

Community. Songwriters, performers, and music and sound recording rights owners would benefit from such a system. If approved by Congress, "existing music licensing groups could easily handle the collection and distribution of these royalties."<sup>33</sup>

Broadcast Music, Inc. (BMI) also stated that copyright owners or representative performing rights organizations do and will continue to have the practical ability to negotiate with digital audio services' owners or operators. BMI has already completed negotiations with two digital cable audio services for payment to its clients for transmissions of their works, and similar agreements could be made with digital broadcast service owners.<sup>34</sup> BMI suggested that royalties "to account for whatever home taping is likely to result from DAB transmissions could be imposed upon either blank tape or digital recording equipment manufacturers or sellers to be remitted to the Copyright Royalty Tribunal or other appropriate agency for distribution..." based on an "industry-negotiated formula for division among participants."<sup>35</sup> In its reply comments BMI stated that compensating artists by placing a royalty on blank tape and/or recording equipment would encourage and compensate artists without placing unfair burden upon consumers.<sup>36</sup>

In its comments the Copyright Coalition urged Congress to enact legislation to establish a home audio taping royalty system. A royalty

<sup>33</sup> ASCAP comments at 10.

<sup>34</sup> BMI comments at 2.

<sup>35</sup> *Id.*

<sup>36</sup> BMI reply comments at 10.

system would not interfere with introduction of new recording technologies, nor would it unduly impede consumers' abilities to tape at home, according to the Coalition. Systems are in place internationally that seem to work, and could serve as models. If not a royalty, a compulsory license could be established to authorize the practice of home audio taping in exchange for a modest royalty on recorders and/or blank tapes. The license rate could be set by the Congress, or by the Copyright Royalty Tribunal<sup>37</sup> to ensure fairness to all interested parties. Administration of the system could be conducted by existing performing rights societies. The Coalition stressed that the mechanical Serial Code Management System (SCMS) alone, even if implemented, could not curb home copying from digital sources, but that SCMS may be effective as part of an overall compensation framework.

The Recording Industry Association of America (RIAA) did not propose any particular royalty system in its comments, but instead lobbied heavily for a performance right in sound recordings, saying that "performance royalties from the countless broadcasts of these recordings (referring to recordings that don't become "hits", but continue to get airplay) would provide deserved and needed income to . . . artists and musicians."<sup>38</sup> In general the AFL-CIO Department of Professional Employees, American Federation of Musicians, and American Federation of Television and Radio Artists supported RIAA's comments.

<sup>37</sup> Copyright Coalition comments at 19.

<sup>38</sup> RIAA comments at 15.

Strother Communications, Inc. (SCI), a proponent of a terrestrial, over-the-air digital audio broadcasting system, supported the idea that performers and copyright owners should be fairly compensated for transmission of works by DAB operators. However, SCI maintained "that the existing mechanisms by which such compensation is determined and paid by radio stations will continue to be adequate for that purpose. Thus, in the case of recorded music programs, performers' and copyright owners' compensation can be handled under the auspices of ASCAP and other performing rights organizations, exactly as it is today." 39

CD Radio, Inc., a developer of integrated satellite and terrestrial delivery of digital audio services, also claimed that copyright owners and their representatives can negotiate compensation for digital programming in the same manner as is done today for AM, FM and TV transmission. 40 The firm stated said that "royalties should not be placed on tapes or recording equipment if this discriminates against the development of digital audio radio." 41 General Instrument Corporation, a manufacturer and supplier of electronic products, systems and components, took a similar view regarding negotiations for compensation, commenting that it is too early to tell whether or not royalties on hardware or tape are needed.

The Home Recording Rights Coalition (HRRC) was opposed to the concept of imposing royalties on recording media or digital recording

39 SCI comments at 2.

40 CD Radio comments at 3.

41 *Id.*

equipment. Briefly, in response to question three, the HRRC contended that as a practical matter, copyright owners or their representatives can negotiate with DAB owners and operators for compensation for DAB transmissions.

HRRC stated that royalties are not necessary. "Any royalty tax, whether collected through technical monitoring devices or through old-fashioned taxation, would be unwarranted and unfair and would impose costs on all consumers, whether they tape or not." 42 A cornerstone of their anti-royalty argument is the proposition that "digital media are no different from their analog counterparts in fact or as a matter of copyright law." 43 HRRC adds that performance royalties for commercial users, such as broadcasters, dance club operators, and restaurant operators, should certainly be considered before placing a royalty on private home taping activity. 44

The New York Patent, Trademark and Copyright Law Association contended that placing a royalty on recording materials is not "an appropriate solution to the copyright infringement problem, if there is one," because "it imposes a tax on the purchasers or users of these devices (recording equipment) who do not violate copyright laws and that does not seem acceptable." 45

42 *Id.*

43 HRRC reply comments at 2 (emphasis omitted).

44 *Id.* at 36-37.

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

The National School Boards Association (NSBA) does not support royalties on blank tapes. In fact, NSBA continued, "we, in education, will demand an exemption from this tax."<sup>46</sup>

CBS, Inc. took no particular view on any proposed royalty system, but instead merely noted that compensation arrangements can be made that "do not place requirements or restrictions on broadcasters" and would be "adequate to satisfy the concerns and needs of the recording industry, performers, and copyright holders."<sup>47</sup>

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

Not all of the commentators addressed the royalty issues raised by the Copyright Office. Of those who did ASCAP, BMI, and the Copyright Coalition strongly supported placing a royalty on blank tape and/or equipment. The Home Recording Rights Coalition opposed such a solution just as strongly. The Recording Industry Association of America chose to discuss payments for performers instead of reiterating its past position on home taping royalties. Among those commentators falling in between were those who

<sup>46</sup> NSBA comment at 3.

<sup>47</sup> CBS, Inc. comments at 6.

felt consideration of the topic was premature (General Instruments), those who felt any payments should be negotiated by the parties (CD Radio, Inc.; New York Patent, Trademark and Copyright Law Association), those who felt compensation could be handled by existing mechanisms (Strother Communications), and those who felt that their organization should be exempt from any such payment (NSBA, NAB.)

Uniformly, commentators advocating establishment of a royalty system in sound recordings pointed to the fact that many other nations have established such systems that could be used as models. In its initial comments the Copyright Coalition provided a report on home audio taping royalties, issued in January 1990 by the European Mechanical Rights Bureau. In addition, culture ministers from the European Community have discussed recommendations for protecting performers' and producers' rights in their works.<sup>48</sup>

Although the commentators who addressed the royalty issues did so from different perspectives, most of those who responded did feel that some kind of compensation was warranted. They simply did not agree on what that compensation should be.

<sup>48</sup> Clark-Meads and Hennessey, EC Ministers Hear Copyright Concerns, *Billboard* (Dec. 1, 1990) at 64. A discussion of this material can be found in the next section.

#### IV. INTERNATIONAL DISCUSSIONS

##### A. Reaction to the SCMS Proposal

The European Economic Commission (EEC) did not find the 1989 Athens agreement regarding an SCMS technological solution to be a sufficient answer to the question of how to protect the holders of copyrights and neighboring rights from digital home copying.<sup>49</sup> Other technologies, such as recordable and erasable compact discs, loom on the horizon, and they now feel that it is necessary to develop technical systems which cover these aspects of digital recording.

Additionally, the question of how to remunerate rightsholders remains unresolved. The EEC does not believe that levies are the best solution for digital home copying, but recognizes the necessity of paying for the use of protected works. Accordingly, the Commission has concluded that the best solution is a technical system which not only limits copying, but also ensures direct payment by the consumer for each digital copy made -- for example, a credit card system.<sup>50</sup>

The International Federation of the Phonographic Industry has said that it will continue to lobby governments and governmental bodies for remuneration for private copying through a royalty on blank analog and digital tapes and/or recording equipment.<sup>51</sup>

<sup>49</sup> Letter from Commissioner Bangemann, Vice President, EEC, to Ian Thomas, IFPI Secretariat (November 2, 1989) ["Bangemann letter"].

<sup>50</sup> Bangemann letter at 3.

<sup>51</sup> Id.

As part of the Athens agreement, the European hardware industry undertook to accept any political decision about royalties on blank DAT tapes and equipment. Those signing the pact formally agreed to "accept the principle of royalties and ... not oppose efforts by the recording industry to secure legislation to implement such royalties." By contrast, Japanese firms would only acknowledge that the issue is important to recording interests. They consented to "explore the feasibility of a technical mechanism or alternative system for private copying remuneration in future digital recording devices, although such a discussion would not constitute acceptance by the hardware industry of the principle of royalties."<sup>52</sup>

##### B. Compensation for Home Taping Under Foreign Laws

The effect of unauthorized home taping on copyright proprietors has been discussed repeatedly during the last decades.<sup>53</sup> At the heart of these discussions is the basic question of whether or not an author should be compensated for the unauthorized taping of copyrighted programs. Legislatures have debated whether or not authors should be compensated for such copying<sup>54</sup> and if so, what the proper remuneration should be, whether it should apply to both the software and the hardware, whether it should take the form of a royalty or a tax, and how the monies generated should be allocated.

<sup>52</sup> S. Dupler, "DAT Accord is Reached, but Questions Linger," Billboard, 1, 87 (August 5, 1989).

<sup>53</sup> OTA Report at 103-135.

<sup>54</sup> Dillenz, The Remuneration for Home Taping and the Principle of National Treatment, Copyright (June, 1990) pp. 186-193.

Most of these discussions focused on analog duplication, and several countries have already determined that a royalty or tax should be imposed for the analog duplication of broadcast or cable programming or any sound recording for commercial or personal use. Some countries have either already provided for digital copying in their compensation schemes or are proposing to do so.

As of August, 1991, at least seventeen countries had enacted legislation to compensate copyright owners for unauthorized private copying of their works. These countries include: Argentina, Australia, Austria, the Congo, the Federal Republic of Germany, Finland, France, Gabon, Hungary, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and Zaire. Bulgaria introduced a blank tape levy in April 1991 apparently to facilitate trade with their western trading partners. Several other countries including Belgium, Denmark, and Italy, are considering such legislation.<sup>55</sup> Recently the Electronic Industries Association of Japan preliminarily approved plans for home taping royalties for digital hardware. A royalty structure will reportedly be established in 1992. At that time Japan's copyright law will be amended to reflect the new agreement.<sup>56</sup>

<sup>55</sup> See App. I. Information for this chart came from the Report by European Mechanical Rights Bureau (BIEM), Distribution of Audio/Video Home Taping Royalties, January 1990; Survey by International Federation of the Phonographic Industry, 1990 Survey of Tariffs for the Public Performance of Phonograms, November 1990; WIPO, Copyright, Sept. 1990 at Text 1-01; 3 Copyright Laws and Treaties of the World, UNESCO, Supplement 1979-1980; 3 Copyright Laws and Treaties of the World, UNESCO, Supplement 1987-1988.

<sup>56</sup> McClure, Japanese Hardware Group Supporting Digital Royalty, Billboard, (Sept. 14, 1991) at 5.

The countries that do add-royalties or taxes to either the software or hardware have developed different schemes. A review of these schemes reveal that some countries, such as Austria, France, and Sweden, place the royalty on the tapes, and some, such as Norway and Spain, on both the tapes and the equipment. As can be expected, both the amount of the royalty and the distribution schemes differ. But most of the countries which have developed royalty systems require that a significant part of the royalties goes to authors and other copyright proprietors. Distribution facts vary according to the formula a country chooses.<sup>57</sup>

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

Compensation for home or private taping is currently a topic for discussion within the World Intellectual Property Organization. The second session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works met in Geneva, on February 10, 1992. This Committee is considering provisions on private reproduction for personal use. The document prepared by the World Intellectual Property Organization (WIPO) indicated a concern that technology has advanced to a stage where the issue should be studied in a wider context. It notes the growing use of digital and optical reproduction techniques by

<sup>57</sup> See App. I.

means of which works can be easily and perfectly reproduced. The proposed provision for private reproduction, other than serial digital reproduction, would be permitted without permission based on a payment provided by a levy on the equipment, the blank material, or both.

The Protocol would thus reflect what is already provided in some countries and is proposed in the bill. It would also ensure that all of the minima of the Berne Convention and the principle of national treatment would be applicable to the proposed provisions.

Compensation for home taping is also being discussed among members of the Universal Copyright Convention and by various other groups representing countries such as the European Economic Commission (EEC).<sup>58</sup> While no compensation system is perfect, some international organizations are now advocating harmonization of such systems, at least as far as establishing a method to balance the interests of the authors of works and users of those works so as to encourage continued creation of new work as well as promoting international unity and distribution. The European Commission met in August 1991 to discuss, among other things, harmonization of copyright law in the European Community. Among the topics of discussion was the value of works lost to piracy of both U.S. and E.C. materials. Proposals are imminent for increasing copyright protection and stimulating commercial sales within the

<sup>58</sup> See Statement of Ralph Oman Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 101st Congress, Second Session, June 13, 1990 at 31 for a discussion of the EEC position on compensation for digital home copying.

E.C.<sup>59</sup> The European Commission already has before it two proposals. One would grant writers, performers, and producers the right to authorize or forbid the loaning or renting out of works protected by copyright. The second proposal would require adhesion by all the Member States before the end of 1992 to the Berne Convention for the Protection of Literary and Artistic Works as updated by the Act of Paris, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. The European Community has also stated that it will submit a proposal to "harmonize the national systems of remuneration for private copying of films, video cassettes, records, audio cassettes and compact discs by way of a levy on blank tapes by the end of 1991."<sup>60</sup>

Concluding that digital tape recorders would stimulate home taping since the technology would permit one to make perfect copies easily, the E.C. concluded in its 1988 Green Paper that urgent action was needed to protect copyright proprietors.<sup>61</sup>

Review of the systems developed in other countries for compensating authors for home taping should be persuasive in determining that it is time for the United States Congress to legislate in this area.

<sup>59</sup> Riddell, Euro Commission Reports "Great Urgency" On Copyrights, Billboard, (Sept. 14, 1991) at 80.

<sup>60</sup> Commission sets out copyright work programme, Common Market Reporters, Release 672, Jan. 91, para. 95,690 at 51,989.

<sup>61</sup> Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology--Issues Requiring Immediate Action, para. 3.91, p. 127 (June, 1988).

#### V. OBSERVATIONS OF THE COPYRIGHT OFFICE

The Audio Home Recording Act proposal represents a potentially historic compromise among the recording, music, and electronics industries and among the representatives of musical performers and consumers. The Copyright Office is pleased to note that the bill apparently brings under its umbrella all affected interests. The legislation will have a positive impact on protection for United States authors and copyright owners worldwide. Many countries collect royalties on recording equipment and media, but distribute the royalties to their foreign authors only on the basis of reciprocity. American authors will now be able to claim their fair share abroad.

The AHRA includes several innovative features. The proposed allocation of royalties based on fixed percentages is new in the United States copyright law, but the system has precedents in foreign copyright laws. It is common to allocate the compulsory license fees among various groups, especially when different authors and copyright owners create the works of authorship. Sound recordings -- the subject matter of the AHRA-- involve two copyright owners in virtually every case. The composer of the music or music publisher owns the underlying music; the record company owns the separate copyright in the recorded sound. The contribution of performers to the creation of the recording is also unique; their creativity warrants recognition through a share of royalties.

Another innovative feature is implementation of the SCMS. The proposal incorporates an existing technical standard, but would be flexible enough to cover new standards as they are approved by the Secretary of

Commerce. The basic elements of the technical requirements seem reasonable and workable. The bill achieves both the certainty of known standards and the flexibility of accommodating future developments. It is not technology specific.

The proposal necessarily includes technical definitions regarding the equipment and media subject to the royalty system and the SCMS. The preliminary analysis of the Copyright Office at this time is that the technical definitions are clear and properly exclude the products not intended to be covered. Further analysis may lead to fine-tuning of the definitions, but we see no major problems now. One minor problem addressed by the Senate was the continuing perception that computer software and audio-visual works might be included under the bill. The Senate's new definition "audiogram" was added to address the perceived ambiguity.

The overall structure of the proposal seems workable. The provisions are carefully drafted. The Copyright Office at this time would suggest only small adjustments regarding time limits set by the proposal, and similar adjustments regarding the procedures related to filing Statements of Account, confidentiality procedures, and verification of the statements.

1. Effective date. It is not clear whether the AHRA would apply to devices and media sold before the effective date. We suggest that the bill apply to products sold after the effective date (even if manufactured or imported before the effective date) but not to sales prior to the effective date of the law. Thus we recommend that the bill make clear that the 45 day period (for reporting the manufacture, importation, and sales of recording equipment or media) begins to run from the effective date of the law, that

reporting does not apply to the equipment and tape sold before the effective date, but does apply to manufacture, and importation that occurs before the effective date when sales occur after the effective date.

2. Time limits for binding arbitration. SEC. 1032 regarding arbitration requires action by the Register of Copyrights within ten days of the receipt of certain requests or reports. The ten day period may be reasonable where the Register must simply publish in the Federal Register a document already prepared by the arbitral panel, as in paragraph (b)(3) of SEC. 1032. Where the Register must analyze or summarize a document, as in paragraph (c) of SEC. 1032, the ten day period may not be sufficient. We recommend a 30 day period to carry out this task.

3. Quarterly and annual Statements of Account. SEC. 1011 (c) requires the filing of quarterly Statements of Account and payment of royalties. This proposal contrasts with the semi-annual filing of statements under the existing cable and satellite carrier licenses, sections 111 and 119 respectively, of the Copyright Act. Since the digital recording industry is in its infancy, at least initially we recognize that more frequent monitoring is necessary. We believe, however, that it would be administratively more efficient to combine the fourth quarter and annual Statement of Account, to total four rather than five separate filings per year. Although it can be handled administratively, we also recommend clarifying in the report the relationship between the quarterly and the annual statements, for example, whether in the course of reconciling the annual statement with earlier quarterly statements amended statements will be required for such earlier quarters.

4. Verification procedure. The proposal establishes a detailed verification procedure for auditing the accuracy of the statements of Account. Pursuant thereto, subsection (e) of section 1011 requires the Office to establish procedures under which interested copyright parties may conduct audits of manufacturers and importers at their business locations. The Copyright Office does not object to the proposed verification, but as prescribing audit procedures is fraught with the potential for controversy, the Office is hopeful that consultation with the interested parties will lead to an agreement rather than lengthy Copyright Office proceedings. We are willing to prescribe procedures and the scope of such audits, but, as this procedure is a first for the Copyright Office, we will expect to consult with interested manufacturing and copyright parties, and are sanguine about the prospect of nonadversarial proceedings.

Under subsection 1011(g), the Register of Copyrights entertains challenges to the independence of certified public accountants used by the parties in the verification proceeding. With respect to the meaning of "independence" as well as the meaning of "generally accepted auditing standards" called for in section 1011(c)(3), the Copyright Office intends to apply the auditing standard of the American Institute of Certified Public Accountants. If any other standard is intended to be used, perhaps references thereto should be contained in the legislative report.

5. Confidentiality. Section 1011(h) prohibits public disclosure of quarterly and annual Statements of Account and information generated during verification audits by creating a presumption that such information is confidential trade secret information within the meaning of 18 U.S.C. §1905.