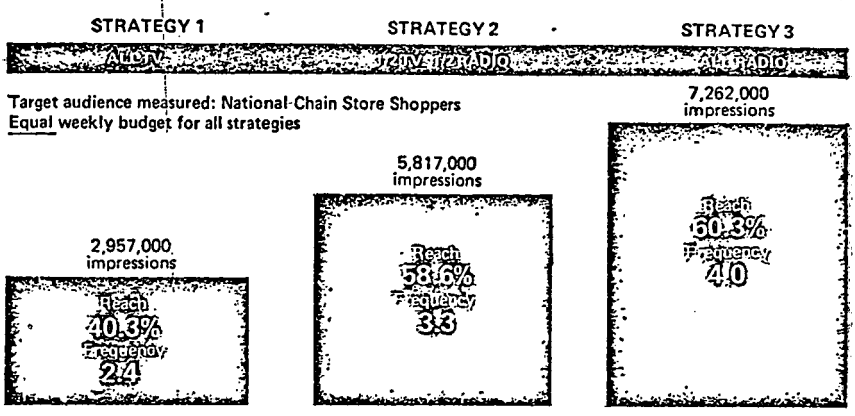
ARMS II

ALL-RADIO MARKETING STUDY

COMPARISON OF 3 MEDIA STRATEGIES TO REACH...

CHAIN STORE SHOPPERS

HOW 3 MEDIA STRATEGIES COMPARE IN TOTAL IMPRESSIONS DELIVERED AS WELL AS REACH AND FREQUENCY



HOW 3 MEDIA STRATEGIES COMPARE IN PERCENT OF AUDIENCE REACHED AT VARYING FREQUENCY LEVELS (FREQUENCY DISTRIBUTION)

Chain Store Shoppers reached	STRATEGY 1 All TV	STRATEGY 2 TV/All Radio	STRATEGY 3 All Radio
1 or more times	40.3%	58.6%	60.3%
2 or more times	23.1	38.8	44.5
3 or more times	14.1	27.2	33.0
4 or more times	8.2	19.6	25.0
5 or more times	5.2	14.3	19.3

Figures above show how the Media Strategies differ in "frequency distribution." Strategy 1 (All Tv) reaches only small percentages of consumers more than 2 times weekly. All Radio does far better.

DETAILS OF 3 MEDIA STRATEGIES AND CUSTOM TAB COSTS

A $13,300 weekly budget was used in Los Angeles ADI. Strategy 1 is Tv in early and late fringe and prime and day was actual buy by a national chain store advertiser. In Strategy 2, $6,650 of original budget remains in Tv, $6,650 goes into morning and afternoon drive and daytime Radio. In Strategy 3, Radio gets total $13,300 budget. All Tv and Radio strategies based on 30" announcements. Further details available from Radio Advertising Bureau Research Department. Cost of reach/frequency analysis only (top half of page): $65. Cost of full analysis including frequency distribution (entire page): $220.

SUMMING UP . . .

1. ARMS II helps you find out more about how media deliver actual customers than any previous study of this quality.

2. You can weigh alternative media strategies . . . Isolate light-viewers . . . Or study heavy-using customers . . . Wide range of target markets.

3. Evaluate Frequency—are you telling your story often enough?

4. Cost of a cross-tab is low. Or it may not be necessary with tabs already done. Over and over ARMS II shows what you saw on preceding pages:

- ADDING RADIO TO TV-ONLY, OR NEWSPAPER ONLY, INCREASES REACH AND FREQUENCY
- YOU GET A LOT MORE IMPRESSIONS PER DOLLAR IN RADIO THAN IN TV OR NEWSPAPERS
- FREQUENCY RISES DRAMATICALLY WITH RADIO . . . AND YOU NEED FREQUENCY—REPETITION—TO SELL

FIND OUT IF THESE PATTERNS HOLD TRUE
FOR YOUR CUSTOMERS WITH ARMS II.
SEE HOW TO OBTAIN TABS ON NEXT PAGE

COMMENT LETTER NO. 14

LOS ANGELES, CALIF., *November 28, 1977.*

MS. HARRIET L. OLER.

DEAR MS. OLER: I would welcome an amendment to the copyright law which would provide royalties for performers and record producers, because in my opinion that would open the ears of record company executives. And they would listen closer to their recorded material before releasing it to the public.

Yours truly,

CHARLES GORDON, *Songwriter.*

NATIONAL BROADCASTING COMPANY, INC.,
New York, N.Y., December 2, 1977.

MS. HARRIET OLER,
Senior Attorney, Copyright Office, Library of Congress,
Arlington, Va.

DEAR HARRIET: This morning our proofreaders discovered some typos in the comments we filed yesterday on the "Impact" paper.

Enclosed is a copy marked to indicate the typos and five copies in which the typos have been corrected.

I would be grateful if you would substitute the corrected copies for those filed yesterday.

Best regards.

Sincerely,

ELEANOR O'HARA.

COMMENT LETTER NO. 15

NATIONAL BROADCASTING CO., INC.,
LAW DEPARTMENT,
New York, N.Y., December 1, 1977.

Re "An Economic Impact Analysis of a Proposed Change in the Copyright Law."

MS. HARRIET OLER,
Senior Attorney, Copyright Office, Library of Congress,
Arlington, Va.

DEAR MS. OLER: This letter contains certain initial comments of the National Broadcasting Company, Inc. ("NBC") on the study, "An Economic Impact Analysis Of A Proposed Change In The Copyright Law" (the "Study"), prepared under government contract for the Copyright Office by Ruttenberg, Friedman, Kilgallon, Gutchess & Associates.

We recognize that the Copyright Office (the "Office") is required by Section 114(d) of the new Copyright Law to report to Congress by January 3, 1978 the Office's legislative recommendations on whether to create performance rights in sound recordings. Nevertheless, it is extremely prejudicial to the position of broadcasters—who are being asked to finance this new royalty—for the Office to afford little more than two weeks to analyze and comment on this 179-page Study. NBC regards this Study as so defective that it will serve no useful purpose to base any significant conclusions thereon. We think the Copyright Office should ignore it completely in reaching its conclusions. Even in the brief time we have had to analyze it, we have uncovered basic flaws discrediting its conclusions. However, NBC reserves its right to file more extensive comments with the Office and with the two House Subcommittees that oversee the Copyright Law and the Communications Act, respectively.

In this letter, we will set forth certain general observations on the scope and bias of the Study, together with specific comments on the economic model of radio broadcasting offered by the authors. We will also comment on the administrative mechanism proposed by the authors.

General comments on the study

The Study reaches two ultimate conclusions which are fundamentally unsound. The first error in the Study is the conclusion that there is objective evidence that establishes the existence of "hidden profits" in the radio broadcast industry and that broadcasters could underwrite these royalties out of "hidden

profits." Apparently, the authors themselves recognize the weakness inherent in that conclusion. Otherwise, it would have been unnecessary to reach the second, and even more glaring false conclusion:

". . . the radio broadcasting industry would be able to pass on any increase in the costs of operation to the purchasers of advertising time without loss of business or revenues" (Study, page xii).

The Study does not purport to analyze the economic impact of performance royalties on the affected industries—broadcasters and other performers of sound recordings; performing artists and record companies. The Study is more narrowly focused.

Pass through to advertisers

That firm assertion that "any increase in the costs of operation" can be passed through to advertisers becomes much less certain in the Study's actual discussion (pp. 64–72) of radio advertising:

"As the evidence presented below tends to suggest, it may very well be the case that radio broadcasters, as a group, will be able to pass on the increase in the cost of operations to advertising sponsors who purchase station time" (emphasis added) (Study, p. 64).

In this section, the authors consider the two sources of that stations' advertising revenues—national spot advertising (which accounts for approximately 25 percent) and local advertising (approximately 75 percent). The authors first consider the national spot market. Table 18 (Study p. 66) sets forth comparative information on percentage increases in television, newspaper and radio national spot advertising in terms of the cost of each medium per thousand of audience delivered to advertisers.

The information in that Table is the greatest indictment of the authors' conclusion. The cost per thousand of radio spot advertising has risen only 24 percent since 1968, compared to a 64 percent increase for television national spot advertising and a 90 percent rise for newspaper advertising. Translate that information into radio station market: the local TV stations and newspaper(s) have been able to maintain or increase advertising revenues while raising costs to levels that are close to, or in the case of newspapers, in excess of double-digit inflation during that ten-year period.

Do the authors presume that radio has failed to raise its national spot rates out of sheer ineptitude or lethargy? Commercial radio broadcasters are in the business of earning as much money as possible to enable them to deliver the best possible radio programming to listeners and a return on investment to stockholders. If radio stations could have raised rates at the same percentage levels as newspapers, no doubt they would have. The plain fact is that the market will not support such increases in radio rates.

Radio stations compete principally with local newspapers for national advertising. In most major markets the newspaper industry is concentrated and thus delivers large audiences and the radio industry is fragmented and each station delivers much smaller audiences. It is not surprising that radio national spot rates have not been able to increase at the levels in which newspaper rates have increased.

This competitive principle is equally or more strongly applicable to the other source of radio revenues—local advertising which accounts for 75 percent of revenues. The authors present data, which we are currently analyzing, on regional increases in the local advertising rates of radio stations during 1971–75 (Study, p. 70). Rates increases range from a low of 19.2 percent in the Pacific region to a high of 38.9 percent in the South Atlantic region, or a national mean (averaging all regions) of 27 percent. Once again radio stations fail to even approach half the national rate of inflation.

We suspect that the authors do not understand how radio stations sell time. The whole Study seems to assume that stations sell for cash all the commercial time they make available. Almost all radio stations have time that can't be sold for cash in every year. As a result they try to minimize losses by selling unsold inventory in barter transactions in which the stations obtain goods and services (e.g., advertising in other media) not cash. In the FCC Financial Data for 1975, barter accounted for more than $12 million of total sales of AM and AM/FM stations alone.

The authors' data leads to a conclusion directly opposite from the one expressed. Radio stations cannot pass on to advertisers the royalty costs of H.R.

6063. They can't even pass through the full increase of costs they have incurred during this ten-year inflationary cycle.

"Hidden profits"

The authors do not supply detailed economic data in support of the "hidden profits" conclusion. The Study attacks the reliability of financial data on radio station losses. On that issue, the authors immediately find that the FCC financial data supports the position that many radio stations lose money. Their analysis next shows that a significant ratio of the stations reporting losses during 1971–75 lost money in four out of the five years. The authors postulate that there must be "hidden profits" in such radio stations because they did not go out of business.

But the authors neglected to analyze station transfer data before reaching a conclusion that there are "hidden profits" in the industry. In another section of the Study the authors present information on station transfers. During the 1971–75 period almost 1600 licenses changed hands (Study, Table 24 at p. 77). Indeed, if the number of stations that transfer licenses after a period of losses is significant, the Study's conclusion that "hidden profits" exist must be discredited.

Because the authors assume the existence of "hidden profits," they determine that the FCC financial reports do not produce objective information about profits and losses. They suggest financial reporting changes to the Commission. We believe the Study should have ended there. The authors had reached a definite conclusion: The information in the FCC financial reports is defective and we cannot derive objective facts sufficient to enable us to assess the economic impact of the Danielson proposals. But no, that approach would apply to preclude the conclusion the Study seems intent on making—i.e., radio stations can afford the royalties proposed by Representative Danielson.

The next steps in the "Profit and Loss Analysis" demonstrate that the study is end-directed. First, the authors simulate the profits and losses of radio broadcasters during the period 1971–75 as if broadcasters had paid royalties on the scale proposed by Representative Danielson. This simulation results in additional stations incurring losses. To offset the actual losses and the simulated losses, the authors adopt the wholly arbitrary and unrealistic method of first excluding payments to owners and affiliates and then excluding the category "other administrative expenses" reported by stations. In each case, the subtractions from costs reported by stations obviously produces a reduction in the numbers of stations reporting losses. In the summary conclusions (Study, pages ix-xiv), the authors find "the above suggests that radio broadcast stations would be able to pay a record music license fee without any significant impact, either on profits or the number of stations in operation."

Having justified its conclusion concerning "hidden profits" on the basis of these artificial exclusions, it is even more surprising that the Study itself does not support this conclusion. In the "Profit and Loss Analysis", after setting forth tables eliminating transactions involving owners and affiliates, the authors observe:

"Some of these expenses are very likely legitimate costs. Without a case by case audit, however, it would be impossible to tell how much of the amount paid to principles would otherwise, have gone into corporate profits. In our opinion, it is reasonable to assume that at least some of the amount would have gone into profits (Study, page 49).

Similarly, after simulating the profit and loss picture in which "other general and administrative expenses" are deducted from costs, the authors note:

"Expenses included in this category include legitimate costs of operation. The fact that the category is such a significant one, however, in terms of the effect it has on the profit versus loss outcome, suggests that there should be more detail concerning the types of expenditures charged to this account" (Study, page 51).

In light of these reservations expressed in the detailed analysis, it is impossible to justify the Study's conclusion that performance royalties can be imposed upon radio broadcast stations without increasing losses.

The economic model is unsound

In the first substantive section of the Study, the authors set out a series of statements which are described as the economic principles that are applicable to the radio station advertising market (Study, Pages 6–36). Given the time available for comments, NBC is unable to present at this time a point-by-point analysis of the errors and fallacies contained in this section. We would, however, direct

the Office's attention to two blatant deficiencies in the radio advertising economic model devised by the authors.

First, the authors state that stations "vary the amount of time available for sale in response to variations in the price paid by advertisers" and that, as a corollary, "station operating costs vary directly with the length of time made available for sale." The corollary is clearly erroneous. One of the key economic attributes of the radio station industry is high fixed costs and low variable costs. Indeed, the principal variable cost in the radio station industry is station advertising and promotion. The NBC Radio Division cannot find any relationship between operating costs and available commercial minutes.

The real fallacy is in the first quoted statement. Supply of adverising time is relatively inelastic in the radio industry. Supply is increased principally by new station licenses or changes in station formats. It is axiomatic in radio broadcasting that format is the prime determinate of the number of commercial minutes a station can broadcast without loss of audience. At the upper range in terms of audience-acceptable commercial minutes are radio stations with all-news formats; at the lower range are commercial stations with classical or FM music formats.

The second key fallacy is that "the demand curve facing individual stations is said to be perfectly elastic" (Study, Page 22). This principle is derived by the authors from a simplistic and inaccurate characterization of the stations market. The authors treat individual radio broadcasters as fungible grains in a bushel of wheat, when the more proper analogy would be to recognize that the radio station advertising market is as differentiated as the restaurant and fast food business. Radio stations in a single market do not compete for 100 percent of the radio listener audience. Radio stations adopt varying formats in order to compete for discrete segments of the total audience in a particular market.

Failure to recognize that the radio stations market is differentiated leads the authors to a series of incorrect assumptions. Chief among these is the astounding statement that cost per thousand of audience delivered is the same for every individual radio station in the country! The concept that cost per thousand is equal throughout the entire industry leads the authors to their second major incorrect conclusion. Cost per thousand will rise uniformly throughout the industry, they hypothesize. Broadcasters can thus, they suggest, pass on to advertisers most of the cost of performance royalties.

The concept that royalty costs can be passed to radio advertisers is wrong. First, cost per thousand is not the same for all radio stations. The diversity of program format currently offered by the radio industry leads to diversity of audience demographics. The ability of an advertiser to target adveristing to the demographic group most likely to purchase his goods or services is a critical factor in determining a radio time purchase. For that reason, there are many markets in which an all-news station with the highest audience share may have time rates that are not very different from a rock station with a much smaller audience. The rock station attracts a number of listeners whose purchasing characteristics are different than all news listeners and of great interest to many advertisers of popular consumer goods. The radio time purchaser may well allocate his radio dollars to time buys from the rock station.

Second, radio broadcasters cannot presently pass on all increases in fixed costs to advertisers. As the authors find elsewhere in the Study only costs related to increased station audience lead to commensurate increases in station rates.

The basic fallacies underlying the economics theories of the authors are so fundamental that the entire Study is thrown into question.

The balance of the study

More than two-thirds of the Study is devoted to the questionable economic analysis discussed above to attempt to show that radio broadcasters can pay approximately $15 million in performance royalties and pass most of the increased costs on to advertisers. Then the authors turn and discuss the following issues: (1) economic impact of the proposal on the recording industry; (2) general economic condition of union performers; and (3) overall administration and administration costs of the compulsory license system.

As to the economic impact on the recording industry, the authors find it difficult to estimate essentially because of a lack of data. We have to agree. The authors have not attempted to compile the data on the recording industry that would be necessary to assess the significance of performance royalties to record-

ing companies. They summarize information furnished by recording company spokesmen years ago when Congress held hearings on increasing the mechanical royalty rate. That information is presented through 1974 for the 10 to 20 firms that were the largest companies in an industry that then included more than 500 companies.

Based on such information, the Study determines that the total amount to be distributed after administrative costs would be "less than one-half of one percent of net sales and 8 percent of after tax profits" of the recording industry in 1973. The authors treat that 8 percent figure as trivial and conclude "the effect of a change in the copyright law as it would affect record companies is slight but a favorable one." Can anyone seriously suggest than an 8 percent increase in bottom line profits that has no related costs is trivial?

We think this section of the Study is totally deficient. The authors did not make any attempt to gather detailed information about the current economics of the recording industry from the trade press. Even if they had limited themselves to information available in Variety, they would have been able to analyze more relevant economic data about the industry as a whole.

NBC will not comment on the portion of the Study dealing with economic conditions among performing artists. First, no attempt is made in the study to analyze the economic impact of the Danielson proposal on performing artists. Second, this section of the Study, the authors tell us, is derived from a separate and as yet unpublished study the authors performed as subcontractors of the AFL–CIO under a Labor Department grant. Third, this survey was confined to economic conditions among members of performing artists unions rather than performing artist generally. Finally, the data summarized in the Study was obtained from a number of performing artists who do not make sound recordings. A representative sample for a survey germane to the Study should only include performers who have made sound recordings.

Administration of H.R. 6063

H.R. 6063 contains provisions for the administration of the compulsory licenses and the royalties generated thereby. Certain administrative functions are permanently assigned to the Register of Copyrights and the Copyright Royalty Tribunal. However, the bill gives "copyright owners, performers and copyright users" one year to attempt to establish a private entity to collect and distribute the royalties pool. If they fail, the distribution and collection functions are assigned to the Register of Copyrights.

In a Study which is supposedly devoted to the economic impact of H.R. 6063, it would have been appropriate to have suggested royalty-maximizing procedures to assist the governmental or private entity in collecting and distributing the fees. Unfortunately, the Study does not contain such recommendations. Governmental administration is not even discussed. Yet, governmental administration is the most likely option if H.R. 6063 is enacted. It would be a monumental accomplishment for copyright users, owners and performers to be able to agree to establish such a private entity in one year.

The Study suggests three forms of nongovernmental systems, which the authors describe as "parallel, augmented and substitute." The "parallel system" actually merely implements Section 1(f) of H.R. 6063: establishment by users, owners, and performers of a new private entity to collect and distribute the royalties. Surprisingly, the authors reject the "parallel system." The basis for the rejection is the barely-supported conclusion that "the administration costs might exceed the total amount of the fees collected" (Study, p. 84). If that is truly the case, H.R. 6063 should be rejected out of hand. What possible interest could be served by imposing $15 million or more in costs on radio broadcasters and distributing not one penny to performing artists? Here again, the real fault lies with the Study.

No administrating authority—governmental or private—would dare launch a system in which the costs of administration exceeds the collections.

The "augmented system" and the "substitute system" proposed by the authors both involve collaborative relationships among the new private entity, ASCAP and BMI. Neither system would come within the limits of the antitrust immunity provided H.R. 6063.

We would, however, ask the Office to note one extraordinary cost suggestion made by the authors in their discussion of the "substitute system." The Study recommends requiring broadcasters to provide "tapes of air play as a condition of licensing." This major cost suggestions which exceeds the provisions of H.R. 6063 is euphemistically described as "shifting some of the cost of data collection

onto the broadcasters" (Study, p. 88). Why wasn't this cost added in the "Profit and Loss Analysis" section? Furthermore, the costs to broadcasters of taping all or substantial portions of the broadcast day could well be excessive, even to the point of being prohibitive. This suggestion would necessitate extensive outlays for (union) personnel to do all actual recording, plus administrative costs associated with making the tapes available. The total cost of this taping to thousands of broadcast stations may exceed the revenues produced by the proposed royalties. It is worth noting, in this connection, that the FCC recently rejected a suggestion that stations keep tapes of just the news and public affairs programs they broadcast. One of the reasons put forth by the Commission to reject this idea was the excessive cost that such a procedure would entail.

Conclusion

We respectfully suggest that the Register of Copyrights should not incorporate this Study in the Congressional report that will be filed January 3, 1978. All parties adversely affected by the "findings" should have the opportunity to subject the Study to critical analysis. Private parties will operate under certain handicaps in this respect because they will have access neither to the authors' computer programs or the FCC data base. Nonetheless, a fair period of comment should be afforded.

Respectfully submitted,

JAY E. GERBER,
Vice President and Assistant General Counsel.
ELEANOR O'HARA,
Assistant General Attorney.

COMMENT LETTER NO. 16

TAFT, STETTINIUS & HOLLISTER.
Washington, D.C., December 8, 1977.

Re performance rights in sound recordings.

HARRIET L. OLER,
Senior Attorney,
Copyright Office, Library of Congress,
Arlington, Va.

DEAR MS. OLER: In response to the Notice of Inquiry dated November 2, 1977, and published in the Federal Register, you will find enclosed five copies of the comments submitted by Taft, Stettinius & Hollister in behalf of the Taft Broadcasting Company.

Sincerely,

ROBERT TAFT, Jr.

Enclosures.

BEFORE THE COPYRIGHT OFFICE, LIBRARY OF CONGRESS, WASHINGTON, D.C. 20559

S77-6-B

In the Matter of Performance Rights in Copyrighted Sound Recordings;
To: Register of Copyrights.

COMMENTS OF TAFT BROADCASTING COMPANY

Taft Broadcasting Company (hereinafter "Taft"), by its attorneys, submits these comments in response to the Notice of Inquiry issued on November 2, 1977,[1] and all other comments filed thereon. These comments are directed specifically to the study by Stephen M. Werner of the firm Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, entitled "An Economic Impact Analysis of a Proposed Change in the Copyright Law",[2] and to the direct and reply comments thereon. The Report purports to evaluate the likely economic results to the radio broadcast industry, the performers, and the recording industry, of a proposed Amendment to The Copyright Law to provide for performers and copyright owners of copyrighted material performance rights in such material.

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[1] Fed. Reg. Vol. 42, No. 215, p. 58226.
[2] Hereinafter cited as "The Report."

GENERAL COMMENTS

Before examining the economic considerations attempted to be evaluated in The Report, the question that first must be faced is why these economic factors should be considered at all. Article I, § 8, Cl 8, of the Constitution is designed "To promote the Progress of Science and Useful Arts by securing for a limited time to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." The rationale for this clause is, of course, to serve the public interest by encouraging invention and artistic creation and by protecting original work. While economic consequences can and do result for the authors, for those who publish, and for the public, they do not transcend this principal public purpose. Originality is an inferred requirement.[3] The economic encouragement to the creator of the original item is given to benefit the public through its use and enjoyment. In the absence of specific statutory protection, any person may fully avail himself of musical and literary work.[4]

It is from this point of view that Taft wishes to comment on the study. While we find ourselves in agreement with much material already included in filed comments against granting a performance right, and specifically the comments of the American Broadcasting Companies, Inc. on The Report, we have additional concerns, especially with the consequences to the public and the radio and record industries likely to occur from the economic changes inherent in the granting of performance rights. The quality and availability of broadcast material would almost surely be adversely affected.

Moreover, the discussion in The Report makes it clear that any recognizable economic benefit to performers would be dependent upon building a monitoring and collection agency in the nature of either a private performance rights society or some new bureaucracy, empowered to deal on a monoply basis not only with all performers regardless of their wishes, but also with all record companies. This has alarming implications.[5] Based on the economics of monitoring and administration, the conclusion, as already demonstrated as to existing copyright rights, is almost inevitable that any of the systems proposed would invite limitation of production and stifle efforts of new and less established performers to develop their talents, of new producing companies to enter the business, and of existing producers to present new material.

It seems inevitable that there would be outright contradictions of accepted Federal antitrust principles in the approach which encourages restraints on development of talent and competition in the industry. This would be directly contrary to the basic public purpose of Article I, §8, Cl 8, of the Constitution and of copyright law. Further detailed comments on this problem will be made in reviewing respective elements of The Report.

While detailed comments will also be made on the portions of The Report that deal with economic impact on broadcasters, a very basic general criticism is offered at the outset. This entire portion of The Report seems to be aimed at contesting basic rules of economics and ignoring standard business operating procedures. This is done by rationalization to offset published and totally available data provided by broadcasters by suggestions and inferences drawn from material not available to anyone other than the FCC, and apparently available to the reporting firm on a restricted basis. It is hard to avoid the conclusion in studying this portion of The Report that the researchers started with a Robin Hood complex that performers are poor and radio stations are rich, and then tailored their approach and material to meet that premise. The failure to deal with individual companies or models which could have been meaningful is deplorable and makes The Report largely useless.

For instance, Taft, as a public company which operates at least ten radio stations must currently report not only to the FCC but also, in detail, to the SEC and to its stockholders. Its accounting and reports must comply with proper accounting standards and be certified by its certified public accountants, and its detailed tax returns are audited annually for their accurancy and fairness by the Internal Revenue Service. Probably, stations covering a majority of the listening audience in prime times are similarly constrained. To infer as to stations such

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[3] *Puddu* v. *Buonamici Statuary Inc.*, CCA NY 1971, 450 Fed. (2d) 401.
[4] *Cable Nision* v. *KUTV.*, CCA Idaho 335 Fed. (2d) 348, cert. den. 379 U.S. 989.
[5] The Report, p. 88.

as those owned by Taft and other similarly situated owners that there is the figure juggling and manipulation claimed by The Report is plainly misleading and patently impossible.

Finally, The Report makes no case whatsoever to show any need for assistance or any economic or copyright justification for extending a performers royalty to the recording companies. To the contrary, the only inference that can be drawn from the material provided is that record companies are prospering and that new producers are coming into the business at a good rate. Indeed, the question that must be asked is whether the record companies were included solely because they are generally the copyright owners at the time of the performance and that the only way to justify extending copyright protection to those who merely sing, or play, or mechanically record the original work is to piggyback on the copyright which the recording company has already secured from the original writer or composer through payment or other compensatory arrangement.

Against these considerations the balance of these comments will be directed to specific portions of The Report.

COMMENTS ON SUMMARY OF FINDINGS AND CONCLUSIONS FALLACIES REVEALED

1. (page ix) The intended meaning of showing losses by 30 to 35 percent of radio stations in any one year is not that they will be forced out of business. Rather, it is directed to the equities of Federal law abandoning an existing free market arrangement and adversely affecting radio broadcasting service to the public.

2. (page x) The fact that losers don't leave industry is based on the original or purchase value put on the franchise. To retain this the station must reduce losses and maximize profit potential so that money can be borrowed to improve operations or the best price can be realized on sale.

3. (page xi) The Report's conjecture on diversion of income here and throughout is not supported and, if it exists at all, is necessarily typical because of the SEC, the IRS, the certified public accountants, and the stockholders.

4. (page xi) The claim that broadcasters fudge figures because of threat of competition of would-be operators is specious. Only limited number of channels (almost all allocated) are available. Low reporting hurts sale and credit potential for the stations. Sound and accurate accounting practices are required by sound business practice. CPA's, the SEC, and the IRS.

5. (page xiii) The general conclusion that increased cost could be passed on to purchasers is fallacious for a number of reasons.

(*a*) Radio advertising has been hurt badly by TV competition as has magazine and newspaper advertising. For instance prices of magazine advertising only went up 25 percent in ten years.[6] Newspaper advertising prices went up because of cost problems, but lost volume vs. TV nationally.

(*b*) Radio advertising rates are immensely sensitive to competition and price changes both nationally and, even more, locally. For most stations it would be folly not to raise prices if the market will bear it. To do otherwise would be defying economic sense.

(*c*) Rationalizations based on start-up period loss figures and closely held, owner-operated stations have little general application to radio broadcasting generally.

6. (page xiii) The comments on performers do not reflect that even those not under royalty payments as composers or participating in record sales are currently paid for their recorded performances on the basis of market considerations between them, their employing bands, the recording companies, the copyright owners, and the radio stations. To reverse this by Federal mandate would be to create a windfall to some at the expense of others.

As will be discussed later, if any readjustment is to be forced for the benefit of performers, by far the simplest course would be to require an increase in Record Company payments to the Phonograph Record Manufacturers Special Payments Fund (referred to on page 81 of The Report). This would then be reflected in current royalties paid and other payments within the existing structure, with little or none of the heavy administrative costs discussed on pages 79–89 of The Report.

This also eliminates the question as to why a profitable and expanding record industry should be entitled to any further royalties.

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[6] See Appendix A (Wall Street Journal Dec. 6, 1977).

COMMENTS ON THE "INTRODUCTION"

1. (page 4) It should be understood, as The Report states, that "Almost exclusively, the holders of copyrights on sound recordings are record producers."

2. (page 4) The Report's revelation that "The performers are to share equally in royalties received from each record" emphasizes how far the proposed Amendment would depart from principles of copyright law that are based on the value of the contribution of the individual. The "drummer would receive just as much as the lead singer."

This raises the question whether the true purpose of the legislation and impact of The Report is really to provide a mechanism for control by, and long-time support of the collection and auditing agency and its affiliated labor organizations, rather than to reward original talent under the copyright laws.

COMMENTS ON THE ECONOMIC IMPACT ON BROADCASTERS

1. (page 22) The Report is based on the stated premise that "the basic rate for a given number of radio listeners is determined radio-industry wide." This is so demonstrably false as to jeopardize the validity of the rest of The Report. The geographical location, the nature of the target audience (i.e. programming for ethnic, cultural, age, and even educational background), the signal characteristics, and even listening habits have sharp impact on differing rates that can be charged competitively.

2. (pages 44 and 45) The reporting of repeated station losses without leaving the industry does not in any way suggest that station operators do not have the objective of maximizing the difference between revenues and expenses. Any manager of a Taft station would be relieved quickly for a failure to do so. All but one of Taft's ten stations (that most recently purchased) are operating in the black. What is reflected in a record of sporadic or continued losses in other stations is an attempt to salvage an initial investment in the franchise in an unfavorable competitive market situation.

3. (page 45) The "net advertsing receipts" definition discussed in the footnote to The Report is inequitable in many ways, but particularly in that it would include no relationship to the extent of frequency of play of copyrighted sound reproductions, as all talk, all news, format stations would be severely penalized and stations would be forced to use broadcast material which record companies chose to put out, since it would be paid for anyway.[7] These factors and others are all taken into account currently in negotiating payments with ASCAP and BMI under current copyrights.

In this regard, attention should be given to the proposed royalty base in H.R. 6063. On page 12 of that bill it is defined as follows:

"Net receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies."

This definition differs sharply from the base used for current royalty payments by stations to ASCAP and BMI, where the base is such net receipts less not only advertising commissions but also the following: Air Talent Charges; New Ticker Costs; Remote Pickup Costs; Broadcast Rights Charges, Prize Costs; and Sales Commissions. Even before such deductions, excluded from net advertising revenues are the following: political advertising; bad debts; and discounts.

This discrepancy between the royalty base proposed and that in current use means the burden of the performance royalty would be far more onerous and inequitable in its application. It might even exceed in burden the somewhat higher percentage royalties paid ASCAP and BMI.

4. (pages 48 and 48a) By its own admission The Report in its Table 9 eliminates all payments to owners or stock holders or their relatives under "common control" without regard to the size, justification, or nature of the payments or their acceptance as proper by the FCC, the IRS, and the CPAs. This is patently prejudicial and makes the Table useless and misleading.

5. (page 50) Table 10 is subject to similar fallacies. There is no basis for disallowing legitimate approved administrative expenses.

6. (pages 54 and 55) The Report's comments on classical music stations demonstrates the admitted effect of certain programming on rates as well as revenues. This belies the position of The Report on page 22.

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[7] H.R. 6063 is unclear as to whether radio stations may opt for a pro-rated basis.

7. (page 62) The attempted inference drawn by The Report as to "profit versus loss outcomes of various categories of stations" does not and cannot apply to most. It is invalid as to all since it fails to recognize franchise values paid or invested, even for stations with a record of continued losses.

8. (page 63) The recommendation for additional FCC reporting by radio broadcasting presents a sharp contrast with the admitted unavailability of any substantial financial information about record companies from whom only "selected" profit and loss data was provided and accepted on less then half the firms by the industry itself apparently without audit or opportunity for or attempt to establish verification.

9. (page 66) Table 18 dealing with cost per thousand trends reflects merely that radio has fared poorly as compared with its competitors. Moreover, the Table fails to reflect total revenues of the respective media and fails to show outdoor advertising or magazines at all. Attached as Appendix A hereto is an article from the Wall Street Journal of December 6, 1977, showing the dominance and growth of television and the poor record of magazine competition during the same period. It would have been meaningful and useful if The Report had shown the shift in the allocation of all advertising dollars over the period. See Appendix B. This Table's results perhaps explain why it was not used, since it would have discredited the assumptions and conclusions of The Report.

10. (page 67) The Report here again "suggests" inelasticity of radio demand in a blind refusal to recognize economic realities. The high degree of competition in radio, especially in local business, is reflected in almost immediate response to market conditions. The Report's repetitive technique tends to create a false impression.

11. (page 72) The information relating to increases in number of stations fails to recognize that more FM stations resulted from increased receivers and stereo broadcasting and receiving developments.

12. (page 73) Tables 20 and 21 reflect no inflation factor.

COMMENTS ON THE ECONOMIC IMPACT ON PERFORMERS

These comments, like the comments on the economic impact on radio stations, are full of erroneous assumptions and misleading inferences. Several should be pointed out.

1. (pages 81 and 82) The Report shows the Phonograph Record Manufacturers Special Payments Fund already operating at an administrative expense of only 6.7 percent of the record companies contributions. This offers the possibility that financial relief, if shown to be required and justified for performers, might be provided far more cheaply and effectively by increasing the payments required by record companies into this fund by the amount proposed to be raised through the performers royalties, or about $15 million. Moreover, this added cost would then be passed on with a market related basis by the record companies between the original copyright owners, the record companies themselves, and the public. This might avoid a possible future development of a payment system under which record companies may have to be charged by broadcast stations for playing of their recordings.

2. (page 84) It is particularly interesting to note that The Report states "it should be noted that under the parallel ssytem, even with maximum compulsory fee applied to all stations, the administrative costs might exceed the total amount of fees collected." Such a result would certainly negate any intended benefit from the proposal except as a possible subsistence allowance to the performing rights society, its affiliates and their employees. The complexity of the three alternative collection and distribution systems proposed in itself challenges the viability of the proposal.

3. (page 84) Since ASCAP and BMI do not collaborate to reduce costs today, it seems even less likely that they would do so with a performing rights society.

4. (page 85) The enormous monitoring and distribution costs of ASCAP and BMI today, totaling $24.4 million, indicate the likelihood that the actual distribution of royalties to performers would be minimal and the administrative overhead unacceptably heavy.

5. (page 87) The Report indicates that for the proposed system to be practical new technology and shifting of costs for data collection to broadcasters would be required. Resulting increased costs are not reflected in the earlier discussions of the economic effects on radio broadcasters, nor is the cost of additional capital investment in new technologies.

6. (page 88) The recognition by The Report that the performing rights society must represent all record companies and all performers means that a compulsory closed shop would be imposed on performers. This seems sure to have the result of discouraging talent development. Also it would create a serious temptation for record companies to collaborate to support their market by reducing production and increasing prices. The entire structure would give the record companies and/or the organization controlling the performing rights society almost absolute control over performers and would tend to stifle new talents and additional young people coming into the performers ranks. Whether this would amount to an outright violation of the anti-trust laws is certainly a question that should be seriously studied by the anti-trust division of the Department of Justice. Consider the background of experience that led to the need for U.S. Supreme Court decisions in the ASCAP and BMI cases.[8]

7. (page 88) Should the recording companies be required to supply the performing rights society with tapes, this would be a sizeable additional cost not computed into the discussion of the economic impact on radio stations.

8. (page 88) If there were to be a prescribed license fee set by the Registrar of Copyrights as suggested by The Report, it would impose an enormous burden on that office and establish a whole new bureaucracy and body of law.

9. (page 91) The Report admits that any royalty distribution system necessarily involves in itself a compromise between total coverage and unacceptable administrative costs. It would seem under a mandatory system, as proposed, many performers would be discriminated against and might well have legal recourse to require recognition of their interests.

10. (page 101) It is interesting to note that the comparisons between individual earnings and the poverty level fail to reflect that the poverty level is based on family income, data not included in The Report. One cannot help wondering whether this may not be intentional in view of the information requested in the questionnaire as set out on page 177 of The Report. In question 19 total income of all family members of the household was requested in addition to individual earnings. The Report fails to show what the comparison would be between total income of all members and the poverty figures. There is also a failure to recognize that many performers are in fact part-time employees only and members of families in which there may be other income.

11. (page 105) The Report notes that for 76 percent of musicians receiving royalty income today such payments reflect only 5 percent or less of earnings. Since the royalty payments to ASCAP and BMI currently are 1.75 percent and 1.7 percent respectively it seems unlikely that any substantial number of performers will receive significant payments under the proposed 1 percent performers royalty. Certainly those payments do not seem to be justified when the enormous administrative expense projected is taken into account.

COMMENTS ON THE ECONOMIC IMPACT ON THE RECORDING INDUSTRY

We have already commented on the total lack of information or data relating to the record industry, but the question remains as to why the recording companies should share at all in a performers royalty if one is put into effect. The only plausible answer would seem to be that since The Report indicates they are almost always the copyright owners, there may be a serious legal question as to whether royalty payments could be mandated to performers unless the copyright owner is also included. That hardly seems a sufficient basis for requiring further payments by broadcasters to record companies.

Respectfully submitted.

ROBERT TAFT, JR.

APPENDIX A

POPULAR PERIODICALS—MAGAZINES GET A BOOST AS ADVERTISERS TRY TO BEAT INCREASING TELEVISION-TIME COSTS

(By David M. Eisner, Staff Reporter of The Wall Street Journal)

Magazines have become the hottest advertising medium on Madison Avenue.

Thanks in part to soaring costs of television commercial time, magazines are enjoying a boom unlike anything in more than two decades.

[8] *U.S.* v. *ASCAP*, 1950–51 Trade Cases, 62595; *U.S.* v. *BMI*, 1966 Trade Cases, 71941.

"This industry has never been more prosperous," says Robert A. Burnett, president of Meredith Corp., whose October issue of Better Homes & Gardens contained a record $8.5 million in advertising and was so thick that editors worried about having enough paper on hand to print it. "And I don't see any sign that business is letting up."

General Foods Corp., one of the nation's biggest advertisers, says that in the past year it has doubled to about 30 the number of national brands it advertises in magazines; it anticipates that magazines will get a larger chunk of its ad budget in the future.

Change of Thinking

Similarly, Benton & Bowles Inc., a large New York advertising agency that has become disenchanted with this year's estimated 20 percent boost in the cost of primetime television, recently began shifting some of its clients' ad funds into magazines. If sales growth of the magazine-advertised brands doesn't slow, the agency says it is prepared to transfer at least $40 million a year—about 18 percent of its current billings—to magazines from television.

This represents a significant change of thinking among some of the biggest name-brand advertisers, who until now have relied heavily on television to get their messages across. It could also signal a slowdown in the upward climb of television revenues and a corresponding increase in the fortunes of magazines. Ironically, a number of magazines were driven out of business by television in the 1950s and 1960s.

According to the Magazine Publishers Association, a trade group, magazine advertising revenues through October spurted 21 percent from a year ago while the actual number of pages rose 10 percent. Increases of a similar magnitude are expected for the balance of 1977 and for 1978.

All kinds of magazines have participated in the surge—weeklies and monthlies, men's and women's, news and sports. Through the first nine months of this year, some of the major revenue gainers include Playboy, up 24 percent; Cosmopolitan, up 29 percent; Time, up 21 percent; Sports Illustrated, up 22 percent; TV Guide, up 14 percent, and Psychology Today, up 33 percent.

Ad Costs to Rise Further

Just how much of those increases are attributable to money originally scheduled for television, as opposed to improved economic conditions in general, is a matter of some dispute. "There's been some shifting, but no wholesale movement yet," says Robert Welty, senior vice president-media director for the ad agency Bozell & Jacobs International Inc. "But the way TV costs are going, more of it is bound to happen," he believes.

Over the past 10 years, according to a study by another agency, BBDO International Inc., TV network prime-time ad rates have climbed 76 percent while magazine rates have increased 25 percent, based on the number of viewers of readers reached. Foote Cone & Belding Communications Inc. projects that by 1981 prime-time prices will be up another 77 percent with magazines up less than half this rate at 31 percent. Price increases for daytime and local commercial spots also will far exceed expected magazine rate rises, the ad agency says.

"Many advertisers are being given a choice of either raising their own prices to cover their TV ad expenditures, or looking around for cheaper media," observes Edward Stern, vice president in charge of media programming for Foote Cone & Belding.

The networks profess they aren't worried about losing revenue to magazines. "We don't have any evidence that advertisers are staying away," says an executive at American Broadcasting Cos. "In fact, demand for network time generally has been so heavy that some advertisers have had to go into magazines because they couldn't get the television time they wanted," he asserts.

"Most Effective Medium"

Others, however, note that recent primetime demand has been soft and that commercial spots that were selling earlier in the year for an average of $4 a minute for each thousand viewers slumped to about $2.50 in October. "We may have been overpriced in some cases, and magazines probably did benefit to some extent," another network official concedes.

Many advertisers are understandably cautious about switching. "Television is still the most effective medium around," says Willard Hadlock, vice president and manager of Leo Burnett Co.'s media department. "I would be very reluctant to

recommend that any of our clients cut back on television while its competitors were still in it."

Still, Mr. Hadlock says that one Burnett client, which he declines to identify, is in the process of putting "a substantial amount of money" into magazines at the expense of television. In addition, a number of normally heavy TV users like Sears, Roebuck & Co., Johnson & Johnson Inc. and Coca-Cola Co. recently have doubled and tripled already large magazine outlays. Schlitz beer spent $500,000 in the first half of this year for ads in magazines like Fortune and Money in an effort to convince "opinion-leaders" that Schlitz is a quality product, a spokesman says. Last year the company spent virtually nothing on beer advertising in magazines.

Not only is General Foods advertising more of its brands in magazines, but it also is looking for more magazines to advertise in, says Arch Knowlton, a top company advertising official. "We've been heavy into the multimillion-circulation women's magazines, but now we're advertising in things like Bon Appetit and Apartment Life," he notes. A company study on the effectiveness of magazines versus television advertising found that "we would do just as well in a couple of brands and in some others would do even better" by cutting TV time and buying magazine space instead, he adds.

One result of the strength of magazine advertising has been to encourage several publishers to try new magazines, says Joseph Welty (no relation to Bozell & Jacob's Joseph Welty), vice president and advertising director for McCall Publishing Co. "We can't put out a new magazine on that basis, alone, but the fact there's a real chance to succeed in the market has helped quite a bit," he says. In February, McCall will launch a new magazine named Your Place, targeted at the "new twenties" age group. "Major advertisers," contends Mr. Welty, "are asking for more opportunities in print."

Similarly, Time Inc., encouraged by the success of its People magazine and the healthy magazine environment in general, is test-marketing a new women's magazine that is scheduled to debut early next year.

Advertisers aren't completely happy with magazines, however. Several complain that the editorial content isn't expanding fast enough in relation to the increasing number of ad pages. "Some magazines are getting to look like catalogs," says Foote Cone & Belding's Mr. Stern. "People are beginning to wonder what chance their ad has of being read when it's sandwiched in with 400 other ad pages."

APPENDIX B

TABLE OF ALL COMPETITIVE ADVERTISING MEDIA RESULTS, 1968–76 (7)

[In millions of dollars]

Year	Media						
	Total[1]	TV	Newspaper	Magazine	Radio	Outdoor	Direct mail
1968	18,090	3,231	5,231	1,283	1,190	208	2,612
1969	19,420	3,585	5,714	1,344	1,264	213	2,670
1970	19,550	3,596	5,704	1,292	1,308	234	2,766
1971	20,740	3,534	6,198	1,370	1,445	261	3,067
1972	23,300	4,091	7,008	1,440	1,612	292	3,420
1973	25,120	4,460	7,595	1,448	1,723	308	3,698
1974	26,730	4,851	8,001	1,504	1,837	309	3,986
1975	28,230	5,263	8,442	1,465	1,980	335	4,181
1976	33,460	6,622	9,910	1,789	2,277	383	4,754
1977 (estimated)	37,370	7,670	(2)	(2)	(2)	(2)	(2)

[1] Figures do not total because trade press, miscellaneous etc. not included.
[2] Not available.

Source: Television Bureau of Advertising.

COMMENTS

Note that during this period television increased its percent of the total advertising dollars from 17% to 20% during a period in which radio increased by only two-tenths of a percent, newspapers by only 1% and direct mail not at all. This indicates radio advertising prices increased as rapidly as the market would permit.

COMMENT LETTER NO. 17

ARNOLD & PORTER,
Washington, D.C., December 12, 1977.

HARRIET OLER, *Esquire,*
General Counsel's Office,
Copyright Office, Crystal City, Va.

DEAR MS. OLER: I am enclosing herewith five copies of the Reply Comments of the Recording Industry Association of America in connection with the economic impact analysis of a performance right in sound recordings.

Sincerely yours,

CARY H. SHERMAN.

Enclosures.

REPLY COMMENTS OF RECORDING INDUSTRY ASSOCIATION OF AMERICA ON "AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE IN THE COPYRIGHT LAW," A REPORT SUBMITTED TO THE COPYRIGHT OFFICE BY RUTTENBERG, FRIEDMAN, KILGALLON, GUTCHESS & ASSOCIATES

The Recording Industry Association of America (RIAA) submits this Statement in response to the comments filed with the Copyright Office by various broadcasters and broadcaster groups.

We are not commenting on the challenges made by the broadcasters to the methodology of the Ruttenberg Report. Rather, responses are more appropriate from those responsible for the preparation of that Report.

We would note, however, that conspicuously absent from the broadcasters' comments is a reply to the suggestion made in the Report that a study be conducted of a randomly selected number of stations.[1] If the broadcasters are truly convinced that the conclusions reached by the study are incorrect, then they should have no objection to a more thorough investigation of the industry.

Likewise noteworthy is the absence of rebuttal data assembled by the broadcasters. The claim that insufficient time was allowed for the broadcasters to respond to the study is unavailing; the broadcasters had ample opportunity to develop the relevant data during the entire past year.

Although sharply critical of the Ruttenberg Report in most respects, the broadcasters emphasize a statement in the study that it is "not clear" that the enactment of a performance right amendment will result in an increase in the amount of non-rock music that is recorded.[2] This finding comes as no surprise, of course, since the question was not even studied in the Ruttenberg Report.

In any event, no one has suggested that there is "document evidence . . . to support the proposition that a performance royalty in sound recordings will encourage creativity and thus benefit the public welfare."[3] No one knows for certain what would be the real-life result of the enactment of a performance royalty.

We do know it would be a step in the right direction. That is, creators of sound recordings would gain some compensation for their creative efforts. We do know that it would encourage the production of sound recordings in a way that does not now exist. We do know it would help recording companies offset the continuing round of cost increases, thereby benefitting the consumer. We do know that it would provide some encouragement and reward to the performers and musicians. We do know that it would contribute to an economic climate in which new and untried performers, musicians and composers might find it easier to get their works recorded.

We also know that enactment of a performance royalty would provide some measure of future protection for recording companies, performers and musicians against unknown technological developments.

The suggestion that it must be demonstrated conclusively that a performance right in sound recordings would "encourage creativity" is, we submit, another of the broadcasters' red herrings.[4] Certainly, the focus of the broadcasters' arguments to Congress was not that royalty payments by cable television operators

[1] See pp. 62–63 of the report.
[2] See, *e.g.*, Comments of the National Association of Broadcasters, p. 22; *Comments of* Radio and Television Broadcast Station Licensees, p. 3.
[3] Comments of Radio and Television Broadcast Station Licensees, p. 3.
[4] The NAB goes one step further. They imply that such a showing may be necessary for such legislation to pass constitutional muster. See, Comments of National Association of of Broadcasters, p. 22.

would encourage creativity in the production of television programming. Likewise, the encouragement of creativity was not at issue when copyright liability was imposed for the first time on jukebox operators and public broadcasting. The basis on which Congress decided to grant copyright protection was one of simple equity—fair compensation for the exploitation of another's creative work.

Finally, disagreement over the methodology used to derive economic conclusions should not divert the attention of the Copyright Office from the principle which is at issue—whether it is equitable for creators of copyrighted recordings to be compensated for the commercial use that is made of those recordings.

DECEMBER 12, 1977.

COMMENT LETTER NO. 18

BROADCAST FINANCIAL MANAGEMENT ASSOCIATION,
Chicago, Ill., December 8, 1977.

MRS. HARRIET L. OLER,
Senior Attorney, Copyright Office,
Library of Congress, Arlington, Va.

DEAR MRS. OLER: Recently, a report entitled "An Economic Impact Analysis of a Proposed Change in the Copyright Law," prepared by the firm of Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, was submitted to your office.

The report, analyzing the economic impact of performers royalties on the broadcasting industry, deals with a subject which has previously been presented for consideration.

Due to the length of the analysis, and the short time allowed for comments, a detailed reply cannot be filed at this time.

The Broadcast Financial Management Association, however, does wish to object to the general concept of the proposed change in the law, and intends to file a report detailing those objections subsequent to studying the report further.

Very truly yours,

GENE R. ANDERSON, *President.*

COMMENT LETTER NO. 19

CABLEGRAM RECEIVED BY TELEPHONE, DECEMBER 14, 1977, 4 P.M.

My absence from Office at Union Convention prevented me from reviewing and commenting prior to the time of the broadcast organization comments concerning the economic impact report.

As usual, the broadcasters have provided no data of their own to substantiate their self-serving views.

If they deny the reports suggestion concerning (hidden profits), let the NAB provide its own data to rebut. NAB Members have the data.

The broadcasters attempt to quote the Ruttenberg Report to support their opinion that enactment of a performance royalty (would not, in fact, promote record production.)

NAB says the Ruttenberg capital study contains no showing that enactment of HR–6063 would have this intended effect.

Whether or not a performance royalty would promote record production, time will tell.

There is no doubt, however, a performance royalty will provide some modest financial reward to those who have created sound recordings. That is the crux of the matter.

The NAB also says that the cost of collecting the royalty may be large, and that the performers, musicians, and producers may not get as much money as the broadcasters would like us to believe.

We'll take that risk, thank you.

Barbara, I have repeated this to the point of boredom, but again, I must say that whether or not a royalty would promote production and whether or not there will be significant financial reward are not primary questions that can be considered in an isolated fashion. There is still to be met the dominant moral issue and this the broadcasters do not and cannot meet.

SANFORD I. (BUD) WOLFF,
National Executive Secretary,
American Federation of TV and Radio Artists.

ADDENDUM TO THE REPORT OF THE REGISTER OF COPYRIGHTS ON PERFORMANCE RIGHTS IN SOUND RECORDING

Statement of the Register of Copyrights containing a Summary of Conclusions and Specific Legislative Recommendations

INTRODUCTION

The Congressional mandate to the Register of Copyrights contained in section 114(d) of the new copyright statute reads as follows:

"On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any."

On January 3, 1978, I submitted to Congress our basic documentary report, consisting of some 2,600 pages, including appendices. The basic report includes analyses of the constitutional and legal issues presented by proposals for performance rights in sound recordings, the legislative history of previous proposals to create these rights under Federal Copyright law, and testimony and written comments representing current views on the subject in this country. The basic report seeks to review and analyze foreign systems for the protection of performance rights in sound recordings, and the existing structure for international protection in this field, including the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. The basic report also includes an "economic impact analysis" of the proposals for performance royalty legislation, prepared by an independent economic consultant under contract with the Copyright Office.

After reviewing all of the material in the basic report, together with additional supplementary material,[1] I have prepared this statement in an effort to summarize the conclusions I have drawn from our research and analysis and to present specific recommendations for legislation. With the presentation of this statement, the Copyright Office believes that it has discharged all of is responsibilities under section 114(d).

It was understandable that enactment of section 114(d) was greeted with raised eyebrows and cynical smiles. Some of those who favored performance rights in sound recordings viewed it as a temporizing move, aimed at ducking the issue and delaying Congress's obligation to come to grips with the problem. Others, opponents of the principle of royalties for performance of sound recordings, expressed derision at the idea of entrusting a full-scale study of the problem to an official who had, in testimony before both Houses of Congress, expressed a personal commitment to that principle. The Register's Report could either be looked on as a time-consuming nuisance that had to be gotten out of the way before Congress could be induced to look at the problem again, or as something that could be dismissed as worthless because the views of the official responsible for it were already fixed and her conclusions were predictable.

Neither the idea nor the drafting of section 114(d) originated with anyone in the Copyright Office. When approached with the proposed compromise that subsection (d) reflects, we accepted the responsibility and the short deadline imposed by the new subsection with two thoughts in mind:

First, we agreed with those who felt that any full-scale effort to tie enactment of performance royalty legislation directly to the bill for general revision of the copyright law would seriously impair the chances for enactment of omnibus revision. Keeping the subject of performance royalty alive but splitting it off for later Congressional consideration reduced the twin dangers of lack of time to complete work on the bill for general revision, and concerted opposition to the bill as a whole.

[1] Three further addenda are being submitted to Congress concurrently with this statement: (1) a report, prepared by an independent legal consultant, of the history of labor union involvement with the issue of performance royalties over the past thirty years; (2) a supplementary report by the independent economic consultant; and (3) a bibliography on performance rights in sound recordings.

Second, we also agreed that, with a problem as important and hotly contested as this one, Congress should have a fuller record and more thorough research and analysis on which to base its consideration of proposed legislation. Although the deadline for the report (January 3, 1978) coincided with the date on which the Copyright Office was required to implement the whole new copyright statute, we felt that it would be possible for us to complete both jobs on time.

As I viewed the mandate in section 114(d), the important thing was to provide Congress with a body of reliable information that would help it to legislate intelligently and effectively on the subject of performance rights in sound recordings. Regarded in this way, the basic documentary report, together with the other three addenda, are far more important than this statement of conclusions and recommendations.

In approaching our task under section 114, we set up a project under the leadership of Ms. Harriet Oler to address the entire problem without any preconceptions and as thoroughly, objectively, searchingly, and comprehensively as possible. Ms. Oler analyzed the problem, laid out the project, and directed its implementation. She and the other members of her team, notably Richard Katz and Charlotte Bostick, deserve the highest praise for the end product of their work. I believe that their basic documentary report, including the independently-prepared studies by Stephen Werner and Robert Gorman, will be of immediate value to Congress in evaluating legislative proposals on the subject and will also be a lasting contribution to scholarship and literature in the copyright field.

Let me state it as plainly as possible: none of the material in the basic documentary report or in the other addenda was prepared to reflect or support any preexisting viewpoint or position of the Register of Copyrights or the Copyright Office. The only directions that were given to anyone connected with the project were to be as objective and honest as humanly possible—to search out the relevant facts and law and follow them wherever they might lead. Aside from the general statements of the scope of their studies as stated in their contracts, the work done by Mr. Werner and Professor Gorman was entirely independent of any direction from the Copyright Office, and their reports were presented exactly as received.

As Register of Copyrights since 1973 I have taken a consistent and rather strong public position in favor of the principle of performance royalties for sound recordings. This was no secret to anyone when section 114(d) was added to the revision bill and, in enacting that provision, Congress could hardly have expected me to abandon beliefs and convictions based on many years of personal research and experience in the field. What it could expect were two separate things: first, as full and objective a study by the Copyright Office of the problem as possible; and, second, an honest and unbiased statement of my conclusions and recommendations, as Register of Copyrights, based on a fresh review of the Copyright Office study.

This statement is intended to fulfill the second of these two obligations. My hope is that it will be of some help to Congress in considering the difficult problem, but that no one attach undue weight to any of its conclusions or recommendations. In particular, I hope that it will be considered as entirely separate from the Copyright Office's basic documentary report, so that the attacks on my conclusions and recommendations will not undermine the usefulness of the body of information brought together in the basic report.

The following is an effort to present, in outline form, the basic issues of public policy, constitutional law, economics and Federal statutory law raised by proposals for performing rights in sound recordings together with a bare statement of the conclusion I have reached on each of them, and a highly condensed discussion of the reasons behind each conclusion.

1. The Fundamental Public Policy Issue

Issue.—Should performers, or record producers, or both, enjoy any rights under Federal law with respect to public performances of sound recordings to which they have contributed?

Conclusion.—Yes.

Discussion.—The Copyright Office supports the principle of copyright protection for the public performance of sound recordings. The lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. Professor Gorman's fascinating study shows that, in seeking to combat the vast technological unemployment resulting from the use of

recorded rather than live performances, the labor union movement in the United States may in some ways have made the problem worse. It is too late to repair past wrongs, but this does not mean they should be allowed to continue. Congress should now do whatever it can to protect and encourage a vital artistic profession under the statute Constitutionally intended for this purpose: the copyright law.

Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed, not only by the commercial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

2. Constitutional Issues

a. *Issue.*—Are sound recordings "the writing of an author within the meaning of the Constitution?

Conclusion.—Yes.

Discussion.—Arguments that sound recordings are not "writings" and that performers and record producers are not "authors" have become untenable. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976.

b. *Issue.*—Can sound recordings be "the writings of an author" for purposes of protection against unauthorized duplication (piracy or counterfeiting), but not for purposes of protection against unauthorized public performance?

Conclusion.—No.

Discussion.—Either a work is the "writing of an author" or it is not. If it is, the Constitution empowers Congress to grant it any protection that is considered justified. There is no basis, in logic or precedent, for suggesting that a work is a "writing" for some purposes and not for others.

c. *Issue.*—Would Federal legislation to protect sound recordings against unauthoized public performance be unconstitutional? (i) if there has been no affirmative showing of a "need" on the part of the intended beneficiaries and hence no basis for asserting Congressional authority to "promote the progress of science and useful arts"; or (ii) if there has been an affirmative showing that compensation to the intended beneficiaries is "adequate" without protection of performing rights?

Conclusion.—No.

Discussion.—These are actually disguised economic arguments, not constitutional objections. Congressional authority to grant copyright protection has never been conditioned on any findings of need, or of the likelihood that productivity or creativity will increase. The established standard is that Congress has complete discretion to grant or withhold protection for the writings of authors, and that the courts will not look behind a Congressional enactment to determine whether or not it will actually provide incentives for creation and dissemination. It is perfectly appropriate to argue that a particular group of creators is adequately compensated through the exercise of certain rights under copyright law, and therefore Congress should not grant them additional rights. It is not appropriate to argue that a Federal statute granting these rights could be attacked on the constitutional ground that it did not "promote the progress of science and useful arts."

d. *Issue.*—Would the establishment of performance rights interfere with the First Amendment rights of broadcasters and other users of sound recordings?

Conclusion.—No.

Discussion.—The courts have been generally unreceptive to arguments that the news media have a right to use copyrighted material, beyond the limits of fair use in particular cases, under theories of freedom of the press or freedom

of speech. These arguments seem much weaker where the copyrighted material is being used for entertainment purposes, where the user is benefiting commercially from the use, or where the use is subject to compulsory licensing.

3. Economic issues

a. *Issue.*—Do the benefits accuring to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists?

Conclusion.—No, on balance and on consideration of all performers and record producers affected.

Discussion.—This is the strongest argument put forward by broadcasters and other users. There is no question that broadcasting and jukebox performances give some recordings the kind of exposure that benefits their producers and individual performers through increased sales and popularity. The benefits are hit-or-miss and, if realized, are the result of acts that are outside the legal control of the creators of the works being exploited, that are of direct commercial advantage to the user, and that may damage other creators. The opportunity for benefit through increased sales, no matter how significant it may be temporarily for some "hit records," can hardly justify the outright denial of any performing rights to any sound recordings. That denial is inconsistent with the underlying philosophy of the copyright law: that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain (*Mazer* v. *Stein* 347 U.S. 201 (1954)).

b. *Issue.*—Would the imposition of performance royalties represent a financial burden on broadcasters so severe that stations would be forced to curtail or abandon certain kinds of programming (public service, classical, etc.) in favor of high-income producing programming in order to survive?

Conclusion.—There is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programming, and drive marginal stations out of business.

Discussion.—This has been the single most difficult issue to assess accurately, because the arguments have consisted of polemics rather than facts. An independent economic analysis of potential financial effects on broadcasters was commissioned by the Copyright Office in an effort to provide an objective basis for evaluating the arguments and assertions on both sides of this issue. This study concludes on the basis of statistical analysis that the payment of royalties is unlikely to cause serious disruption within the broadcasting industry. There are arguments aplenty to the contrary, but there is no hard evidence to support them.

c. *Issue.*— Would the imposition of a performance royalty be an unwarranted windfall for performers and record producers?

Conclusion.—No.

Discussion.—As for performers, the inedependent economic survey commissioned by the Copyright Office indicates that only a small proportion of performers participating in the production of recordings receive royalties from the sale of records and that, even if they do, royalties represent a very small proportion of their annual earnings. While the statistics collected with respect to record producers is less conclusive, the economic analysis concludes that the amount generated by the Danielson bill for record companies would be less than one-half of one percent of their estimated net sales.

4. *Legal issues*

a. *Issue.*—Assuming that some legal protection should be given to sound recordings against unauthorized public performance, should it be given under the Federal copyright statute?

Conclusion.—Yes.

Discussion.—Considerations of national uniformity, equal treatment, and practical effectiveness all point to the importance of Federal protection for sound recordings, and under the Constitution the copyright law provides the appropriate legal framework. Preemption of state law under the new copyright statute leaves sound recordings worse off than they were before 1978, since previously an argument could be made for common law performance rights in sound recordings.

b. *Issue.*—What form should protection take?

Conclusion.—The best approach appears to be a form of compulsory licensing, as procedurally simple as possible.

Discussion.—No one is arguing for exclusive rights, and it would be unrealistic to do so. The Danielson bill represents a good starting point for the development of definitive legislation.

c. *Issue.*—Who should be the beneficiaries of protection?

Conclusion.—There are several possibilities; since performers and record producers both contribute copyrightable authorship to sound recordings, they should both benefit.

Discussion.—Special considerations that must be taken into account include the fact that many performers on records are "employees for hire," the unequal bargaining positions in some cases, and the status of arrangers.

d. *Issue.*—How should the rates be set?

Conclusion.—Congress should establish an initial schedule, which the Copyright Royalty Tribunal would be mandated to reexamine at stated intervals.

Discussion.—It would seem necessary to establish minimum statutory rates at the outset, rather than leaving the initial task to the Tribunal. Review of the statutory rates by the Copyright Royalty Tribunal should be mandatory after a period of time sufficient to permit the development of a functioning collection and distribution system.

LEGISLATIVE RECOMMENDATIONS

Section 114(d) asks the Register of Copyrights, among other things, to set forth "recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material by performance rights in such material," and to describe "specific legislative or other recommendations, if any."

Based on the conclusions outlined above, my general recommendation is that section 114 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.

Specific legislative recommendations are embodied in the following draft bill, which is essentially a revision of the Danielson Bill (H.R. 6063, 95th Cong., 1st Sess. 1977).

DRAFT BILL

A BILL To Amend the copyright law, title 17 of the United States Code, to create public performance rights with respect to sound recordings, and for other purposes

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

SECTION 1. This Act may be cited as "The Sound Recording Performance Rights Amendment of 1978."

SECTION 2. Section 101 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended by deleting the definition of "perform" and inserting the following: "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. In the case of a motion picture or other audiovisual work, to 'perform' the work means to show its images in any sequence or to make the sounds accompanying it audible. In the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists."

SECTION 3. Section 106 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended by deleting clause (4) and inserting the following: "(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly; and"

SECTION 4. Section 110 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended as follows:

(a) In clause (2) insert the words "or of a sound recording" between the words "performance of a nondramatic literary or musical work" and "or display of a work,"

(b) In clause (3), insert the words "or of a sound recording," between the words "of a religious nature," and the words "or display of a work,";

(c) In clause (4), insert the words "or of a sound recording," between the words "literary or musical work" and "otherwise than in a transmission";

(d) In clause (6), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a governmental body":

(e) In clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment";

(f) In clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "nondramatic literary work," and "by or in the course of a transmission"; and

(g) In clause (9), insert the words "or of a sound recording embodying a performance of a dramatic literary work that has been so published," between the words "date of the performance," and the words "by or in the course of a transmission".

SECTION 5. Section 111 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the antitrust laws," and "for purposes of this clause" the words "and subject to the provisions of section 114(c),".

SECTION 6. Section 112 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended as follows:

(a) In subsection (a), delete the words "or under the limitations on exclusive rights in sound recordings specified by section 114(a),' and insert in their place "or under a compulsory license obtained in accordance with the provisions of section 114(c),".

(b) In subsection (b), delete the reference to "section 114(a)" and insert "section 114 (b)(5)".

SECTION 7. Section 114 of title 17 of the United States Code as amended by Public Law 94–553 (90 Stat. 2541), is hereby amended in its entirety to read as follows:

"§ *114. Scope of exclusive rights in sound recordings*

(a) *Limitations on exclusive rights.*—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

(1) The exclusive right under clause (1) of section 106 is limited to the right to duplicate all or part of the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording;

(2) The exclusive right under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality;

(3) The exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording;

(4) The exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; and

(5) The exclusive rights under clauses (1) through (4) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided,* That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(b) *Rights in sound recording distinct from rights in underlying works embodied in recording.*—The exclusive rights specified in clauses (1) through (4) of section 106 with respect to a copyrighted literary, musical, or dramatic work, and such rights with respect to a sound recording in which such literary, musical, or dramatic work is embodied, are separate and independent rights under this title.

(c) *Compulsory license for public performance of sound recordings.*—(1) Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

(2) When phonorecords of a sound recording have been distributed to the public in the United States or elsewhere under the authority of the copyright owner, any other person may, by complying with the provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

(3) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the following requirements:

(A) On or before ————————, 19——, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

(B) The compulsory licensee shall deposit with the Register of Copyrights, at annual intervals, a statement of account and a total royalty fee for all public performances during the period covered by the statement, based on the royalty provisions of clauses (7) or (8) of this subsection. After consultation with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the statement of account and royalty payment.

(4) Failure to record the notice, file the statement, or deposit the royalty fee as required by clause (3) of this subsection renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(5) Royalties under this subsection shall be payable only for performances of copyrighted sound recordings fixed on or after February 15, 1972.

(6) The compulsory licensee shall have the option of computing the royalty fees payable under this subsection on either a prorated basis, as provided in clause (7) or on a blanket basis, as provided in clause (8), and the annual statement of account filed by the compulsory licensee shall state the basis used for computing the fee.

(7) If computed on a prorated basis, the annual royalty fees payable under this subsection shall be calculated in accordance with standard formulas that the Copyright Royalty Tribunal shall prescribe by regulation, taking into account such factors as the proportion of commercial time, if any, devoted to the use of copyrighted sound recordings by the compulsory licensee during the applicable period, the extent to which the compulsory licensee is also the owner of copyright in the sound recordings performed during said period, and, if considered relevant by the Tribunal, the actual number of performances of copyrighted sound recordings during said period. The Tribunal shall prescribe separate fomulas in accordance with the following:

(A) For radio or television stations licensed by the Federal Communications Commission, the fee shall be a specified fraction of one percentum of the station's net receipts from advertising sponsors during the applicable period;

(B) For other transmitters of performances of copyrighted sound recordings, including background music services, the fee shall be a specified fraction of two percentum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period; and

(C) For other users not otherwise exempted, the fee shall be based on the number of days during the applicable period on which performances of copyrighted sound recordings took place, and shall not exceed $5 per day of use.

(8) If computed on a blanket basis, the annual royalty fees payable under this section shall be calculated in accordance with the following:

(A) For a radio broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend upon the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of at least $25,000 but less than $100,000: $250;

(ii) Receipts of at least $100,000 but less than $200,000: $750;

(iii) Receipts of $200,000 or more: one per centum of the station's net receipts from advertising sponsors during the applicable period;

(B) For a television broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend on the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of at least $1,000,000 but less than $4,000,000: $75;

(ii) Receipts of $4,000,000 or more: $1,500;

(C) For other transmitters of performances of copyrighted sound recordings, including background music services, the blanket royalty shall be two per centum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period;

(D) For other users not otherwise exempted, the blanket royalty shall be $25 per year for each location at which copyrighted sound recordings are performed.

(9) Public performances of copyrighted sound recordings by operators of coin-operated machines, as that term is defined by section 116, and by cable systems, as that term is defined by section 111, are subject to compulsory licensing under those respective sections, and not under this section. However, in distributing royalties to the owners of copyright in sound recordings under sections 116 and 111, the Copyright Royalty Tribunal shall be governed by clause (14) of this subsection. Nothing in this section excuses an operator of a coin-operated machine or a cable system from full liability for copyright infringement under this title for the performance of a copyrighted sound recording in case of failure to comply with the requirements of sections 116 or 111, respectively.

(10) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing U.S. securities for later distribution with interest by the Copyright Royalty Tribunal, as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a compilation of all statements of account covering the relevant annual period provided by subsection (c)(3) of this section.

(11) During the month of September in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(3) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may, subject to the provisions of clause (14) of this subsection, agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(12) After the first day of July of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (B) of this subsection (c)(3) during the twelve-month period of which claims have been filed under clause (11) of this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royaly fees.

(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(14) The royalties available for distribution by the Copyright Royalty Tribunal shall be divided between the owners of copyright as defined in subsection (e), and the performers, as also defined in said subsection, but in no case shall the proportionate share of the performers be less than fifty percent of the amount to be distributed. With respect to the various performers who con-

tributed to the sounds fixed in a particular sound recording, the performers' share of royalties payable with respect to that sound recording shall be divided among them on a per capita basis, without regard to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his right to the royalties provided in this subsection to the copyright owner or the performer, respectively, and no such purported transfer shall be given effect by the Copyright Royalty Tribunal.

(d) *Exemptions From Liability and Compulsory Licensing.*—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable annual period, if during such period—

(1) In the case of a radio broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a television broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $1,000,000; or

(3) In the case of other transmitters of performances of copyrighted sound recordings, its gross receipts from subscribers or others who pay to receive transmissions during the applicable period were less than $10,000.

(e) *Definitions.*—As used in this section, the following terms and their variant forms means the following:

(1) "Commercial time" is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by a spot commercial announcement at intervals of less than fourteen and one-half minutes.

(2) "Performers" are instrumental musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording. For purposes of this section, a person coming within this definition is regarded as a "performer" with respect to a particular sound recording whether or not that person's contributions to the sound recording was a "work made for hire" within the meaning of section 101.

(3) A "copyright owner" is the author of a sound recording, or a person or legal entity that has acquired all of the rights initially owned by one or more of the authors of the sound recording.

(4) "Net receipts from advertising sponsors" constitute gross receipts from advertising sponsors less any commissions paid by a radio or television station to advertising agencies.

(f) *Sounds accompanying a motion picture or other audiovisual work.*—The sounds accompanying a motion picture or other audiovisual work are considered an integral part of the work that they accompany, and any person who uses the sounds accompanying a motion picture or other audiovisual work in violation of any of the exclusive rights of the owner of copyright in such work under clauses (1) through (4) of section 106 is an infringer of that owner's copyright. However, if such owner authorizes the public distribution of material objects that reproduces such sounds but do not include any accompanying motion picture or other audiovisual work, a compulsory licensee under sections 116 or 111 or under subsection (c) of this section shall be freed from further liability for the public performance of the sounds by means of such material objects.

SECTION 8. Section 116 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is heerby amended as follows:

(a) In the title of the section insert the words "and sound recordings" after the words "nondramatic musical works" and before the colon;

(b) In subsection (a), between the words "nondramatic musical work embodied in a phonorecord," and the words "the exclusive right" insert the words "or of a sound recording of a performance of a nondramatic musical work,";

(c) In the second sentence of clause (2) of subsection (c), between the words "provisions of the antitrust laws," and "for purposes of this subsection," insert the words "and subject to the provisions of section 114(c),";

(d) In clause (4) of subsection (c), redesignate subclauses (A), (B), and (C) as "(B)", "(C)", and "(D)", respectively, and insert a new subclause (A) as follows:

"(A) to performers and owners of copyright in sound recordings, or their authorized agents, one-eighth of the total distributable royalties under this section, to be distributed as provided by section 114(c)(14);"

and in the newly-designated subclause (B), between the words 'every copyright owner" and the words "not affiliated with" insert the words "of a nondramatic musical work".

SECTION 9. In section 801 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), amend subsection (b)(1) as follows: in the first sentence, between the words "as provided in sections" and "115 and 116, and" insert "114,"; and in the second sentence, between the words "applicable under sections" and "115 and 116 shall be calculated" insert "114,". Amend subsection (b)(3) by inserting, between the words "Copyrights under sections 111" and "116, and to determine" the following: ", 114,".

SECTION 10. In subsection (a) of section 804 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), insert "114," following the words "as provided in sections" and "115 and 116, and with", and at the end of clause (2) of subsection (a) add a new subclause (D), as follows:

"(D) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 114, such petition may be filed in 1988 and in each subsequent tenth calendar year."

In subsection (d) of section 804, insert ", 114," between the words "circumstances under sections 111" and "or 116, the Chairman".

SECTION 11. Amend section 809 of title 17 of the United States Code, as amend by Public Law 94-553 (90 Stat. 2541), by inserting ", 114," between the words "royalty fees under section 111" and "or 116, the Tribunal".

SECTION 12. This Act becomes effective six months after its enactment.

COMMENTS ON DRAFT BILL

Among the many detailed questions raised by the Danielson Bill, the draft bill set out above, or both, the following deserve special consideration:

1. *Definitions.*—The draft bill revises the definition of "perform" in section 101 to embrace sound recordings. Another possible amendment in that section might expand the definition of "fixed" to include cases where a work is being fixed simultaneously with its performance. An important question involves the rights of performers who are employees for hire; the draft bill does not change the definition of "work made for hire" in section 101, but defines "performers" in section 114 in a way that is intended to insure their right to share in performance royalties despite their employee status.

2. *Limitations on Performance Rights Generally.*—The draft bill amends seven of the nine clauses of section 110 to add sound recordings to the material whose performances are exempted. Should clause (1) of section 110 also be amended to exclude from the exemption performances of sound recordings given by means of a phonorecord known to be unlawfully made? Should clauses (1) and (2) be amended to exclude from the exemptions sound recordings made expressly for instructional purposes?

3. *Exemption for Public Broadcasting.*—The draft bill retains the exemptions for public broadcasting now in section 114.

4. *Act that Triggers the Compulsory License.*—The draft bill follows the Danielson Bill in making compulsory licenses available when phonorecords of a sound recording have been publicly distributed anywhere. It does not limit the place of distribution to the United States (as in section 115), and it does not adopt proposals to allow a period of free use (30 days was suggested) before any liability would accrue.

5. *Administration.*—The draft bill follows the pattern established in sections 111 and 116 of the Copyright Act of 1976, providing for filing in the Copyright Office and payment of fees there, but entrusting to the Copyright Royalty Tribunal the tasks of distributing royalties and adjusting rates.

6. *Criminal Penalties.*—The Danielson Bill subjected a user who had not complied with the compulsory licensing requirements to full liability for copyright infringement, but insulated such a user from criminal liability even if the infringement was willful. The draft bill restores the possibility of criminal penalties in this situation.

7. *Royalty Rates.*—The draft bill recasts the rate provisions of the Danielson Bill in an effort to make them a little simpler, but leaves the basic system and amounts largely untouched. The compulsory licensing rates for jukebox and cable performances are not increased in sections 116 and 111, so the beneficiaries of those sections would be required to share their pot with performers and record producers.

8. *Substitution of Negotiated Licenses.*—The Danielson Bill allowed for the substitution of negotiated licenses and urged the formation of collecting agencies to make this possible. This raised a number of practical problems and inconsistencies, and the existence of the Copyright Royalty Tribunal adds a new factor. The draft bill is based on the premise that all licensing in this area will be compulsory.

9. *Distribution of Royalties.*—The Danielson Bill provided for a mandatory fifty-fifty split between performers and "copyright owners." It did not come to grips with the status of performers who are employees for hire. The draft bill gives at least fifty percent of the royalties to performers on a per capita basis, regardless of their employment status, but allows performers to negotiate for more (not less) than a fifty percent share.

10. *Exemptions.*—Both the Danielson Bill and the draft provide outright exemptions to smaller radio and television stations and music services.

11. *Definition of Performers.*—Neither draft mentions arrangers, although in practice they are often assimilated to performers. Arguments can be made that employed arrangers should be entitled to share in the royalties under section 114.

12. *Soundtracks.*—The draft bill seeks to clarify a difficult question: are "soundtrack recordings" subject to compulsory licensing when they are publicly performed?

OTHER RECOMMENDATIONS

Finally, mention must be made of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention, adopted in 1961). This notably-motivated and ambitious international instrument was years ahead of its time, but it has retained its vitality and has much to offer to the United States and its creative communities. This country could adhere to the Rome Convention if the proposed legislation were enacted, and the possibility should be thoroughly explored at the appropriate time.

THE RECORDING MUSICIAN AND UNION POWER: A CASE STUDY OF THE AMERICAN FEDERATION OF MUSICIANS

(By Robert A. Gorman, professor of law, University of Pennsylvania)

PREFACE

While much of the background material for this Study was available in books, articles, and other printed documents, a great deal of it was provided through interviews with a number of persons, all of whom proved to be extremely good-natured, patient and helpful. The author expresses his gratitude to Robert Crothers, Executive Secretary of the American Federation of Musicians, and to Henry Kaiser, its General Counsel; to Martin A. Paulson, Trustee of the Music Performance Trust Funds; and to Sanford I. (Bud) Wolff, Morton Becker, and John C. Hall, Jr., of the American Federation of Radio and Television Artists. The deepest debt is owed to Cecil F. Read, who gave of his time and his extraordinary memory, as well as documents which would not otherwise be available, in three long (but fast-moving) days of interviews. Mr. Read could not have been more gracious, helpful and objective in his detailed recounting of the events described herein. Without him—in more ways than one—this Study could not have been written.

Finally, a special word of thanks is due Barbara Ringer, Register of Copyrights, who with her characteristic inquiring mind and sharp instincts knew that there was here a story to be told. The author hopes that the writing of the tale lives up in some modest measure to the events themselves and to the major dramatis personae.

INTRODUCTION

For nearly half a century, our national laws dealing with the employment relationship have either granted directly certain benefits—such as a minimum

wage, a safe place to work, retirement benefits, protection against discrimination on the basis of race or sex—or have left these benefits to be secured through the play of economic forces known as collective bargaining. There have been efforts over roughly the same period of time to grant, by action of Congress, compensation to performers when their performances have been captured on film or tape or phonograph record and then re-played by others for commercial profit. All such efforts have thus far failed. The Copyright Act of 1976 has no provision for "performers' rights" in recorded music or recorded speech, as distinguished from copyright in the musical composition or literary work being rendered. It has been the task, therefore, of labor organizations representing performers—instrumental musicians, singers and actors—to attempt to secure such performers' rights through the private mechanism of collective bargaining.

So long as there were no mechanical means for recording and recreating such performances, there was no concern about such performers' rights or attendant royalties. Once, however, the inventive genius of such persons as Thomas Edison had produced the motion picture and the phonograph record, a person's performance could be played far away, and played often. One obvious consequence was the very serious threat to that performer's employment opportunities, as well as to the employment of other performers for whose services the recording could be substituted. Another consequence was the belief that, whether or not the performer's employment was threatened, it was "just and proper" that he or she be recompensated when the performance was rendered from the recording, particularly when others were reaping commercial benefits from the performer's talents.

One group of performers for whom these problems have been acute are the instrumental musicians, who perform not only live but also on phonograph records and tapes, on filmed television programs and on motion picture soundtracks. These musicians are represented by the American Federation of Musicians, who periodically negotiate labor agreements with employers in the various entertainment industries. There are, for example, separate contracts covering wages and working conditions for instrumental musicians working for the manufacturers of phonograph records, for the producers of television films, and for the producers of so-called theatrical motion pictures. The re-use of the "fixed" performances of musicians, generically referred to here as "recordings," has generated a conflict of interests between two constituencies within the union. One such group is that which performs on these recordings. They hear them replayed for commercial profit—on radio broadcasts, or jukeboxes, or wired-music services, or television broadcasts—and they naturally wish to have some share in that profit, since their talents have contributed to it. The other group of effected musicians is that which has been ousted by the use of recorded music. These are the musicians who would otherwise be asked to perform live—on radio and television programs, in theatres and nightclubs, in dancehalls, restaurants and hotels. This latter group can reasonably feel that it is the recording musicians who are responsible for their displacement, and that some of the profits from the commercial exploitation of recorded music should inure to the benefit of those whom that music has displaced.

There have been insistent pressures within the American Federation of Musicians to bargain not so much for performers' rights and performance royalties, but rather for the protection of the predominant segment of the membership which does not record for the phonograph record, motion picture or television industries. These pressures have retarded the endorsement by the Federation of performers' rights in their collective bargaining agreements. It took what has been characterized as a "revolt" within the membership of the AFM, occurring in the late 1950's, to move the Federation leaders to a bargaining policy more protective of the interests of the recording musicians.

It is this evolution (or revolution) in the philosophy and bargaining policy of the American Federation of Musicians which is the subject of this Study.

THE RISE OF RECORDED MUSIC AND OF JAMES C. PETRILLO[1]

Invented in 1877 by Thomas A. Edison, the phonograph became a practicable device for home enjoyment between 1896 and 1900. Through technological im-

[1] Most of the factual material recounted in this chapter and the two following chapters is based upon two very thorough and useful works: R. Leiter, The Musicians and Petrillo (1953), and Countryman, The Organized Musicians, 16 U. Chi. L.Rev. 56, 239 (1948–49). A less detailed, but still helpful, treatment of these facts and also of the origin and operations of the Music Performance Trust Funds, is to be found in Chapter III of T. Kennedy, Automation Funds and Displaced Workers (1962).

provements leading to greater fidelity of sound, orchestral recording became a reality in 1913, supplementing the emphasis in the preceding decade upon vocal performances, most notably those of Enrico Caruso. The phonograph record brought more employment opportunities to instrumental musicians than it displaced. It was not until the 1930's that the competition of records with live musicians became serious, as radio broadcasters came to rely extensively upon the playing of such records over the air.

Beginning in 1910, silent motion pictures—previously used as a novel adjunct in vaudeville theatres—became a commercial success in their own right, with the appearance of the multi-reel picture. This development brought a most substantial need for instrumental musicians. Some motion picture studios hired small musical groups to perform in the studios during filming, as a way of relieving some of the tedium of the actors' day. But far greater was the use of instrumental musicians in the theatres in whicvh silent movies were exhibited. Theatre employment for live musicians increased tenfold. Many theatres hired a single musician, typically a pianist or organist, to provide mood music to accompany the silent film, while other theatres hired orchestras, some of substantial size, to accompany the vaudeville and film attractions shown under the same roof. By 1926, there were some 22,000 musicians playing in American motion picture theatres. Contracts between theatre owners and the American Federation of Musicians served as some guarantee of continued employment.

Additional employment opportunities for musicians were generated by the emergence in 1920 of radio as a device for transmitting voice and music. A dearth of program material led to extensive reliance on phonograph records, but federal government regulations designed to achieve diversity of programming resulted in a limitation upon recorded music and the use of live musicians. At first, these musicians played for the radio stations without pay, as a means of publicizing their wares, but soon they became subject to wage scales negotiated between the local stations and the locals of the AFM. The duty to pay for live music provided an inducement for more frequent recourse to phonograph records, which were often introduced so as to give the radio audience the impression that the music was being performed live in the radio studios. Local employment opportunities were more seriously undermined in 1926 and 1927, when the NBC and CBS radio networks were formed, and a single program could be transmitted through local stations to the entire nation.

Perhaps the most dramatic blow to the employment of live musicians was the advent of the talking motion picture. Warner Brothers released the "Jazz Singer" in 1927. Within two years, 2,000 theatres had installed sound equipment, the cost of which was substantially less than the cost of retaining a staff of musicians on a full-time basis. In 1929, the number of musicians performing for vaudeville and motion pictures had fallen from 22,000 to 19,000 and by 1930 it had fallen to 14,000. That year saw a precipitous decline to some 5,000 performing musicians in American motion picture theatres. This decline was accompanied by an all but total destruction of the power of the AFM in the theatres; a strike needs workers to call upon, and no threatre exhibiting sound motion pictures could be closed by the refusal of live musicians to work.

Many of the displaced musicians packed their instruments and moved to the land of promise, Hollywood; but the motion picture studios provided employment for only some 200 or 300 of them, and they had to be of outstanding ability. Those who were hired by the motion picture producers were assured of some stability if employment through labor agreements negotiated by the AFM, which provided for the hiring of a minimum number of musicians in the studio's "staff orchestra," or the expenditure of a minimum amount of money annually for staff musicians. Many within the AFM called for a ban on recording for motion picture sound tracks. But such a recording ban would probably have been unsuccessful, since musicians who were willing to play could have been wooed from the union through lucrative employment contracts. Moreover, such a ban would probably have been illegal, since a work stoppage directed against the producers as a means of procuring employment from theatre owners would likely have been treated as a secondary boycott, unlawful both under state tort law and the Sherman Antitrust Act. Joseph N. Weber, President of the AFM since 1900 decided instead to launch in 1929 and 1930 a public-relations campaign directed at inducing a public boycott of sound motion pictures, claiming that they were a debasement of music, but that met with little success. The later decision of some

locals to exert pressure directly on movie houses in 1936 and 1937, including the use in some cases of picket lines and sit-ins, met with a similar fate.

President Weber was, however, sensitive to the fact that motion picture soundtrack (like the phonograph record) could be re-used to the detriment of live employment opportunities, and he succeeded in securing restrictions on such use. The 1938 labor agreement between the AFM and the major studios provided that a motion picture soundtrack was to be used only "to accompany the picture for which the music was performed" and was not to be used for any other picture or purpose "except to accompany a revival of the picture for which recordings were originally made." (That restriction on the use of soundtrack remains in the AFM contracts to this day, almost verbatim, and is qualified by only a limited number of exceptions, such as the "dubbing" of the soundtrack onto phonograph records; in such cases, the original motion picture recording musicians are to be paid at scale wages as if they had themselves performed on the phonograph record.)

At the same time as sound motion pictures were drastically reducing the need for live musicians in theatres, other events were limiting their employment opportunities elsewhere. There were, however, some countercurrents which retarded the decline. In 1929 to 1932, phonograph record manufacturing dropped. Apparently, in a time of depression, the public was getting its principal pleasure from the musical and comedic material broadcast over the radio rather than through the purchase and playing of phonograph records. But in 1932, there was an upswing in the manufacture of records and the resulting employment of musicians in that industry. The major contributing factors were the lower-priced record, the rise of "swing" music and the proliferation of the jukebox. From 1920 to 1933, live musical performances in hotels, restaurants and nightclubs were adversely affected by the lack of liquor to which the music could serve as accompaniment. The demise of Prohibition at the end of 1933 generated an increase in such "club dates" for musicians. But the major and most insistent threat to live performers in the 1930's came from the use of recorded music on radio programs.

The year 1930 saw the development of the so-called electrical transcription, which made it possible to record fifteen minutes of a radio program on a single sixteen-inch disc, and then to use that disc for delayed rebroadcast, either on the West Coast the same day or anywhere in the nation months or years later. Soon after, the Muzak Corporation became the major force in "wired music," which involved a private hook-up to a central station playing musical transcriptions, which were transmitted to hotels and restaurants. In radio broadcasting itself, the Federal Radio Commission loosened its limitations upon the use of phonograph records on the air, and this policy was continued by its successor agency, the Federal Communications Commission, created in 1934. (Those agencies did, however, take steps to assure that the broadcaster announced that the music was being played from phonograph records and not by a live orchestra.) Radio broadcasters responded to the public's increasing taste for popular music by playing records. In the late 1930's, more than half of the music played on American radio stations was transcribed or was from phonograph records. Local radio stations throughout the country were making less use of full-time "staff orchestras" and of "casual" musicians both because of the availability of recordings and because of the spread of the radio network systems.

At this time, a young man of influence within the American Federation of Musicians was gravely concerned about the threat which recorded music posed to the economic wellbeing of musicians. He was James Caesar Petrillo, who became President of Local 10 in Chicago in 1922, when he was thirty years old. Petrillo, earlier than any other leader within the labor movement, emphasized that technological unemployment within the field of instrumental music was different from other trades or crafts. In other trades workers were displaced by the inventions of entrepreneurs, while it was the musicians themselves who were responsible for making the recordings which displaced their fellow artists. From this fundamental premise, Petrillo earlier concluded that one way to avoid technological unemployment was for musicians simply to cease forging the instruments of their own destruction, that is, to cease recording. Another conclusion he drew somewhat later was that to the extent musicians did make recordings, they were obliged to mitigate the harmful economic impact upon their fellow musicians. This latter policy helped Petrillo to consolidate his political power within the Federation; ulimately, however, it generated a significant

division within the membership which can fairly be said to have directly contributed to Petrillo's voluntary resignation from the presidency of the AFM in 1958.

Petrillo, while President of the Chicago local, was the first in the AFM to strike against broadcasters to combat their use of recordings. In 1931, Local 10 called a strike of Chicago radio musicians, in part to prevent the use of records on commercial broadcasts. The strike was settled through the broadcasters' concessions on other matters. The Chicago local in early 1937 announced that it would not permit its members to make recordings or transcriptions unless the local officers could assure that there would be an end to "the menacing threat of canned music competition." Petrillo, and the policy he effected in Local 10, carried weight at the annual convention of the Federation in 1937, which gave its mandate to President Weber to begin an economic battle against the encroachments of mechanical music.

Weber entered negotiations in 1937 with representatives of radio broadcasting and of the transcription and phonograph record companies. He declared that he was prepared to order his musicians to cease performing on radio and to cease recording, if that was necessary to assure increased employment of musicians in the radio stations. The two-year agreements negotiated with the radio broadcasters provided for a very substantial increase in the size of the radio staff orchestras. The networks and their affiliates, which previously had been spending $3,500,000 yearly in musicians' wages, agreed to spend an additional $2 million. The 1938 agreements with the recording companies required those companies to place on each record label a restrictive legend similar to "only for non-commercial use on phonographs in homes." The objective was to impose an "equitable servitude" on the recordings, so that the musicians could enjoin their use on radio broadcasts. Both the "quota" contracts with the broadcasters and the record-label strategy were soon subjected to legal challenge.

As the radio "quota" contracts were about to be renegotiated in 1939, Assistant Attorney General Thurman Arnold published a list of union practices which he asserted to be clear violations of the Sherman Act and which the Antitrust Division would prosecute with vigor. Included were "unreasonable restraints designed to compel the hiring of useless and unnecessary labor." In an attempt to avoid this peril, the AFM relegated its labor negotiations to the local level, between local stations and individual union locals. But, although wage scales of radio musicians moved up in the period 1940 to 1947, the number of staff musicians at the radio networks and local stations fell from 2,237 to 1,939. By the end of that period, it could be said that the average local radio station was employing less than one-third of a full-time musician.

The more widely known legal attack upon the collective bargaining strategy of President Weber was directed at the record-labeling requirement in the labor agreements between the AFM and the recording industry. Phonograph records commonly bore such labels as "for home use only" or "not licensed for radio broadcast," in the hope that remote purchasers—such as radio stations—would be bound thereby. Several "name performers" who had organized themselves as the National Association of Performing Artists, instituted a number of test suits in the late 1930's against radio broadcasters that refused to abide by the warning on the label. Several of these suits were successful, the most important being the 1937 decision of the Supreme Court of Pennsylvania in *Waring* v. *WDAS Broadcasting Station, Inc.*[2] In that case, Fred Waring, hired to perform on radio under the sponsorship of the Ford Motor Company, sued station WDAS which had purchased a Waring recording bearing a conspicuous warning legend and played it over the air; Waring was displeased with the competition this gave his own live performances. The Pennsylvania courts enjoined the unauthorized use of the phonograph record. This victory was, however, short-lived. The United States Court of Appeals for the Second Circuit reached a contrary result in 1940 in the famous case of *RCA Manufacturing Co.* v. *Whiteman.*[3] There, the court held that the sale of the recordings of the Paul Whiteman orchestra resulted in the loss of state copyright protection because it was a "general publication," and that the restrictive legend neither saved the copyright nor imposed an enforceable equitable servitude upon purchasers of the recordings. The *Whiteman* court further held that state doctrines of unfair competition could not overcome the preemptive

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[2] 327 Pa. 433, 194 Atl. 631 (1937).
[3] 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

implications of the federal copyright scheme, which dictated free use of creative works not protected under federal law. The impact of this decision was great, both because it was expressed in a most thoughtful opinion by the most highly regarded jurist of his day, Learned Hand, and because the Second Circuit encompassed New York, a center for record production and sales and for radio broadcasting.

The *Whiteman* decision is uniformly regarded even today by representatives of recording artists as one of the very grievous blows that American law has inflicted upon these artists. (As will be seen below, the other unwelcome legal actions were a product not of the courts but of the Congress.) The effect of *Whiteman* was that radio broadcasters were legally entitled, upon the payment of the price of a phonograph record, to exploit and re-exploit for their own commercial advantage the public's desire to hear the major recording artists of the day. The American Federation of Musicians would have to look elsewhere for devices to pressure the broadcasters to refrain from so utilizing recorded music as to destroy the employment opportunities of live musicians. The Federation came to appreciate that the direct economic pressure could be such a device. The obvious targets of such economic pressure were the record manufacturers and the broadcasters. The more forward-looking labor leaders appreciated that the broadcasters could weather a work stoppage fairly well, because they could rely on the very source of the musicians' distress, the phonograph record.

After the broadcasting and record negotiations of 1937 and 1938, President Weber came under sharp verbal attack from local president Petrillo, who was getting increasing notoriety within the AFM. He was known in part for his tough stance within Local 10 on the question of mechanical recordings and in part for the fact that the Chicago musicias were the highest paid in the union. By 1940, Weber—at the age of 75—had served as the AFM president for 40 years. That year, he announced his retirement, and James Caesar Petrillo at the age of 48 was elected President of the Federation.

THE 1942 RECORDING BAN AND THE CREATION OF THE RECORDING AND TRANSCRIPTION FUND

The experience of Petrillo in Chicago in 1937 and 1938, in which he had ordered his musicians not to record, suggested to him that a nationwide ban could be fully effective in preventing the use of recordings on radio. To consolidate the position of the AFM as a preclude to any such recording ban, Petrillo took two major steps shortly after his election as Federation president.[4] Many solo instrumentalists, accompanists and symphony orchestra conductors were members of the American Guild of Musical Artists, and not of the AFM; a recording ban could be undermined if the AGMA musicians would not cooperate. Petrillo threatened in August 1940 to withhold from AGMA artists the services of musicians who were members of the AFM. Although this campaign was resisted and litigation was brought by the leaders of AGMA, that group finally capitulated, and by February 1942, ninety-nine percent of the solo concert instrumentalists had become members of the AFM. Another two-year campaign was successfully waged by Petrillo to organize the last holdout in American symphonic orchestras, the Boston Symphony Orchestra. The AFM Annual Conventions of 1941 and 1942 authorized Petrillo to ban the making of records and transcriptions.

In June 1942, Petrillo notified the recording and transcription companies that after August 1, AFM members would not record. The nationwide recording ban went into effect as threatened, and all recording ceased. Petrillo's target was not so much the recording industry, which he made clear he would happily support if their recordings could be limited to home use, but the broadcasting industry. The recording ban generated a public uproar, with seventy-three percent of the American public favoring legal action against Petrillo; a Senate committee investigation; concern about the impact of the recording ban, and the resulting decrease in the flow of new records to the radio stations, upon the morale of our fighting men and women; and a public-relations war between the AFM and organized labor here and abroad on one side, and the recording companies and broadcasters, who often were in control of newspapers as well, on the other.

In 1942, the Federal Government, through Assistant Attorney General Thurman Arnold, commenced an antitrust action in the federal court in Chicago seeking an injunction against the Federation, its officers and directors, from

[4] See chapter 7 in Leiter, *op. cit. supra* note 1.

continuing the recording ban. The claim was that the Federation was in violation of the Sherman Act, attempting to restrain commerce in phonograph records and electrical transcriptions and to eliminate competition between recorded music and live music. The complaint pointed to the elimination of records for home use, for radio use and for use in jukeboxes. Other charges were leveled against the defendants. Petrillo had in July 1942 ordered an end to the twelve years of Saturday afternoon radio broadcasts of performances by high school orchestras from the National Music Camp at Interlochen, Michigan; the defendants were charged with seeking to eliminate all live radio performances of music by persons not members of the union.

Petrillo had since 1940 required radio networks to boycott affiliated stations which failed to hire a standby orchestra when network musical programs were being transmitted through the local stations; the antitrust complaint alleged that it was illegal to seek to require radio stations to hire standby musicians whose services were "neither necessary nor desired." This lawsuit was a part of Attorney General Arnold's campaign to use the Sherman Act to prevent "featherbedding" and the intereference by labor with the adoption of improved mechanical methods reducing the demand for labor. The National Association of Broadcasters filed a brief amicus curiae in support of the Government's contentions. The district court granted the Federation's motion to dismiss.[5] It held that the defensely acts were not enjoinable and were not violations of the Sherman Act. The pertinent Federal statutes—the Clayton Act and the Norris-LaGuardia Act—declared lawful the use of a work stoppage or the threat of a work stoppage in pursuit of the union's objectives in a "labor dispute." The case was held to involve such a "labor dispute," since the Federation was in effect seeking a "union shop" in the broadcasting industry, directed both against nonunion live performers such as the Interlochen orchestra and against phonograph records and electrical transcriptions. The United States Supreme Court summarily affirmed the dismissal.[6]

At the same time, in February 1943, the Federation proposed that recording companies should pay to the union a fee in the nature of a royalty for each phonograph record and transcription made by union members. The union would disburse these moneys so as to reduce unemployment caused largely by these mechanical reproductions. The union fund would provide work through live concert performances, free to the public, which would foster musical talent and music appreciation. This "trust fund" proposal was the imaginative creation of President Petrillo, whose philosophy it was to have an industry, thriving upon the services of recording musicians, contribute to the economic wellbeing of those musicians ousted from work by such recordings. His memories of the grievous loss of theater employment for union members, resulting from motion picture soundtrack, were still vivid in Petrillo's mind. The record and transcription companies, however, rejected his proposal. They objected to placing these moneys within the union's uncontrolled discretion and they in principle resisted the claim that they had any obligation to persons, identified merely by their membership in the union, who had never been their employees. Negotiations foundered, and the strike continued on, into the summer of 1943, a year after it had begun.

The recording companies managed fairly well to weather the cessation of the musicians' services. They had built up some backlog of new recordings just before the strike, and they were able to make new pressings of records made earlier. They made new recordings without using instrumental musicians, relying heavily on unaccompanied vocalists or on vocalists who were accompanied by instruments not then covered by AFM rules or contracts, such as harmonicas, ocarinas, ukeleles and one-man bands. There was some, but limited, sale of "bootleg" records and of records made in Mexico and Cuba. Because of the war, there was a shortage of raw materials used in record manufacture, particularly shellac, so that the production of new records would have been limited even apart from the recording ban. Nonetheless, the recording companies attempted to exert some pressure for a settlement—after conciliation efforts had failed regarding the union's proposal for a trust fund—by taking their case to the National War Labor Board. The NWLB was empowered to investigate disputes over contract negotiations, to direct the parties to adopt specific settlement terms, to bring those terms to the attention of the public, and ultimately to have them enforced by governmental seizure of the business in the event the Economic

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[5] *United States* v. *American Fed'n of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942).
[6] 318 U.S. 741 (1943).

Stabilization Director was to find "that the war effort will be unduly impeded or delayed" by continuance of the dispute. The NWLB asserted jurisdiction, and while a panel of the Board was holding hearings, the strike took a dramatic turn.

In September 1943, Decca Records—which along with Columbia and RCA Victor produced almost all of the phonograph records in the United States, and which itself produced one-quarter of the total—signed a contract with the Federation. Within a month, several large transcription companies and twenty-two small record and transcription manufacturers signed the Decca contract. The companies agreed to pay royalties on each phonograph record sold, ranging from one-fourth cent on a thirty-five cent records, to 2½ percent of the sale price of records selling for more than $2.00. The royalty on electrical transcriptions was three percent of the company's gross revenue from their sale, lease, or license (except that transcriptions used only once by any one radio station were royalty free). The royalties were to be kept by the Federation in a separate fund, called the Recording and Transcription Fund, and were to be used "only for purposes of fostering and propagating musical culture and the employment of live musicians, members of the Federation." By March 1944, almost eighty small recording and transcription companies had signed the Decca agreement. RCA Victor and Columbia, however, along with the NBC transcription division stood firm. In part, they were fearful that the union's royalty demands, if successfully imposed upon them, would inevitably be presented to their parent broadcasting companies, the National Broadcasting Company and the Columbia Broadcasting System.

The hold-out recording and transcription companies continued to press their case before the National War Labor Board. In March, a three-member panel of the Board recommended that the musicians should be ordered to return to work and that no royalty plan should be approved. In June 1944, the full Board, while agreeing that the record ban should end immediately, approved the concept of a union welfare fund and ordered arbitration of the amount and disposition of the royalty payments. Petrillo refused to accede, since he had already secured favorable terms from the other companies, which might be jeopardized by less favorable terms in an arbitration proceeding (since the existing agreements contained a so-called "most favored nation" clause). The NWLB order was not made the subject of a seizure order by the Economic Stabilization Director, since the continuation of the recording ban only at RCA Victor and Columbia could hardly be said to impede the war effort unduly. The public outcry, however, continued, as did informal governmental pressures. In October 1944, more than two years after the recording ban had begun, President Roosevelt sent a telegram to Petrillo, appealing to his patriotism and citizenship, and urging him to end the ban and to abide voluntarily by the order of the National War Labor Board. Petrillo refused. Among other things, he pointed out that agreements had already been reached with 105 recording and transcription companies, and that he was in no position to give RCA and Columbia more favorable terms.

Shellac imports increased. Decca began to record a larger share of the new popular songs. Recording artists began to switch to Decca from RCA Victor or Columbia, the most celebrated example being Jascha Heifetz, who left RCA to sign a nonexclusive agreement with Decca in October 1944. The competitive pressures on the two major hold-out companies became too great. In November 1944, almost twenty-seven months after the recording ban began, RCA Victor and Columbia agreed to terms, and full production was restored in the recording industry.

The contract which was signed by the major recording companies, by smaller record companies totalling roughly 600, and by electrical transcription companies had a termination date of December 31, 1947. The wage provisions were, however, renegotiated in October 1946, and the Federation was able to secure substantial wage increases, resulting in scale payments of $41.25 for three hours of regular recording or $38.50 for two hours of recording by symphony orchestra. These wage figures will play an important part in this story of the union, because no further wage increase was negotiated by the AFM for recording musicians until the end of 1958, while payments into the fund newly created under the 1943 and 1944 contracts mounted significantly. Royalty payments to the union for the Recording and Transcription Fund accumulated from 1943 to 1947. These payments were separately administered and kept apart from general union moneys; no part was used to pay the salary of any union official. Union disbursements from the fund began in early 1947, and were designed to provide employment for musicians

through the offering of live concerts, without admission charge, in such places as parks, ballrooms, concert halls, schools and hospitals. The fund was to be divided among the locals of the union, some 700 in number, with each local (except for the three largest, in New York, Los Angeles and Chicago) receiving $10.43 for each member in good standing; the largest three locals were entitled to this sum per member for each of their first 5,000 members and to only $2.00 for each additional member. With almost all of the phonograph recording taking place in these three cities, this "discrimination" rankled many of the recording musicians, who felt that their share of disbursements from the fund was not commensurate with the fund income that had been generated by their recording services. These local allocations were to be disbursed by the local union officers to unemployed members of the local for their services at public concerts. Every program planned by any local was to be approved in advance by the national union. It was not unusual for accusations to be made that the local officials were allocating fund payments so as to reward their friends, regardless whether they were unemployed.

The total amount collected by the Federation and placed in the Recording and Transcription Fund through the end of 1947 was approximately $4,500,000, which was substantially all expended in 1947 through 1949. This expenditure was often supplemented in particular instances by contributions from the locals and from civic organizations and local governments. Nearly 19,000 performances were given, generating more than 45,000 paychecks. The types of performances in order of decreasing frequency included teen-age dances, entertaining units, band concerts, orchestra concerts, regular dances, jazz concerts, parades, and symphony concerts. The success of the fund was principally attributable to the boom in the production of phonograph records at the end of the war. In 1945, 165 million records were sold; in 1946, the figure rose to 275 million; and in 1947, to 350 million sales. Only a relatively small part of the fund was generated from the three-percent royalties from the licensing of radio transcriptions.

UNION ATTEMPTS TO INCREASE RADIO EMPLOYMENT, AND THE LEA ACT

The AFM did not exclusively devote its energies during World War II to the elimination of phonograph records as a threat to live musical performance by union members on radio. Other union policies were designed directly to promote employment on network and local radio stations. It has already been noted that Federation locals in the late 1930's succeeded in negotiating "quota" agreements requiring a minimum dollar expenditure on staff musicians at local stations. Although the availability of phonograph records to the radio stations, and the manpower shortages of World War II, generated substantial pressure to reduce the number and size of staff orchestras, Petrillo continually exerted pressure to maintain and indeed to increase the number of musicians employed in radio broadcasting. The Federation's policy was to have the locals negotiate for the hiring by the radio stations of a specified minimum number of musicians; these individualized quotas were based upon the station's financial status and to some degree upon its previous employment figures. The Federation was in a better position to extract such quota agreements from local stations that were network-affiliated, as distinguished from independents; the networks, which were more dependent upon the services of live musicians and thus upon the good graces of the union, often exerted gentle pressure upon the recalcitrant affiliated station to capitulate to the union's demands. The Federation used several techniques for eliciting cooperation from the networks. Since a number of networks piped the music of name bands from live performances in hotels, those bands could be barred from playing for the networks. The union could also call out the network staff musicians and thus cut off all "sustaining" musical programs; commercial programs, in which the musicians were under contract to individual sponsors or their producers, could still be broadcast. Finally, a total strike against the networks and the sponsors could be threatened or effected; although this device was rarely used, NBC and CBS in 1945 lost the services of its musicians on two popular commercially sponsored programs.

The Federation's objective of increasing employment in the local stations was carried out through other methods as well. Stability of employment in those stations was threatened by the increasing use throughout the 1930's of so-called cooperative programs by the networks. These programs were originated at the network, and blank periods were provided into which local commercials could be inserted by local stations to which the program was fed. The Federation con-

tended that these "co-op" programs were displacing many local bands, since local sponsors no longer had to place their advertisements through local programs utilizing local musicians. Accordingly, in late 1940, Petrillo ordered members of the AFM not to perform on such co-op programs, many of which were then forced to turn to vocal rather than instrumental musical backgrounds. (The Federation's ban, aimed immediately at the sponsors or producers employing live musicians, could fairly be characterized as a secondary boycott, since its ultimate object was to induce the local stations to hire more musicians. It was, however, not until 1947 that such secondary pressure was explicitly declared illegal by Congress, in the Taft-Hartley Act.)

FM broadcasting, beginning just before the war, gave promise of increased employment for musicians, except when AM broadcasters simultaneously transmitted on FM outlets. In October 1945, the AFM notified broadcasters that its members would not perform on simultaneous AM-FM broadcasts unless a standby orchestra was employed. If, for example, the network staff orchestra utilized ninety-five musicians for the simultaneous broadcast, ninety-five more would have to be hired—simply to "stand by"—for the period of the broadcast. Alternatively, the broadcaster would be expected to pay a "standby fee" to the union.

Standby musicians also had to be used by radio stations when their programs featured musical performances by amateurs, military bands, nonunion musicians, or traveling musicians from other jurisdictions. The outright banning of these kinds of performances was often effected by the AFM. Its most controversial action was Petrillo's order in July 1942 to remove from the air a long-running program carrying student concerts from the National Music Camp at Interlochen. Petrillo aggravated matters by boasting in early 1944, "Nor was there in the year 1943 any other school band or orchestra on the networks and there never will be without the permission of the American Federation of Musicians." The airtime thus preserved for professional musicians was minuscule, but the public outcry was enormous. Bills passed the Senate on two occasions prohibiting interference with the broadcasting of noncommercial cultural or educational programs.

In the House of Representatives, however, the anti-Petrillo sentiment was more deeply felt. The Interlochen decree by the Federation's President was seen as part of a pattern of dictatorial behavior, manifested in a host of actions contrary to the public interest, such as the recording ban of 1942–44, a controversial eleven-month strike in 1944–45 directed against local station KSTP in St. Paul, and the negotiation of employment quotas and standby orchestras in radio broadcasting. In 1945, Congressman Clarence F. Lea sponsored comprehensive legislation (H.R. 5117) directed at a number of these practices. Technically, the Lea Bill was an amendment to the Communications Act of 1934 dealing with radio broadcasting. As introduced, it outlawed "the use of force, violence, intimidation, or duress, or . . . the use or express or implied threat of the use of other means" where the object was either to compel a broadcaster to employ "any person or persons in excess of the number wanted by" the broadcaster; or to compel a broadcaster to take action designed to generate pay for live musicians on radio whether or not their services were actually performed; or to compel a broadcaster or any other person (obviously including manufacturers of phonograph records or electrical transcriptions) to pay an exaction for, or to impose restrictions upon, the use or sale of recordings or transcriptions in connection with broadcasting. In short, the target was the Federation's attempts at "featherbedding" as a means of artificially maintaining employment in radio broadcasting, and the union's attempts to prevent the use of phonograph records and transcriptions in such broadcasting. The recommended sanctions for violation were fine and imprisonment. The bill made it clear that broadcasters and recording companies were free to agree to such arrangements voluntarily, and that such agreements could be enforced by the union. It was the compulsion of such an agreement that the bill outlawed.

One need only skim the legislative debates on the floor of the House and Senate to sense the deeply felt antipathy toward Mr. Petrillo. As one Congressman stated: "I agree that this all is aimed at Petrillo. Let us not kid ourselves. He is the man we are after. We are not after the fellow who blows the horn or plays the violin or plays the piano. We are after Petrillo, the man who runs the union like a dictator.[7] There were constant references to Petrillo as a dictator, with

[7] 92 Congressional Record 1556 (1946).

emphasis placed on his middle name and analogies made to Capone and Hitler.[8] Almost every speaker made reference to some incident in his district in which a military band or a school band was forbidden to play because of an edict from Petrillo. The ban on the Interlochen broadcasts was especially condemned. Petrillo was made the focal point for attacks upon a wide range of abuses, although only a few of these were directly addressed by the Lea Bill. There were references to Petrillo's authority under Article 1, Section 1 of the Federation bylaws to suspend the constitution and bylaws as well as other rules adopted by the membership; to the fact that the Federation's ban of amateur and military bands on the air portended yet greater control over the content of radio programming; to the fact that Petrillo uniformly put his selfish interests over the interests of patriotism and over the appeals of his President; to the union's interference with the live performances (as opposed to performances on the radio) of amateur and military groups; and to the fear that the standby charges and the royalties for transcription licensing would serve as an example for unions in other industries.

The Committee Report which accompanied H.R. 5117 more systematically listed the kinds of demands made by Petrillo and the Federation upon the broadcasting industry in then recent years:[9] "That broadcasters employ persons in excess of the number wanted; that in lieu of failure to employ such persons the broadcaster should pay to the federation sums of money equivalent to or greater than funds required for the employment of members of the federation; that payments for services already performed and fully paid for should be repeated; that payments should be made for services not performed; that broadcasters should refrain from broadcasting noncompensated, noncommercial educational or cultural programs; that broadcasters should refrain from broadcasting musical programs of foreign origin; that tributes should be paid for using recordings, transcriptions, and other materials used for broadcasting; that restrictions should be placed on the manufacture and use of recordings or transcriptions for the purpose of restricting or preventing the use of such materials for broadcasting; that tributes should be paid for recordings previously paid for; that dual orchestras should be employed for a single broadcast over two or more outlets; that over 400 small broadcast stations in the country having no live orchestras would be compelled to employ such orchestras; that the use of voluntary noncompensated orchestras be barred from broadcasts unless an orchestra of the Federation of Musicians were also employed or that the union was paid an equivalent or greater amount than the regular charge for a federation orchestra."

The report referred to millions of dollars extorted from the broadcasting industry, and opined that "if demands now pending were granted it would, by these racketeering and extortion methods, require the broadcasting industry to pay tribute probably much in excess of $20 million a year for peace against these boycotts, strikes, and threats."[10]

Petrillo's activities ad engendered such hostility among Congressmen that it was a foregone conclusion that some version of the Lea Bill would be enacted. Some voices, however, were raised against it. The Congress of Industrial Organizations pointed out several of the more troubling features of the bill. The ban upon "duress" or of "other means" could be understood to outlaw not merely intimidation, but a speech, a pamphlet or other publicity, or the "threat" of an individual to quit work. Such a ban, particularly in view of the criminal penalties, was said to be unconstitutional for vagueness and an impairment of free speech and press. The ban on compelling the hiring of more employees than the broadcaster "wanted" made it possible for the employer freely to overwork the employees on its staff, to the point of threatening their health and safety, without any recourse for the union to peaceful concerted measures in support of collective bargaining.[11]

Congressman Marcantonio of New York expressed dismay that the law would make it a crime to engage in a peaceful strike, and that Congress was for the first time attempting by limiting collective bargaining to fix employment relations in the broadcasting industry. He pointed out the unfair advantage given to broadcasters when workers may be jailed for giving speeches or issuing pamph-

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[8] *Id.* at 1548, 1556.
[9] H.R. Report No. 1508, 79th Cong., 2d Sess. 3 (1946).
[10] *Ibid.*
[11] 92 Congressional Record 1546 (1946).

lets in support of demands for increased employment. "It is a bill to increase the profits of broadcasting monopolies at the expense of workers and not a bill to protect children's orchestras, as its proponents would have us believe. This bille definitely provides for imprisonment for striking and definitely increases the profits of licensees and broadcasting companies at the expense of the American musicians and other workers in the broadcasting industry." [12]

Congressman Celler, also of New York, suggested that while Petrillo's solution for unemployment in broadcast music was unsound, so too was that of the Lea Bill. He suggested that Congress should instead consider creating a system of royalty payments to recording musicians when their recordings are utilized commercially. "Why should we not provide that where a record is used for a household, one cost, one premium shall be paid, but where the record is replayed unlimitedly and has the result of putting out of business the very man who created the record, . . . then in the first instance the royalty should be increased, and every time there is a replaying of that record there should be another royalty, or additional royalties, paid to those who originate the record. He stated that the bill unfairly punished hard-working and patriotic musicians because of Petrillo's misdeeds. The problems generated by technology in musical recording "can only be solved by just collective bargaining and partly by painful readjustment and partly by an intelligent method of imposition of royalties and fair distribution of such royalties." [13]

For the most part, these appeals fell on deaf ears. Several motions were made on the floor of the House to amend the bill, but they were voted down. One amendment would have struck from the bill the language "or by the use or express or implied threat of the use of other means"; [14] this would have sheltered a peaceful strike to get more workers employed or to get payments when records are played. Another amendment would have substituted for the bill's criminal penalties an action for an injunction and the loss by the union and individual wrongdoers of the protection normally given concerted activity under the National Labor Relations Act; in substance, the violators would be liable to discharge.[15] Another would have limited the criminal penalties to the officers of the union rather than to all of the union's members as their agents,[16] while yet another would have limited liability to those who committed an overt act accompanied by a threat of physical force or violence.[17] This concern on the part of some legislators for the severity of the criminal sanctions proposed in the Lea Bill was not shared by most members of the House. Their view was that the Federation's activities involved "moral turpitude akin to that of larceny, embezzlement, the acquisition of another's property by false pretenses, racketeering, and extortion." [18] They also found a $1,000 fine hardly unfair, given the $20 million per year which was allegedly being extorted by the AFM from the broadcasters.[19] Another unsuccessful amendment—which properly understood would have substantially destroyed the principal objective of the legislation—would have permitted the union to strike "for any objective which may be lawfully obtained through negotiations." [20] This amendment would have sheltered strikes to secure standby orchestras or standby payments, and strikes to secure royalty payments on recordings and transcriptions, since such terms could under the statute be lawfully negotiated and lawfully incorporated in a labor agreement.

Although these amendments failed, one was adopted by representatives of the Committee while the issue was under discussion on the floor of the House. Rather than making it unlawful to compel a broadcaster to employ more workers than was "wanted by such licensee," the House inserted instead the phrase "needed by such licensee to perform actual services." [21] The change was an important and favorable one for the musicians, for it rendered the test for "featherbedding" somewhat more objective. As thus amended, the Lea Bill passed the House on February 21, 1946, by a resounding vote of 222 to 43.

[12] *Ibid.*
[13] *Id.* at at 1547.
[14] *Id.* at 1559.
[15] *Id.* at 1559–60.
[16] *Id.* at 1562.
[17] *Id.* at 1564–65.
[18] *Id.* at 1543.
[19] *Ibid.*
[20] *Id.* at 1562–64.
[21] *Id.* at 1564.

Because the House bill differed from the much more confined bill passed by the Senate, a conference committee was convened, and the bill which issued was in all pertinent respects the same as the Lea Bill as passed by the House. Perusal of the floor debates in both Houses shows that there was substantial misunderstanding and disagreement as to certain central provisions of the bill. There was, for example, disagreement as to whether it would be illegal for a union to strike to secure a contract provision giving royalties to musicians for repeated broadcasts of their recordings on the radio.[22] Moreover, in spite of the rather clear terms of the bill which would sustain the validity of such a contract provision if voluntarily agreed upon, and which would validate "the enforcement or attempted enforcement, by means lawfully employed," of any such contract provision, there was still disagreement as to whether a union could strike to enforce such a royalty provision already in a labor agreement.[23] Indeed, even efforts at negotiating for such a provision were regarded by some Congressmen as within the ban of the Lea Bill.[24] Nor was there a common understanding as to whether the number of employees "needed" by the broadcaster was to be conclusively determined by the broadcaster itself or by a court of law.[25] Finally, there was confusion as to whether the payment of royalties for the use of phonograph records or transcriptions was even an "exaction," coercion to secure which would be unlawful; some Congressmen understood that term to embrace only unlawful payments from the broadcasters and not payments by way of royalties or compensation.[26]

Undaunted by the failure to secure understanding, let alone agreement, on these fundamental issues, the House passed the conference bill on March 29, 1946, by a vote of 186 to 16; and the Senate followed suit on April 6, 1946, by a vote of 47 to 3 (with 46 members of the Senate not present and not voting). On April 16, the Lea Act was signed into law by President Truman.[27] The full text of the Act is set forth in an appendix to this Study.

It is instructive to examine each section of the Lea Act to consider how it restricted the bargaining policies of the American Federation of Musicians in the broadcasting and recording industries, and what the implications were for performing musicians after 1946. Section 506(a)(1) outlawed strike threats—surely a form of "duress" or "other means"—to compel local stations or networks to hire a standby orchestra on "co-operative" programs, or on simultaneous AM–FM transmissions, or even to compel them to maintain or increase the size of their staff orchestras. Indeed, if stations could demonstrate that they had no "need" whatever for staff musicians, for example because music was adequately available through recordings, then union pressure to maintain any kind of staff orchestra, no matter how small, was illegal and subject to criminal sanctions. This section represented the beginning of the end for staff orchestras, at both the network and local levels. Staff musicians dwindled throughout the late 1940's and early 1950's, and there is today no staff orchestra on any radio network or station, or any television network or station, in the nation. Section 506(a)(2) made the ban on the union's "standby" strategy more complete, by outlawing pressure on networks or stations to make payments to the union in lieu of hiring standby musicians.

Section 506(a)(3), which outlawed union compulsion to pay more than once for services "in connection with" the broadcaster's business was very broad indeed. Presumably, however, the legislators had in mind the standby payments demanded of the networks for music played on co-operative programs and similar payments demanded of AM stations for simultaneous broadcasts on FM. Section 506(a)(4), banning demands for money for services not to be performed, condemned standby payments for yet a third time. The language of Sections 506(a)(3) and 506(a)(4) could also be read to outlaw demands upon a broadcaster to pay royalties to recording musicians each time a phonograph record or transcription was aired. Such a reading was not necessary, however, since this conduct was more precisely outlawed in subsection (b) of the Act.

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[22] *Id.* at 3244, 3251–54.
[23] *Id.* at 2821, 2823.
[24] *Id.* at 2823, 3253–54.
[25] *Id.* at 3245, 3256.
[26] *Id.* at 3254.
[27] 60 Stat. 89, 47 U.S.C. § 506 (1946), amending the Communications Act of 1934, 48 Stat. 1064, 1102.

Compulsion by the union to eliminate broadcasts of music performed by school bands, military bands, and amateur groups—and possibly musical performances in the course of religious services (a particularly offensive example conjured up by several Congressmen during the floor debates)—would be outlawed under subsection (a)(5). The 1943 Petrillo ban on the Interlochen broadcasts, and on the broadcasts of all school orchestras, was the principal target here. It should be noted, however, that this statute did not outlaw union pressure to ban such groups from live performance at hometown events, so long as these were not broadcast over the radio. Although there were apparently very few foreign broadcasts of music that Petrillo attempted to ban, as an unfair form of competition with his own musicians, that conduct too was outlawed, in Section 506(a)(6).

Section 506(a) having effectively outlawed all union pressure directly to increase employment of musicians by radio broadcasters, Section 506(b) effectively outlawed union pressure to secure the same objective through imposition of restrictions in or royalties from recordings. While subsection (a) banned coercion of "a licensee," subsection (b) also banned coercion of "any other person." Had the Lea Act been in effect during the 1942–44 recording ban, it would apparently have made it unlawful. One of the Federation's objectives had been to compel producers of electrical transcriptions to pay to the union moneys based upon a percentage of profits derived from the use or licensing of those transcriptions for radio broadcasts. Assuming that a payment unwillingly made is an "exaction," the union would have been coercing the transcription producer ("any other person") to pay an exaction "for the privilege of, on account of, . . . manufacturing, selling, . . . renting, . . . using or maintaining recordings [or] transcriptions . . . used or intended to be used in broadcasting." The victims now to be protected were the producers of transcriptions and not just the broadcasters; and they were to be protected whether the payments were to go to the union itself or to a third party, such as a special trust fund separately administered. Read broadly, the quoted language might even have barred union pressure upon a manufacturer of phonograph records for the payment of royalties on record sales (to the public generally as opposed to sales to broadcasters) in the event that broadcasters played the same recorded song over the air.

Most clearly, Section 506(b)(1) outlawed pressure directly against the radio broadcaster for the purpose of securing an agreement to pay "performance royalties" to recording musicians when their records were played on the air. Although Congressman Celler had suggested that Congress ought legislatively to provide for such royalty payments, the Lea Act forbade the use of strikes and picketing to achieve that objective through collective bargaining. Since most would agree that effective collective bargaining is premised upon the availability, if only in reserve, of peaceful concerted activities, the Lea Act all but removed from the agenda of bargaining between the Federation and the broadcasting industry the question of so-called re-use payments or royalties for recorded music. This legal constraint against such union pressure was soon reinforced by economic constraints. A strike threat is credible only so long as Federation members are employed in the industry, and in the decade after the Lea Act was passed, more and more radio stations and eventually the radio networks employed fewer and fewer staff musicians.

Read broadly, the language of Section 506(b)(2) would outlaw a strike against the manufacturers of phonograph records where the object was to prevent the use of such records on radio broadcasts. The section bars duress or other means against persons to force them "to accede to or impose any restriction upon [the] production [or] use" of recordings or transcriptions for "the purpose of preventing [their] use" in broadcasting. The more obvious target, however, was the union's campaign of the preceding decade to have the recording companies place legends upon their record labels purporting to restrict those records to home use and to bar them from use on radio broadcasts. Such legends had been declared in the *Whiteman* case to be legally unenforceable, so that the ban in the Lea Act was of limited importance. But some states still treated those legends as creating enforceable servitudes on the records. Moreover, the *Whiteman* case merely declared the legends unenforceable; the Lea Act declared, the attempt to secure them criminal, wherever done throughout the United States. Subsection (b)(2) also outlawed pressure by the union directly upon the broadcaster, where the object was to compel the broadcaster not to play phonograph records on the air, or not to play electrical transcriptions. This congressional ban was reinforced in Section 506(b)(3) which effectively outlawed union compulsion

of broadcasters or of transcription producers to pay royalties for re-use of transcriptions containing musical performances, when the musicians had been paid for their original performance.

In short, Section 506(b) forbade the union to strike or picket in support of demands—certainly against broadcasters and in most instances against recording companies—for royalty or re-use payments for the broadcasts and the sales of phonograph records and transcriptions, and for restriction or elimination of recorded music on radio programs.

It can be seen that the reach of the Lea Act was very wide indeed, and that it deprived the Federation of the power to achieve through collective bargaining not only some of its more objectionable goals but also several goals which most objective observers would conclude were acceptable if not indeed laudable in the campaign to protect the economic status of the professional musician in the face of widespread radio use of recorded music. Many Congressmen were prepared to take such action not merely because of their hostility to Mr. Petrillo but also because of their beliefs about the economic status of the recording musician and of musicians generally. When, for example, Congressman Marcantonio asked Congressman Brown, a member of the Lea Committee, how he could justify making unlawful the demand of musicians for royalties when their recordings were played on the air, Brown answered: "Let me say further, for the gentleman's edification and education, that today, as he well knows, union musicians are receiving higher compensation than ever before in history; that today there are more musicians employed in the United States than at any time in our history; that these recordings and radio appearances have made the musicians of the United States, and their profession, the most prosperous in all of our history, as well as in all the history of any nation on the face of the earth." [28]

The activity outlawed by the Lea Act was not, however, as broad as might first appear. Notwithstanding the prohibitions of Sections 506(a) and (b), subsection (c) explicitly permitted the enforcement, by means lawfully employed, of any contract right that the union had against a broadcaster or recording company, whether the contract was made before or after the passage of the Lea Act. What that meant was that although the Federation could not strike to secure standby payments or the banning of amateur orchestras from the radio or payment for the use of phonograph records or transcriptions, a broadcaster could voluntarily agree to such conditions and if it did, the Federation could enforce that agreement, by lawsuit or arbitration but also by a strike. In short, the Lea Act permitted negotiating for such contract provisions, but barred a strike to secure them. Although Congress could explain this anomaly by stating that its purpose was not to outlaw broadcaster decisions but rather to outlaw resort to extortion and racketeering by the AFM, the Lea Act went beyond those union techniques and embraced "duress" or the "use of any other means." This made criminal sanctions turn upon the question of whether the Federation was merely urging the broadcaster or record company to comply, or was "constraining" that person to comply. The statute also invited subterfuge on the part of the union at bargaining sessions; for if negotiations were taking place with regard to both wages and, say, re-use payments or standby orchestras, a strike by the union could be designed as a strike over wage rates (and therefore lawful) although the real pressure was being exerted on the "residuals" or "standby" issues. In any event, the permission in Section 506(c) for the continued enforcement of existing contract obligations rendered lawful and enforceable the Recording and Transcription Fund agreements of 1943 and 1944 between the Federation and the recording industry. There was, however, some question whether Federation pressure to renew the fund agreement after its termination on December 31, 1947 would be lawful under the Lea Act.

One month after the Lea Act became law, Petrillo and the Justice Department put it to the test. For several years, radio station WAAF in Chicago had employed three musicians on its staff. In May 1946, the Chicago local, with Petrillo as its President, in an effort to induce the station to hire three more musicians, directed the three employees to cease working and set up a picket line in front of the station's place of business. The United States Attorney charged Mr. Petrillo with a criminal violation under Section 506(a) of the Lea Act: the use of duress or other means to coerce WAAF to employ persons "in excess of the number of

[28] 92 Cong. Rec. 2823 (1946).

employees needed by such licensee to perform actual services." Among other things, the Government pointed out that in the months subsequent to the strike call, the work of the three striking musicians was being performed by the switchboard operator and another woman in the office of the radio station.[29] In December 1946, Judge La Buy of the federal district court [30] in Chicago sustained Petrillo's claim that the Lea Act provisions were unconstitutional, and dismissed the criminal charges.

The judge held, first, that the due process clause of the Fifth Amendment was violated by making a crime of conduct so indefinite and uncertain as coercing a broadcaster to employ persons in excess of the number "needed," a term that was too vague to be understood by persons of common intelligence. "Life and liberty may not be imperilled by or be subject to such a frail and uncertain device as one man's opinion against another's. The will of an individual [the broadcaster] to make an act a crime or not, depending upon his own judgment, is abhorrent to our form of government." Judge La Buy was also concerned that under the Lea Act the hiring of "unnecessary" employees—which would be lawful if done by the broadcaster on its own or upon agreement of the broadcaster and the union—leads to a criminal conviction for officers and members of the union when effected through "free speech as manifested by peaceful picketing." He held that the statute violated the First Amendment by outlawing picketing which was not violent but rather was designed to disseminate the views of Petrillo and the AFM. As if the statute were not unconstitutional enough, La Buy held that the Thirteenth Amendment ban upon involuntary servitude was also violated when the Lea Act declared criminal the quitting of work by the three musicians to compel WAAF to hire three more. Finally, he held that the Fifth Amendment was also violated by the Act's arbitrary classification in violation of due process of law. He concluded that it was arbitrary to single out broadcasting station employees and to deprive them of the right to strike and picket in support of their demands, while workers in other American industries were accorded that right.

Through an expedited appeal pursuant to the Criminal Appeals Act, the dismissal of the charges was directly reviewed in the United States Supreme Court. By a vote of 5 to 3, the Court reversed and remanded the case to the District Court. [31] The Court held that, although the statements of an employer as to the number of employees "needed" was not conclusive, "We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. . . . It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees." [32] The Court also held that Congress could properly single out employee practices in the radio industry which injuriously affected commerce, and outlaw those practices, without being obligated to outlaw all comparable practices in all other industries. The Court concluded by holding that under the appeals statute it was to pass upon the constitutionality of the statute only upon its face, and not as charged under the facts of the complaint. Accordingly, it held that the claim that the Lea Act was applied in this case to punish peaceful picketing and to compel involuntary resumption of employment was not ripe for the Court's scrutiny.

Three dissenting Justices were prepared to hold that the Lea Act provisions being tested were unconstitutional, because so vague as to expose persons unfairly to jeopardy of their life, liberty and property. "How can a man or a jury possibly know how many men are 'needed' 'to perform actual services' in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?" [33]

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[29] See Leiter, *op. cit. supra* note 1, at 160.
[30] 68 F. Supp. 845 (N.D. Ill.), *reversed*, 332 U.S. 1 (1947), on remand, 75 F. Supp. 176 (N.D. Ill. 1948).
[31] 332 U.S. 1 (1947).
[32] *Id.* at 7.
[33] *Id.* at 17.

On remand, Judge La Buy so construed Section 506(a)(1) as to render it all but ineffective.[34] The evidence at the trial before him showed that the three members of the Federation employed by WAAF worked as record librarians, and that the station consumed ninety percent of its broadcast time playing records and electrical transcriptions. In May 1946, Petrillo had served notice on the station that it should hire three more musicians. After an exchange of telegrams and letters, the station stated that it could hire only one more musician, while Petrillo stated that he would order the three musicians to withdraw their services (which he did, and they did). In these dealings as well as in previous negotiations, the relationship between the station and Petrillo was found by Judge La Buy to be "cordial and cooperative." Moreover, station employees testified that neither they nor the station were even inconvenienced by the walkout.

The court concluded that the prosecution had failed to prove the defendant guilty as charged. He began by noting that the Lea Act did not outlaw the use of the strike to enforce existing contract provisions. At the time of the Petrillo demand and the walkout, the three musicians had individual contracts of employment with the station and those contracts explicitly incorporated the constitution and bylaws of the Chicago local, which in turn explicitly empowered the local president to withdraw the services of union members should he determine this would protect the interests of the local or its members. Beyond that, however, the judge also held that the Act could be violated only if the prosecution was able to prove that Petrillo had knowledge that the three additional musicians were "unnecessary," and he concluded that sufficient proof of knowledge was lacking. WAAF never actually informed Petrillo that it had no need for the services of three additional musicians, and Petrillo at all times understood that these additional musicians were to perform actual services. The judge paid little attention to the fact that the station devoted ninety percent of its time to recorded music, and that Petrillo himself was purported to say shortly before his arrest that he was purposely violating the Lea Act in order to test its constitutionality.

There appears to have been no reported criminal prosecution under the Lea Act since the 1948 *Petrillo* decision.

Events after 1948 rendered it unnecessary in any event to have recourse to the Lea Act. For one, the work stoppage against broadcasters became increasingly ineffective as a union weapon as the number of musicians employed by broadcasters dwindled. It is ironic that in the *Petrillo* case itself, the "extortion" and "compulsion" so widely feared by Congress caused no inconvenience to the operations of the radio station. At least as significant, strike threats against radio networks (which for a number of years still retained staff musicians) in order to pressure local radio stations to retain their own staff musicians or to hire standby musicians now fell within the proscription of the Taft-Hartley Act of 1947. That Act banned the secondary boycott, upon charges in an administrative proceeding before the National Labor Relations Board. In such a proceeding the Board could promptly secure a federal court injunction against the continuance of the threat or the use of strikes or picketing.

Whatever the reasons may have been—the Lea Act of 1946, the Taft-Hartley Act of 1947, a new round of Congressional hearings directed against the AFM in 1948—the Federation in 1948 reversed a number of its bargaining positions in the broadcasting industry. Petrillo lifted the ban on radio broadcasting by school orchestras, although the Interlochen Camp remained on the AFM unfair list and radio stations declined to carry broadcasts of its concerts. New three-year contracts between the union's locals and the network originating stations expressly authorized simultaneous AM-FM transmissions without any extra pay for the musicians or for the union. The Federation announced that it would no longer apply pressure on the networks to compel affiliated local stations to hire additional musicians.

THE TAFT-HARTLEY ACT, THE RECORDING BAN OF 1948, AND THE CREATION OF THE MUSIC PERFORMANCE TRUST FUNDS

Three provisions of the Taft-Hartley Act of 1947 were of particular pertinence to the American Federation of Musicians. Section 8(b)(4) declared it an unfair labor practice for a labor organization to induce a secondary boycott. Although

[34] 75 F. Supp. 176 (N.D. Ill. 1948).

the contours of the secondary boycott have never been altogether clear, it is fairly certain that several AFM tactics used in the early 1940's would have been illegal after 1947. Examples are the ban on performing for network programs in order to induce affiliated stations to hire more musicians and the ban upon making electrical transcriptions when the object was the inducement of radio stations to hire musicians.

Section 8(b)(6) is the featherbedding" provision of the TaftHartley Act. An earlier version of this Section in the House bill was patterned upon the Lea Act, and outlawed the demand by a union to employ "persons in excess of the number of employees reasonably required by such employer to perform actual services." When this bill was considered by a conference committee, the Senate conferees rejected it as unduly broad. In explaining their reasons on the floor of the Senate, Senator Taft spoke while *United States* v. *Petrillo* was on appeal to the Supreme Court: "The Senate conferees, while not approving of featherbedding practices, felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible. So we declined to adopt the provisions which are now in the Petrillo Act. After all, that statute applies to only one industry. Those provisions are now the subject of court procedure. Their constitutionality has been questioned. We thought that probably we had better wait and see what happened, in any event, even though we are in favor of prohibiting all feather-bedding practices. However, we did accept one provision which makes it an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine. . . ." [35] Not surprisingly, the illustration given by Senator Taft of the meaning of Section 8(b)(6) came from the music industry. He said that it would be an unfair labor practice for a union to insist that a person hire ten musicians even though he had physical room for only six musicians and would therefore have to pay the other four for not working.[36]

The bill that Taft endorsed, and that was ultimately approved, forbade a union "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value, in the nature of an exaction, for services which are not performed or not to be performed." Even this more narrow proscription encountered some resistance from those who argued that the section might improperly be read to bar the pursuit of traditional labor objectives, such as job safety and rest periods.[37] Ironically, on the day Congress voted to override the veto of the Taft-Hartley Act by President Truman, on June 23, 1947, the Supreme Court handed down its decision in the *Petrillo* case upholding the constitutionality of the Lea Act.[38]

Perhaps the most serious threat to the Federation policies of the Petrillo years was Section 302 of the Taft-Hartley Act. That section made it unlawful for an employer to pay or to agree to pay money to any union representing its employees, and for any person to request or accept such payment. The obvious targets were union extortion and management bribery of union officials. However, the provisions of the section were expressly declared inapplicable in Section 302(c)(5) to money paid to a trust fund established by the union "for the sole and exclusive benefit of the employees of such employer, and their families and dependents," provided the payments are for health care, pensions, compensation for injuries or accidents unemployment benefits, or insurance for these contingencies and provided "employees and employers are equally represented in the administration of such fund." As this legislation was being considered in Congress in 1947, it became clear that the exemption provisions would not reach the AFM Recording and Transcription Fund, the disbursements from which were completely within the control of the Federation. Although the ban of Section 302 was not to govern contracts already in existence, the agreements with the recording and transcription companies were to expire on December 31, 1947, and any negotiations for contract renewal would be governed by Section 302.

Petrillo was not happy with the thought that the fund would have to be administered jointly with management. Nor did it appear that any such fund,

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[35] 93 Congressional Record 6441 (1947).
[36] *Id.* at 6446.
[37] *Id.* at 7501.
[38] See generally American Newspaper Ass'n v. NLRB, 345 U.S. 100 (1953).

even jointly administered, could be used to provide benefits for persons who had never been employees of the recording and transcription companies. Yet it was a cornerstone of the Petrillo philosophy that recording royalties should be used to benefit not the recording musicians but other musicians throughout the country who had been displaced by the use of recorded music on radio broadcasts, in jukeboxes, and through wire-music services such as Muzak. Such uses had grown ever more prevalent since the end of World War II.

Not one to shrink from the use of economic force in the face of inhospitable legislation, Petrillo announced in October 1947 that upon the expiration of the contracts with the phonograph record and electrical transcription companies, all AFM musicians would cease recording. His notice to the recording companies stated that it was "our declared intention, permanently and completely, to abandon that type of employment." Petrillo's action was pursuant to a resolution adopted at the 1947 AFM convention which authorized the Executive Board to order a record ban at the expiration of the current agreements. That summer authorization was an invitation to the recording companies—who had been through a recording ban only three or four years before—to produce and stockpile master records which could be used for pressings during the period when the musicians refused to record. The recording ban went into effect on January 1, 1948. Petrillo agreed in February to allow recording of transcriptions for network shows, if the disc was used only once and then discarded; the principal purpose was to permit delayed broadcasting of normally "live" network programs on the West Coast. Other than that, no recordings were made.

There was initially no rush by the companies to end the stoppage, since record stockpiles were high, and since transcriptions of many commercials and radio programs could be done with vocalists only (aided on occasion by ocarinas and ukeleles). But as months went by, the stockpiles diminished and some foreign recordings and "bootleg" recordings by anonymous or pseudonymous American musicians made their way onto the market. In May 1948, transcription companies filed charges of secondary boycott with the NLRB against the Federation and the New York and Los Angeles locals. The theory was that the transcription companies were being forced by the recording ban to cease doing business with the radio stations, which were the true "primary" objectives of the union's strike. Surprisingly, there was no resort to criminal prosecution under Section 506(b)(2) of the Lea Act, which outlawed "duress" or "any other means" to "compel or constrain a licensee or any other person . . . to accede to or impose any restriction" upon the production manufacture or sale of recordings or transcriptions "if such restriction is for the purpose of preventing or limiting [their use] in the production, preparation, performance or presentation" of a radio broadcast. Since the apparent purpose of the recording ban was to end the playing of records and transcriptions on the radio, one would think that a violation of the Lea Act could readily be made out. Yet no such action was taken. Even the Taft-Hartley charges ultimately foundered, as in December 1948, the regional director of the New York office of the National Labor Relations Board refused to issue a complaint under Section 8(b)(4) against the Federation or its locals.

Perhaps it was believed that the true purpose of the 1948 recording ban—unlike the 1942 ban—was not to prevent the use of recordings on radio broadcasts and thus to increase the use of live musicians, but that it was rather to restore the payments to and benefits from the trust fund in the interests of part-time and unemployed musicians. Such a union objective would not be so clearly "secondary." However, there was surely considerably evidence that the Federation's purpose was indeed to remove recorded music from radio, witness Petrillo's comments that the strike was directed not at the eighty percent of phonograph records used in the home but at the twenty percent used on radio broadcasts, and his statement of intention to cease recording altogether.

Although some of the recording companies were thus engaged in legal maneuvering, most were anxious as 1948 wore on to reach a settlement with the Federation. A committee of such companies met with the union in an attempt to perpetuate the trust fund in a manner that would be consistent with the Taft-Hartley Act. It was agreed that this could probably be done if the fund were to be administered by an independent trustee rather than by the union. A tentative agreement was reached on October 28 between the union and representatives of the four major recording companies (RCA Victor, Columbia, Decca, and

Capitol) and three smaller companies, but the companies conditioned their participation upon an assurance of legality from their attorney, from the Department of Justice and from Senator Taft! After the assurance from their attorney, the record companies submitted copies of both their proposed labor agreement and the proposed trust agreement to the Attorney General, who in turn consulted with the Solicitor of Labor of the Department of Labor. Both of these officials concluded that the proposed trust fund was lawful, since the trustee—who was to be selected by the recording companies and not by the union—was not a "representative" of the AFM, so that any payments from the companies to him were not within the ban of Section 302 of the Taft-Hartley Act. Senator Taft had by then rendered a similar advisory opinion. The 1948 Phonograph Record Trust Agreement and the 1948 Labor Agreement were executed on December 14, 1948. The 1948 Electrical Transcription Agreement was executed on December 20, 1948. Recording promptly resumed, almost one full year after the strike had begun.

The trust agreements in the recording industry were to run for five years. Royalties from phonograph record sales and transcription licensing, at substantially the same rates as obtained under the earlier Recording and Transcription Fund agreement, were to be paid to a trustee nominated by the record companies collectively and appointed by the Secrteary of Labor. The 1948 agreements specifically provided that the Trustee was not to act as a representative of the union or of any person receiving payments from the trust fund. The Trustee was directed to perform his functions "on the sole basis of the public interest." He was to distribute money so as to provide employment for instrumental musicians throughout the country, whether or not they were union members, for the performing of concerts free to the public "in connection with patriotic, charitable, educational, and similar programs." The Trustee was to engage musicians at the prevailing local union wage scale, and was to arrange performances upon the advice ont only of the AFM but also of business, civic and charitable groups and organizations. The Trustee was to distribute moneys among localities throughout the United States and Canada, in areas bounded by the jurisdiction of the various union locals, and in amounts based upon a per capita count of the local union members. But all local expenditures were to be supervised by the Trustee and were not to be used to reward union supporters or otherwise to enrich the local union or any private commercial enterprise.

The first Trustee to be named by the record companies, with the concurrence of the AFM, was Samuel R. Rosenbaum. Mr. Rosenbaum was an attorney, a member of the Pennsylvania Bar and engaged in private practice in Philadelphia. In his capacity as chairman of the Labor Committee of the National Association of Broadcasters and of a group of independently-owned radio stations, Rosenbaum had conducted negotiations in 1937 on the opposite side of the table from the AFM. There was nothing in his background to suggest that he would act as a representative of the union in the administration of the trust funds. Upon assuming his duties in December 1948, Rosenbaum considered various methods by which the funds could be most efficiently administered. His efforts have been described as follows: "He determined that it would not be practical to set up branch offices in each of the areas he was required to serve. In accordance with the terms of the Trust Agreements, he, therefore, sought the assistance of the National Recreation Association, Community Chest, American Red Cross, Kiwanis Clubs, Rotary Clubs, and other business, musical, welfare and educational organizations, but none of these was prepared to assume the burdensome responsibilities attendant upon producing recommendations of worthwhile projects in the hundreds of areas to be served.

As provided in the Trust Agreements, he also sought the assistance of the AFM. Mr. Petrillo and the International Executive Board of the AFM refused to have anything to do with the administration of the Trusts, fearing that AFM participation would run afoul of the Taft-Hartley Act, but they finally were persuaded by the Trustee to permit the AFM Locals to make recommendations as to projects which the Trustee might sponsor in their respective areas." [39] The locals thus assumed the principal responsibility for making recommendations for free public performances, all such recommendations to be approved by the Trustee. A local representative also was expected to attest that each performance had actually been rendered, as a condition to the Trustee's mailing a separate paycheck to each of the participating musicians.

[39] Shapiro v. Rosenbaum, 171 F. Supp. 875, 882–83 (S.D.N.Y. 1959).

The trust funds and Mr. Rosenbaum were to become central characters in a future conflict of major dimensions within the American Federation of Musicians. Another significant element in that conflict was the fact that the 1948 labor agreements for the recording musicians provided for a wage scale of $41.25 for a three-hour recording session. This was the same scale figure as had obtained under the 1946 agreements in that industry, and under the terms of the 1948 agreement that scale was to continue to prevail for five more years through December 31, 1953.

Having created trust funds in the recording industry, the American Federation of Musicians turned its attention to other industries in which recorded music was seen as displacing the services of live musicians. One such industry was television, which burst upon the American scene after the war. Petrillo, initially uncertain about the direction and implications of television for professional musicians, had in 1945 ordered union members not to render services on television programs. This ban was removed in 1948, in contracts between the major networks and the major Federation locals. Most of the television shows in the late 1940's were performed live, but it was not long before the Hollywood studios began to make a substantial number of films of programs for television use exclusively, as distinguished from theatrical exhibition. In its first collective bargaining negotiations with Hollywood producers of television films, the Federation negotiated not only a labor agreement covering wages and working conditions for musicians recording on those films but also a trust agreement, which generated payments from the producers to a newly created trust fund parallel to that established in the phonograph recording and transcription industry. The labor agreement expressly required the signatory companies to have simultaneously executed the trust agreement, and expressly authorized the union to terminate the labor agreement in the event the signatories failed to perform their obligations under the trust agreement. In effect, producers of television films could not secure the services of musicians unless they had first agreed to contribute to the trust fund.

The signatories of the 1951 Television Film Trust Agreement were Samuel R. Rosenbaum as Trustee and the producers and distributors of films or soundtracks for television (among them, ABC, CBS, NBC, Desilu and Disney Productions). The agreement covered the use on television, at any time in the future, of films produced during the term of the agreement and embodying performances of Federation musicians, or pictures of them performing. When these films were to be shown for the first time on television payments were to be made to the trust fund by the signatory producers or distributors or their licensees. In most instances, the payment was to be five percent of the company's gross revenues for the use or exhibition of the film on television, for as long as the film was so used or exhibited. Even films exhibited by network producers on so-called sustaining programs (i.e., without commercials) for which they received no revenue were to generate for the trust fund 2.5 percent of the production cost of the film whenever the film was shown on the network.

Soon after the negotiation of the television film labor and trust agreements, the Federation negotiated labor and trust agreements covering to production of commercials for television—the so-called "jingles and spot announcements" agreements. The trust fund agreement was between Trustee Rosenbaum and the producers and distributors of the film or soundtrack for television commercials. The companies agreed to pay to the Trustee $100 for any jingle or spot which used the services of musicians, when first exhibited on television. Unlike the royalty for television films, this was to be a one-time payment.

The fourth trust fund, also administered by Mr. Rosenbaum, was based upon the revenues derived from the release to and exhibition on television of films initially made for exhibition in motion picture theatres (referred to as theatrical motion pictures). The labor agreements between the Federation and the motion picture studios had provided, since 1939, that the music on the soundtrack of a theatrical motion picture was to be used only with that film or a revival of it. The object was to bar the development of so-called "library" soundtracks from older films for re-use in films subsequently produced. Later, the Federation agreed to permit "dubbing" of film soundtrack onto phonograph records, provided the film musicians were paid therefor at the rate they would have received had they made the record themselves. Similar re-use payments had to be made when portions of the film soundtrack were used in "radio transcriptions to exploit the picture." The Federation was, however, less certain about the wisdom

of permitting theatrical motion pictures containing the services of musicians to be used on the emerging medium of television. Section 11(I) of the labor agreement negotiated in September 1946 between the Federation and the major motion picture producers (MGM, Paramount, Twentieth Century Fox, RFO, Warner Brothers, Columbia, Universal, Republic) and representatives of the larger "independent" producers provided that the producers were not to transfer, to use or to authorize the use of soundtrack or film with musicians "on or in connection with television" except after negotiations with and the written consent of the Federation. The 1946 agreement also provided that this section was to be incorporated by the producers in any agreement they might make regarding the licensing or utilization of soundtrack and in all employment contracts of motion picture musicians.

The Federation modified this ban on the television exhibition of theatrical motion pictures in their agreements of May 1951 with the film producers. The labor agreement of that year provided that theatrical motion pictures producers produced either before or after 1946 could be released for television exhibition, provided the soundtrack containing musical performances was completely re-recorded by a new orchestra, with the musicians being paid at the current scale for film recording.

At the same time, the motion picture producers agreed to make payments into a trust fund for theatrical films released to television, such payments to continue so long as the motion picture was used on television. The producers were to pay Trustee Rosenbaum five percent of the gross revenues derived from the "use, exhibition, exploitation, rental, or other dealing with any film" on television. "Gross revenues" was defined as the "genuine selling, leasing, or licensing price for each broadcast of the film on television" as fixed in a bona fide arm's length transaction. By an addendum to the agreement with the producers, they later agreed to make a one-time payment to the trust fund for each documentary film shown on television.

Thus, by 1952, the four Music Performance Trust Funds were receiving payments from four sources: the phonograph record and transcription companies, paying roughly one percent of the sales of records and three percent of the revenues from the use of transcriptions; the producers of theatrical motion pictures, paying five percent of the gross revenues from the release and continuing exhibition of such films on television; the producers of films for television, paying five percent of the gross revenues from the exhibition of such films; and the producers of television jingles and spot announcements, paying $100 upon the first showing. By far the greatest proportion of the trust funds paid to Trustee Rosenbaum came from phonograph records. Throughout the 1950s, the total payments to and allocations from the Trust Funds increased each year. In the fiscal year ending June 30, 1950, after the first full year of the funds' operation, exclusively in the phonograph record and transcription industry, $900,000 was disbursed; in fiscal 1951, $1,400,000; in 1952, $1,700,000; in 1953, $1,950,000; in 1954, $2,200,000; in 1955, $2,300,000; in 1956, $2,800,000; in 1957, $3,900,000; in 1958, $4,850,000; and, in 1959, $6,325,000. In one decade, the fund had increased seven-fold.

In spite of the health of the Music Performance Trust Funds, however, the health of the profession itself was by no means on the upswing in the post-war period.

THE STATE OF THE ENTERTAINMENT INDUSTRIES, 1945–55

The history of the entertainment industries in the decade between 1945 and 1955 was dominated by the rise of television broadcasting. Commercial programs had first begun to appear on television as early as 1941, and in 1943 Petrillo set the wage scale for musicians performing on television. As World War II was drawing to a close, however, Petrillo and the International Executive Board became uncertain of the direction that television would take, and whether it would generate more employment for musicians or would instead generate filming or recording techniques which permitted the re-use of television programs and the possible displacement of musicians. Accordingly, in February 1945, Petrillo and the IEB reversed their policy of cooperation with the new medium, and forbade musicians to play on television, whether live or by film.

This same uncertainty about the implications of television motivated Petrillo in negotiating in 1946 with the motion picture producers. Petrillo demanded that the producers refrain from releasing to television any motion pictures originally made for theatre exhibition. Discussing these negotiations more than a decade

later, Petrillo claimed that he had no fixed idea of protecting any particular group of musicians; his object was simply to "tie up the motion picture so that it not be freely utilized in another medium. He did, however, suggest that the principal beneficiaries of the restrictive provision were the musicians employed by the radio broadcasting industry; if old theatrical motion pictures were to preempt television time, there would be fewer opportunities for radio musicians to work for the television broadcasters. There was surely no conception in 1946 that the restrictive clause could be used as leverage to secure re-use payments for the film musicians when their films were released to and exhibited on television. Petrillo believed that the film musicians were extremely well paid, and that it was more important to preserve work for other less affluent members of the union.[40] Although the motion picture producers were reluctant to accede to the ban upon the release to television of theatrical films, they did so. The motion picture industry was riding the crest of a financial wave in 1946 and was dependent upon the hundreds of musicians working in staff orchestras at major studios; Petrillos warnings of a possible strike induced the studios to submit to the television ban.

This hostility on the part of the Federation to the television use of musical performances—whether live or on film—was soon relaxed.

In early 1948—shortly after Petrillo had declared an end to the recording of phonograph records and electrical transcriptions—Petrillo lifted the ban on performing for television, and network contracts were negotiated governing wages and other working conditions in the television studios. (These 1948 contracts with the networks, to run for three years, devoted principal attention to the work of radio musicians. They abandoned earlier restrictive AFM policies which required the hiring of standby orchestras, or standby pay, when a musical performance was broadcast simultaneously on AM and FM stations or when so-called co-operative programs were fed by the networks to local affiliates.) In the next network negotiations, in 1951, agreements were reached covering radio broadcasting, which made provisions for the continuation although not the expansion of staff orchestras; television broadcasting, which made no provision for staff orchestras and which contemplated the making of kinescopes of live programs for one-time delayed showing within sixty days for any affiliated stations; and television films, which provided for the payment by the network-producers of five percent of their gross revenues from the exhibition of those films to the Music Performance Trust Funds.

Beginning in 1947, the Hollywood motion picture bubble began to burst, and several studios soon came to appreciate that one relatively painless way to turn a quick profit was to sell old theatrical motion pictures to television. By 1950, several of the smaller motion picture studios had been joined by Republic Studios in seeking a relaxation of the Federation's ban upon the television use of theatrical films. In the motion picture industry negotiations of 1951, the AFM agreed to permit the producers to release their films to television, provided several conditions were satisfied. First, the producer was required to score an entirely new soundtrack for each picture, using the same number of musicians as had been used in making the original soundtrack. Second, the producer was to pay the musicians the prevailing scale rates for the recording of television film, which were at that time $50 per musician, $100 for the leader, $100 for the orchestra manage, $150 for the arranger, and $50 for the copyist. Third, the producer was to pay to the Music Peformance Trust Fund five percent of its gross revenues derived from the television exhibition of the motion picture.[41] Some producers quickly learned that it was not feasible to score and use an entirely new soundtrack, either because of the overlay of music with the spoken words of the actors or because the track could not physically be separated from the motion picture film. This led to a situation in which many producers would hire a new orchestra simply to make a "dummy" sound track which was never used. Soon musicians were hired to assemble, blow some notes, and collect a paycheck; one studio held a dummy scoring session in which thirty-seven films were scored in one hour and the musicians were paid $1,850.

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[40] Deposition of James C. Petrillo, in Atkinson v. American Fed'n of Musicians, Case No. 670, 348, Cal. Super. Ct., L.A. County, at 62, 64–72, 100, 113–18, 131–35, 141. (April 29–30, 1958).

[41] Hearings on Investigation with Respect to the Operations of the Contributions to Musicians Performance Trust Funds, House Comm. on Education and Labor, 84th Cong., 2d Sess. 135 (1956) [hereinafter cited as Trust Fund Hearings].

Both the producers and Petrillo realized that the situation was intolerable, and a new agreement was reached in September 1952. Dummy recording sessions were abolished, and producers were permitted to use the original soundtrack upon payment to the original film musicians of one-half of the 1952 scale: thus, $25 was paid to each instrumental performer, $50 to the leader, $50 for the orchestra manager, $75 for the arranger, and $25 for the copyist. This was to be a one-time payment. The producers were to continue to contribute five percent of their gross revenues to the Trust Fund. The Trust Fund was also to receive the payments due any film musician in the event he (or his widow) could not be located. Under the 1951 agreement requiring re-scoring, some $477,300 was paid to Hollywood musicians; and under the 1952 agreement, payments were made (until June 1955) of some $279,400.[42]

While television was emerging in the late 1940's and early 1950's as a preeminent medium for American popular entertainment, radio was not faring well. Not surprisingly, neither were the musicians in radio staff orchestras. Staff orchestras on local radio stations were dwindling to the point of disappearance. The need for local musicians was slim indeed, given the all but total reliance of most stations either on network programming or on recorded music. This impetus toward the playing of phonograph records or transcriptions on radio became greatly accelerated as the public turned to television for the kind of dramatic and comedy shows that had formerly been more common fare on radio. Even the network staff orchestras based in New York, Los Angeles, and Chicago, which had each provided full-time employment for fifteen to twenty-five musicians, began to shrink, as did the orchestras hired by sponsors for network radio programs. As television became the principal medium for advertising commercial wares to the public, radio shows were cancelled and the networks gradually became unable to afford staff orchestras of any size. Musicians made transcriptions of the theme music or cue music for popular radio shows, and these were re-used for two or three years. Although this generated contributions to the Music Performance Trust Fund, it eliminated employment opportunities for the radio musicians. Today, there are no staff orchestras at the radio networks or at any local radio stations.

There was some slight trade-off in television work for musicians, however, once the three-year ban on performing on television was lifted by Petrillo in early 1948. Musicians were utilized widely on television variety shows and to provide the background for dramatic programs and situation comedies. But the television networks had learned during the three-year ban on live music that in many instances they could get by through reliance upon "canned music," including phonograph records and particularly the soundtrack of foreign motion pictures. (There were contractual restrictions in the AFM contracts with American film producers upon the use of their soundtrack apart from the film for which it was made.)

This resort to "canned" music for television programs again came to the fore after 1951, when the Federation permitted musicians to play for films made especially for television but required the producers to pay five percent of their revenues to the Music Performance Trust Fund. It would not be unusual in such cases for the musicians making the film to be paid a total of $1,200, while the producers paid $2,000 upon the first exhibition of the film on television, and more for later showings. The recording musicians received no re-use payments for such later showings. Since it would be possible to score that same program with canned music for not much more than $100, it often became prohibitive to film television shows with live musicians. It became quite an art to cut and paste the soundtrack of old foreign films and "compose" with them to provide musical background for television film. More punctilious producers of television films would have original music written, only to have it taken abroad for recording, where labor costs were lower and the obligation to contribute to the Trust Fund could be escaped altogether.

Between 1952 and 1955, only some twenty percent of the music for television films was scored by live American musicians, while the balance was scored with foreign or canned music, or with no music at all.[43] The problem was compounded by the Federation's policy at that time not to supply live musicians to producers who used any canned soundtrack on any of their television films. In 1954, this policy was modified in the hopes that there would be an increase

[42] *Id.* at 135–36.
[43] *Id.* at 45.

in the employment opportunities in television films for American musicians.[44] No significant increase resulted. The musicians hardest hit by this use of canned or foreign music were the members of Local 47 in Los Angeles, since it was they who in the early 1950's performed on more than ninety-five percent of the television film using live American musicians. The Hollywood musicians believed that their plight was in considerable measure attributable to the Trust Fund policies of the Federation.

Musicians in the phonograph record industry were at the same time witnessing a diminution of their income, but this was produced not by any suppression of the sale of records, but rather by an increase in the cost of living. Between 1945 anl 1955, retail sales of phonograph records were relatively constant,[45] and the emergence of new recording companies provided some new employment opportunities for recording musicians. But the wage scale for such musicians was exactly the same in 1953 as it had been in 1946, while in this period the cost of living had risen more than thirty-five percent and the earnings of performing artists represented by other unions (such as the American Federation of Television Artists and the Screen Actors Guild) had risen anywhere from ten to nearly sixty percent.[46]

The health of the theatrical motion picture industry in the decade after 1945 was perhaps the most depressing of all.[47] The corporate income of motion picture producers before taxes had risen steadily from $33 million in 1937 to a peak of $309 million in 1946. In the same period, the amount of money spent on motion picture attendance rose from $676 mililon to $1,692 mililon. A drastic reversal took place between 1946 and 1947. Corporate income fell from $309 million in 194 steadily down to $80 million in 1952, while money expended at the box office dropped to $1,284 million; this, at a time when cost of living, per capita income, and population of the United States were significantly mounting. Gross revenues of the ten leading companies fell from $968 million in 1946 to $682 million in 1954, 30 percent under the 1946 figure. Although there was a modest upturn in 1955 and 1956, this was attributable not to the production and distribution of theatrical motion pictures, but rather in substantial part to the increase in the production of films especially for television and in revenues from the sale of old theatrical motion pictures to television.[48] Indeed, the increasing number of releases of old films to television in the early 1950's was a mark of the depressed state of the motion picture industry. Previously, the major producers were able to heed the requests of the distributors and exhibitors not to release these films to television, in view of the serious competitive impact this would have on moviegoing. Such self-restraint in the release of old films paralleled the reluctance of the AFM to have such films released to television, given the possible effects upon the employment of live musicians.

Ironically, the release of theatrical films to television must have reinforced further the flight of the American consumer from the motion picture theatre to the living room television set.

Between 1946 and 1956, when the American population was sharply rising from 141 million to 167 million, the total movie-going audience fell by one-half, from an average weekly attendance of 90 million persons in 1946 to 46.5 million persons in 1956. Of that latter fiture, fewer than 12 million persons attended conventional four-wall theatres, while the balance went to drive-in theatres and on the average paid less per person.[49]

Not only was the moviegoing audience shrinking. So, too, was the production of American films. As a noted economist stated in a 1957 study entitled "Hollywood at the Crossroads": "Falling attendance and the sagging box office have had a severe impact upon Hollywood. This is evident from an examination of the motion picture industry's central economic function, the production of films. Between 1946 and 1956 the number of U.S. produced features released in the American market declined by 28 per cent. Over the same years imported features released in the U.S. rose by 233 per cent. In 1946, American productions accounted for 81 per cent of the total: by 1956, the U.S. share had dropped to 57 percent.

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[44] *Id.* at 83.
[45] *Id.* at 57.
[46] *Id.* at 52.
[47] *Id.* at 57.
[48] I. Bernstein, Hollywood at the Crossroads (Hollywood A.F.L. Film Council Study) 12 (1957).
[49] *Id.* at 2.

By 1956, in fact, Hollywood was producing over 100 fewer features per year than it had in 1946." [50]

That study painted a bleak picture of the industry, and detailed "the fracturing of its business structure in the decade following World War II," caused by adverse antitrust decrees; by the emergence of the independent producer; the breakdown of the term contract between the major studios and their actors, producers, directors and writers; the shrinking number of "stars" and the higher prices that had to be paid for them; the business diversification that characterized many of the major producers (investment, ownership of foreign theatres, oil and gas, real estate); the production of high-cost films; and the cost of new techniques of exhibiting motion pictures (three-dimensional effects, wide screen and improved sound).[51]

Not surprisingly, the drop in theatre attendance and motion picture production were mirrored in a worsening of the economic status of persons employed in the studios. Studio employment fell from 22,000 in 1946 to 13,000 in the mid-1950's, with the major studios being the hardest hit. Some stability was provided by the increasing activity at the motion picture studios in the production of films for television. "Even with this booster, however, the motion picture companies need fewer than three workers for each five they employed in 1946. By contrast, the whole U.S. economy now employs six workers for each five needed in 1946." [52] The earnings of motion picture employees rose only 66 percent between 1946 and 1956, while Los Angeles workers in manufacturing saw their wages rise 76 percent, and those in retail trade enjoyed an increase of 72 percent. [53] While the payroll of all employers across the Nation was increasing 103 percent in that decade, the total Hollywood payroll was shrinking by 20 percent. A major factor in this downslide was the substantial increase in the number of American films being produced abroad. This was attributable in part to lower wages and taxes abroad, and principally to the readier availability of money and subsidies there.[54]

Behind all of these grim statistics for Hollywood lay television. America's leisure-time patterns were keeping more of us at home, where live entertainment and films were available for "free." Americans in total were spending 35 percent more for recreation in 1955 than in 1946 (roughly $11.6 billion as compared to $8.6 billion). In that period, spending for motion picture theatres dropped roughly thirty percent; spending for live entertainment such as legitimate theatre and opera rose roughly ten percent; and spending for radios, television receivers, recordings and musical instruments nearly doubled (rising from $1.14 billion in 1946 to $2.18 billion in 1953).[55]

All of the developments just described in the entertainment industries—phonograph recordings, radio, television, and theatrical motion pictures—can perhaps best be summarized by considering their impact upon the income of professional musicians working in Los Angeles, the members of Local 47 of the American Federation of Musicians.[56] In spite of the competition from television, jukeboxes, and wired-music services, their income from live performances in nightclubs, ballrooms and the like rose from a total of $4.9 million in 1950 to $7.7 million in 1954. Their income from work in television films also rose in their period, from $455,000 in 1951 to $1,129,000 in 1954. (Interestingly, in 1952, the "re-scoring fees" to Local 47 members from the release of theatrical motion pictures to television was $200,000, while their income from recording for one-half hour filmed television programs was not much more, $284,000. The gap widened substantially in the years immediately following.)

The income of the Los Angeles musicians from live television between 1951 and 1954 rose from $547,000 to $1,873,000; their income as staff musicians on local television stations dwindled to almost nothing, while casual employment on local television remained relatively stable, and their income more than doubled from work on commercial programs broadcast on the networks. Earnings from work in radio were seriously diminished, falling from some $3,210,000 in 1950 to some $1,200,000 in 1954; while their earnings from employment by

[50] *Id.* at 8.
[51] *Id.* at 19–29.
[52] *Id.* at 36.
[53] *Id.* at 42.
[54] *Id.* at 65–70.
[55] Facts Consolidated, Trends in Imports of Sound Recordings. Prepared for Cecil F. Read. Aug. 1958.
[56] Trust Fund Hearings at 53–54.

radio stations fell only some fifteen percent, their earnings from commercial employment by sponsors or advertising agencies for radio network broadcasters fell by a factor of three, from $2.6 million in 1951 to $860,000 in 1954. Somewhat surprisingly, in light of the shrinkage of production of theatrical motion pictures in Hollywood, the earnings of Local 47 members in motion pictures increased slightly between 1950 and 1954, from $4.4 million to $5 million.

In short, in the five years under discussion, Local 47 members witnessed a substantial percentage increase in their total earnings from live face-to-face performances in nightclubs and the like, and from live television and television films; a modest increase in their total earnings from phonograph records and theatrical motion pictures; and a precipitous decline in their earnings from live and transcribed radio performances. Overall, these musicians felt increasing concern about their economic situation. Scale wages for phonograph records were the same in 1954 as in 1946; Hollywood production of theatrical motion pictures was sharply declining; there was serious concern about the future of the musician in all forms of radio work; and, although television work, both live and on film, was on the upswing, there was concern that an undue amount of work opportunities was being sacrificed by the use of canned and foreign music on television films. Certain actions taken by President Petrillo and the International Executive Board of the AFM in 1954 and 1955 brought matters to a head, and triggered a revolt within the membership of Local 47.

THE TRUST FUNDS IN 1954-55, AND THE APPEAL OF LOCAL 47

Although the Hollywood musicians perceived their economic situation to be gradually worsening throughout the late 1940's and early 1950's, their overt resistance to the Trust Fund policies was triggered by two decisions made by President Petrillo and the International Executive Board in 1954 and 1955. One decision, in negotiations with the phonograph record industry resulted in the perceived diversion of a long-overdue wage scale increase from the recording musicians to the Music Performance Trust Fund. The second decision, in June 1955 during the term of the agreement with the motion picture industry, resulted in the diversion of rescoring fees, payable upon the release of theatrical motion pictures to television, from the film musicians to the Music Performance Trust Fund.

The wage scale for a three-hour recording session for phonograph record musicians was set at $42.25 by the labor agreement of 1946 between the AFM and the record manufacturers. At the end of the yearlong strike of 1948, a new agreement was reached in which the Recording and Transcription Fund was transmuted into the Music Performance Trust Fund, in order to comply with the Taft-Hartley Act. That agreement made no provision for an increase in scale for the recording musicians over its 5-year duration. During the negotiations for a new agreement, in December 1953, Petrillo sought both a substantial pay increase for the recording musicians and an increase in the contributions to be paid to the Trust Fund upon the sale of phonograph records (then at an average level of one percent of the retail sales price). The recording companies were adamant in their resistance to an increase in their royalty obligations to the Trust Fund. They were already paying some $1.5 million per year into the Fund. and they believed that any increased payments from the record companies should be paid to the recording musicians, as an incentive and reward that was appropriate to boost their morale. The companies appreciated that for every dollar diverted into the Trust Fund, there would be one dollar less to pay the musicians who made the records.

A tentative agreement was reached in early January 1954, by which the Trust Fund payments were to be increased by seven and one-half percent for 1954 and 1955, and by another seven and one-half percent of the original royalty figures for 1956 through 1958. In addition, there was to be an increase in scale pay for the recording musicians of 10 percent for the first 2 years of the contract and another 10 percent over the next 3 years (resulting in a pay scale from 1956 through 1958 21 percent higher than the pre-contract scale).

After the recording companies had thus expressed a willingness to pay these percentage increases to the recording musicians, Petrillo in January declared to the companies that they should have no interest in whether those increases were paid to the musicians or were instead paid to the Trust Fund (over and above the percentage increases in the sales royalties payable to the Fund). Al-

though the companies initially demurred, the course of negotiations was such that they did not feel it sensible to press the issue; the memories of the 1948 strike, and no doubt also of the 2-year strike 5 years before that, were still fresh. The Labor Agreement that was finally executed in January 1954 provided for the continuation throughout its 5-year term of the $41.25 scale for a 3-hour recording session. It also provided for the payment of 10 percent of musicians' scale earnings during the first 2 years, and of 21 percent of scale earnings during the next 3 years, to the Music Performance Trust Fund. The separate 1954 Trust Fund agreement provided in addition for two increases of 7½ percent over the prior prevailing royalty rate calculated on the number of records sold.

This version of the 1953–54 record negotiations was related some 3 years after the event by James B. Conkling, in a court deposition.[57] At the time of the negotiations, Mr. Conkling was President of Columbia Records and represented that company in negotiating the 1954 Labor Trust Agreements. His account was sharply contradicted by President Petrillo and by the International Executive Board. They consistently asserted that the 10 and 21 percent payments were never intended as wage-increase payments for the recording musicians. It is interesting to note that in the individual contracts of employment made between the recording companies and their recording artists, which generally provided for certain payments to the artists as an advance against any future royalties they might receive on record sales, the 10 and 21 percent payments were treated for these purposes as payments to the recording musicians themselves; the 7½ percent increase in royalties to the Trust Fund were not.

In any event, word of the negotiations for the 1954 phonograph record agreements reached the recording musicians of Local 47, who were angered not only by the failure to secure any scale increase—making their scale earnings throughout 1958 the same as in 1946—but also by the perceived diversion to the Trust Fund of wage increases already conceded by the recording companies. Initially, royalty payments to the Trust Fund had been rationalized as a tax upon the record producers to ease some of the unemployment generated by the recording business. Now, the recording musicians could fairly characterize the Trust Fund payments as a diversion of long overdue pay increases from them, the creative and working artists, to musicians the bulk of whom were not working in the industry, or were not union members, or were relying on Trust Fund payments merely as a modest supplement to their principal source of income in some other trade.

The Los Angeles musicians performed on roughly one-third of the phonograph records made in America, while nearly all of the theatrical motion pictures made in the 1940's and before utilized the services of Local 47 members. When the AFM in 1951 relaxed the five-year ban upon the release of theatrical motion pictures to television, Hollywood musicians were the beneficiaries of the new re-scoring policy, which conditioned such release upon the making of a new soundtrack. When this proved impracticable, the so-called Hollywood Film–Television Labor Agreements of 1952 and 1954 provided for the television use of theatrical films upon the payment of so-called re-scoring or re-use fees to the musicians who performed on the original soundtrack of the films: the re-scoring fee was $25 for each instrumental musician, or one-half the prevailing scale for recording on television film. If the motion picture company was unable to ascertain the number or identity of these musicians (or of their widows), a formula was established requiring payment to the Trust Fund.

The separate Hollywood Film-Television Trust Agreements of 1952 and 1954 provided for the payment by the signatory motion picture companies of five percent of the gross revenues they received, both when the film was released to television and so long as the film continued to be used on television. The period 1951 to 1955 witnessed the release of thousands of theatrical motion pictures to television, as an antidote for the sharp decline in box office receipts and corporate profits in the motion picture industry. These transactions generated nearly $800,000 of re-scoring fees, payable initially to the musicians recording "new" soundtrack (more accurately, "dummy track") and thereafter to the musicians who worked on the original film.

In June 1955, in the middle of the term of the 1954 Labor Agreement and Trust Agreement with the motion picture producers, Petrillo and the International

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[57] Deposition of James B. Conkling, in *Anderson* v. *American Federation of Musicians*, Case No. 669, 990, Cal. Super. Ct., L.A. County, *passim*.

Executive Board declared that the producers were to cease making re-scoring payments to the film musicians and to begin making them instead to the Music Performance Trust Fund, in addition to the payment of five percent of their gross revenues. At the meeting of the IEB in Cleveland, in connection with the 1955 Annual Convention, the Board resolved: "In many cases the musicians who made the original pictures have passed away or cannot be located. It is on motion made and passed that any future such repayments be made to the Music Performance Trust Fund instead of to the musicians originally employed. This is effectively immediately. In case this action requires a change in the contract, the matter is to be left in the hands of the President." [58]

Petrillo promptly took appropriate action by informing the motion picture companies of this change, a unilateral action he was empowered to take on behalf of the musicians—without consultation with or approval by the affected parties—under the terms of the Federation's constitution and bylaws.

Petrillo asserted that, because of the death or unknown location of most of the musicians employed in films in the 1930's and 1940's, there were by 1955 only some one hundred musicians who were receiving re-scoring fees under the 1954 Labor Agreement, a situation which he characterized as a "racket." [59] He also believed that the film musicians had very few equities in the matter: "Musicians who originally made the picture received the union scale. They didn't make the picture without pay, and we thought if we took the money and put it in a Trust Fund it will do more good for 260,000 musicians than a handful of musicians. . . . In the labor movement you deal with majority membership; what is best for the majority, not the individual. . . . The group that we are conducting the negotiations for is part of the American Federation of Musicians. . . . Always we work for the interest of the majority of the members of the Federation." [60] He stated that it was a "mistake" to ever have entered into a labor agreement which provided for the payment of re-scoring fees to the film musicians.[61]

The musicians of Local 47, however, viewed the June 1955 directive of the President and the IEB as an unjustified diversion of moneys from older film musicians, many of whom were now unemployed and in need of the re-scoring payments for the necessities of life, to other musicians across the country who had not given of their creative endeavors to the motion picture industry and who might not even be members of the union. They were outraged particularly by the recapture of some checks that had already been made out to the account of the film musicians and that were then re-issued to the Trust Fund. Their distress mounted upon their learning that within the first year after the Federation's decision of June 1955 it was estimated that because of the very large television deals made by a number of major motion picture producers, more than $2.5 million would be paid into the Trust Fund rather than to the Hollywood musicians. It was said, for example, that Warner Brothers alone had sold some one thousand films for use in television.[62]

The conflict between the Trust Fund policies of the AFM and the interests of the recording musicians (on film and on phonograph records) was thus highlighted in these two episodes: the diversion of wage increase payments in the 1954 phonograph record industry agreements, and the diversion of re-scoring fees in June 1955. Both of these decision by the AFM officers were later to be explained in a deposition by President Petrillo, under sharp questioning by opposing counsel.[63]

Question. Have you personally favored the establishment of performers' rights, . . . either in the Federation or elsewhere?

Answer. Well, performance rights is all right if a performer can get his rights, but my idea as a labor leader is always trying to get some employment for the fellow that is out of work. . . . The guy that I want to help is the fellow that is going out of business.

Question. You don't have any interest in securing additional benefits for the man who is making the recording, who is doing the work?

Answer. Well, the fact is, I guess, his is the highest wage scale in the country. How can you say we are not doing anything for them? The best conditions, the

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[58] International Musician, Aug. 1955, pp. 48–49.
[59] Petrillo deposition, *supra* note 40, at 74, 114.
[60] *Id.* at 114, 118.
[61] *Id.* at 71–72.
[62] Trust Fund Hearings, at 17.
[63] Petrillo deposition, *supra* note 40, at 67–69.

best wage scale is the recording musician. What are we supposed to do, get them some more money, some more conditions, residual rights? What about the guy that is out of work here? Aren't you thinking about him at all, this fellow that has been put out of work? . . . You are for the guy that is making the dough, and I am for the guy that is out of work; that is the difference between the two of us.

The board of directors of Local 47 at its meeting of July 1955 authorized the Recording Secretary of the Local, Maury Paul, to draft a letter to the International Executive Board protesting its action of the previous month. The letter pointed out the re-scoring or re-use payments made to studio musicians were going to many persons across the country who were in serious need, and in only a comparatively few instances to well-paid working musicians. It also relied on the equities of the former film musicians: "A case in point are those members formerly employed by RKO. Only a handful of these members are presently employed. This studio has just been sold and the trade papers state that 700 pictures made by this firm will hit the television market. Do not these members deserve some consideration?" The letter also pointed out that many of the film musicians had relied on the Federation's generally prevailing practice of securing payments for musicians upon the transfer of their work from one medium to another. Secretary Paul concluded with an endorsement of the trust fund principle, but stated that "the local board feels that these funds should be supported by industry payments and not by payments by members of the federation." He suggested that it would be fair to tax the earnings of all musicians throughout the country for the purpose of easing the problems of musicians displaced by recording technology. The International Board replied to Paul's letter on behalf of Local 47, by stating that it was prepared to reconsider its action at its mid-winter meeting in January 1956.

The regular general membership meeting of Local 47 in September 1955 brought out an unusually large number of members—some 520, in spite of the fact that the meeting was held on Yom Kippur. The meeting voted unanimously to pursue a formal appeal to the International Executive Board for relief from its policies, and to appoint a member of the Local's Board of Directors, Cecil F. Read, to represent the Local in its appeal. Read had "worked in Chicago in theatres before there was sound movies, then in radio stations before there was an NBC or CBS network, and in hotels and dance halls before live musicians were displaced by juke boxes and wired musical services." [64] In 1947, he moved to Los Angeles, where he worked on network radio programs, phonograph records, videotape and film television programs, and motion pictures. Read was vigorous, articulate., meticulous with facts and figures, and passionate in his concern for the plight of the recording and film musicians.

The resolution of the Local 47 membership which directed the taking of an appeal to the International Executive Board also directed all of the officers and employees of the Local to furnish Read with all of the documents he might need in preparation. The next day, the Vice-President of the Local, who was also an International representative resigned his office to avoid turning over documents. At its next regular membership meeting, in October 1955, a by-election was held to fill the office of Vice-President. Read ran for the position, against a member who was supported by the International officers; Read won by a vote of approximately 1300 to 500. Although before this by-election, Petrillo had granted the request of Local 47 for a hearing of its appeal before the International Executive Board, he withdrew his authorization when Read was elected Local Vice-President. Only when the Local reinstated its petition did Petrillo relent. Read's requests for information and documents from Federation officers and from the Trustee of the Music Performance Trust Funds were for the most part denied.

In January 1956, Read presented the Local's formal Appeal to the International Executive Board in New York City, both through oral argument and legal and economic briefs. A detailed written statement, seventy-two pages in length, was presented to the IEB in support of the Appeal.[65]

The basic argument of Local 47 was that the Trust Fund policies of the Federation had resulted in a severe impairment of the economic position of the recording musicians, and that the union had thereby violated its fiduciary obligation as bargaining representative of those musicians and had deprived them of their property rights. The appeal began by pointing out the economic

[64] Hearings on Performance Rights in Sound Recordings, Copyright Office, July 28, 1977, pp. 404–05.

[65] The full text of the Appeal is set forth in the Trust Fund Hearings, at 57–93.

plight of the recording musicians. While per capital income in the United States had risen 229 percent from 1939 to 1955, and the cost of living had risen 91 percent, the wage rates for musicians in phonograph recording had increased only 37 percent, and the wage rates for musicians in theatrical films had increased 61 percent. In that same period, the hourly rates negotiated by the American Federation of Television and Radio Artists (AFTRA) for singers had increased 80 percent; the hourly rates for singers represented by the Screen Actors Guild (for vocal performances in motion pictures) had increased 250 percent; and the hourly rates negotiated by the Screen Writers Guild had increased 133 percent. This differential was compounded by the fact that it was common practice among unions representing other creative artists involved in film or recordings to negotiate for royalty payments to the performers upon re-use in the same medium or upon transfer to a different medium. For example, actors represented by the Screen Actors Guild were paid royalties when their theatrical films were exhibited on television, when their television films were exhibited in theatres, and when their television films were shown more than once on television. Performers represented by AFTRA were paid for re-use of kinescope television shows and transcribed radio shows, and when motion picture soundtrack was transferred onto phonograph records or phonograph records were dubbed onto television film. In the musicians' case, most of these re-use payments were made instead to the Musicians Performance Trust Fund.

The Appeal of Local 47 then proceeded to describe the Trust Fund policies of the Federation and their harmful impact on the film and recording musicians. Payments were made to the Trust Funds, but not to the musicians, when phonograph recordings were sold, but not to the musicians, when phonograph recordings were sold, when electrical transcriptions were replayed on radio, when theatrical motion pictures were released to and exhibited on television, when television films were re-used and when commercial announcements were re-broadcast. Wage increases negotiated for musicians performing on phonograph records were paid instead to the MPTF. Trust Fund payments for the re-use of television films made it prohibitive to use live American musicians and induced producers to use foreign or canned music instead. In the half year since June 1955, the release to television of more than 1,000 theatrical motion pictures was alleged to have resulted in the diversion of nearly $1.6 million of re-scoring fees from the Los Angeles musicians to the Trust Fund, with a correlative loss to Local 47 of nearly $24,000 in union dues.

The Local's Appeal insistently emphasized the fact that its membership was so small in proportion to the total membership of the AFM that it was unable to protect its interests within the governing organs of the Federation, so that the burden fell upon the Federation leaders to do so. Of the national union's membership of 250,000, roughly 50 percent were alleged to do no musical work at all, and only roughly 20 percent were employed "full time" (earning $3,000 or more per year from performing). Of the full-time musicians, roughly 53,000 in number, some 41,000 were engaged in live performances in clubs, bars, hotels, restaurants and the like. Only some 12,000 were employed in the fields of radio, television, movies, and the recording industries. Thus, no more than 3 percent of the Federation membership were recording musicians, the majority of them working in Los Angeles and New York. The Los Angeles musicians accounted for 97 percent of all recording for motion pictures, ninety-four percent of television film recording done by American musicians, and thirty-three percent of the performances on phonograph recordings. Their services generated roughly half of the payments going into the Trust Funds, yet they received only some 4 percent of the moneys paid out by the Trust Funds.

Because of its limited voting power within the Federation, Local 47 claimed in its Appeal that "an extremely high degree of responsibility and trust rests with the governing body of the Federation to respect and safeguard the interests of this important but impotent minority in the conduct of affairs affecting film and recordings."[66] ". . . [T]he Federation was and is acting as bargaining agent for the musicians actually doing the work (under the law of agency); and . . . all payments negotiated, both of a specific amount as well as those in royalty form, belong to the musician, or his heirs, whose recorded services are being utilized. . . . In discharge of its responsibilities as agent, the union has a fiduciary relationship to those it represents akin to that of a trustee, and must govern itself with respect to their interests accordingly. . . . By membership in the

[66] *Id.* at 64.

union, the musician does not relinquish his individual rights in his performances . . .; nor does the Federation acquire any authority to prejudice, diminish or transfer those rights, or the fruits thereof. . . ." [67] The will of the members of Local 47 should be controlling, and should not be subject to the control of the entire Federation membership, "in whose councils the recording musicians has virtually no representation." [68]

The Appeal also developed the theory that "A performer has a basic right in his performance, and the re-production and exploitation thereof in any form. This is a right in the nature of property." [69] This right was also labeled a "performance right," justifying compensation for the musician (or any other creative performer, such as an actor or singer) whenever his recorded work—on records, tape, soundtrack or film—is commercially exploited. The right was viewed as fully comparable to the right of an author upon the printing of copies of his book, or to the right of a composer upon the public performance of his music.[70]

The Appeal closed with a detailed request for relief. It petitioned the International Executive Board of the AFM to grant the following benefits: (1) The payment of increases in the recording industry wage scale, now twenty-one percent, to the recording musician instead of to the Trust Fund; (2) The payment recording fees of $25 to musicians recording the soundtrack of a theatrical motion picture upon its release to television, and the recovery from the Trust Fund of all such fees paid since June 1955; (3) The payment of re-use fees for transcribed radio shows to the recording musician rather than to the Trust Fund; (4) The payment of royalties for re-runs of films made for television not to the Trust Fund but to the recording musicians; (5) The reduction in the total cost of recording music for television films, in order to recoup the present losses from the use of imported or library soundtrack; (6) The explicit adoption by the Federation of the principle of performance rights, and the making of a concerted effort (with actors, singers, writers, directors and other performing artists) to change the copyright law to recognize such performance rights.

The Appeal of Local 47 was denied by the International Executive Board, which so advised Cecil Read by letter of February 16, 1956.[71] The Board at the outset denied that the ten and twenty-one percent scale payments under the phonograph record industry agreement was really a wage increase or was anything other than a contribution to the Trust Fund. It stated that the objective of Local 47 was the discontinuance of the Trust Funds, and that "This would mean that many musicians throughout the country would be deprived of the little employment made possible by the Fund and for which the recording industry acknowledges it owes an obligation. The only ones to benefit would be the recording musicians who are among the best paid members of the Federation and whose mechanical product is the principal reason for the widespread unemployment among our other members."

THE REVOLT WITHIN LOCAL 47

At the same time as Local 47 was on record as attacking the Federation's trust fund policies, the President of the Local was going on record to defend them. John te Groen had been President of Local 47 since 1950. In that capacity he attended in late 1955 a meeting of delegates from California, Arizona and Nevada, at which a resolution was adopted which reflected the "grassroots" support of union members for the Music Performance Trust Funds. Te Groen joined in a unanimous resolution "That this conference go on record as vigorously opposing any movement which has for its purpose the weakening or destruction of these funds, and further, that it affirms its support of President Petrillo in his efforts to protect the interests of the great membership of our federation." [72]

After the International Executive Board rejected the Appeal of Local 47, Cecil Read consulted an attorney for advice as to the best way to pursue the interests of the Local within the context of an indifferent Federation leadership and Local President. Read's attorney advised him that a lawsuit might be brought, but that this would be a long, protracted battle. He suggested that a more effective route might be the formation of an independent union which

[67] *Id.* at 65, 69.
[68] *Id.* at 69.
[69] *Ibid.*
[70] *Id.* at 88.
[71] International Musician, March 1956, p. 12.
[72] Trust Fund Hearings at 129

could promote the interests of the Los Angeles musicians through separate collective bargaining negotiations.

In anticipation of the regular membership meeting of Local 47 on the afternoon of February 27, Read and several of his supporters precipitated a "secret" meeting that morning at Larchmont Hall in Los Angeles, at which some 100 or 300 invitees were present. Read and his associates, informally known as the Steering Committee, devised a plan for the conduct of the afternoon general membership meeting, the principal elements of which were the creation of a Musicians Defense Fund (to take any legal action necessary to assert the positions articulated in the earlier Appeal to IEB) to be financed by voluntary contributions from the membership, and the taking of appropriate action, including ouster, of any officers of the Local who remained loyal to the position of the IEB and of President Petrillo. Unknown to the participants in the "caucus" meeting on the morning of February 27 in Larchmont Hall, their words were recorded; the owner of the hall had called a business representative of the Federation and had gotten his approval for the secret tape-recording of the meeting.

The regular membership meeting of Local 47 was held that afternoon at the Palladium, with at least 2,000 members (out of a total membership in the local of some 16,000) in attendance. The meeting was chaired by President te Groen. The principal item on the agenda was Cecil Read's report on the fate of the Local's Appeal to the International Executive Board. After so reporting, Read announced that any further attempt by the Local to redress its felt wrongs within the Federation would be futile, and he introduced two resolutions, one authorizing further action including litigation to protect the rights of its members, and another authorizing the creation of a music defense fund. It became quite clear that the litigation contemplated by the Read supporters was not merely an attack on the Trust Funds but also an attack upon the Federation as representative of the recording musicians, through a National Labor Relations Board election. President te Groen spoke against the resolutions, warning that their adoption could lead to the revocation of the Local's charter from the Federation, and he soon ruled consideration of the resolutions out of order, on the ground that proper notice of their introduction had not been given to members of the Local in the formal call for the meeting. The ruling was appealed to the membership by one of Read's associates, and after it was overruled, the resolutions were adopted.

This tactic had been planned by the Read faction during the morning meeting at Larchmont Hall, as had the next step—the introduction of a demand for the resignation of President te Groen, along with Financial Secretary Hennon and Recording Secretary Paul, and then the introduction by Cecil Read of a resolution that these three Local officers be suspended from office. Further heated discussion resulted in a substitute motion by Read for the temporary suspension of President te Groen; te Groen earlier that evening had on the stage of the Palladium privately stated to Read that he would abide by the instructions of the Federation and of President Petrillo even if those instructions were to conflict with the policies of Local 47. te Groen ruled Read's motion out of order, but Read appealed the ruling of the chair. The meeting fell into a state of turmoil, and Read put to a voice vote the issue of overruling te Groen and suspending te Groen, and ruled that both votes had carried. The meeting concluded with an appeal by the Read supporters for contributions to the Musicians' Defense Fund.

The next day, February 28, the Local's Board of Directors held its regular meeting, with Vice President Read—taking over the duties of the Local president—in the chair. The Board adopted a motion to file formal charges against te Groen and secretaries Paul and Hennon, and to call a special meeting of the Local membership to consider such charges.

On March 1, the Local Board of Directors met again. te Groen was present and declared that he had not been legally removed from office. Moreover, he adverted to a telegram sent that day by President Petrillo to each member of the Local's Board of Directors. The telegram stated that Mr. te Groen had filed with the International Executive Board an appeal from the action of the February 27 meeting of the Local suspending him from office, and concluded: "Pending the disposition of the appeal the suspension is stayed and all actions taken by the Board of Directors of Local 47 since February 27, 1956, at meetings not chaired

by Mr. te Groen are stayed and it is further ordered that pending said appeal Mr. te Groen shall continue in his official elected position as President of Local 47." Read declared that Petrillo's order was invalid. When te Groen and Hennon left the room, this destroyed the Board's quorum and the meeting was adjourned.

Four days later, Read and his supporters circulated among the Local membership a call for a special general meeting at midnight of March 12 to consider charges against te Groen and requesting his removal from office. Among the charges was that te Groen "has failed and refused to accept the policies endorsed by the general membership of this Association [i.e., Local 47] in the protection of its best interests," and that he "is subservient to and dominated by his personal loyalty to James Caesar Petrillo" even though the instructions and directions of Petrillo and of the Federation "are directly contrary to the wishes, desires and instructions of the general membership of this Association..."

In the meantime, the International Executive Board had established a committee of five of its members to investigate the claim of te Groen that the February 27 meeting had been improperly packed and plotted and that his suspension was unauthorized. That investigating committee wrote to Local 47 directing that the charges against te Groen looking toward his removal from office not be pressed while the investigation was going on, and directing that the membership meeting called for March 12 be cancelled by order of the IEB. At a meeting of the Local's Board of Directors on March 9, a motion introduced by Read, declaring that there was no authority for calling off the March 12 meeting, was adopted by a 9 to 2 vote. The March 12 midnight meeting was in fact held, and very well attended. Since te Groen was not present, Read felt it appropriate to say some words in his defense. Then, by secret ballot, the membership voted, 1,535 to 51, to remove John te Groen from the presidency of the Local. Promptly after the meeting, te Groen filed an appeal to the IEB from the action of the meeting removing him from office, and President Petrillo directed that pending the appeal the removal from office would be stayed and te Groen was to remain as President of Local 47 and Chairman of its Board of Directors.

Another confrontation was assured when at a later meeting of the Local membership, some 1,800 members heard the reading of charges prepared by Read against Local Secetaries Hennon and Paul. Some 1,500 voted by secret ballot to remove them from office, but Petrillo promptly overrode that action and ordered them reinstated.

Two days after the March 12 meeting at which te Groen was removed from the presidency of Local 47, he and Secretary Hennon filed charges with the International Executive Board, naming Cecil Read and eleven others; a thirteenth participant in the "revolt" was similarly charged on March 28. The formal charges were that the "defendants" had obstructed the operations of the Local by conspiring to oust the regularly elected officers of the Local; that they had packed the meeting of February 27 and invalidly effected an alleged suspension of the Local president; that they met as the purported Board of Directors of the Local on March 1, contrary to the orders of President te Groen; that they improperly called the meeting of March 12 and persisted in holding that meeting in defiance of the order of President Petrillo and the International Executive Board; that they invalidly attempted to oust te Groen from office at a meeting invalidly called; and that they openly invited the revocation of the Local's charter. All of these allegations were said to demonstrate conduct which was properly the subject of discipline within the union—advocating dual unionism, defying orders of the Federation, and placing obstacles in the way of the successful maintenance of Local 47. The charges against Read and his supporters concluded: "The charged members and each of them participated in the attempt to establish an organization which was intended and designed to wrest from AFM its exclusive right to represent and bargain for musicians employed in the motion picture, the recording and the broadcasting industries. The charged members and each of them have by act, deed and word of mouth, attempted to bring AFM into disrepute and to substitute for it a dual, rival and antagonistic bargaining agent."

All of the "defendants" filed answers, denying many of the allegations of the charges, denying the validity of certain of the Federation's bylaws and directives and demanding a trial and hearing, with the right to confront and cross-examine witnesses, before an impartial tribunal to be selected by the membership of Local 47. On March 28, the defendants were notified that a trial on the charges had been scheduled. The hearing, with the plaintiffs and defendants represented by attorneys, was conducted in Hollywood from April 9 to April 13,

on most of these days in the evening as well as in the morning and afternoon. In addition to the testimony offered by witnesses, the tapes of the "caucus" of February 27 at Larchmont Hall were introduced in evidence and played. The referee appointed by President Petrillo at the direction of the International Executive Board to preside at the hearing on these charges was Arthur J. Goldberg, then special counsel to the AFL–CIO. Referee Goldberg rendered his exhaustive and detailed decision on May 4, 1956.[73]

Referee Goldberg set forth the facts behind the "revolt" within Local 47, and stated at the outset that it was not his task to consider the merits of the position of Reed and his supporters, but only to determine whether their actions were subject to discipline under the constitution and bylaws of the AFM or Local 47. He then proceeded to analyze some of the larger issues raised by the charges, stating that "almost every union at some stage must balance the interests of various groups among the employees whom it represents in determining the allocation of benefits that can be negotiated by the union," and that "Necessarily, when such decisions are made, there may be those who feel that they have not received their proper share of the benefits negotiated by the union." While it would be a perversion of trade union principles to hold that complaints and efforts to change union policy should be the subject of discipline, "just as surely, every union, and indeed every organization, must insist upon compliance with the reasonable rules which govern its structure in the processing of these complaints, and in the pursuit of the efforts to change its policy. If the organization provides procedures by which the grievances of the individual group may be heard and considered, it is a fundamental obligation of the group to pursue those procedures in presenting their point of view. . . . There was available to the local, as there is in almost every union, the right to appeal [the action of the International Executive Board denying the Local's Appeal against Trust Fund policies] to the ultimate governing body of the union—the Convention. This procedure the defendants did not utilize. . . ."[74] The referee concluded that the Federation could properly insist that the defendants utilize the procedures in the union constitution and bylaws and that they obey the union's rules and regulations.

Referee Goldberg then turned to the applicable rules of the AFM. He found that it was reasonable for the Federation to provide in Article 13, Section 1 of its bylaws for the fine or expulsion of a member who "in any way places obstacles in the way of the successful maintenance of a local or violates any law, order or direction, resolution or rule of the Federation." Also appropriate, held Referee Goldberg, was the application of Article 12, Section 36 of the bylaws, which provided that "advocacy of dual unionism . . . shall constitute sufficient and proper grounds for expulsion."

The Referee then proceeded to consider each of the charges against each of the defendants. He found that six of the defendants, including Cecil Read, had participated in the ouster of te Groen on February 27, 1956, and that they thereby violated the bylaws of Local 47, since the suspension from office was, pursuant to a plan made at a secret caucus, without prior notice, without charges, without a hearing, and without a secret ballot; and that these defendants also violated the bylaws of the Federation, since the illegal ouster of elected officers surely "places obstacles in the way of the successful maintenance of a local". These six had engaged in a "deliberate and wilful conspiracy to suspend te Groen, not for any neglect or duty or other proper charge, but because he would not agree in advance to lead the local in defiance of the lawful regulations of the Federation."[75]

The charge that certain of the defendants violated President Petrillo's telegrammed order setting aside te Groen's suspension from office was not sustained, since the meeting of the Local's Board of Directors at which these members were in attendance was adjourned for lack of a quorum. But the charge was sustained, against eight defendants including Cecil Read, regarding the ignoring of the order from the International Executive Board to cancel the meeting of March 12 (at which te Groen was purportedly voted out of office); these members of the Local's Board of Directors had contravened one section of the Federation's bylaws making local bylaws subordinate to those of the Federation, and

[73] The full text of the Referee's decision is set forth in International Musician, May 1956, pp. 9 *et seq.*

[74] *Id.* at 39.

[75] *Id.* at 41.

another section outlawing the violation of a Federation order or directive. The defendants' refusal to cancel the March 12 meeting could not be justified simply by claiming that the IEB order was conrtary to the "will of the membership" of the Local; the order was within the power of the IEB, since it was confronted with a serious claim by President te Groen that the "will of the membership" was in this case in violation of the rights of individual members and of the union's orderly processes.

Referee Goldberg also sustained against Read and one other defendant the charge that they openly invited the revocation of the charter of Local 47, by their participation in all of the pertinent events, particularly the ouster of te Groen and the open defiance of the order of the IEB. This certainly constituted an obstruction of the successful maintenance of Local 47, in violation of the Federation's bylaws. As for several other defendants who participated in some but not all of the pertinent events, "while I am convinced that perhaps all of them also understood what they were doing, nevertheless, in keeping with my desire to grant to the defendants the benefit of any doubt, I am finding [them] not guilty of this charge [of inviting the loss of the Local's charter]." [76]

Cecil Read alone was held guilty of the charge of advocacy of dual unionism, "one of the most serious charges that can be leveled against a trade unionist." Read "left no doubt, in his remarks, that the course of action which he planned and advocated involved the creation of a separate bargaining unit for Local 47 outside of the Federation and in opposition to it, and an election campaign to certify the local instead of the Federation under the National Labor Relations Act." [77] The other defendants were held not guilty, in view of the serious nature of the charge, the doubt whether these defendants fully understood the implications of Read's plans and actions, and the Referee's desire to accord the defendants the benefit of any doubts.

Finally, Read and five other defendants were held guilty— by virtue of their conspiring at the Larchmont Hall caucus to precipitate the summary and illegal ouster of unprepared and unwarned officers of the Local—of placing obstacles in the way of the successful maintenance of the union. Several other charges were dismissed as overbroad, unsupported or duplicative.

In recommending sanctions against the defendants, Referee Goldberg was as discriminating and lenient as he was in ruling upon the substance of the charges. One defendant was found not guilty on all charges. It was recommended that a second defendant, technically guilty of one charge, not incur any penalty at all. It was recommended that ten other defendants, not including Cecil Read, be expelled from membership in the AFM and in Local 47, but that they be reinstated after one day on condition that they refrain thereafter from advocating dual unionism, placing obstacles in the way of Local 47 and violating any order, direction or rule of the Federation. If abiding by that condition for 1 year, these defendants were to be deemed to have fully satisfied their penalty except that they were to be disabled to hold office in Local 47 for a period 2 years after their reinstatement (pursuant to a bylaw of Local 47 regarding expulsion from membership). The recommended sanction for Cecil Read was the most severe: expulsion from membership in the Fedration and Local 47 for 1 year, with readmission granted on application thereafter, provided that during the period of expulsion he engaged in no advocacy of dual unionism against the Federation, placed no further obstacles in the way of the successful maintenance of Local 47, and violated no order, direction or rule of the Federation. Read too was to be debarred from holding office in Local 47 for 2 years after reinstatement.

Within 3 weeks of the issuance of the Goldberg recommendations, the International Executive Board met in New York City and, on May 23, 1956, adopted his findings and recommendations with immaterial variations. Cecil Read was expelled from union membersip, with the right to apply for reinstatement in a year. Uan Rasey, Ray Toland, Warren Baker John Clyman, Jack Dumont, William Atkinson, William Ulyate, Earl Evans, Marshall Cram, and Martin Berman were expelled from union membership, with the right to apply for reinstatement after a day. At the same meeting the International Executive Board also sustained the appeals of John te Groen and Maury Paul from their ouster as President and Secretary, respectively, of Local 47.

The matter did not end there, however, for all of the defendants were granted an opportunity to present their case to the full membership at the June 1956

[76] *Id.* at 43.
[77] *Ibid.*

Annual Convention in Atlantic City, New Jersey. President Petrillo turned over the chair to a Convention delegate, who urged that the appellants be given every consideration. Defendants Toland, Baker, Clyman, Cram, Rasey, Atkinson, Dumont and Read individually stated their case and, according to the formal minutes, "The delegates listed very attentively." [78] President Petrillo then spoke in reply, reviewing the trust fund policies of the Federation and giving the reasons behind the action of the International Executive Board in expelling the appellants. Among other things, his speech referred to the well-paid Hollywood musicians who were attempting to take the bread from the tables of the delegates. After a standing ovation, several members of the Executive Board made brief statements in support of their decision to expel. The tape recording of the Larchmont Hall meeting was played.

A motion was then made and seconded to sustain in full the action of the International Executive Board. Maury Paul, the Secretary of Local 47, then rose and—in one of the many ironies offered up by this case history—on the instructions of the Local, read a resolution urging that the expulsion of the appellants be reversed. The resolution asserted that all of the appellants had been expelled for the actions they had taken on behalf of Local 47, pursuant to the expressed desires and wishes of membership meeting resolutions and petitions; and that their expulsion from union membership was "unjust and inequitable." Tre resolution also required the Local 47 delegates to read it at the Convention and to vote for a reversal of the expulsions.

Thereupon, a vote was taken to sustain the expulsions, and the motion was passed "unanimously by a standing vote."

Petrillo publicly criticized to Groen and Paul for seeking to overturn the expulsions, but they gave public assurance that they personally supported the action of the International Executive Board but were forced to cast their vote against it by virtue of the instructions imposed by the membership of Local 47.

In spite of the fact that Read and his closest supporters had thus been ousted from their membership in the Federation and in Local 47, the members of that Local still actively supported the principles for which Read had been fighting. This was evidenced on the following day at the Convention, which opened with a long series of resolutions on behalf of Local 47. proffered in each instance by President te Groen on instructions of the Local membership. Among the proposals embodied in those resolutions was: ratification by the membership of all collective bargaining agreements; the deletion from the Federation bylaws of article I, section 1, giving the President the power to annul provisions of the constitution and bylaws; abandonment of the policy of requiring payments to the Music Performance Trust Funds in the motion picture, television, phonograph recording and transcription industries: the reinstatement of the policy of requiring rescoring payments to film musicians when theatrical motion pictures are released to television: the endorsement by the Federation in contracts, legislation and treaties of residual and re-use performance rights; the negotiation for wage increases in the phonograph record industry commensurate with the increase in the cost of living since 1946; the deletion of the powers of the Executive Board to annul actions of the Convention and to expel any local from the Federation; the granting to larger locals of votes at the Convention commensurate with the size of their membership, not subject to the present maximum of ten votes; the deletion of the President's power to remove a local officer without due process; amendment of the Federation by laws to provide for appeals to the Convention on decisions other than fines and expulsion; payment to musicians for re-use of certain radio transcriptions rather than payment to the Trust Fund.

In every case, upon the recommendation of the Federation committee initially charged with considering these resolutions, the Convention voted them down. It did, however, support a lengthy resolution introduced the following day, affirming the policy of the Federation leadership in regard to the Music Performance Trust Funds and the "fight against unemployment," applauding the effort and "persuasive talent" of President Petrillo n this matter, and criticizing the "uninformed, mislead, and dissident group of musicians" responsible for unwarranted attacks upon the Trust Fund policies of the Federation.[79] During the period of the Convention. the International Executive Board also approved a resolution empowering the Board to place a local union in trusteeship, under the control of a trustee appointed by the President of the Federation, in the event the Board had

[78] International Musician, Aug. 1956, p. 28.
[79] International Musician, Sept. 1956, pp. 18–19.

reason to believe that the union, its officers or members are violating the Federation constitution or bylaws, or are acting in a manner detrimental to the welfare or interests of the Federation or of the local, thus warranting emergency action.[80]

By the close of the 1956 Convention, the Read faction of Local 47—and the membership of Local 47—had been rebuffed by the full membership of the Federation. The leaders of the rebel faction had been expelled, the challenges of Local 47 to the Trust Fund policies had been rejected, and the International Executive Board had been given express power to place a renegade local under trusteeship. There were no further intra-union forums to which the recording and film musicians could take their case. This outcome did not, however, take Read by surprise. He had already appeared before a legislative subcommittee in the House of Representatives of the United States Congress, and he was about to spearhead four massive lawsuits, one directed against each of the Music Performance Trust Funds, in the courts of California.

THE TRUST FUND HEARINGS OF 1956

On May 10, 1956—less than 1 week after the filing of the recommendations of Referee Goldberg—the chairman of the Committee on Education and Labor of the U.S. House of Representatives appointed a special subcommittee to investigate the operations of the Music Performance Trust Funds. The Chairman of the subcommittee was Phil M. Landrum of Georgia, and the other two members were James Roosevelt and Joe Holt, representatives from Los Angeles. The subcommittee traveled to Los Angeles in order to take testimony on May 21 and 22 from the Hollywood musicians who were most adversely affected by the Federation's trust fund policies, as well as those who were the principal characters in the struggle for power within Local 47.[81] Extended testimony was given by Cecil Read, who also introduced into evidence the entire text of the Appeal of Local 47 that had been presented to the International Executive Board of the Federation in January 1956. Testimony was also given by John te Groen, and other persons in the Hollywood music industry, including bandleader Bob Crosby and television producer and actor Ozzie Nelson.

In general, the witnesses' testimony emphasized two perceived abuses: the diversion of compensation from recording musicians to the Trust Funds, and the undemocratic structure and procedures of the American Federation of Musicians. Somewhat ironically, both Read and te Groen articulated their shared view that the diversion of the $25 re-scoring fees, upon the release to television of theatrical motion pictures, from the original recording musicians to the Musicians Performance Trust Fund, was grievously unfair and objectionable to the Hollywood musicians. te Groen observed that he had, as President of Local 47, promptly challenged this June 1955 action of the International Executive Board by a letter to the Board, and that he intended to raise the challenge again at the forthcoming 1956 Annual Convention. Read also presented detailed information regarding the diversion to the Trust Funds of imminent wage increases in the phonograph recording industry and of re-use payments for transcribed radio programs; and regarding the severe impact of substantial Trust Fund payments upon the employment of live musicians in television film. Read made it clear that he had no objection to the Trust Funds in principle, or even to an exaction from the earnings of all musicians for the purpose of alleviating unemployment. His objection was rather to the diversion of wage increases to the Trust Funds: the massive disproportion between the moneys contributed to the Trust Funds through the services of Local 47 and the moneys that Local 47 musicians received from the Funds; the use of Trust Fund moneys to subsidize nonmembers and persons relying on music merely as a part-time supplement to some other principal employment; and the dissemination of Trust Fund moneys by local union leaders as a form of patronage and favoritism.

The second principal theme of the hearings—the undemocratic structure and procedures of the Federation—was sounded by Read and by other witnesses, particularly Bob Crosby. It was pointed out that the constitution, bylaws and usages of the AFM gave extraordinary power to the President and to the International Executive Board: the power to negotiate agreements without consultation with or ratification by the membership of any of the affected locals;

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[80] International Musician, July 1956, p. 6.
[81] See Trust Fund Hearings.

the power to enter into an agreement to further the interests of the bulk of the union's membership, in order to preserve positions of power within the national union and in disregard of the interests of local members adversely affected; and the power held by President Petrillo pursuant to Article I, Section 1 of the AFM constitution, to annul and set aside not only any actions taken by local unions but also any provisions of the constitution and bylaws themselves. The Read and Crosby testimony also underlined the fact that Local 47 was powerless to secure any redress within the available intraunion machinery. Its attempt to oust its unsympathetic officers was overruled by Petrillo; and it lacked voting power within the annual convention that would be commensurate with its membership, since the voting rules were weighted against the largest locals and since even a reversal by the full convention of the Trust Fund policies of Petrillo and the IEB could be summarily reversed by Petrillo himself.

These grievances—and other more detailed grievances which were articulated in the testimony before the House subcommittee—were said by Read to warrant the following legislative remedies directed generally at all labor organizations: Prohibition of the absolute power of any union president or officers to annul any portion of the constitution or bylaws without the express approval of a majority of the members; prohibition of the misuse of assessments collected for specific purposes such as welfare, pension, unemployment and strike benefits; required submission of all collective bargaining agreements for approval by the members in the bargaining unit covered by that agreement; prohibition of any evasion of the Taft-Hartley provisions dealing with voluntary employer payments into welfare funds; required uniformity and nondiscrimination in the assessments levied against union members; creation and enforcement of residual property rights in musical performances, so-called performing rights, under the laws of copyright and similar laws regulating the exploitation of artistic property.

The testimony offered in the 2 days of hearings in Los Angeles was often spirited and sometimes poignant. The congressmen through their questions attempted to get a clear understanding of the sometimes complex operations of the various entertainment industries and the various Trust Funds. On several occasions, their questions became near rhetorical, expressing their indignation at the unilateral powers reposed in and sometimes exercised by the President of the AFM. In the hearing room were a significant number of Hollywood musicians, who on occasion punctuated favorable testimony with applause and unfavorable testimony with derisive laughter or with critical comments.

The slender report of the subcommittee, only four pages in length, was filed on October 10, 1956. Among their findings was the conclusion that Local 47 "has no voice in collective bargaining negotiations carried on at the national level, and has no effective control of its own affairs," and that "it is unlikely that members of that local can ever obtain proper or adequate participation in the management of the affairs of the union."[82] The subcommittee's conclusions and recommendations, however, fell far short of the recommendations of Read and his supporters. The subcommittee concluded, first, that the federal government ought not interfere with the day-to-day relationships between union officials and union members. "[S]uch intraunion matters can and should be worked out within the structure of the labor organization itself; sooner or later in most cases the will of the members themselves will govern the conduct of the union."

The subcommittee's second recommendation went a bit further in the direction sought by Read. Using as a model Section 302(c)(4) of the Taft-Hartley Act, which forbids an employer to deduct dues from the members' paychecks for purposes of paying them directly to the union unless the member has so authorized in writing, the subcommittee suggested that it might be wise to require a similar employee authorization before the union and employer could agree to have any other part of the employee's wages paid to the union or to a third party, such as the Trustee under the Music Performance Trust Funds. This would require the union to poll the employees in advance of collective bargaining to determine whether they preferred to have part of their wage increase in the form of some other benefit, through the creation or continuance of a specific employee benefit plan. Although it was appreciated that this might result in some delay in the collective bargaining process, the subcommittee thought this

[82] Special Subcommittee of House Committee on Education and Labor, 84th Cong., 2d sess., Report of Musicians Performance Trust Funds 3 (Comm. Print 1956).

might be outweighed by the values of employee participation in the setting of collective bargaining policy and an administration of employee benefit plans that was satisfactory to the employees whose wages were being contributed. Since these issues went far beyond the particular problems of Local 47 and the AFM, the subcommittee recommended no more than that additional hearings be held to determine the feasibility of amending the Labor-Management Relations Act to achieve such a result. It also concluded "that further hearings regarding the operations of the musicians performance trust funds are not necessary when considered from the standpoint of possible Federal legislation. Hence, with this recommendation and report the subcommittee believes its assignment has been completed."

The report of the subcommittee, while generally sympathetic to the cause of the Hollywood musicians, must have provided only cold comfort. Its rejection of the suggestion that the Federal Government had a role in regulating intraunion affairs between officers and members frontally rejected one of the major objectives of Read and his supporters. Ironically, the subcommittee's conclusion was in effect ignored by Congress when, within three years, it enacted the Labor-Management Reporting and Disclosure Act of 1959, the principal feature of which was the so-called union member's Bill of Rights. That Act gave union members the right to participate in discussions at union meetings, to vote on union business, to run for union office and to participate in the election of union officers. This congressional rejection of the suggestion that it had no role to play in assuring democratic relationships between union officers and union members was manifested in a law which bears the name of Congressman Landrum, the chairman of the subcommittee to investigate the Music Performance Trust Funds.

The subcommittee's second recommendation was not soundly based, either in precedent or in policy. Reliance on the Taft-Hartley rules regarding employee authorization for dues deduction did not prove the case for employee authorization for payments into specific benefit plans. The decision to require payment of union dues is one which the union and employer make in collective bargaining, without advance consent from individual employees.

The consent is necessary only to approve a particular method for paying those dues (i.e., checkoff from periodic wages) in the absence of which the employee would have to pay the dues directly. Democratic determination of employee compensation policy is normally pursued into through advance direct vote of the membership, which the subcommittee acknowledged would commonly be impractiable and time-consuming, but through the designation of negotiating committees and often through post-negotiation ratification procedures. Whatever the strength or deficiencies of the subcommittee's suggestions for further hearings on the matter of pre-negotiation membership approval of benefit plans, it appears that no such hearings were convened and no such legislation introduced.

THE TRUST FUND LAWSUITS

In late 1956 and early 1957, four lawsuits were brought in the California state court by film and recording musicians who were members of Local 47. In each case, the defendants were the American Federation of Musicians, the Trustee of the Music Performance Trust Funds, and companies in either the recording industry or the film industry. Each lawsuit attacked the legality of one or another Music Performance Trust Fund, sought an injunction against payments to the Trustee and the appointment of a receiver to collect Trust Fund moneys for the plaintiff musicians instead, and sought damages against the Federation on account of payments already made to the Trust Funds. The theory of recovery in each case was that the Federation, through its trust fund policies, had violated its fiduciary obligation as exclusive bargaining representative for the film and recording musicians. The actions were brought in the California state court to guard against the possibility of the transfer of the case to a federal court in New York, where both the Federation and the Trustee had their principal offices, to the great inconvenience of the plaintiffs and other principal witnesses.

The first lawsuit, *Anderson* v. *American Federation of Musicians*, was filed on November 20, 1956; it attacked the Music Performance Trust Fund pertaining to the phonograph record industry. The second lawsuit, *Atkinson* v. *American Federation of Musicians*, was filed on November 29, 1956; it attacked the Music

Performance Trust Fund pertaining to theatrical motion pictures. *Beilmann* v. *American Federation of Musicians*, filed on April 30, 1957, attacked the Trust Fund pertaining to films made for television. *Bain* v. *American Federation of Musicians*, filed June 6, 1957, attacked the Trust Fund pertaining to electrical transcriptions of radio programs and to commercial announcements ("jingles and spots") for radio and television.

Anderson, involving the phonograph record industry, proved to be the principal case. It was brought first, since it was thought to be the strongest case for the plaintiffs. It was the case which was the subject of protracted proceedings regarding a major issue of state-court jurisdiction, proceedings which made their way to the Supreme Court of California and to the United States Supreme Court. It was the only case of the four that went to trial, with twenty-four days of hearings. And it was the case which resulted in a judgment for the plaintiffs and precipitated the settlement of the other three.

The style and theories of the *Anderson* complaint set the pattern for the complaints which followed. The plaintiffs in Anderson were recording musicians covered by the 1954 Labor and Trust Fund agreements with the phonograph record industry. All of the ninety-one named plaintiffs, with the exception of Cecil Read, were members of the Federation and of Local 47, and they purported to represent a group of 6,000 members. The defendants were the American Federation of Musicians, the Trustee of the Music Performance Trust Funds (Samuel R. Rosenbaum), and the phonograph recording companies which were parties to the 1954 Labor and Trust Agreements. The complaint alleged that in the negotiations for those agreements, the Federation secured the oral agreement of the companies to a wage increase for the musicians, only to induce the companies to pay these "wage increase payments" to the Trustee, in addition to the "royalty payments" paid to the Trustee since 1948 and calculated as a percentage of the price of records sold. It was alleged that this diversion of wage increase payments and royalty payments to the Trust Fund violated the Federation's fiduciary duties to the plaintiffs as their bargaining representative.

Paragraph XIV of the complaint alleged that the Federation "failed to bargain honestly, conscientiously and in good faith on behalf of the plaintiffs"; that the Federation pursued a plan and scheme of "trading away the just wage and property interests of the plaintiffs for services actually rendered and to be rendered by them, for the purpose of benefiting others than the plaintiffs through the device of such trust fund payments"; and that this action was "motivated by the Federation's hostility and opposition to the plaintiffs and their interests." Paragraph XX asserted that the responsible parties were President Petrillo and the International Executive Board, who were "actuated by the selfish aim and purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation; and in furtherance thereof, used the medium of such trust fund payments to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada who vastly outnumber the plaintiffs" and who receive "Trust Fund payments at the plaintiffs' expense." These acts were alleged to be "discriminatory and oppressively unfair" to and to constitute a "constructive fraud" upon the plaintiffs.

Having stated their theory—which today would be denominated "the duty of fair representation"—the plaintiffs alleged the underlying facts. Only some twenty percent or 53,000 of the Federation's 260,000 members earn their living solely from musical employment, and of these, 41,000 give live performances in hotels, nightclubs, restaurants, travelling bands, and the like, while only 12,000 work in motion pictures, television films, radio and recordings. Only two and one-half percent of the union's membership is employed in the phonograph record industry. While theatre and night club musicians received a fifty percent increase in gross wages from 1946 to 1954, the plaintiffs remained at the same wage scale as in 1946, despite an increase in the cost of living and an increase in the pay of allied or comparable performing artists. The benefits received by the plaintiffs from the Trust Fund have been only an infinitesimal fraction of the payments to the Fund generated by their own performances in the production of phonograph records. The Trust Fund moneys have been paid to persons otherwise gainfully employed, or persons not earning their livelihood as musicians, or persons who are not even members of the Federation, all of whom are "hostilely" and "knowingly" subsidized through the "confiscation of the wage fruits of [plaintiffs'] labors and services."

The complaint asserted that under the 1954 Labor Agreement diverting "wage increase payments" to the Trust Fund, more than $1,737,900 had been paid to the

Trustee, and that $2,250,000 more would be paid during the balance of the agreement unless the defendant recording companies were to be enjoined. (This was in addition to $5,750,000 in anticipated "royalty" payments, based on record sales, for the balance of the 1954 agreement.) The plaintiffs also alleged that they had taken an appeal against this trust fund policy to the International Executive Board, and that their resolutions on the issue submitted at the 1956 Convention had been rejected. They had thus exhausted all avenues of relief within the Federation, and any further such effort would be futile.

The complaint articulated three other causes of action: one under the California Labor Code, which barred an employer's withholding of any part of an employee's wage "either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person";[83] one against the Federation only, in the amount of $1,737,900 for wage increase payments already paid to the Trust Fund under the 1954 agreement; and another only against the Federation for royalty payments in the amount of $6,750,000 already paid, in the preceding four years, as royalties to the Trust Fund (the four-year period apparently having been dictated by the applicable statute of limitations).

The relief requested on the principal cause of action was an order forbidding the defendant recording companies from making any wage-increase payments or royalty payments to the Trust Fund and requiring them instead to make such payments to the recording musicians; requiring the Trustee to hold the Trust Fund for the benefit of the musicians who recorded the phonograph records, or their heirs; forbidding the Trustee to disburse any past or future wage increase payments or royalty payments to anyone other than the recording musicians (who were to be adjudged to have a property right in such payments); impounding all Trust Fund payments presently or in the future in the custody of the Trustee, such moneys to be transmitted by the recording companies and the Trustee to a receiver appointed by the court or directly to the court, and to be divided among the recording musicians according to shares determined by a referee to be appointed by the court.

The *Atkinson* case challenged the Federation's decision in June 1955 to divert to the Trust Fund the re-scoring fees formerly paid to recording musicians upon the release of theatrical motion pictures to television. The 22 plaintiffs were musicians performing in motion pictures produced originally for theatrical exhibition under the Labor Agreements of 1952 and 1954, who claimed to represent some 2,400 members of the Federation. All of the named plaintiffs, with the exception of Cecil Read, were members of the Federation and of Local 47. The defendants were the American Federation of Musicians, Trustee Rosenbaum, and motion picture companies which were parties to the 1952 and 1954 Hollywood Film-Television Labor Agreements and the companion Trust Agreements, as well as other companies who bought the rights to theatrical motion pictures for purposes of distributing them to television.

The complaint set forth the terms of the 1952 and 1954 agreements, which provided that the original recording musicians would receive $25 upon the release of the motion picture to television, and also provided for the payment by the motion picture companies to the Trustee of 5 percent of the gross revenues for the television exhibition rights. These provisions for re-scoring fees or re-use payments were said by Article XIII of the complaint to reflect "an established and recognized custom, practice, trade usage and principle of wage negotiation in the motion picture industry with respect to musicians and other talent and allied crafts and unions participating in the production of motion pictures, including performers, musicians, authors and actors, whereby all such performers, auditors, actors and musicians were, and are recognized as being, entitled to" such re-use fees as an additional payment for their services in the production of such motion picture in the nature of "deferred compensation for such service, and as . . . a valuable property right." In June 1955, the International Executive Board acting on the pretext that the recording musicians or their heirs entitled to the re-use payments could not be located, which the plainiffs alleged the IEB knew to be untrue and a sham—authorized President Petrillo to make a unilateral demand upon the motion picture companies to make the re-use payments instead of the trust fund. Petrillo's action was alleged to be purposely timed so as to divert to Trust Fund recipients "vast amounts of re-use payments from then impending and publicized wholesale sales and

[83] Cal. Labor Code, §§ 222, 224 (1971).

licenses of vast libraries of motion picture companies, for use or exhibition on television."

It was further alleged that this action of the Federation violated its fiduciary duties to the plaintiffs as their bargaining representative; that it was part of a plan and scheme to utilize the bargaining power of the plaintiffs while trading away their re-use payments and just wage increments for the purpose of subsidizing Trust Fund recipients; that this was done with hostility, was a constructive fraud upon the plaintiffs, and imposed a discriminatory and oppressive burden upon the plaintiffs by confiscating the wage fruits of their labor and services; and that the purpose of Petrillo and the IEB was to perpetuate themselves in office. Statistics were set forth to show that only some 2,400 members of the Federation—less than one percent of the total membership—were employed in the production of theatrical motion pictures, and that the advent of television since 1952 had substantially reduced, jeopardized or eliminated the employment of the plaintiffs in theatrical motion pictures, while their pay from the Trust Fund was negligible.

The complaint also recited the agreements made by the major motion picture producers—RKO, Paramount, Columbia, Twentieth-Century Fox, Warner Bros., MGM, United Artists, and Republic—for the release of thousands of old films to television. It was alleged that approximately $1,495,000 in re-use payments had been diverted from the plaintiffs to the Trust Fund since June 1955, and that, unless the defendant companies were enjoined, some $5 million would be diverted to the Trust Fund from films already licensed or sold to television, and another $5 million would be diverted under licenses or sales to be made in the future.

A second cause of action was stated, as in the *Anderson* case, founded on the California Civil Code. Other causes of action were alleged regarding the five percent royalty payments under the 1952 and 1954 contracts, on the theory that these would have been used to augment the musicians' re-use payments had the Federation acted loyally, conscientiously and in good faith, and in accord with its fiduciary obligations. Separate causes of action were alleged against the Federation, seeking $1,495,000 damages for re-use payments diverted to the Trust Fund since June 1955, and $2,973,950 damages for the royalty payments in that period. A specific claim was made against defendants which were serving as licensing or distributing companies for the motion picture producers and which were thereby required to become signatories to the Trust Fund agreement; and another specifically against the Trustee for money had and received for the benefit of the plaintiffs in the preceding six months totaling $200,000.

The relief sought in the motion-picture case was comparable to that sought in the phonograph-record case: an order forbidding the motion picture companies, and the licensing and distributing companies, to make any re-use payments or royalty payments to the Trust Fund instead of to the plaintiff musicians; an order directing the Trustee to hold the Trust Fund moneys for the benefit of, and to pay them only to, the plaintiff musicians recording for motion pictures; and an order impounding moneys now or thereafter in the custody of the Trustee, appointing a receiver for the receipt of such moneys, and appointing a referee to determine the shares of the recording musicians in the payments made and to be made by the defendant companies.

The third lawsuit filed, in April 1957, the *Beilmann* case, named as plaintiffs musicians employed by companies in the production of motion pictures made primarily or solely for television under labor agreements made in 1951 and 1954, the so-called Television Film Labor and Trust Agreements. The plaintiff class comprised some 1,200 musicians. The defendants were companies, several hundred in number, which were party to the 1951 and 1954 Television Film Agreements, the American Federation of Musicians and Trustee Samuel R. Rosenbaum. The complaint adverted to the 1951 Trust Agreement which required the defendant television film companies to pay to the Trustee five percent of the gross revenues for the exhibition of television films produced under the companion Labor Agreement, including revenues from all future exhibitions and re-runs of those films. The same arrangement prevailed under the 1954 agreements.

The complaint alleged that the Federation had violated its obligation of loyalty and good faith in protecting the property interests of the plaintiffs in their wages for services, including compensation that the television film companies would have been willing to pay the musicians for re-runs of such films. Again, there were allegations of hostility; of the unfair creation of a subsidy from the bargaining power of the plaintiffs for the benefit of musicians not in the film-recording industry and not union members; of the responsibility of Petrillo and the members

of the International Executive Board, who were motivated by a desire to perpetuate themselves in office; of constructive fraud; and of the exhaustion of plaintiffs' intra-union remedies through its Appeal to the IEB and to the 1956 Convention. The plaintiffs asserted that the total number of musicians engaged in the production of television films was 1,200, less than one-half of one percent of the AFM membership; yet the members of Local 47 were alleged to provide ninety-four percent of all of the live instrumental music used for television films, and an equivalent proportion of the payments made to the Trust Fund. It was further alleged that some $2,100,000, the property of the plaintiffs, had in the past been diverted in the form of five percent royalty payments to the Trust Fund, and that $600,000 would be so diverted in the future from the television films already produced which utilized plaintiffs' services.

A second cause of action was asserted against the defendant companies which were in the business of selling, distributing or syndicating television films and were thereby required to become parties to the 1951 and 1954 Trust Agreements and to make royalty payments to the Trust Fund. A third cause of action was stated against the Federation, for the diversion of $2,100,000 made as Trust Fund royalty payments rather than as compensation to the television film musicians. A fourth cause of action was asserted against the Trustee, for money had and received in the preceding 1 year, in the amount of $800,000.

A fifth cause of action, departing somewhat from the formulations of the *Anderson* and *Atkinson* complaints, focused on the loss of musical employment on television films as a result of the substantial Trust Fund payments required by the 1951 and 1954 agreements. It was alleged that the obligation to make the five percent royalty payments created such a cost differential for the defendant film companies between live music and old soundtrack or canned music, that ninety percent of all television film made by defendants utilized foreign or canned music. Moreover, many shows formerly using live musicians had been discontinued, allegedly as a result of the Federation's Trust Fund policies. Article XXXV of the complaint asserted that these policies had "virtually destroyed and traded away the plaintiffs' employment opportunities in the production of television films, for the benefit of the trust fund, and to the grievous economic injury and detriment of the plaintiffs." The plaintiffs sought a declaration that the 1954 Television Film Trust Agreement was invalid, along with the condition in the Labor Agreement that defendant companies hire no musicians until the companies had agreed to make payments to the Trust Fund. A sixth and related cause of action for damages, solely against the Federation, rested on the harm to the plaintiffs' employment caused by the royalty provisions, and the fact that the television film companies were ready, willing and able to employ plaintiff musicians without paying royalties, and also to negotiate reasonable re-run payments to the plaintiffs for the exhibition of television films.

The relief sought was, principally, an order forbidding the defendant companies to pay royalties to the Trustee and requiring such moneys to be paid to the plaintiffs; an order requiring the Trustee to hold the five percent royalty payments for the benefit of the plaintiff musicians, as their property, and to pay such moneys only to them; an order impounding the royalty payments now or in the future in the custody of the Trustee, appointing a receiver, and appointing a referee to ascertain the plaintiffs' equitable shares; an order authorizing the defendant companies to employ plaintiffs without performing the conditions of the 1954 Trust Fund Agreement; and an order barring the Federation from disciplining plaintiffs working for companies which were not making royalty payments to the Trust Fund; and a judgment for damages of $2,900,000.

The fourth lawsuit filed, *Bain* v. *American Federation of Musicians*, was something of a catchall, but its principal attack was upon the diversion to the Trust Fund of royalties from the re-use of radio transcriptions. The plaintiffs, a class of some 1,000 musicians all of whom were members of the Federation and of Local 47, were employed in the making of electrical transcriptions for radio, and of commercial announcements ("jingles and spots") for radio and television. The defendants were the American Federation of Musicians, the Trustee of the Music Performance Trust Funds, and companies which were parties to the 1948 Electrical Transcription Labor and Trust Agreements. It was stated that the 1948 Electrical Transcription Labor Agreement (expiring on December 31, 1953) provided that if a signatory company wished to re-use or to dub a transcription or a commercial jingle or spot, it would first have to secure the permission of the Federation and to pay the recording musician the full scale payment that would

be applicable to the new use, as additional compensation for the original performance. The same re-use restriction clause was also to bind persons to whom the signatory recording companies might sell the transcription. All signatory companies also had to sign the 1948 Electrical Transcription Trust Agreement, which obligated them to pay to the Music Performance Trust Fund three percent of the gross revenues derived when electrical transcriptions, jingles or spots were used more than once on radio, such obligation lasting as long as the transcription continued in use.

The complaint alleged that these Trust Fund payments were in substance wage increases for the plaintiffs and were improperly diverted by the Federation, in breach of its fiduciary duties and its obligation to bargain honestly, conscientiously and in good faith. The plaintiffs were alleged to constitute less than one-half of one percent of the Federation's membership, and to have been the object of a hostile attempt by President Petrillo and the International Executive Board to perpetuate themselves in office through their trust fund policies. It was requested that the court adjudge that re-use fees and royalties were the property of the plaintiffs, and that the union could not alter the dubbing restriction clause and the re-use restriction clause in the Labor Agreements except for the benefit of the plaintiffs who recorded the electrical transcriptions or the jingle or spot announcement.

Further causes of action were alleged to arise from several other transactions: the Transcription Labor and Trust Agreements of 1954, which increased the royalty payments to be made to the Trust Fund upon the use of electrical transcriptions; the 1954 and 1956 Labor Agreements relating to television jingles and spots, which provided for the payment of $100 to the Music Performance Trust Fund for each jungle or spot when first exhibited on television; a 1954 agreement between the Federation and the radio networks which authorized the re-use of transcriptions by a different sponsor from the original one, provided re-use payments of $27 per musician were made to the Trust Fund (in contrast to the $54 scale rate which had previously been paid for such re-use to the recording musicians). Claims were also asserted against NBC and CBS for diverting to the Trust Fund re-use payments deriving from the re-broadcast, with new sponsors, of transcriptions of such radio shows as Gunsmoke, Jack Benny, and Dragnet; against the AFM, for $2,150,000 allegedly wrongly paid to the Trust Fund pursuant to the union's Electrical Transcription Labor and Trust Agreements; and against Trustee Rosenbaum for $200,000 for moneys had and received in the preceding year.

In each of the four Trust Fund lawsuits, the Federation—usually joined by the other defendants—raised a number of defenses. At the threshold, it was argued that Trustee Samuel R. Rosenbaum was, under California law, an indispenable party who had to be personally served within California in order to confer jurisdiction on the court. Rosenbaum had in fact been served in New York City. Moreover, were the California Code of Civil Procedure to be construed to permit such constructive service, it would violate the constitutional rights of the Trustee under the Due Process Clause of the Federal Constitution. The defendants then proceeded to contend that, even if the California court could constitutionally assert jurisdiction, the plaintiffs had no case on the merits. The Federation, it was argued, was empowered as the exclusive bargaining representative under the National Labor Relations Act to enter into the Trust Fund agreements to create employment opportunities for the benefit of the entire Federation membership, a power that was also conferred by the bylaws of the Federation. Even if it were to be determined that the plaintiffs did have some grievance on the merits, however, this was said to be barred by such affirmative defenses as statute of limitations, laches, estoppel, waiver and ratification, given the substantial period of time during which the plaintiffs had raised no protest regarding the Federation's negotiations for the Trust Fund payments. Finally, the defendants claimed that the power of any court to hear these actions was pre-empted by the exclusive jurisdiction of the National Labor Relations Board.

In December 1956, shortly after the filing of the *Anderson* and *Atkinson* lawsuits in California, Trustee Rosenbaum initiated in the State court of New York an action designed to test the same issues addressed in the California cases. The intention was to get a more favorable ruling on the merits, more expeditiously, and in a more convenient forum. *Rosenbaum* v. *Melnikoff* named as defendants the American Federation of Musicians, the signatories of the labor and trust agreements in the phonograph record industry and the theatrical motion picture

industry, and some two dozen musicians previously employed in the production of phonograph records and in the scoring of motion pictures made primarily for theatrical use and thereafter released to television. The New York action was one for a declaratory judgment, adjudging the validity of all of the pertinent labor and trust agreements and determining that the defendant Federation had violated no duty to the recording and film musicians. If the New York court were to determine that the musicians named as defendants there were representative of the same class of musicians as were plaintiffs in the *Anderson* and *Atkinson* cases in California, this would significantly impair the effectiveness of the California lawsuits and presumably render any decision in New York preclusive of a decision on similar issues in California.

Plantiffs in the *Anderson* case moved quickly, and on December 4, 1956, Judge Ford issued a temporary restraining order barring the making of any "wage increase payments" by the phonograph record companies to the Trustee until the court could pass upon the motion of the plaintiffs for a preliminary injunction against such payments and for the appointment of a receiver to impound such moneys. Depositions were taken in late December and early January, and after three days of hearings in mid-January 1957 (in both the *Anderson* and *Atkinson* cases) Judge Ford denied the motion for preliminary relief upon the ground of lack of jurisdiction. He concluded that the non-resident Trustee was an indispensable party and that provisional relief could be granted by a California court only if the Trustee were personally served there. The office of the Trustee was in New York, all collections for the Trust Funds were made there, and disbursements originated there. Judge Ford stated that, had there been no jurisdictional defect, sound discretion would have probably warranted the issuance of a preliminary injunction against further payments to the Trust Funds. Although technically, the ruling merely prevented the issuance of injunctive relief, and left viable the plaintiffs' claims in the two cases for some $13 million in damages for the past diversion of plaintiffs' compensation, it appeared likely that the court would ultimately conclude that Trustee Rosenbaum was as indispensable to the disposition of that claim as he was to the disposition of the equitable claim for injunction and the appointment of a receiver. Plaintiffs promptly prepared for an appeal of the order of Judge Ford, and moved for an injunction pending appellate review, but Judge Ford denied the motion.

On February 6, 1957, the *Anderson* plaintiffs filed a petition in the District Court of Appeals—styled *Anderson* v. *Superior Court of the State of California*—seeking a writ of mandate commanding the lower court to assume jurisdiction over the request for preliminary relief in the *Anderson* case. On April 24, the district court of appeals in a unanimous decision directed that a writ of mandate issue commanding the lower court to assume such jurisdiction.[84] On yet a further appeal, to the Supreme Court of California, another unanimous decision issued, on December 6, 1957, affirming the intermediate appellate court and directing that the trial court assume jurisdiction over the plaintiffs' motion for a preliminary injunction and the appointment of a receiver pendente lite.[85] The Supreme Court of California concluded that any court of that state having jurisdiction over the defendant recording companies, which were subject to the claims of the Trustee for payments to the Trust Fund, also had jurisdiction, upon constructive service of the Trustee outside California to adjudicate the ownership of the moneys, debts, funds and obligations impounded by the receiver or owed by such resident debtor-defendants.

The trial court in *Anderson* could therefore issue a preliminary injunction against recording companies doing business in California, to appoint a receiver for the collection of Trust Fund payments and to exclude the Trustee from any right, title or interest in moneys due from the companies or moneys held by the receiver. The state Supreme Court held that such an exercise of quasi in rem jurisdiction would be consistent with the Fourteenth Amendment to the federal constitution. The court issued its writ of mandate on December 6, 1957. Counsel for the Federation and the major phonograph record companies sought review in the United States Supreme Court. An application to Mr. Justice Douglas to stay the judgment of the California Supreme Court was denied, and on June 30, 1958, the Court denied certiorari.[86] Throughout this entire proceeding for writ of mandate, Judge Ford had continued in effect the temporary restrain-

[84] 310 P.2d 145 (1957)
[85] 49 Cal. 2d 338, 316 P.2d 960 (1957).
[86] 357 U.S. 569 (1958)

ing order barring the making of any wage increase payments by the defendant phonograph record companies to the Trust Fund; this effectively created a res upon which the jurisdiction of the California trial court could operate in the *Anderson* case.

On January 8, 1958, after the decision of the California Supreme Court and before the denial of the writ of certiorari, the *Anderson* plaintiffs secured a favorable ruling from Judge Ford on their renewed request for preliminary relief. He issued a preliminary injunction restraining the defendant recording companies from making any wage increase payments to the Trustee, and he also granted plaintiffs' motion for the appointment of a receiver pendente lite to collect and impound such funds. The plaintiffs were required to post an injunction bond in the amount of $50,000, and the Citizens Bank was appointed receiver pendente lite.

Although the time had apparently arrived for all parties to the California lawsuits to develop their case on the merits, the litigation tangle drew more intense. When Trustee Rosenbaum, President Petrillo and other Federation officials failed to respond to the plaintiffs' requests for depositions, the plaintiffs had to resort to the trial court in New York to issue a subpoena duces tecum in aid of the California litigation. A subpoena was issued; the Federation and the Trustee moved to vacate; the denial of the motion was appealed to the New York Appellate Division and then to the New York Court of Appeals, both of which sustained the issuance of the subpoena. Other subpoenas were issued, avoided and attacked, in the courts of both New York and California. Ultimately, the Federation entered into a stipulation for the taking of the depositions of Petrillo and other members of the International Executive Board in New York City in late April and in May 1958. Depositions were taken, and other pre-trial discovery pursued.

THE RISE OF THE MUSICIANS GUILD AND THE NEW REGIME IN THE AFM

By the end of 1957, Cecil Read and the other dissidents in Local 47 had fought their battle against the international union and its officers at several levels. They had pursued an Appeal to the International Executive Board, which had shunned their attack upon the union's trust fund policies. They had attempted to take over control of Local 47, but that led to their trial on charges before the Executive Board and their expulsion from union membership. They had instigated Congressional hearings and apprised a legislative subcommittee of their union's autocratic operations and of their economic plight, but no legislative initiative developed. They had commenced four massive lawsuits in the courts of California, seeking millions of dollars and the effective dissolution of the Music Performance Trust Fund. The dismissal of their case had just been reversed by the California Supreme Court, and a long road lay ahead before judgment could be rendered. As 1958 began, the dissidents planned for a more direct attack upon the control and the policies of the Federation. They formed a rival union.

In January 1958, the labor agreement between the Federation and the motion picture producers had expired and negotiations were proceeding for a new agreement. These negotiations were conducted at the national level. The principal spokesman for the union was, of course, President Petrillo, who was aided by union representatives from the major studios. In addition, there were representatives present from Local 47, who had prevailed on Petrillo to participate in the negotiations; they were formed into a committee of some sixty persons, with representation from the musicians at all of the studios, and they had formulated some fifty-five proposals, some of which were not fully considered. Although Petrillo was somewhat wary of the bargaining ability of the group from Local 47, he felt that the officers had supported him in the conflict with Cecil Read, and he gave them some responsibility in the negotiations.

The film producers were proving intransigent. With the downslide in motion picture attendance and production, there was a reduced need for full-time staff musicians in the studios. These musicians were paid an annual salary for their services, but some were drawing a full year's pay by putting in only 150 to 350 hours of work. Moreover, the studios had already released to television many of their theatrical motion pictures made before 1948; the exhibitors had expressed concern about the release of later motion pictures, for fear that their availability on television would eat yet further into their box office proceeds. But the studios were anxious to win the contractual right to release to television some

of their post-1948 films to free those films from royalty payments to the Music Performance Trust Fund. What had been an obligation to pay five percent of the gross revenues along with the $25 re-scoring fees (based on the number of musicians in the original film) had been converted into an obligation simply to pay 6 percent of the gross revenues to the Trustee.

On the other side of the bargaining table, the Federation proffered the demands of the Local 47 musicians, which could only be characterized as extravagant, given the state of the motion picture industry. Demands were made for more than a doubling of the wage scale, and for substantial increases in the size of the studio staff orchestras. Petrillo urged his bargaining team to become more realistic and to limit their demands to the most important. But the committee from Local 47 responded by taking all of their fifty-five proposals and incorporating them into five omnibus demands.

The producers walked out of the negotiations, and the Federation called a strike among the motion picture musicians. The producers continued to score their soundtracks, first by recording in Mexico and England and then, after the AFM secured the cooperation of the unions there, by recording in Munich and Rome. The studios sent their editors, composers and orchestra leaders to Europe, and scored soundtrack there for less than the cost would have been in the United States. A Federation-induced public boycott of these films had no serious impact.

Cecil Read became fearful that the widespread use of foreign musicians and canned soundtrack, which had been so harmful to the Hollywood musicians in television films, would deal a similar blow to their employment in theatrical films. He saw that the studio strike was having little effect, and there appeared to be little concern on the part of Petrillo, who was about to have his deposition taken in the pending lawsuits brought by many of the Hollywood musicians. In March, 1958, Read rented a hall and called a meeting of interested film musicians; some 125 of the 300 studio staff musicians attended. Read encouraged those in attendance to petition Petrillo to reopen negotiations wiht the producers and to eliminate or modify the Trust Fund arrangements in order to save employment in the motion picture industry. This petition proved unavailing. Read became convinced of the need to form a rival union among the motion picture musicians, and to oust the AFM as their bargaining representative.

In April 1958, Read and four others formed an association, the Musicians Guild of America. Authorization cards were distributed among the film musicians who were assured that their signing would be held in confidence: the obvious sanction for such dual unionism would be expulsion from the AFM and the likely loss of job opportunities. Meetings were held at Read's home, and space was rented for a Guild office. Donations were sent to the Guild by many of the members of Local 47. That same month, the Musicians Guild of America filed a petition with the National Labor Relations Board for a representation election. Under the applicable law, the filing of the petition forced a cessation of bargaining between the Federation and the studios. The strike was also effectively terminated, a development which laid open the officers and members of the Guild to the charge of George Meany, President of the AFL–CIO, that they had "committed the grievous sin of strike breaking against their union brothers." [86a]

Hearings before the NLRB were scheduled for June 1958. The Federation was under substantial pressure; it was being sued for millions of dollars in the four California lawsuits, its strike effort was weak and its strike fund was depleting, and a representation campaign would have to be waged. The Federation therefore stipulated that the appropriate bargaining unit in which the election was to be held would be all those musicians who had two calls to work during the preceding eighteen months at the major movie studios in Los Angeles County. Roughly 1,400 musicians were eligible to vote. The election was held on July 10, 1958, and, by a narrow margin, the Guild won.

Negotiations promptly commenced between the Guild and the producers, covering both theatrical motion pictures and the films made by the producers for direct use on television. Unencumbered by a nationwide constituency, the Guild could focus its attention soley upon the economic situation of the Hollywood musicians. A major problem that had to be addressed—at this time it preoccupied both the national leadership of the AFM and the leadership and members of the Musicians Guild of America—was the extensive use of canned music, American and foreign, in the scoring of films. It was the hope of the Guild that

[86a] International Musician, Aug. 1958, p. 45.

it could secure more employment for its members in the Hollywood studios, particularly in television films. It was also the hope of the Guild that it could secure a favorable contract with the Hollywood producers and use that as a springboard for successes in other segments of the entertainment industry.

It turned out that their task was more onerous than they had anticipated; ironically, in some considerable measure because they had along the way secured a long-sought objective, the end of the reign of James C. Petrillo. In late April 1958, Petrillo had been subjected to very intensive questioning through depositions in the Trust Fund lawsuits. the next month, which was one month before the Annual Convention of the Federation—scheduled for June 2, 1958 in Philadelphia—the May issue of the International Musician carried a lengthy letter to all of the officers and members of the Federation, from President Petrillo, announcing his intention to decline to accept the nomination of the Convention as President of the Federation.[87] Petrillo recounted his long service in the labor movement, with the Chicago local, the international union, and the American Federation of Labor and A.F.L.-C.I.O. He stated that his intention had been to retire at the 1957 Convention but that he had reconsidered because of the then recently initiated trust fund lawsuits in California. Now that he had given his deposition, and had been advised by his attorneys that the suits might go on for years, he felt that the time was right for retirement.

"I cannot say that I am a sick man, but I am a tired man and I do not seem to have the recuperative powers I used to have. My doctor advises me that if I continue as President, I would have to take things easy. I just can't take it easy in this position without hurting the organization I love." Poignantly, he made reference to the many good labor leaders who "have made the vital mistake of remaining on the job when their usefulness to the organization they represent is a thing of the past." Adverting to the need for stamina in coping with negotiations and with restrictive labor laws, Petrillo noted that "the position requires a vigorous, younger man with bright, new ideas."

In reflecting upon his accomplishments, Petrillo in his letter gave first mention to the creation of the Music Performance Trust Funds in the record and motion picture industries, and the fact that the funds had both encouraged the appreciation of live music by the public and generated employment for union members. He extolled the practice of democracy within the union, and expressed his gratitude to those who had supported him in times of adversity in the face of attacks both from within and without the union. "I am leaving you an honorable organization with a good, clean record, which gives me great personal satisfaction. But after 42 years as a labor leader, I believe the time has come when I am entitled to spend whatever years I have left in relaxing and doing the things I want to do for my family, my friends and myself." Petrillo was 66 years old at the time of his announcement.

At the June 1958 Convention, hundreds of delegates—led naturally enough by a band—marched down to the stage, urging Petrillo to reconsider his decision to resign, but the urgings were to no avail.[88] The contestants for the Presidency were Herman D. Kenin, a member of the International Executive Board since 1943 and a former President of Local 99 in Portland (and a former practicing lawyer), and Al Manuti of Local 802 in New York City. Petrillo stated that when he had become President of the Federation he was recommended by his predecessor, Joe Weber; and he said that he, too, had his own successor in mind and would identify him should the Convention so desire. On motion, the Convention expressed its desire, and President Petrillo named Mr. Kenin. The election was held the next day, and Kenin won by a vote of 1,195 to 608. A resolution was introduced to have Petrillo made an advisor to the union and its officers, to receive his former presidential salary for the rest of his life, but Petrillo declined to accept any salary so long as he continued to receive a salary as President of the Chicago local.

The attention of the Convention delegates was not focused exclusively on the presidency, for the next day a resolution was introduced seeking a concerted effort within the union to deal with the problems created by the Musicians Guild of America and with the intimations within the motion picture and recording industries that the Trust Funds might be terminated. The resolution was offered "to the end that this Federation can emerge as a unified organization and so that we can destroy once and for all the possibility of a Guild dual in purpose to the

[88] International Musician, July 1958, p. 29.
[87] International Musician, May 1958, p. 6.

A.F. of M., with the danger of a bitter conflict which can end chaos for all musicians." [89] After discussion, the resolution was reworded so as to refer simply to the "difficulties in Los Angeles" and was endorsed by the Convention and later Adopted by the International Executive Board, which referred the resolution to President Kenin.[90]

In the summer and fall of 1958, as the Musicians Guild of American was negotiating an agreement on behalf of the Hollywood film musicians, Kenin began to articulate and implement a philosophy which was far more congruent with that of the MGA than was ever the case under President Petrillo. In August, after negotiations with two large producers of television films, Revue Productions and Desilu Productions, the Federation executed agreements which placed priority upon security of employment and dramatically curtailed the producers' obligations to make Trust Fund payments. These contracts, running for 5 years, provided for a 10 percent pay increase after the third year, and also for employment guarantees for American musicians, even for film shows formerly utilizing canned music. The Revue contract provided for a payment of only 1 percent of revenues to the Trust Fund, in contrast to the 5 percent payments which had formerly obtained. The Desilu contract eliminated altogether the concept of a percentage payment to the Trust Fund derived from the gross revenues on each production, and substituted a diminishing-scale flat-fee payment for the second through the fifth re-runs of the show.[91]

The next major shift in emphasis in the trust fund policies of the Federation came with a speech by President Kenin on September 21, 1958, in Newburgh, New York.[92] Adverting to the dual-union movement in Los Angeles and the attacks upon the Trust Funds, Kenin stated: "The Trust Funds are not major objectives of the Federation. Indeed, accurately speaking, they are not objectives at all. They are rather a means—an important one, but just one of several—to achieve the Federation's basic objective. And that objective, of course, is live jobs for living musicians or, put otherwise, the survival of live music." He labeled "absurd" the suggestion that the Federation was more interested in the growth of the Trust Funds than in the welfare of the members. "The fact is, of course, that the Federation has always stood willing, able and even anxious to exchange Trust Funds payments for direct live employment. That is the whole point of the Funds and the consistent policy of the Federation." He referred to the recent television film contracts, and their "conversion" of trust fund payments into guaranteed employment, as not an abandonment of the trust fund policies but a "complete fulfillment" of them. "We shall use the Trust Funds solely to advance the job opportunities and standards of our members."

Kenin then turned in his speech to the certification of the MGA as bargaining representative for the major motion picture producers. He expressed his fear that dual unionism in a time of diminishing work opportunities would undermine the objectives of the union movement. "Where jobs are relatively few and job seekers are relatively many, and there is no single scale set by a single union, the result is obvious:—wages and other conditions can only go in one direction—down—way down." He pointed to the MGA negotiations just completed with the producers of theatrical and television films, and outlined the extent to which the Federation's achievements in those industries had been undermined by the MGA through its weakness and its lack of experience.

It was indeed within the same month as the Kenin speech, September 1958, that the Musicians Guild of America had consummated an agreement with the major motion picture producers, some two months after their NLRB election victory. The objectives of the Guild were to reduce unnecessary costs in the scoring of television film, principally by eliminating payments to the Trust Fund, to increase employment of the Hollywood musicians in substitution for canned music, and to increase their wage scale. The agreements permitted the television film producers to develop a "track library" for each series, containing the show's theme music, opening and closing music and the like; and to re-use that library on that series. Beyond that, every show had to use some music recorded live by American musicians represented by the Guild. At least one recording session of 3 hours was to be called for each series, at which all of the music to be used in 13

[89] International Musician, Aug. 1958, p. 37.
[90] International Musician, September 1958, p. 43.
[91] International Musician, Aug. 1958, pp. 6–7.
[92] International Musician, Oct. 1958, p. 8.

segments of that series (one-third of a season) could be scored. The producers agreed that they would not use the soundtrack of any television film recorded during the agreement for any other television film or series, during the life of the contract and for ninety days thereafter. Similar restrictions were made applicable to theatrical motion pictures: old track would not be used in films made in Los Angeles during the term of the contract and for ninety days thereafter, and in the same time period soundtrack recorded by Guild musicians would not be used in any other film released for theatrical exhibition.

Although the Guild negotiators would have wanted to secure residual payments for its members when television films were re-used in subsequent seasons, they felt that their association did not have the economic power to extract such a concession from the film producers. Of course, the principle of the re-use or residual payment, tantamount to a "property right" or a "performance right" in the musicians' creative performance, was one which had been embraced by Cecil Read in the Trust Fund Appeal in January 1956, the Trust Fund Hearings in April 1956, and the Trust Fund lawsuits in late 1956 and early 1957. But it was one thing to embrace that claim in principle, and another to implement it in collective bargaining. The MGA knew that were it to induce a work stoppage in support of its claims for residual payments, the television film producers would simply revert to the use of canned music.

As the September 1958 speech by President Kenin demonstrated, the leaders of the AFM were quick to subject the MGA film agreements to detailed criticism. They pointed out that under those agreements theatrical motion pictures could be released to television without the Guild's consent; that soundtrack from one film could be dubbed into any other film if the producers could hold out beyond ninety days in the next negotiation; that soundtrack made for a television film could be dubbed into a entire series; that the Guild contract contained a no-strike provision; that canned music (the "library track" of theme songs) could be dubbed in with live music. All of these concessions were condemned as significant retreats from longstanding policies of the Federation. The MGA had also given up studio staff orchestras with a guaranteed salary, and substituted a system of so-called casual or free-lance employment. Moreover, it had permitted the film producers to score the music for an entire 13-week series in one 3-hour session (at scale of $55 for orchestras of 35 or more) while, although the AFM scale was somewhat less, the Federation contracts had authorized the scoring of only one film per session. The failure of the Guild to secure residual payments came under particularly heavy attack. President Kenin referred to the longstanding AFM policy against the unregulated use of theatrical film on television, and said that this was discarded by "a man who for 2 years was ranting and raving about the fundamental rights of performing musicians to residual payments. Under his contract, motion picture films can be used on television repeatedly and endlessly without payments either to the individual performers or to the trust funds." [93]

Undaunted by the AFM criticism of their agreements in the Hollywood motion picture studios, the leaders of the Guild filed with the National Labor Relations Board in October 1958 a petition for another representation election, this time on behalf of musicians engaged in making phonograph records in Los Angeles County. As with the bargaining unit limited to the Hollywood studio musicians, the Guild hoped that by limiting itself to this narrower geographic constituency, it could secure a majority of the votes and free itself of the Federation's trust fund policies. Because of the limitation of the Guild's petition to the Los Angeles recording musicians, it served as no legal obstacle to the commencement of negotiations for a new agreement between the AFM and representatives of the phonograph companies covering recording elsewhere.

The Federation negotiated a new agreement, with a 5-year term, in January 1959. Once again, the agreement reflected a retreat by President Kenin from his predecessor's single-minded attention to the growth of the Music Performance Trust Funds. The improvement in the wage scale for the recording musicians was dramatic. In December 1958, scale pay for these musicians was $41.25 for a 3-hour recording session, the same as it had been for 13 years. The former contract had also required that 21 percent of scale, or $8.66, multiplied by the number of recording musicians was to be paid to the Music Performance Trust Funds. In the contract of January 1959, scale was increased to $48.50, still less than the two payments under the previous agreement. But the new agreement created for

[93] *Id.* at 13.

the first time in the industry a Pension Plan, into which the recording companies were to pay 5½ percent of scale per musician (in this instance, an additional $2.67). The agreement also provided for increases in scale in each successive year, so that beginning in October 1962, a musician received $56 for a 3-hour session; in addition, the payments due to the Pension Fund increased to 8 percent of scale earnings, generating total compensation of $60.48.

Consistent with the new approach that had been reflected in the television film contracts negotiated by Kenin within 2 months of becoming President of the Federation, the 1959 agreement provided for a cut-back in the contributions of the phonograph record manufacturers to the Music Performance Trust Fund. From January 1956 through December 1958, the "wage increase payments" of 21 percent of scale, which had been so controversial when negotiated by President Petrillo in January 1954, had been paid to the Trust Fund. In the agreement of January 1959, those payment were eliminated. The Trust Fund obligation of the recording companies was to revert to the previous payments of roughly 1 percent of the retail price of records sold. In a pamphlet distributed by President Kenin, in which he described the new agreement and pointed out the new benefits secured therein, he stated: "Many of our recent gains were made possible by exchanging Music Performance Trust Fund contributions for jobs, pensions, residuals, and pay increases."

Section 21 of the new phonograph record industry agreement adverted to the petition currently pending with the NLRB seeking a representation election in Los Angeles. That section stated: "The parties hereto believe that the unit sought therein is clearly inappropriate. Out of deference to the processes of the Board, however, the parties agree that, in the case of any company which is named as a party in any such petition, the increase in minimum scale provided for in this agreement shall not be paid for services performed in Los Angeles County unless and until said petition is dismissed or otherwise finally disposed of in favor of the Federation." It provided that such companies were, in the interim, to open an escrow account and to deposit currently, at the same time they were paying wages to the musicians, the difference between the 1954 scale and the scale provided for in the new agreement.

Other industry agreements negotiated by the American Federation of Musicians in 1959 continued to pay greater attention to the compensation of the film or recording musician and somewhat less attention to the Music Performance Trust Funds. In February 1959, agreements covering live radio and television programs on the networks sought to maintain staff orchestras in some of the larger cities at a time when the need for them, particularly in radio, was sharply dwindling. These agreements also established pension funds in these industries for the first time. In May 1959, new agreements between the Federation and the television networks, covering television film, continued the pattern of the Revue and Desilu agreements by reducing Trust Fund payments in exchange for increased live employment of musicians. In November 1959, a new agreement relating to jingles and spot announcements in radio and television traded Trust Fund payments for wage increases, residuals and pensions for the recording musicians.

THE SETTEMENT OF THE TRUST FUND LAWSUITS

The period beginning in June 1958, with the resignation of James Petrillo from the Federation presidency, had witnessed a lessening of commitment by the Federation to the Music Performance Trust Funds. The Trust Funds were certainly an important element in the union's philosophy and in its bargaining activities. But the zealous attempt to expand the level of contributions to the Trust Funds, typically at the expense of the film and recording musicians, had apparently become a thing of the past. At the same time, the Trust Funds were being attacked in courts of law on three different fronts. One such front, of course, was in the state courts of California, where depositions had been taken in the spring of 1958 and the parties were preparing for trial a year later.

The Trust Fund in the motion picture industry, pertaining to the release to television of theatrical motion pictures, was also being challenged, in the Federal district court in New York. In 1957, Republic Productions, Inc., one of the major producers of theatrical motion pictures, had instituted an action in the Federal court in California, seeking treble damages under the Sherman Antitrust Act. The case was transferred the following year to the Federal district court in New York. The complaint charged that the defendants—the AFM, the International

Executive Board, and Trustee Samuel R. Rosenbaum—had conspired to restrain and monopolize interstate commerce in the distribution and licensing of motion pictures for exhibition on television. The case was not to be concluded until July of 1965, when the court dismissed the action.[94]

The New York district court traced the history of negotiations in the motion picture industry—the 1946 ban on the release of theatrical films to television, the 1951 agreement requiring that any films so released were to be fully re-scored, the 1952 agreement requiring instead the payment of re-scoring fees to the original film musicians, and the Trust Agreements requiring payments to the Music Performance Trust Fund of 5 percent of the producer's gross revenues from the television exhibition. The court considered the so-called labor exemption from the antitrust laws, found in the Clayton Act and the Norris-LaGuardia Act, and concluded that had the Federation engaged in a work stoppage to secure the above agreements, the stoppage would have been exempt from the Sherman Act; the union was acting in its self interest and was carrying out its legitimate objects in collective bargaining. If a strike to secure these objectives is lawful, so too, concluded the court, must be a collective bargaining agreement effecting those objectives. Even the 1946 total ban on release of theatrical films to television was lawful: "Its purpose was to protect professional musicians, members of the union as a whole, from the competition of recorded music. In the final analysis, therefore, the clause related to the economic welfare of union members, to their job opportunities and to the wages which they would eventually receive." [95] Although the assault by Republic Productions upon the Trust Fund was ultimately rebuffed, the case was very much alive in the period 1958 to 1965.

The third legal attack upon the Music Performance Trust Funds was directed at the fund in the phonograph record industry. It was in the form of shareholders' derivative actions brought by shareholders of the Radio Corporation of America (manufacturer of RCA Victor Records), the Columbia Broadcasting System (manufacturer of Columbia Records), Loew's Incorporated (manufacturer of MGM Records), and Decca Records, Inc., against those corporations and Trustee Samuel R. Rosenbaum.[96] Those actions were instituted in the Federal district court in New York in 1955—even before Cecil Read had been sent by the members of Local 47 to argue their case before the International Executive Board—and challenged the legality of the Phonograph Record Trust Fund under Section 302 of the Taft-Hartley Act. The claim was that the Trustee was a "representative of employees" and that therefore the payments to him from the phonograph record manufacturers were in violation of Section 302. The relief sought was an injunction against any payments to the Trustee from the companies, and any disbursements from the fund by the Trustee.

The court examined the history of the Trust Funds in the recording industry—the 1942 strike, the Recording and Transcription Fund, the 1948 strike, the Trust Agreements creating the Music Performance Trust Fund, the appointment of Mr. Rosenbaum, and the operation of the fund. The court stated that "The legislative history of Section 302 shows that it was directed against the establishment of funds exacted from employers and administered by union officials at their unlimited discretion and without any obligation whatever to account." [97] The court held that "neither the provisions of the Trust Agreements nor the Trustee's administration of the Trusts constitutes him a 'representative of employees' within the meaning of the Taft-Hartley Act." [98] This judgment was not, however, rendered until February 1959, after the Musicians Guild of America had petitioned for an election among the Los Angeles recording musicians and the AFM had negotiated an agreement in the phonograph record industry which redirected the "wage increase payments" allegedly taken from the recording musicians in January 1954 and diverted to the Trust Fund.

The principal attack upon the Music Performance Trust Funds was in the four California lawsuits spearheaded by Cecil Read. *Anderson* v. *American Federation of Musicians*, which also attacked the Trust Fund in the phonograph record industry, was set down for trial on March 9, 1959, before Judge Kincaid of the California Superior Court. The trial opened with a motion by the Federation to dis-

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[94] *Republic Prods., Inc.* v. *American Fed'n of Musicians*, 245 F. Supp. 475 (S.D.N.Y. 1965).
[95] *Id.* at 482.
[96] *Shapiro* v. *Rosenbaum*, 171 F. Supp. 875 (S.D.N.Y. 1959).
[97] *Id.* at 885.
[98] *Id.* at 884.

miss the action, premised on the absence of personal jurisdiction over the Trustee. This motion was denied, in view of the earlier test of this issue before the state Supreme Court. The Federation prevailed, however, on its demurrer to the two causes of action against the AFM for damages resulting from payments previously made to the Trustee. The court agreed with the Federation's contention that the plaintiffs as members of a voluntary unincorporated association could not bring an action against themselves. This adverse ruling induced the plaintiffs to file for a postponement of the trial on the principal cause of action for equitable relief against the Trust Fund payments; it was their intention to seek review of the demurrer regarding the causes of action for damages against the Federation. (The claim for injunctive relief based on alleged violation of the California Labor Code had earlier been withdrawn.)

This strategy, however, was abandoned when counsel for the plaintiffs learned, on March 18, 1959, that the Appellate Division in New York State had denied the request of the defendant musicians in *Rosenbaum* v. *Melnikoff* for a stay of that proceeding pending the outcome of the California lawsuits. Counsel appreciated the risk of the New York action being tried first ,with the attendant need to transport the *Anderson* and *Atkinson* witnesses and documents to New York, as well as the risk of any judgment in New York having res judicata and estoppel effects in California. The *Anderson* plaintiffs thus chose to resume the trial on their principal, and one remaining, cause of action in California for declaratory and injunctive relief against the Federation, the Trustee and the defendant recording companies. The trial consumed some twenty trial days, in March and April 1959. Judge Kincaid upheld the plaintiffs' principal contentions on the facts and the law, and held that the plaintiffs were entitled to judgment.

The Judge concluded, at the outset, that the plaintiffs had properly brought the action on behalf of a valid class and that they had exhausted all of their internal remedies within the Federation. He found, as a matter of fact, that the phonograph record companies had offered the Federation a wage increase for recording musicians in negotiations for the 1954 Labor Agreement, but that the Federation knowingly diverted this to the Music Performance Trust Fund. In comments from the bench, he fully endorsed the plaintiffs' legal theory: "[T]he representatives of the musicians, having acted in a hostile manner toward those whom they were to represent, and with a lack of complete good faith in such representations, equity will pierce the effect of such a contract to the extent within the jurisdiction of this Court, and recognize that these funds in equity and good conscience belong to the men and women who earned them by their labor and efforts." [99] Judge Kincaid then rejected the defendants' affirmative defenses of waiver, laches, estoppel, statute of limitations and ratification. Acknowledging that his jurisdiction was limited to the wage-increase payments in the hands of the court-appointed receiver or still retained by any of the enjoined recording companies, he stated: "It is the adjudication of this Court that the trustee, Rosenbaum, is excluded from any right, title or interest in or to any or all of such sums. It further adjudges that plaintiffs are in equity the owners of said funds." [100]

Written findings of fact and conclusions of law were signed by the judge on May 29, 1959. He concluded that the plaintiffs had a property right in the proffered wage-increase payments in the 1953–54 negotiation, and that the Federation had violated its fiduciary duty in diverting those payments to the Trust Fund. The defendant Trustee was deemed to have no right, title or interest to the wage-increase payments forthcoming from the defendant record companies under the 1954 agreement or already in the hands of the receiver. The preliminary injunction against the defendant recording companies was made permanent, requiring them to pay wage-increase payments being withheld by them not to the Trustee but to the receiver, the Citizens Bank, whose authority to act as receiver and make disbursements was continued by the court. Judgment for the plaintiffs was actually entered in July 24. Not surprisingly, notices of appeal were filed by the Federation and by certain of the recording company defendants. A cross-appeal was filed by the plaintiffs challenging the dismissal of the two causes of action for damages against the Federation.

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[99] Petition for Allowance of Attorneys' Fees, Harold A. Fendler and Daniel A. Weber, in *Anderson* v. *American Fed'n of Musicians*, Case No. 669, 990, Cal. Super. Ct., L.A. County, 72–73.

[100] *Id.* at 73–74.

While the appeals were pending, meetings were being held in December 1959, among counsel for the plaintiffs in the *Anderson* case, Harold A. Fendler and Daniel A. Weber; Henry Kaiser, the general counsel for the AFM; and Samuel R. Rosenbaum. The object of these meetings was to explore the possibility of settlement of all of the Trust Fund lawsuits pending in California. (The *Atkinson* case, involving the Trust Fund payments for theatrical motion pictures released to television, was also ready for trial.) The settlement discussions were pursued in a spirit of cooperation and fairness, and after several meetings, a proposed agreement was reached. President Kenin endorsed this proposed settlement in a letter addressed to the Presidents of the Locals in San Francisco, Chicago, Los Angeles, Nashville, and New York City, and it was unanimously approved at membership meetings of Local 47 in Los Angeles on April 3, 1960 and of Local 802 in New York on April 10, 1960.

The proposed settlement terms were as follows. In the *Anderson* case, all moneys presently in the hands of the receiver, totaling more than $1,900,000 (plus interest), would be distributed, after the deduction of the receiver's fees and other litigation expenses, to the recording musicians. An additional $215,000 or more, representing "wage increase payments" (calculated at 21 percent of scale earnings) which were due and owing to the Trustee from record companies which were not defendants in the California action, would be assigned by the Trustee to the receiver for collection and distribution to the recording musicians. This total of more than $2,250,000 represented substantially all of the 21 percent wage raise diverted from the recording musicians since the *Anderson* action was filed. It did not, however, include the wage increase payments at ten percent of scale, which had already been paid into the Trust Fund in 1954 and 1955, which Judge Kincaid had already held could not be recovered as damages from the Federation.

In the *Atkinson* case, Trustee Rosenbaum was to pay $1 million to the California receiver to be divided as ordered by the court among the musicians who worked on theatrical motion pictures that were released to television. The amount paid to each musician—including conductors, arrangers, copyists and contractors—would be in proportion to the number of such motion pictures in which he worked.

The *Beilmann* case, involving the 5 percent royalties payable to the Trust Fund on the exhibition of films made primarily for television, was to be settled simply upon the payment by the Trustee to the receiver of $50,000 to cover court costs and legal fees. The principal objective of that lawsuit had by then already been achieved. The new AFM television film agreements had replaced the 5 percent Trust Fund payments with a smaller flat payment on the second through the seventh re-runs; and additional employment for musicians had been secured, at the expense of foreign canned music, through more favorable agreements negotiated by both the AFM and the Musicians Guild of America.

In the *Bain* case, involving re-use of transcribed radio shows, the Trustee was to pay the receiver $50,000 covering fees, as well as $89,000 to be distributed to the musicians who had recorded certain radio shows (Jack Benny, Dragnet, and Gunsmoke); those shows had been transcribed for one-time use but had been subsequently rebroadcast upon the payment of $89,000 to the trust fund. The other principal target of the *Bain* lawsuit, the $100 Trust Fund payments on radio and television jingles and spots, had already been eliminated through changes in the Federation's contracts, which exchanged the $100 Trust Fund payments for a wage increase, pension fund contributions and a percentage re-use fee for the recording musician if the jingle or spot was used for more than 6 months.

Under the proposed settlement, the plaintiff musicians in the four cases would receive a total of roughly $3,500,000—$2 million from the receiver, and $1.5 million from the Trustee of the Music Performance Trust Funds.

The settlement proposals also had to deal with the New York proceeding in *Rosenbaum* v. *Melnikoff*, which was still pending and awaiting trial. The object was to avoid an independent judgment in New York which might undermine the disposition of the California cases. It was agreed that the New York case should be resolved in a manner "parallel" to the California cases, and that the principal step to be taken was the formal appearance of the Trustee in the California actions and his consent to the judgments there. This would have to be approved by the New York court and by the state Attorney General, under the New York law governing the operation of charitable trusts.

These proposed settlement terms were endorsed not only by President Kenin, by Trustee Rosenbaum and by the members of the Locals principally affected,

but they were also endorsed by Cecil Read and his supporters. They concluded that the settlement terms embodied to substantial degree the objectives they had been pursuing since the Appeal to the Federation International Executive Board, the "revolt" within Local 47 and the formation of the Musicians Guild of America.

All of the parties to the proposed settlement understood that it would have to be approved by the California court and by the plaintiff musicians in all of the cases, and that the Trustee would have to be authorized by the courts of New York to appear in the California actions. A petition for judicial approval of the settlement was filed in the California court in June 1960, and within a month the terms of the proposed settlement were published in the Federation's newspaper, The International Musician; in Allegro, the publication of Local 802; in Overture, the publication of Local 47; and in the Los Angeles Daily Journal. A hearing was held on the question whether the settlement should be approved by the court, and in September 1960—almost 4 years after the *Anderson* case was commenced—Judge Wolfson signed an order approving the settlement of all of the four cases. Protracted legal maneuvering, however, delayed a formal approval in New York of the Trustee's participation in the California cases until November 8, 1963, when the New York Supreme Court after lengthy hearing before a referee, determined that the settlement in California was fair and equitable and that the Trustee should be authorized to appear in the California actions for the purpose of consenting to the judgment there and to consummate the settlement.

All that now remained was to reduce the settlement agreement to a final order in California. Judge Kincaid, who had made findings of fact and conclusions of law and entered a judgment in the *Anderson* case in 1959, had since retired. But he was appointed to sit *pro tem* at the hearing of April 15, 1964, at which time the *Anderson* appeals were dismissed by stipulation, the 1959 findings of fact and conclusions of law were vacated, the written general appearance of the Trustee was filed, and a molified judgment in the terms of the proposed settlement was entered. The so-called Trust Fund lawsuits, begun in November 1956, were terminated in April 1964.

THE RECONCILIATION OF THE FEDERATION AND THE GUILD, AND THE NEW AFM LABOR AGREEMENTS

By the middle of 1960, the Musicians Guild of America was receiving mixed reviews, at least as measured by the votes of its natural constituents. Two years after its election victory among the film musicians in the major Hollywood studios. it won an election among musicians employed by the Alliance of Television Producers and it also prevailed in 10 elections involving the musicians of 10 small phonograph record companies. But it was losing its support in the major studios producing theatrical motion pictures and television films. Its contracts there had been loudly and effectively criticized by the AFM, while at the same time President Kenin was negotiating contracts in the phonograph record industry and other sectors of the television film industry which had given substantial economic benefits to the recording and film musicians, typically through dilution of the Trust Fund payments. In a proceeding before the National Labor Relations Board, the Board held that although the collective bargaining agreement between the Guild and motion picture producers was to run for 3½ years, it would serve as a bar to a fresh representation election only for the first 2 years of its duration. Accordingly, upon petition of the American Federation of Musicians a new election was held among the Hollywood musicians in the summer of 1960. Their choice was between the AFM and the incumbent Guild. and the Guild was defeated.

Negotiations were then commenced by the AFM on three fronts: with the motion picture producers covering television films (leading to the so-called Television Film Labor Agreement—Motion Picture Producers Association Pattern); with the networks covering the filmed television programs which they produced (leading to the Television Film Labor Agreement—Network Pattern); and with the motion picture producers covering theatrical films. Agreements in all three industries became effective on January 1, 1961. Those agreements marked an increased concern on the part of the AFM for the economic interests of the film musicians and a further retreat from the aggrandizement of the Music Performance Trust Funds. Indeed, the Trust Funds in those industries were effectively extinguished.

Of the three agreements, the television film agreement with the motion picture producers (the MPPA pattern) was the only one which made no provision for residual payments (or some equivalent) to the musicians for later re-uses of their recorded performance. But other substantial economic benefits were secured. Scale for a 3-hour recording session was increased to $61.75; minimum scoring hours for each thirteen weeks of a half-hour series were increased from 12 to 18 hours; "library track" could not be mixed on a television show with live music; the re-use of theme music for a single series was allowed, but not beyond 1 year; and for the first time in the industry, the producers were to make payments to the AFM–Employers' Pension and Welfare Fund, calculated at 3 percent of the employees' scale earnings. The Guild contracts negotiated in 1958 left one major legacy: no payments were to be made to the Music Performance Trust Funds for films produced during the term of the contract.

Perhaps the most dramatic benefit secured by the Federation in its 1961 agreements was the introduction of residual payments for the re-use of filmed television programs produced under the Network Pattern agreement. The formula was based upon that utilized in the 1959 television film agreement with Desilu and also upon the collective bargaining agreements negotiated in the television industry by the American Federation of Radio and Television Artists. The AFM agreement provided that when a television film produced during the contract term was exhibited on television for a second or subsequent time, the musicians who scored that film were to receive re-use payments, in declining amounts through the sixth showing. For example, if the orchestra originally performing on the television film soundtrack had 21 or more musicians, each musician would not only be paid at scale for the original recording session (the scale figure was $50), he would also be paid $125 when the program was shown a second time; $62.50 for a third showing, and the same amount again for the fourth showing; and $31.25 for each of the fifth and sixth showing; there were to be no payments for the seventh showing and beyond. The trade-off for this important benefit was the demise of the obligation to pay 5 percent of the gross revenues from re-runs to the Music Performance Trust Funds. The networks and other signatory companies also agreed to minimum scoring requirements and to a new obligation to contribute five percent of the musicians' scale earnings to the Pension and Welfare Fund.

This somewhat anomalous dichotomy between filmed television programs produced by the motion picture studios and filmed television programs produced by the networks has continued to this day. The Federation now negotiates a Television Film Labor Agreement and a Television Videotape Labor Agreement. The former governs, for the most part, television programs with a dramatic or comedy story line, while the latter—an outgrowth of live television and then of kinescope television—governs principally variety shows. There is considerable flexibility as to which producers and distributors execute which agreement, and some indeed execute both. The major difference between the two is that the Television Film agreement to this day contains no provision for residual payments to the film musicians, although that has for years been a principal demand of the Federation at the bargaining table and generally the last to be relinquished. The Videotape Labor Agreement does provide for re-use payments. However, the formula for residuals is no longer one of flat dollar payments, as it was in 1961. Now, the film musician receives 75 percent of his scale earnings for the original scoring for the second run and the same for the third run; 50 percent of scale for each of the fourth, fifth, and sixth runs of the show; 10 percent for the seventh run; 5 percent for each of the eighth and ninth runs; and no payment for the tenth and subsequent runs.

In recent years, with the opening of new markets—both geographic and technological—for television film and videotape, the Federation has expanded its interest in negotiating for the equivalent of re-use payments for the film musicians. Thus. in the videotape agreement, there is a provision for the payment of 45 percent of scale earnings to the film musician when the program is broadcast outside of the United States and Canada (subject to a reduced percentage payment if the foreign area is relatively confined). And even the Television Film Labor Agreement now provides for payments to film musicians when their television program is exploited in so-called supplemental markets such as video cassettes or pay television. For such uses, the producer-signatory must pay 1 percent of its "accountable receipts" from the distribution of the film in the supplemental markets, and this is divided among all of the musicians who recorded on that film.

with each receiving a pro rata share measured by his individual earnings on the film compared to the earnings of all musicians on that film. (A similar provision appears in the Television Videotape Agreement.) These payments are to be made to a Television Film Special Payments Fund to be distributed as additional wages for the film musicians. The current Television Film Labor Agreement also provides that if a television motion picture is exhibited in motion picture theatres, the producer has the choice of re-scoring (an option which the earlier history suggests will not often be chosen) or of paying all of the musicians who scored the film 50 percent of their scale earnings, to be paid when the film is first placed in theatre exhibition.

With the 1961 Network Pattern television film agreement, the Federation and the networks expressly recognized that some of the commercial success of a television film was fairly to be shared with the musicians who scored the film. Television films produced before that year and still being re-played on television—such as I Love Lucy, Groucho Marx, and Burns and Allen—are still generating contributions to the Music Performance Trust Funds. But the Trust Funds are drawing nothing from television films produced since 1961. Cecil Read and leaders of the Local 47 "revolt" had perhaps lost their battle with the AFM on behalf of the Musicians Guild of America, but they had won the war for the endorsement of performers' rights and for the effective demise of the Trust Fund in television films.

A similar war was won in the 1961 collective agreement negotiated by the Federation with the motion picture studios covering theatrical motion pictures. New wage scales were negotiated, with a provision that they were to be increased by five percent on October 1, 1961, and further increased by seven percent on November 1, 1962. Payment of three percent of scale earnings was to be made, for the first time, to the Pension and Welfare Fund. Most dramatically, the film producers agreed that if they released to television any theatrical motion picture made on or after February 1, 1960 (which included the last nine months of the Guild agreement), the producer was to pay to the original film musicians a pro rata share of one and two-thirds percent of the producer's receipts from the distribution of the film to television. (This was defined as the producer's gross revenues less an arbitrary forty percent to cover distribution fees and expenses.) Again, each musician was to receive a share of this fund measured by his own earnings for the scoring of the particular theatrical film in comparison to the earnings of all of the musicians. Since 1972, those payments for the distribution of theatrical motion pictures to television have been paid into a fund known as the Theatrical and Television Motion Picture Special Payments Fund, which is supervised by an independent administrator. Today's agreements also provide for the payment by the producers of 1½ percent of their gross revenues from the marketing of their theatrical motion pictures in the so-called supplemental markets, those payments also being directed to the Special Payments Fund and pro rata distribution made to the film musicians.

In exchange for the payments to the film musicians on the release of theatrical films to television, the Federation made two major concessions. Theatrical films produced during the term of the labor agreement, and subsequently released to television, would no longer generate payments to the Music Performance Trust Funds. Moreover, the Federation acquiesced in the claim of the motion picture producers that they no longer had an obligation to make payments, either to the Trust Funds or to the musicians, for the release to and exhibition on television of theatrical motion pictures which were made before 1960. Before the 1958 negotiations between the producers and the Musicians Guild of America, the producers had been paying—pursuant to the June 1955 declaration of the International Executive Board of the AFM—5 percent of their gross revenues, as well as the "wage increase payments" of 10 percent and then 21 percent of the musicians' scale earnings, to the Music Performance Trust Funds. The producers argued to the AFM, however, after the Federation had regained its status as bargaining representative, that the intervention of the Guild agreement had dissolved any obligation to make Trust Fund payments under the prior Trust Agreements. Indeed, the motion picture companies went yet further, and successfully contended that theatrical motion pictures made before 1960 were also free of the soundtrack restrictions in the earlier Federation labor agreements, so that the soundtrack from those earlier films could freely be dubbed into later ones. (There were thus no restrictions upon the utilization of the soundtrack from early MGM musicals in the recent "That's Entertainment" motion pictures.)

Although the Federation in the period from 1959 to January 1961 was thus negotiating agreements in the recording and film industries that were much more favorable than those of the past to the recording and film musicians, the Guild—although it had lost its bargaining status in the major Hollywood studios—was still a force to be reckoned with. In 1960 it had won elections among the employees of a number of television producers and a number of small phonograph record companies.

The Guild contracts with the record companies were to run for four years, during which time increases in wage rates were to be paid and contributions by the companies to the Music Performance Trust Funds were to be terminated. The Guild secured wage scales that were substantially higher than those negotiated by the Federation in its 1959 contracts with the bulk of the recording companies. Under the Federation agreements, the scale payment in 1960 was $51.50; in 1961, $53.50; and in 1962, $56. For the same years under the Guild contracts with the smaller record companies, the scale was to be $67.50, $70, and $72.50. The Guild labor agreements also required the parties "to use their best efforts to evolve an equitable plan for payments of royalties and health and welfare benefits to musicians." This provision articulated for the first time in the phonograph recording industry a commitment to the principle that record sales should generate payments to the recording musicians themselves, and not simply payments to the record manufacturers or to a trust fund.

Just as the AFM had widely advertised the perceived failings of the Guild contracts in the motion picture industry, the Guild called its higher negotiated wage scale to the attention of the recording musicians in Chicago, New York and Los Angeles. In May 1961, the Guild wrote to some 5,000 musicians, asking "Wouldn't you like to be paid Guild scales whenever you work for a record company?" and enclosing signature cards for authorizing the Guild to serve as collective bargaining representatives. The Guild promised to petition for National Labor Relations Board elections, which would oust the AFM in mid-contract. The response of the recording musicians to the Guild appeal revived the Guild's threat to the hegemony of the AFM in the phonograph record industry. The leaders of both the Guild and the AFM appreciated, however, that the Guild campaign would likely not bring total victory for one or the other among the employees of the major recording companies, and that divided representation would weaken the bargaining position of the musicians.

When a suggestion was made that the leaders of the Guild and the Federation might meet for the purpose of exploring a settlement of their differences, these leaders took prompt action. Negotiations were conducted in the summer of 1961 among Herman Kenin, Cecil Read, representatives of the governing boards of the AFM and the Guild, and the attorneys for both organizations. Contemporaneously, Kenin was appearing before the 1961 Annual Convention, and stating on behalf of himself and the International Executive Board that "we stand ready to exchange any part of the Trust Fund payments for a better deal for the working musician." [101] A number of delegates from some of the smaller Locals opposed this position, stating that the Trust Funds had been a substantial aid to them in preserving live music. A resolution was in fact made to bar Kenin's recommendation, but it was defeated by a voice vote.[102] Kenin and the Board could regard this as an invitation to take appropriate action to restore all film and record musicians to the AFM fold. By the end of the summer an agreement had been reached between the Musicians Guild of America and the American Federation of Musicians.

In a letter from Herman Kenin dated September 5, 1961, to the Board of Directors of the Musicians Guild of America, Kenin, after expressing "my personal and official thanks for the unfailing courtesy displayed by your representatives throughout the course of these conversations," stated that all parties had acted on the fundamental premise "that the interest of professional musicians could best be promoted by the consolidation of their total economic and political power into a single union." The Guild representatives had agreed to dissolve the organization as soon as possible. The Federation had agreed to take the following major steps:

(1) On the subject of re-use and residual payments, the Federation was to seek to induce the phonograph record manufacturers to pay fifty percent of the moneys currently payable to the Music Performance Trust Fund to the musi-

[101] Variety, June 14, 1961, at 45.
[102] Variety, June 21, 1961, at 51.

cians who made the recordings. "Additionally the Federation reaffirms its policy to seek residual or reuse payments for the recording musician in all other recording fields."

(2) Those former members of Local 47 and the Federation who had been expelled because of their support of the Guild were to be reinstated with full, uninterrupted rights as though they had never been expelled. All fines that had been imposed on musicians relating to their support for the Guild were to be nullified and, if already paid, those fines were to be paid back.

(3) "The Federation reaffirms its policy to grant to all musicians employed in the fields within the Federation's jurisdiction the right to ratify all contracts it negotiates."

(4) The Federation was to establish a committee, to be periodically and democratically elected by all Los Angeles members working in the recording field—records, transcriptions, theatrical and television film, and jingles and spots. The committee, whose members were to be actively working in the recording field and which was to have a representative of copyists and arrangers as well as instrumental musicians, was to have the right to communicate advice and opinions directly to the Federation on all matters relating to recording musicians. This so-called Recording Musicians Advisory Committee was also to advise the Federation on the formulation of bargaining demands, and to send a representative to serve in an advisory capacity at all Federation labor negotiations.

The Kenin letter concluded: "The International Executive Board of the Federation has already approved these understandings, and we hope that you and your membership will promptly do the same so that with the strength of unity we can all work together to realize our common objectives." Cecil Read and the other officers of the Guild called a meeting of their membership, roughly 1,000-strong, and the members gave their consent to the agreement with the AFM, and voted to dissolve the Guild and to permit their current agreements in the various entertainment industries to lapse in favor of the Federation.

Thus, by the fall of 1961, Cecil Read and his colleagues at the Musicians Guild of America had substantially achieved the objectives which they had courageously articulated and fought for some six years before. The AFM had permitted the Music Performance Trust Funds effectively to terminate in their agreements covering theatrical motion pictures, television film and television commercials, and had made a commitment to balance Trust Fund payments in the phonograph record industry with comparable payments to the recording musicians. Relieved of the burden of Trust Fund payments, all of the industries granted significant pay increases to the film and recording musicians, both in the form of direct wages and in the form of contributions to pension, health and welfare funds.

The concept of the re-use or residual payment for the recording and film musicians was embraced by the AFM, which had already negotiated successfully for such payments in network television films and theatrical motion pictures, and which was to bring them within three years to phonograph records and transcriptions, television videotape programs and television commercials. The expulsions and fines imposed upon the "rebels" of Local 47 were lifted, and they returned to full membership in the local and the Federation. As members they had the authority to participate in the shaping of collective bargaining policy and in the ratification of labor agreements. The preceding year, in September 1960, the California court had approved the favorable settlement of the Trust Fund lawsuits. The trial and judgment in the *Anderson* case had effectively established that the Federation could not unfairly or discriminately ignore the economic interests of the film and recording musicians while bargaining for a nationwide constituency. The settlement of all of those cases brought to those musicians some $3.5 million; because of the delay in the disposition of the *Rosenbaum* case in New York, and the enormous complexities of calculating the appropriate shares in the judgment of all of the musician plaintiffs, payment to the individual musicians were not begun util 1967.

It was in the 1964 contract with the phonograph record manufacturers that the Federation was first able to follow through on its promise to secure residual payments for recording musicians based on record sales. For all recordings made during the term of the 1964 agreement, the companies promised to pay into a fund for a period of 10 years from the date of first release the following percentage of income on record sales: .6 percent when the suggested retail price of the record was $1 or less; .9 percent when the price was between

$1 and $1.25; 1.45 cents for records selling between $1.25 and $1.50; 2.9 cents for records selling between $1.50 and $2; and 1.45 percent of the suggested retail price when that was in excess of $2. On the average, the musicians fund would receive 1 percent of the retail price of each record sold. In the preceding Federation agreement in the phonograph record industry, negotiated in 1959, the royalty on record sales that was to be paid to the Music Performance Trust Fund has escalated to an average of 2 percent of the retail price of each record sold. In effect, the 1964 agreement reduced the Trust Fund contributions by half, with half going instead to the fund for the recording musicians themselves.

This fund, known as the Phonograph Record Manufacturers' Special Payments Fund, was to be administered by the United States Trust Company, separate from the coffers of the union. Before distribution of the fund to the musicians, the administrator was to subtract its administrative expenses and the "manufacturers' share" of the fund, which comprised social security taxes, unemployment insurance, disability and workmen's compensation payments, and the like, which were owed by the recording companies on the payments to the fund. The remaining proceeds were to be distributed to each musician who had performed on a record in the preceding year, each musician receiving a proportion of the total distributable fund "as scale wages payable to such musician in the immediately preceding calendar year by all [signatory recording companies] shall bear to scale wages payable to all such musicians in said calendar year by all [signatory recording companies]."

This division of royalties from records sold, with one-half going to the recording musicians and one-half to the Music Performance Trust Funds for live musical performances free to the public, continues to this day. There have, however, been slight modifications in the formula for contributions to and disbursements from the two funds. The record companies are now expected to pay some .6 percent of the manufacturer's suggested retail price for all records sold, and .5 percent of such price for all tapes sold, to the Trustee of the Music Performance Funds, who is now Martin A. Paulson. An equal amount is to be paid to the Special Payments Fund. The disbursements to the recording musicians from the latter Fund are no longer determined by their pro rata earnings the preceding year. Instead, there is a formula which weights each musicians's earnings from recordings in the previous year most heavily, and then accords gradually less weight to earnings reaching back 5 years; this is compared to the total earnings of all recording musicians over the preceding 5 years similarly weighted. In sum, a record will generate contributions to the Special Payments Fund if it has been recorded in the preceding 10 years, and will result in disbursements from the Fund to musicians who have made any phonograph records in the preceding 5 years. In 1976, the Phonograph Record Special Payments Fund disbursed more than $11 million to roughly 40,000 eligible recording musicians, for an average of some $278 per person for the year. The same year, the Music Performance Trust Funds were disbursing nearly $10 million to some 350,000 individual musicians performing in live concerts throughout the United States and Canada.

At the same time as the Federation was negotiating its 1964 Phonograph Record Labor and Trust Agreements, it was also negotiating new agreements covering the musicians performing on electrical transcriptions for radio. The predecessor agreement, negotiated in 1959, had provided for a payment to the Music Performance Trust Funds of 3 percent of the revenues from the distribution or licensing of transcriptions. The 1964 agreement, following the pattern of that year's contract in the phonograph record industry, provided both for an increase in scale pay and for a division of the moneys that had formerly gone to the Trust Fund. Half of those moneys, 1.5 percent of the gross revenues received by the signatory manufacturer or distributor, were to be paid to the Trustee, while an equal amount was to be paid to the recording musicians. Today, that formula prevails. There is an Electrical Transcription Special Payments Fund, the administrator of which receives these payments from the contract signatories and allocates the fund among musicians who have made such transcriptions within the preceding 5 years, utilizing the same weighted formula as obtains for the special payments fund in the phonograph record industry.

A little more than a year after the reconciliation of the American Federation of Musicians and the Musicians Guild of America in 1961, there appeared an item in the New York Times, in small print almost lost within a clutter of short articles on the entertainment page: "James C. Petrillo, president of Local 10 of the

American Federation of Musicians and former president of the Federation, will face opposition for the first time since 1933 in next month's elections, it was disclosed today. Chicago Musicians for Union Democracy, an anti-incumbent group, put up the name of Barney Richards, a pianist and band leader, at today's nominating meeting at the union's headquarters." [103] The results of that election some 3 weeks later made the front page: "James C. Petrillo was defeated today for re-election as president of the Chicago Federation of Musicians, Local 10. The defeat apparently market the end of a career going back to World War I for the 70-year-old Mr. Petrillo, a former head of the American Federation of Musicans. He had held union offices since 1919. This was his first challenge in 30 years. The official count gave Mr. Richards 1,690 votes and Mr. Petrillo 1,595." [104] The chairman of the opposition organization was quoted as saying: "This shows that professional musicians have taken control of their own union to be run in a professional manner with professional dignity."

In recounting Petrillo's major achievements, the Times article mentioned his success, at the Atlantic City convention of 1956, in putting down the threat of the Hollywood musicians, through "political skill, vindictiveness, and dirty pool." Although the article referred to his easy re-election at that Convention, it failed to observe that this was Petrillo's high-water mark, and that the so-called "situation in Los Angeles" was to contribute to his decision to retire from the Federation presidency within 2 years.

THE MUSIC PERFORMANCE TRUST FUNDS TODAY

With the settlement of the Trust Fund lawsuits in 1960, and the negotiation of new Federation contracts soon after, payments ceased coming to the Trust Fund from newly produced television films, television jingles and spot announcements, and theatrical motion pictures released to television. Since that time, the almost exclusive source of income for the Music Performance Trust Funds has been the sale of phonograph records. Allocations from the Trust Funds averaged more than $5½ million per year from 1961 through 1968. The allocation figures since that time have shown a general upward trend: in fiscal year 1969, $6,935,000; in 1970, $7,370,000; in 1971. $7,255,000; in 1972, $8,085,000; in 1973, $9,000,000; in 1974, $8,700,000; in 1975, $8,892,306; in 1976, $9,430,340; and in the fiscal year ending June 30, 1977, the annual allocation totalled $10,700,272. Since 1950, the Trustee has disbursed a total of nearly $155 million, and sponsored some one million performances.

The current Trust Agreement in the recording industry provides that its object is the arranging and organizing of personal performances by instrumental musicians throughout the United States, its territories, possessions and dependencies, and Canada "on such occasions and at such times and places as in the judgment of the Trustee will contribute to the public knowledge and appreciation of live music. In pursuance of such purposes and objectives, the Trustee shall organize such performances for live (face to face) audiences (which may also be broadcast over radio and television) upon occasions where no admission fees are charged, in connection with activities of patriotic, charitable, educational, civic and general public nature, such as, but not limited to, veteran's hospital entertainment programs, juvenile and adolescent social programs, programs of educational or cultural intention, programs for local or national civic, community or patriotic celebrations, symphony society or other musical activities of a non-profit nature, and similar programs and activities, entirely without profit to the trust fund. The Trustee shall not act as a representative of the Federation . . . The Trustee shall be guided solely by the terms and conditions hereof and shall perform the Trustee's functions on the sole basis of the public interest." [105] The Trust Agreement has some 4,400 recording companies as signatories. Many of very small and short-lived concerns, and only some three hundred companies are presently the source of contributions to the MPTF. Recording companies are induced to sign the Trust Agreement because it is a condition upon the union's signing a labor agreement with those companies and supplying them with recording musicians.

The first Trustee was Samuel R. Rosenbaum, who was selected by the recording companies (with the approval of the Federation) and appointed by the Secretary

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[103] N.Y. Times, Nov. 14. 1962, p. 44.
[104] N.Y. Times, Dec. 6. 1962, p. 1.
[105] Phonograph Record Trust Agreement § 3(a).

of Labor in 1948, after the yearlong ban on the recording of phonograph records and electrical transcriptions. The ban was itself a response to the Taft-Hartley Act of 1947, which had effectively declared illegal the predecessor fund, the Recording and Transcription Fund, which was administered by the AFM and created after a two-year strike beginning in 1942. Rosenbaum realized that it would take an enormous, and potentially costly, administrative apparatus to supervise the organization of and payments for concerts throughout the United States and its possessions and in Canada. He sensibly decided to utilize the already existing and geographically wide-ranging structure of the Federation and its Locals.

The Trustee invites and receives recommendations for musical performances from Locals of the AFM, although recommendations can be initiated from any number of sources, for example from hospital administrators or park recreational directors. These requests for musical performances are referred to a local person who is charged with administering the MPTF; the MPTF designates who that local administrator will be and, although it is sometimes a person who is not in the union or is not even a musician, it is more commonly an official of the local union. That person designates a leader for the musical event, and the leader selects the sidemen for the performance. The selection of the musicians is thus not controlled by the Trust Fund or by the union, and the musicians need not even be members of the AFM. The leader requests an allocation from the Trust Fund, which request is subject to approval by the Trustee. If approved, there is a contract created between the Trust Fund and the leader for the specific engagement. The performing musicians technically become employees of the Trust Fund, to be paid at prevailing local wage scales, and the Trustee remits a paycheck (with appropriate deductions and withholding) directly to the individual musicians, after the local administrator has stated that the performance in fact took place. In the year ending June 30, 1977, the Trust Fund sponsored some 52,000 live music performances in parks, concert halls, hospitals, colleges, playgrounds, schools, libraries and museums; and disbursed some 500,000 checks to 350,000 individual musicians.

The union Locals and the local administrators also assist the Trust Fund by finding persons and institutions which can co-sponsor the musical performances. Co-sponsors—which may be civic organizations, municipalities or county or state bodies, banks or utilities, and the like—will normally provide such facilities as a hall and seating for the performance, printed programs and publicity, and sound equipment. In 1977, money contributions from co-sponsors totalled some $2½ million. Co-sponsorship is attractive, even though the performance must not be used to assist the co-sponsor in any commercial venture, since every cent of the co-sponsor's contribution is used for the performance itself and none is diverted for administration or overhead, which is all borne by the Trust Fund itself. Moreover, all of the administrative services rendered at the local level by local officials are cost-free to the Trust Fund. Only some 15 percent of the phonograph-record contributions to the Trust Fund are consumed by the administration of the Fund; the administrative expenses of such charitable organizations as the Red Cross and the Cancer Society are more in the neighborhood of 50 percent or more of contributions.

Ninety percent of Trust Fund allocations are made to 700 localities in the United States and Canada, corresponding to the geographic jurisdiction of the AFM Locals, according to a formula based upon the number of professional musicians in those localities, as roughly represented by local union membership rolls. The trustee thus has rather little discretion in determining the amounts of the fund to be distributed geographically. The allocation of the other 10 percent of the fund is discretionary with the Trustee, and it may be spent on projects which break through the geographic constraints of the union Locals, such as the support of regional symphony orchestras or off live-audience television performances. The Trust Funds may not be permitted to accumulate, but must be spent currently. To assure that the signatory recording companies are accounting properly for their contributions to the Trust Fund, the staff of the Fund pursues a regular auditing program which involves checking the sales and royalty records of each company once every 2 years. The staff also makes periodic unannounced visits to performances which are being subsidized by the Trust Fund, to assure that the Trust Fund conditions (for example, that no admission fee be charged) as well as quality standards are being satisfied.

Although President Petrillo originated the trust fund concept as a way of moderating the impact of unemployment resulting from the exploitation of

recorded music, the Trust Fund today, and for most of its existence, cannot properly be regarded as a welfare or unemployment fund. For one thing, the average Trust Fund allocation for each musician performing in fiscal year 1977 was some $30.50. Moreover, the Trustee has for some time announced that the principal objective of the Trust Fund is not relief from unemployment but the development of a public appreciation for live music. In any event, most of the payments from the Fund are not received by workers who are unemployed. The great majority of the recipients are employed full-time outside the field of music—as teachers, lawyers, clerks or machinists—and play on occasion for their enjoyment and as a small supplement to their income. Indeed, it was this situation, also prevailing in the early 1950's, which in part gave rise to the grievances felt by the professional recording musicians in Los Angeles, whose services generated substantial contributions for the Trust Fund but rather modest income for them as performers at Trust Fund musical engagements.

Beginning with Trustee Samuel R. Rosenbaum, and down to the present Trustee Martin A. Paulson, the Fund has been operated with a scrupulous regard for its independence from the AFM and its officers. The regulations which govern the operations of the MPTF take pains to state that "MPTF is not a Union fund. It was created and is funded by the producers of recordings in accordance with their labor agreements with the American Federation of Musicians. It is not permissible for Locals to refer to the Area Allocation as 'our trust fund,' or 'the A.F. of M. trust fund.' . . . The Area Allocations are made from the Trustee's guidance in his expenditures and are not allocations to Locals. . . . It is not permissible for the Local or any of its Members to say, for instance, that 'we spend,' or 'we donate,' musicians or money to any performance, cause or body. . . . MPTF is not limited to the employment of Union musicians or of unemployed musicians. . . . The Trustee, like any other employer of Union musicians, is affected by applicable and lawful Union regulations. However, any attempt to control the Trustee's actions by special regulations applicable only to MPTF as an employer cannot and will not be accepted." All programs, publicity and announcements must state that the music is provided by a grant from the Trust Fund and must identify the Trust Fund as "created and financed by the recording Industries under agreements with the American Federation of Musicians." When a project which has been approved by the Trustee is one which a union Local initially recommended, publicity and program material may give full credit to the Local; but the credit "must not misrepresent that the Local gave the grant or the music, but only that the Local recommended it to the Trustee. The credit must always include a reference to the Recording Industries as the source of the grant which pays for the music."

As already noted, these assertions of independence from the AFM were put to the judicial test in 1959 in several lawsuits brought by minority shareholders of four of the phonograph record companies which were signatory to the Trust Fund agreement. Injunctions were sought on the theory that the Trustee's actions were controlled by the Federation, so that the Trust Fund was in violation of Section 302 of the Taft-Hartley Act. The court entered judgment for the defendants, finding that the Trustee's operation of the Music Performance Trust Funds was independent of Federation control.[106]

CONCLUSION

The advent of recording technology in the entertainment industries created demands from the recording musician to share in the profits which others made from re-use or re-broadcast, and created demands from other musicians to preserve their employment. Both of these demands can be accommodated witness the co-existence of the Special Payments Fund and the Music Performance Trust Funds in the phonograph record industry. But at root, these demands do clash, as each dollar taken from the industry to provide employment for the technologically displaced is one dollar less to provide for re-use or residual payments to the recording musicians. The more the industry is encouraged to use a recording many times over in the same form, or to transplant it into a different medium, with liberal payments to the recording musician, the greater is the risk of displacement for other musicians. Conversely, a ban on recording may preserve employment of live musicians, but it will also sharply restrict the income opportunities for recording musicians. It is, in short, no easy task to accommodate

[106] *Shapiro* v. *Rosenbaum*, 171 F. Supp. 875 (S.D.N.Y. 1959).

the interests of these two constituencies within the American Federation of Musicians. The task of accommodation may be pursued through different techniques. The two principle techniques which the Federation has utilized are public action through legislation and private action through contract.

During his years as President of the AFM, James C. Petrillo was more preoccupied with the lot of the unemployed musician than with that of the recording musician. He was also more preoccupied with collective bargaining as a mode of advancing the interests of musicians than he was with legislation. Neither of these strategies proved to be altogether satisfactory.

Petrillo's reliance on private power rather than governmnetal protection is quite understandable. He believed, no doubt rightly, that the economic pressures which the AFM could bring to bear upon manufacturers and broadcasters would bring more desirable results, faster, than would lobbying for protective legislation. At the beginning of his term as President, a work stoppage in the phonograph record or motion picture industry could exert severe economic pressure, as was true to a lesser degree of a work stoppage in network radio. Moreover, Petrillo apparently had a distrust of Government, and he was to show disdain for governmental entreaties—including a presidential entreaty in time of war—throughout the 1940's. When Congress enacted the Lea Act in 1946 and the Taft-Hartley Act in 1947, legislation which was viewed throughout the labor movement as severely repressive, it became obvious that there was very little congressional sympathy upon which the AFM could draw.

Petrillo's emphasis upon the plight of the unemployed musician is also understandable. This choice was dictated by personal experience, personal philosophy and union politics.

On the verge of becoming the President of Local 10 in Chicago when "talkies" were introduced, Petrillo saw tens of thousands of theatre musicians displaced, almost overnight. The widespread commercial exploitation, within only fifteen years, of phonograph records, motion picture soundtrack and television, was reasonably viewed by Petrillo as a threat to the livelihood of the working musician. The 27-month recording ban beginning in 1942 was a product of Petrillo's desire to avoid a repetition in radio employment of the grave employment loss in theatres hardly more than a decade earlier. Petrillo had also developed a philosophy about the technology of sound recording. Unlike other forms of technological unemployment, the loss of employment caused by recorded music was being brought about by fellow musicians, who might fairly be expected to share that economic burden. Finally, concern for the displaced musician was, purely and simply, good politics. Only a small fraction of the Federations' total membership was engaged in recording music for phonograph records or films. The bulk of the membership were the beneficiaries of Petrillo's concern, and it was they who determined what kind of man would sit in the President's chair. Petrillo made sure that he was their man. In his early years as President, Petrillo could count among the Federation's members a substantial number of musicians who had been displaced by sound motion pictures, or who for other reasons felt deeply the impact of that technological development. These members vibrated sympathetically to Petrillo's tune. Had Petrillo come to power 10 years later than he did, as the memory of the "Jazz Singer" had grown dimmer, perhaps he would have formulated a different bargaining strategy.

In any event, the Music Performance Trust Funds were a happy marriage for Petrillo of compassion, philosopry and power. It should not, however, be forgotten that an insistent theme of the Federation's bargaining philosophy had always been the protection of the recording musician, at least when his "frozen performance" was translated into a different medium. The earliest AFM agreements banned the use of motion picture soundtrack for any film other than the one for which it was originally scored, and provided for payments to motion picture musicians when the soundtrack was used, for example, to make a phonograph record; the same was true when phonograph records were to be "dubbed" onto other records or onto soundtrack. The provision for re-scoring of theatrical films released to television, in the 1951 agreement, and the payment of re-scoring fees to the original musicians, in the 1952 and 1954 agreements, were thus part of the fabric of standard Federation practice.

Petrillo's severe difficulties within the union began when he departed from practice, and single-mindedly exalted the interest of the so-called unemployed musicians—many of whom were in fact fully employed, in other trades—

over that of the recording musician. Petrillo obviously believed that the recording musician was being treated well enough, and that the Federation's obligations were discharged by securing high wage scales and imposing restrictions on re-use. But those wages failed to keep pace with the cost of living and with the wages of comparable crafts, and all claims of Petrillo's concern were forfeited by his negotiation of the same scale for phonograph record musicians through 1958 as had obtained in 1946.

That Petrillo's preference for the unemployed musician had to give way under the pressure of events is explained by the history recounted in this Study. Those events would not have occurred as they did were it not for the efforts of men like Cecil Read, who hastened the reversal in Federation policy by a determined campaign within Local 47 and then through the Musicians Guild of America, and also through the intervention of government, through legislative proposals and through combat in the courts. Although Read's attempt to secure favorable legislation proved futile, it set the stage for a greater willingness on the part of Petrillo's successors to invoke congressional assistance.

Petrillo's preference for collective bargaining rather than law was also to be a victim of events—events that were in part legal, in part economic, and in part scientific. All of these events conspired to say the AFM of its strength at the bargaining table. The *Whiteman* case prevented the union from using its bargaining power in the recording industry as a means of removing phonograph records from radio broadcasts. Attempts to impose direct pressure on the broadcasters were totally undermined by the Lea Act of 1946, which outlawed strikes—and thus effective collective bargaining—designed to expand or preserve live employment in radio, or to eliminate or restrict the use of records in broadcasting, or even to extract performance royalties for the recording musicians for the radio use of their recordings. The failure to pressure the broadcasters on the issue of "performers' rights" was attributable just as much to congressional mandate as to the preferences of Mr. Petrillo. The Taft-Hartley Act of 1947 went yet further, and declared the secondary boycott illegal, thereby outlawing the use of economic pressure on a radio network, at a time when the union represented employees there, in order to induce local affiliated stations to retain small staff orchestras.

Scientific and economic events marched together, to deprive the union yet further of bargaining power. A union can lawfully exert economic pressure only where it has employees. Throughout Petrillo's presidency, the use of the phonograph record on radio, and the use of "canned music" in motion pictures and on television films, reduced employment in those industries and, in the process, reduced the capacity of the AFM to do anything effective to address this problem through collective bargaining. The user of recorded music—the radio and television stations, and the motion picture exhibitors—cannot be pressured by the union, because of the lack of live musicians employed there and in part because of legal restrictions. The AFM must therefore exert its bargaining influence in dealings with the producers of recorded music, which are commonly in a position to withstand union pressure because of the availability of foreign or canned music.

Since the resignation of President Petrillo and the election of President Kenin, the Federation has given more attention to the problems of the recording musician and to the political process in the Congress. As has been recounted above, the contracts negotiated by Kenin from 1958 until his death in 1970 were successful in securing payments for recording musicians measured by the number of records sold, or the number of showings of a television program, or the producer's revenues from the exploitation of the recording. On the congressional front, the Federation has actively proposed legislation on such matters as the repeal of the "cabaret tax" of 20 percent of the price of food and drink in places using live musicians; restrictions upon the use of canned foreign music in television; subsidies for the arts; and copyright protection for performers. President Kenin also turned to public relations campaigns (a strategy about which his predecessor was notoriously indifferent) and to programs of cooperation with foreign unions. This wider range of methods for securing the union's objectives has also been utilized by the present President of the AFM, Hal C. Davis.

The seeds of many of the Federation's current problems and policies were thus sown in the late 1950's. It is hoped that this Study has provided a greater appreciation of the events which shaped the Federation of today.

APPENDIX

THE LEA ACT OF 1946

§ 506. Coercive practices affecting broadcasting; enforcement of contracts; penalties; definition.

(a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business for such ilcensee; or

(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or

(5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

(b) It shall be unlawful, by the use of express or implied threat of the use of force, violence, intimidation or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—

(1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using or maintaining recording, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(2) to accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(3) to pay or agree to pay any exaction on account of the broadcasting, by means of recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully em-

ployed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one-year or by a fine of not more than $1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted. (June 19, 1934, ch. 652, § 506, as added Apr. 16, 1946, ch. 138, 60 Stat. 89.)

REPLIES TO THE COMMENTS OF BROADCAST REPRESENTATIVES ON THE REPORT "AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE ON THE COPYRIGHT LAW"

(Prepared by Stephen M. Werner, Ruttenberg, Friedman, Kilgallon, Gutchess & Associates, Inc.)

The Report's authors, Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, hereby submit these replies to the comments made by broadcasters and their representatives.

The replies are directed primarily at comments made by the National Association of Broadcasters. An attempt has been made, nevertheless, to cover the major comments of all broadcast representatives submitting statements on the report. The replies have been grouped into three major categories. The first have to do with comments and questions concerning access to data and confidentiality. The second set of replies are directed at comments on the scope of work and the comprehensiveness of the study. The remaining replies fall under the "Other" category. They were written in response to various points which do not come under either of the two general headings already mentioned.

Access to data and confidentiality

Based on several of the broadcasters' comments, there appears to be some confusion concerning the details of the relationship between the contractor and the Federal Communications Commission (FCC). At no time during the course of the study were we permitted to see an individual station's annual income statement (Form 324). Instead, we were permitted to submit computer programs to FCC data processing personnel which used as a data base information keypunched from the FCC forms. The programs submitted performed two functions. One, they linked together the 1971 to 1975 annual income reports of individual stations. Two, they created coded variables and copied information from the set of five annual reports and produced a single record (two card-images in length). The station records so produced (hereafter called output records) were then released to us for analysis purposes. The output records contain no information of a confidential nature. Specifically, they contained no call letters, file numbers, or broadcast area codes. Officials of the Policy Analysis Branch of the Federal Communications Commission, as requested, were supplied with documentation concerning the contents of each field of the output records. For those wishing to verify the accuracy of the programming effort, the FCC retains in its possession the only copy of a computer printout which contains the input and output records of every 200th set of annual reports processed.

Since the output records released to us in this fashion do not permit us to associate any of the information contained in any output record with a specific station, the rules of confidentiality have not been violated. Theoretically, any research contractor willing to operate under these rules and procedures could be given access to the data. The FCC, however, retains control over the timing and charges made for such use of its facilities and the information in its possession.

In regard to the data concerning employment and unemployment among performing artists, the results of the survey are soon to be released by the Labor Department. Appendix I to this report contains some information concerning the earnings of those engaged in making sound recordings. The information in the Appendix will not be a part of the Labor Department report but was prepared solely for use by the Copyright Office.

Scope of the analysis

Broadcasters claim that the study was limited in scope. The responses to these comments can be divided into two parts. One involves distinguishing topics rele-

vant to economic impact analyses from those associated with all other types of analyses. The other responses have to do with limitations in the scope of work which were imposed because of time, data availability, and legal constraints.

An economic analysis

All impact analyses are directed at specifying quantitatively or qualitatively the effect a proposed change would have on certain variables of interest. What distinguishes the types of analyses is the nature of the variables to be measured. In federal agencies, economic impact statements focus on the potential effect on the consumer price index, labor productivity, competition, and employment. Obviously, these are economic variables. The question becomes, in this instance, what are economic variables of concern to the Copyright Office and legislators.

Our Report focuses on the profit versus loss outcomes experienced by broadcasting stations over time, simulated changes in the level of profits or losses among stations, and to some extent changes in the number of firms in the industry. In May 1977, before the Copyright Office Panel, these same variables were the very ones, the only economic ones, mentioned by the National Association of Broadcasters, in stating their opposition to the Performance Rights Amendment of 1977. Specifically they said, "Establishment of a performance right in sound recordings would jeopardize the economic viability of a substantial number of broadcast stations." The only data advanced to support that claim were FCC aggregate financial report figures concerning the number of stations sustaining losses in 1975.

Because the Report is concerned with the economic impact of the Bill, therefore, it does not deal with the question of whether a performance right in sound recordings is constitutional. For the same reason, it does not deal with the question of whether it is fair to broadcasters nor does it deal with the effect the law would have on the quality of public service programming. While the cutbacks in "community responsive" programming are potential effects of the proposed Bill, they are not economic effects. If they occur, it will be at the discretion of station licensees who are exercising their managerial prerogative to alter the allocation of resources under their control. They must do so in accordance with the priorities they attach to serving the public interest, a trust they have been granted as a condition of licensing by the FCC.

Other constraints

As the broadcasters point out in their comments, there are many reasons other than tax-avoidance on hidden profits which could explain why a station may sustain a loss over time. Some of the reasons also were mentioned in the Report. The FCC data base used in the profit versus loss analysis, however, does not permit any of these additional reasons to be explored. The annual report files contain no information regarding ownership. Files containing information regarding ownership exist but are not fully automated and they are not directly compatible with the annual income statements. Balance sheet data are not collected annually but instead, only once every three years, during application renewal. Special permission and a considerable amount of time and expense, would be required to secure access to hard copies of financial reports and ownership information for classes of stations, such as those reporting losses consistently. In addition, licensee approval would probably be required to obtain information on transfers of ownership and personal capital gains data for owners of such stations.

Information concerning the extent of owner/management is not available because not all broadcasters have provided the necessary information on Form 324. Line 5 of schedule 3 on the form is not always filled in. Consequently, if the form contains no entry for payments to principals, it is impossible to tell whether the amount was zero or omitted.

The data also do not permit an anlysis of the ways in which improvements are financed in individual situations. Without a station by station audit, it would be impossible to tell whether a station needed and maintained a profit over time in order to qualify for a loan.

Finally, the financial reports of stations would not allow for a determination of the question of whether an owner/manager maximizes his personal income net of taxes by awarding himself a bonus or commission instead of receiving his income on the form of dividends. For this purpose an analysis of individual income tax returns would be required. This would also be true of operators who

make the licensee company a Subchapter S corporation. Even with Subchapter S status, an operator may enjoy a tax advantage by receiving a commission or bonus instead of dividends. The maximum income tax liability on wage income (which would include commissions and bonuses) is less than that which applies to dividend income. Under Subchapter S, net income must be treated as dividend income for personal income tax purposes.

To complete a report of the magnitude suggested in the comments would require a considerable amount of time and a large financial expenditure. In addition, many licensees would have to agree to open their books to outside auditors. As pointed out in the Report, the need to go any further is in question if one accepts the findings cited in the report as evidence that reported profits are not necessarily indicative of the industry's ability to pay the increase in music license fees. (It would appear to us, after reading the comments, that this point has already been conceded to by the broadcasters.)

All other comments

The Purpose of the Profit and Loss Analysis.—The report clearly states that "the purpose of the analysis (of financial reports) was to determine whether or not the data indicated discernable trends in terms of the profit versus loss outcome of individual stations over time." (p.x.) The analysis was not limited to the question of whether the imposition of an increase in music license fees would cause broadcast stations to cease operation. (We would like to point out that our Report was the first to introduce data into these proceedings on the question of how many stations actually do go off the air.)

The Inelasticity of Demand for Radio Advertising.—For the purpose of demonstrating an ability of broadcasters to pass-on a cost increase, it would be sufficient, but not necessary, to show that the demand for advertising via radio is relatively inelastic. The fact that the econometric analysis does not prove that the demand for advertising via radio is inelastic is not crucial, therefore, to the argument. It would also be sufficient, if radio and television are substitute media, to demonstrate that the demand price of advertising via television compared to radio has increased. This is exactly what the evidence presented by the broadcasters concerning TV rates suggests. The fact that total expenditures on radio advertising were used as the dependent variable in the econometric analysis, instead of expenditures on local advertising, (75 percent of the total) makes absolutely no difference in terms of testing the significance of any explanatory variable. The test statistic (t-statistic) is unaffected when any of the variables used in the analysis is multiplied by a constant term.

Privately Owned verses Publicly Owned Stations.—Most radio stations are operated as part of a closely-held corporation or owned by individuals or partnerships. They are not owned by corporations which are widely held, that is traded on a nation-wide securities market. The Report addresses itself to the majority of stations. Its findings may not be directly applicable to publicly-held corporations where other regulatory rules are in effect.

The Theoretical Model.—The sections of the report concerning the theoretical framework of the analysis were intended as educational material for the readers in the Copyright Office who are not trained in economics. They were written in textbook fashion and at the introductory level. As with any introductory treatment of markets, competitive market situations were discussed first. In a competitive market, stations do not set prices, individually or in collusion with others. In a competitive market, cost increases have a greater impact on profits than when there are just a few stations in the market. In a competitive market, price tends to equal long run minimum average cost.

To suggest that stations set prices, or that prices can be increased as high as possible without being related to costs, is to suggest that the industry is imperfect, e.g., controlled by a few firms. While this does make the analysis more complex, to pursue the matter further would only harm the broadcaster's position, not help it.

APPENDIX I

A SUPPLEMENTARY REPORT TO THE ECONOMIC IMPACT ANALYSIS OF A PROPOSED CHANGE IN THE COPYRIGHT LAW

The purpose of this supplementary report is to revise some of the preliminary figures already supplied concerning the extent to which performing artists are engaged in the production of sound recordings and to provide additional information which was not available at the time the original report was submitted to the Copyright Office. The new information involves data concerning the individual earnings of those engaged in the production of sound recordings, those who currently receive royalties from the sale of records as well as those who make records but do not receive royalties from sales. Among the performing artists, it is the latter group that may be considered the primary beneficiaries of the Performance Rights Amendments.

REVISED DATA

The following Table contains revised figures concerning the percent of members of the performing arts unions who are involved in the production of sound recordings and the percent of those performers making sound recordings who receive royalties from the sale of records. The Table also shows what percent of those union members receiving royalties receive them because they were the performer, as opposed to the composer or author of a given musical work.

TABLE 1.– PERCENT OF TOTAL UNION MEMBERSHIP MAKING RECORDS AND RECEIVING ROYALTIES, BY UNION

	Union				
	AE	AFM	AFTRA	AGMA	SAG
Ever made records	27.6	51.6	33.8	43.5	23.6
Currently receive royalties	3.3	11.3	5.2	4.0	1.3
As performer	2.5	9.0	3.6	3.5	1.1

As is shown in the table, the majority of those who have been engaged in the production of sound recordings do not receive income from the sale of the records they have produced. The majority of those currently receiving royalties receive them as performers.

The extent to which these statements hold true varies by union. Members of the AFM, for example, are more likely to receive royalties from sales than members of other unions. Similarly, members of the AFTRA are more likely than those of other unions to receive royalties as composers or authors, even though the majority of AFTRA members receiving royalties do so for their work as performers. (The percent of AFTRA members receiving royalties as composers, authors or publishers amounts to 30.1 percent of those receiving any royalties in that union.)

The distribution of individual annual (1976) earnings of those engaged in making sound recordings is displayed in Table 2. Income has been grouped into three classes under $9,000, between $9,000 and $21,000, and over $21,000.

TABLE 2.– 1976 PERCENT DISTRIBUTION OF INDIVIDUAL INCOME AMONG PERFORMING ARTISTS WHO HAVE EVER PARTICIPATED IN MAKING SOUND RECORDINGS, BY UNION

[In percent]

	Union				
	AE	AFM	AFTRA	AGMA	SAG
Income class:					
Less than $9,000	50	42	46	51	54
$9,000 to $21,000	39	37	32	25	22
$21,000 and over	11	22	23	15	24

Note: The highest percentage of the membership of each union falls into the lowest income category.

As in the previous situation, there is some variation in the extent to which this holds for different unions. Comparing the membership of the five unions, for example, the AFM has the lowest percentage of its membership in the lowest income class, 42 percent. AFTRA has the highest percent (23) in the $21,000 and over category.

The situation changes when looking at the distribution of income among those who are currently receiving royalty income from the sale of records. This is shown in Table 3 below.

TABLE 3.—1976 DISTRIBUTION OF INDIVIDUAL INCOME AMONG PERFORMING ARTISTS WHO RECEIVED ROYALTIES ON SALES IN THAT YEAR, BY UNION

[In percent]

	Union				
	AE	AFM	AFTRA	AGMA	SAG
Income class:					
Less than $9,000	22	29	11	4	70
$9 to $21,000	52	31	42	96	27
$21,000 and over	26	41	47	0	3

Note: With the exception of the SAG, the highest percentage of the union membership receiving royalties on sales is found in the middle- or upper-income class.

Almost 50 percent of the AFTRA members who received royalties on sales in 1976 (from among the 3.6 percent of all AFTRA members receiving royalties as performers) had individual earnings of $21,000 or more in 1976. Among AFM members, 41 percent of those with sales royalties (9.0 percent of all AFM members) had 1976 individual earnings of $21,000 or more.

These findings indicate that the majority of those performers receiving royalties on the sale of records enjoy relatively high incomes. It is not true, however, that royalties contribute significantly to this income. This is shown in Table 4 below.

TABLE 4.—PERCENT OF 1976 INDIVIDUAL EARNINGS ATTRIBUTABLE TO ROYALTY INCOME, BY UNION

	Union				
	AE	AFM	AFTRA	AGMA	SAG
Percent of earnings:					
1 percent or less	22.4	49.8	16.5	71.9	9.1
2 to 5 percent	57.6	26.5	31.2	28.1	57.6
6 to 10 percent	15.3	6.6	11.2	----------	15.2
11 percent or more	4.7	17.1	41.1	----------	18.1

Note: In most cases, with the exception of AFTRA members royalties from sales amount to less than 5 percent of individual earnings.

Among the performing artists, however, the intended beneficiaries of the Performing Rights Amendment are not those who receive royalties on sales but those who do not receive such royalties, either because the sales generating potential of broadcast performances has been exhausted or because they had not been party to a sales contract. The overwhelming majority of union members fall into the latter category, as is shown in Table 5.

TABLE 5.—A COMPARISON OF THE PERCENTAGE OF UNION MEMBERS RECEIVING ROYALTIES ON SALES IN 1976 WITH THOSE NOT RECEIVING ROYALTIES ON SALES, AMONG THOSE WHO HAVE EVER PARTICIPATED IN THE PRODUCTION OF SOUND RECORDINGS, BY UNION

	Union				
	AE	AFM	AFTRA	AGMA	SAG
No part of 1976 individual earnings received in royalties	88.2	78.1	84.8	90.9	84.7
A part of 1976 individual earnings received in royalties	11.8	21.9	15.2	9.1	5.3

Note: More than ⅔ of each unions members who have made a recording receive no current income from those recordings.

The table below (Table 6) shows the 1976 distribution of income among this latter group, those who have participated in the production of sound recordings but who do not currently receive royalties on sales.

TABLE 6.—PERCENT DISTRIBUTION OF INCOME AMONG PERFORMING ARTISTS WHO HAVE PARTICIPATED IN MAKING SOUND RECORDINGS, WHO DID NOT RECEIVE ROYALTIES ON SALES IN 1976, BY UNION

	Union				
	AE	AFM	AFTRA	AGMA	SAG
Income classes:					
Less than $9,000	53	46	52	55	53
$9,000 to $21,000	37	40	31	29	23
$21,000 and over	10	14	17	16	24

Note: Among those making records and not receiving royalties, the majority of union members had 1976 individual earnings of less than $9,000. (The only exception occurs among AFM members, where 46 percent reported 1976 individual earnings of less than $9,000.)

CONCLUSION

In our opinion the findings presented above clearly support the conclusions already suggested in the report submitted earlier. Contrary to statements made by opponents of the legislation, the majority of those performing artists who would benefit from the bill do not currently receive compensation from record sales. Furthermore, the majority of those who would receive performance royalties if the bill were enacted have relatively low earnings (from all sources), specifically, below $9,000 in 1976.

A SELECTED BIBLIOGRAPHY FOR PERFORMANCE RIGHTS IN SOUND RECORDINGS

(Research by Sharon Nelson and Alicia Byers, edited by Guy Echols, with assistance by Carol Moody, coordinated by Charlotte Bostick)

A SELECTED BIBLIOGRAPHY FOR PERFORMANCE RIGHTS IN SOUND RECORDINGS

I. Domestic:
   - A. Books and scholarly articles.
   - B. Legislative materials.
   - C. Cases.

II. International:
   - A. Books and scholarly articles.
   - B. Intergovernmental and international reports.
   - C. Legislative materials.
   - D. Cases.

ABBREVIATIONS

ABA	American Bar Association.
AFTRA	American Federation of Television and Radio Artists.
ASCAP	American Society of Composers, Authors and Publishers.
BIRPI	United International Bureaux for the Protection of Industrial, Literary and Artistic Property.
CAPAC	Composers, Authors and Publishers Associations of Canada Ltd.
CISAC	International Confederation of Authors' and Composers' Societies.
DA	Le Droit D'Auteur.
FIA	International Federation of Actors.
GEMA	Gesellschaft Fur Musikalische Auffuhrungs-Und Mechanische Vervielfaltigungsrechte.
ILO	International Labor Office.
RIDA	Revue Internationale Du Droit O'Auteur.
UFITA	Archiv Fur Urheber-Film-Funk-und Theaterecht.
UNESCO	United Nations Educational Social and Cultural Organization.
WIPO	World Intellectual Property Organization.

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