SECTION 116 OF THE 1976 COPYRIGHT REVISION ACT: JUKEBOX OPERATORS AND COPYRIGHT OWNERS JUKE IT OUT OVER ROYALTIES

I. INTRODUCTION

As America danced to the beat of ragtime, jazz, swing, be bop, and rock 'n roll, copyright owners watched with little vicarious pleasure as they were uncompensated for the playing of their songs on jukeboxes.[1] This inequity was redressed by the Copyright Revision Act of 1976.[2] The 1976 Act allows copyright owners to receive jukebox royalties from an annual compulsory license fee paid by jukebox operators for each of their jukeboxes. To insure an economically equitable compulsory license fee, the 1976 Act created the Copyright Royalty Tribunal (CRT) as a fee adjustment mechanism.[3]

Despite the best intentions of Congress, the 1976 Act has not proved to be the basis for an effective working relationship between copyright owners and jukebox operators who own the jukeboxes. The Coin-Operated Phonorecord Player Copyright Act of 1983,[4] proposed during the Ninety-eighth Congress, was

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[1] The earliest jukeboxes were known as "jook organs." They took their name from the "jooks" or "jook joints" which the dictionaries politely label "unsavory resorts." The word "jook" originates from the Gullah blacks who lived on the coasts of Georgia and North Carolina. W. & M. MORRIS, DICTIONARY OF WORD & PHRASE ORIGINS (1962); *see also* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1977).

[2] Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (1982) [hereinafter cited as the 1976 Act]. The Act became effective January 1, 1978.

[3] The CRT was created as a mechanism "to make determinations concerning the adjustment of reasonable copyright royalty rates . . . and to make determinations as to reasonable terms and rates of royalty payments." *Id.* at § 801(b)(1).

The CRT concept is attributable to a Senate bill, S. 543, 91st Cong., 1st Sess. (1969). *See* Greenman & Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ARTS & ENT. L.J. 1, 35–36 (1982).

The CRT consists of five commissioners chosen by the President for seven-year terms. *See* 17 U.S.C. § 802(a) (1982). Out of the first five commissioners appointed by President Carter, "[o]nly one had any substantial experience in copyright matters . . . The other four commissioners included a manager of a radio station, an author, an attorney and an accountant." Greenman and Deutsch, *supra*, at 55-56 (citation omitted).

[4] H.R. 3858, 98th Cong., 1st Sess. (1983) (sponsored by Rep. Breaux, D-La) and S. 1734, 98th Cong., 1st Sess. (1983) (sponsored by Sen. Zorinsky, D-Neb) [hereinafter cited as the Player Act]. Neither bill survived the 98th Congress. Jukebox operators and copyright owners are currently negotiating over the substance of a new bill. If the negotiations fail, Senator Zorinsky may introduce a new bill with modifications to the Player Act. Telephone interview with Dan Fuchs, Legislative Assistant to Senator Edward Zorinsky (Nov. 6, 1984).

Senator Zorinsky was at one time a vending machine businessman. He "started working with jukeboxes when he was 6 years old as an office boy at H.Z. Vending & Sales

the latest round in the continuing conflict over jukebox royalties. The Player Act highlighted the seemingly contradictory interests of jukebox operators in a cash industry who seek anonymity from the government, and copyright owners who seek reasonable compensation for the public performance of their songs. Jukebox operators are represented by the Amusement and Music Operators Association (AMOA)[5] while copyright owners are represented by the performing rights societies[6]—the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc., formerly known as the Society of European Stage Authors and Composers.

This Note will review the conflict between copyright owners

Company, owned by his father . . . ." He left the firm in 1973 to become the Mayor of Omaha. *Zorinsky on Jukeboxes: A Mighty Wurlitzer*, N.Y. Times, July 2, 1984, at A12, col. 4.

[5] AMOA is the not-for-profit industry association of over 2,000 jukebox and "other" coin-operated amusement game operators. *See* AMOA, Position of the Amusement and Music Operators Association on S. 1734 and H.R. 3858, The Coin-Operated Phonorecord Player Copyright Act of 1983 at 1 (1983) (available from AMOA, Oak Brook, Ill.).

[6] The performing rights societies act as clearing houses for the public performances of non-dramatic musical compositions. The members of the societies, composers and publishers, assign their exclusive performing rights to the societies through membership contracts; included in the assignment are the rights and remedies for enforcing the copyright. The societies in turn license the non-dramatic right of public performance to end users, e.g., a radio or television station. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.19 (1983); J. TAUBMAN, IN TUNE WITH THE MUSIC BUSINESS 232-33 (1980).

ASCAP, for instance, either grants a blanket license to publicly perform any of the songs in its repertory or it licenses songs on a per-program basis for the payment of a specified fee. *See* NIMMER, *supra*, at § 8.19; *see also* Columbia Broadcasting Sys. v. American Soc'y of Composers, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979) (upheld right of ASCAP and BMI to issue blanket licenses which do not vary the license fee by the number of songs the user plays from their repertories). *See generally* Note, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 COLUM. L. REV. 1245 (1983). In order to play the songs of the Beatles and the Rollings Stones, a radio station would have to obtain licenses from BMI and ASCAP respectively.

Through various methods, the performing rights societies monitor the public performances of their members' works and assign credits for these performances to the appropriate members. Payments to individual members are made periodically with both ASCAP and BMI maintaining separate accounts for writer and publisher members. *See* TAUBMAN, *supra*, at 234.

Generally, most songwriters do not make a substantial amount of money from royalties. For example, only 1,000 out of 25,000 ASCAP members earn over $10,000 per year in royalties. *Coin-Operated Phonorecord Player Copyright Act, 1983: Hearings on S. 1734 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (statement of Senator Alfonse D'Amato, R-NY, at 2) [the proceedings, in which individual statements are separately paginated, will hereinafter be cited as *Hearings*].

The jukebox portion of royalties is determined by ASCAP, for instance, through a "proxy survey." The survey is based upon featured performances of ASCAP songs on radio and television, not actual jukebox performances which would be, as a practical matter, impossible to monitor. Background music on a radio or television show is not a featured performance. Interview with I. Fred Koenigsberg, Senior Attorney for ASCAP, in New York City (Jan. 5, 1984).

and jukebox operators which began with the enactment of the 1909 Copyright Act.[7] The economics of the jukebox industry will also be reviewed and analyzed. It will be demonstrated that the jukebox industry is really an inseparable part of a coin-operated machine industry that can easily afford the new annual compulsory license fee of $50 per jukebox. Finally, this Note will propose compromise solutions which will give copyright owners reasonable compensation for the public performance of their songs on jukeboxes and, simultaneously, maintain the jukebox operators' profit from the machines.

II. JUKEBOX ROYALTIES AND THE COMPULSORY LICENSE

A. *Background*

The right to receive compensation for the public performance of musical compositions was first recognized by statute in 1897.[8] The 1909 Act recognized this right for all songs except those played on jukeboxes. Owners of jukeboxes, or player pianos as they were known at the time, were exempt from paying royalties to copyright owners. Section 1(e) of the 1909 Act provided that: "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."[9] The justification for the exemption was that copyright owners received free advertising from the public airing of their songs on jukeboxes.[10] In addition, the pre-1909 player piano business was

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[7] Ch. 320 §§ 1-64, 35 Stat. 1075 (1909) [hereinafter cited as the 1909 Act], *amended by* 17 U.S.C. §§ 101-810 (1976).

[8] *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1895-1897); *see also* TAUBMAN, *supra* note 6, at 230.

[9] The 1909 Act, *supra* note 7, at 1076.

[10] During congressional hearings on the proposed 1909 Act, one witness remarked that the music publishers purchased newly made records for the purpose of giving "them away to the owners of penny arcades in consideration of their putting them on their automatic graphophones [phonographs], so that the public will become acquainted with the tune and buy the sheet music." *Arguments To Amend And Consolidate The Acts Respecting Copyright: Hearings on S. 6330 and H.R. 19853 Before the Joint Comm. on Patents*, 59th Cong., 1st Sess. 326 (1906) (statement of Paul H. Cromelin, Vice-President, Columbia Phonograph Co., General President of The American Musical Copyright League), *reprinted in* 4 BRYLAWSKI & GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. J, at J326 (1976).

The Committee report that appeared with the final House version of the 1909 Act stated that the exemption for "the public performance of a musical composition upon coin-operated machines in a place where an admission fee is not charged is understood to be satisfactory to the composers & proprietors of musical copyrights. A representative of one of the largest musical publishing houses in the country stated that the publisher finds the so called 'penny parlor' [parlors where machine music played for a

too unsophisticated to sustain substantial opposition to the pro-exemption forces. ASCAP, the first performing rights society, was not even formed until 1914.[11]

By the 1920's, opposition to the exemption had coalesced, although it was still ineffective. Composers, publishers, and their supporters made several unsuccessful efforts to eliminate the jukebox "loophole" in the 1909 Act.[12] Between 1947 and 1965 only twenty-five days of congressional hearings were devoted to revoking the exemption.[13] At the congressional hearings, those in favor of lifting the exemption maintained that it was a last minute addition to the 1909 Act which resulted in unforeseen consequences injurious to copyright owners.[14] They argued that the exemption not only discriminated against copyright owners but also against copyright users who had to pay royalties.[15] In addition, the exemption created problems for United States composers in foreign countries where jukebox royalties had been paid and foreign composers in the United States where these royalties had not been paid.[16] Finally, they alleged that the jukebox industry had become so strong over the years, grossing as much as $500 million annually by not having to pay royalties, that the industry could not argue that it was unable to pay royalties for songs played on jukeboxes.[17]

In defense of the statutory exemption, jukebox operators argued that the exemption was a "carefully conceived compromise" since the substantial amount of money copyright owners would receive for mechanical royalties would not justify public performance fees.[18] They maintained that the 1909 Act did not discriminate in their favor and that the removal of the exemption would discriminate against them because jukebox performances were essentially an incidental form of music similar to radio mu-

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penny] of first assistance as an advertising medium." H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909), *reprinted in* 6 BRYLAWSKI & GOLDMAN, *supra*, pt. S, at S9.

11 TAUBMAN, *supra* note 6, at 233. SESAC was formed in 1930 and BMI in 1939. *Id.*

12 *See, e.g.*, Henn, *The Compulsory License Provisions Of The U.S. Copyright Law*, Study No. 5, at 30 (1956), *reprinted in* 1 GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, Study No. 5, at 30 (1976) (the failure of H.R. 139 and S. 176 to secure passage during the 72d Congress).

13 H.R. REP. No. 1476, 94th Cong., 2d Sess. 112, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5727.

14 *See id.* at 5727-28. At least one other source found that the jukebox exemption was added to the 1909 Act as an afterthought. *See* CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION—*Comparative Analysis of the Issues*, at 81 (1973).

15 H.R. REP. No. 1476, *supra* note 13, at 5727.

16 *Id.*

17 *Id.* at 5727-28.

18 *Id.* at 5728.

sic in a hotel room.[19] In addition, the operation of jukeboxes was a declining business with profits from other coin-operated machines subsidizing those jukeboxes operating at a loss.[20]

After nearly forty years of debate and congressional inertia, a jukebox royalty became a serious prospect in 1965 when efforts to eliminate the exemption were incorporated into an overall effort to revise the entire 1909 Act.[21] The proposed royalty payment had to be palatable to both copyright owners and jukebox operators as a lack of consensus over jukebox royalties could have frustrated the entire revision effort. The copyright owners wanted fair compensation for jukebox performances of their songs. Jukebox operators, on the other hand, were primarily concerned that the elimination of the exemption from royalty payments would subject them to limitless royalty demands and increased risks of copyright infringement.[22]

The following royalty schemes were proposed by the copyright owners, jukebox operators, and Congress to replace the 1909 Act's exemption: compulsory arbitration;[23] compulsory li-

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19 *Id.*

20 *Id.*

21 The elimination of the jukebox exemption was first presented as § 144 of the 1965 general revision bill which was a left-over from a 1963 House bill which failed to reach the floor of the Congress. *See* U.S. COPYRIGHT OFFICE FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print), *reprinted in* 4 GROSSMAN, *supra* note 12, at 59.

The Copyright Office remarked:

> [The incorporation of the exemption in the general revision bill] means that the concerted and unyielding opposition of the jukebox operators and manufacturers, which has been successful in staving off any change in one paragraph of the present law, will now be directed at the entire revision effort. It would be tragic if the controversy on this one issue were to cause the complete failure of a general revision bill that is urgently needed in the public and national interest. But, lest there be any misunderstanding, we believe it would be deplorable if, to avoid this controversy, one of the most striking inequities of the present law were to be left untouched.

Id. at 59-60.

22 *See id.* at 60. The operators were opposed to any type of performing royalty and would have preferred an increase in the mechanical royalty, i.e. a royalty paid for each record pressed. The position of the Copyright Office was that a mechanical royalty only compensates for the recording of the work; only a performing royalty would be appropriate for the public performance of a song on a jukebox. *Id.*

23 This proposal was offered by the copyright owners. The royalties would be determined by a licensing agreement between the parties. Copyright owners would not be able to collect statutory damages unless they offered to submit to compulsory arbitration or its equivalent in the case of either a disagreement over the rate or other conditions of the licensing agreement. This "would preserve the 'free negotiation' system of copyright licensing . . ." However, jukebox operators argued that "even if arbitration was not offered [they] would still be liable for profits, actual damages, and an injunction . . . and there is no limit on the number of copyright owners with whom the operator[s]

censing with a per-box maximum;[24] compulsory licensing with fixation of stamps on records in the jukebox;[25] compulsory licensing with a fixed fee for each record purchased;[26] and compulsory licensing with a fixed fee for every record in the jukebox.[27] With the exception of compulsory arbitration, each proposed royalty scheme incorporated a compulsory licensing mechanism[28] rather than a fee negotiated in the marketplace.

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would have to negotiate." COPYRIGHT LAW REVISION: H.R. REP. 2237, 89th Cong., 2d Sess. (1966), *reprinted in* 11 GROSSMAN, *supra* note 12, at 106.

[24] This proposal offered by the House provided that a jukebox operator would pay $5 into a fund from which distributions could be made to copyright owners; payment would exempt the operator from infringement liability. This proposal was rejected by both sides because it required centralized payment and thus a governmental body to administer collection of the payments. *Id.* at 106-07. Ultimately, this proposal was incorporated into § 116 of the 1976 Act.

[25] Under this system proposed by the House Committee on the Judiciary, a copyright owner would sell a block of stamps to the operator who would affix a stamp to each record of that copyright owner. This plan was opposed as too expensive. As a practical matter, the stamps would not have been visible if placed on the records in the jukebox. *Id.* at 107.

[26] This plan was proposed by Music Operators of America (later the AMOA, *see, supra* note 5). Operators would register their machines annually with the Copyright Office, then post a certificate of registry on each machine and pay a quarterly statutory fee of 2 cents per composition on all records acquired for use on the jukebox during the quarter. This plan would avoid government involvement. However, the performing rights societies argued that the purchase of records bears no relationship to the number of times they are publicly performed; a record may be performed infrequently or several times daily. This plan would amount to an "honor system" and the 2 cent fee per composition would not cover policing costs. 11 GROSSMAN, *supra* note 12, at 107.

[27] This plan was based on a recommendation by the operators with changes suggested by copyright owners; it would have operated on the "inventory" principle. A jukebox owner would register annually each machine with a list of compositions available for play during the preceding year, post the certificate on the box and pay quarterly royalties at a fixed statutory amount, with a quarterly accounting based on the records in the jukebox. The copyright owners would have to be identified on the records to receive payment. 11 GROSSMAN, *supra* note 12, at 107-08.

[28] "Essentially, a compulsory license is one conferred by [a] statute, contingent on some other action of a copyright owner. It enables others to use a copyrighted work, by copying, performing, displaying or otherwise, without infringement when the user has fulfilled specified conditions, including the payment of fees as royalties." *Basic Concepts*, 1 COPYRIGHT L. REP. (CCH) ¶ 3005 (Mar. 1981). There is "[n]othing in any of the compulsory licensing provisions [which] precludes the user of copyrighted materials from negotiating directly with the owner of the copyright for such terms and conditions of use as are acceptable to both parties." *Id.*

The compulsory license creates a non-exclusive copyright in the copyright owner. Under its provisions, "the exclusivity of the copyright owner is in a sense lost, in that it is 'compulsory' upon him to license those who comply with the requirements for such a license." 1 NIMMER, *supra* note 6, at § 1.07. Where congressional authority to grant an exclusive right to composers and publishers is without question, Congress must also have the power to grant a partial or non-exclusive right as well. *Id.*

For a critique of compulsory licensing in general, see Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1135-39 (1977). Goldstein argues that fees for the use of copyrighted material are best determined by the forces in the marketplace. Thus, the investment made in producing the copyrighted material will be matched by the return from the negotiated royalty fee, and therefore, creativity will be encouraged. As a practical matter, a return on investment rationale for marketplace fee determination is not applicable

The compulsory component of each proposal was necessary to bring together two parties who had a prior history of unsuccessful negotiation.

The House Committee on the Judiciary rejected the compulsory arbitration solution as an insufficient safeguard for the operators; the plans for stamps and fixed fees per jukebox as administratively unworkable; and the proposal based on the number of records purchased as inadequate protection for copyright owners.[29] The Committee concluded that the blanket exemption should be replaced by a compulsory license based on the records available for performances in the jukebox during each three month period.[30] This form of compulsory licensing, however, was not adopted by Congress as part of the 1976 Act.

B. *The 1976 Copyright Act*

Section 116 of the 1976 Act ended the seventy year exemption of jukebox operators from making royalty payments. It corrected a situation that was "widely and vigorously condemned as an anachronistic 'historical accident' " and described as " 'unconscionable,' 'indefensible,' 'totally unjustified,' and 'grossly discriminatory.' "[31] The House Committee on the Judiciary found that:

> (1) The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption.
>
> (2) Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption.[32]

Section 116 reads in relevant part: "The operator of the coin-operated phonorecord player may obtain a compulsory license to

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to a § 116 compulsory license because jukebox royalties only represent a small fraction of the total royalties received by a copyright owner. *See infra* note 157 and accompanying text.

29 11 GROSSMAN, *supra* note 12, at 108.

30 *Id.*

31 H.R. REP. NO. 1476, *supra* note 13, at 5727.

32 *Id.* at 5728.

perform the work publicly on that phonorecord player by filing [an] application . . . and paying the royalties . . . ."[33] Initially, the fee was set at $8 per jukebox.

Compliance with section 116 is a simple administrative matter. All jukebox operators are required to obtain an annual license for each jukebox that meets the definition of a "coin-operated phonorecord player."[34] The license fee is paid to the Register of Copyrights along with an application for a certificate.[35] After receiving the certificate, the operator shall affix it to the registered jukebox "in a position where it can be readily examined by the public . . . ."[36] Affixing the certificate in a visible position on a jukebox facilitates the identification of those boxes and operators who have properly complied with the compulsory licensing requirement.

Despite the simplicity of the statutory licensing requirement, compliance with section 116 has been poor. By August 1978, eight months after the effective date of the 1976 Act, only 34% of the total estimated jukeboxes in circulation had been registered with the Register of Copyrights.[37] The responsibility for policing jukebox locations and enforcing the copyrights has been delegated, by default, to the performing rights societies. Since the 1976 Act became effective, jukebox operators have persistently avoided complying

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[33] 17 U.S.C. § 116(a)(2) (1982).

[34] A "coin-operated phonorecord player" is a machine or device that—

(A) is employed solely for the performance of non-dramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

17 U.S.C. § 116(e)(1) (1982).

The "coin-operated phonorecord player" definition was carefully worded to exclude: 1) coin-operated radio and television sets, and other devices similar to jukeboxes that perform musical motion pictures (all devices for the dramatic performance of musical compositions); 2) establishments with cover or minimum charges, and public clubs requiring membership fees; 3) jukeboxes where the list of musical compositions is only available upon request; and 4) jukeboxes where the choice of songs is made by the owner of the establishment. *See* H.R. REP. No. 1476, *supra* note 13, at 5729-30.

[35] 17 U.S.C. § 116(b)(1)(A) (1982).

[36] *Id.* § 116(b)(1)(C).

[37] Only 134,000 out of an estimated 400,000 jukeboxes had been registered with the Special Licensing Division of the Copyright Office. *See* Hall, *Jukebox Operators Slow in Fee Payoff*, BILLBOARD, Aug. 12, 1978, at 87.

According to an ASCAP estimate, as many as half or even two-thirds of the boxes in the U.S. are currently run "by operators who have not complied with the law." ASCAP, Briefing Book on Jukeboxes and Copyright at 8 (1983) (available from ASCAP, New York City).

with the section 116 licensing provision.[38] While the societies have been extremely successful in litigating claims against infringing operators,[39] they have been far less successful in compelling compliance with section 116.

The Register of Copyrights tabulates the license fees from those operators who have complied with section 116 and then sends a detailed accounting to the CRT.[40] The CRT is empowered to distribute royalties after it receives claims from the performing rights societies and copyright owners unaffiliated with a society.[41] The fees are then distributed pro rata to each unaffiliated copyright owner who proves entitlement.[42] The remainder is then given to the performing rights societies and divided "as they shall by agreement stipulate among themselves . . . ."[43] In practice, almost all the royalties are distributed among the societies. When controversies arise among the claimants over the exact distribution of royalties, the CRT may withhold the disputed royalties until a settlement has been reached.[44]

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38 The jukebox operators refused to provide jukebox locations to the Copyright Office which would have required the performing rights societies to police 500,000 boxes nationally. *See* Hall, *Juke Royalties: Licensors Warned to Plan for Policing Locations*, BILLBOARD, Nov. 5, 1977, at 10. According to BMI, the overall costs of on the spot inquiries in a policing operation would be $30 per jukebox. Hall, *Tribunal Hearing Pleas for Juke Location Listings*, BILLBOARD, Feb. 4, 1978, at 1, 91. After requiring the central listing of jukebox locations, the CRT later repealed its decision because the copyright owners were not using the listings. *See* 46 Fed. Reg. 32,576, 32,577-78 (1981) (repealing 37 C.F.R. § 303.3 (1978)). ASCAP, in defense of the central listing requirement, claimed that the use of the listing was made impossible by the failure of the licensed operators to file the location of their boxes. *Id.* at 32,577.

39 ASCAP's first infringement suit for a § 116 violation was successful; the settlement was in four figures. *See Juke Ops Brush Copyright Act, ASCAP Sues*, VARIETY, Dec. 6, 1978, at 77. For more recent cases, see Broadcast Music, Inc. v. Allen-Genoa Drive-In, COPYRIGHT L. REP. (CCH) ¶ 25,538 (S.D. Tex. May 4, 1983); Broadcast Music, Inc. v. Fox Amusement Co., 551 F. Supp. 104 (N.D. Ill. 1982).

40 *See* 17 U.S.C. § 116(c)(1) (1982).

41 *Id.* § 116(c)(4)(A)-(B).

42 *Id.* § 116(c)(4)(A).

43 *Id.* § 116(c)(4)(B).

44 *Id.* § 116(c)(4)(C). Initially, the societies could not agree over the distribution of 1978 royalties although an agreement was quickly reached. The 1978 royalties were split: ASCAP 47.5%, BMI 47.5%, and SESAC 5.0%. *ASCAP-BMI to Split Jukebox Royalties*, VARIETY, Dec. 12, 1979, at 2.

Again, in 1979, the societies could not agree on fee distribution. On this occasion, the societies appealed to the CRT for assistance but ultimately reached an agreement among themselves before a determination had been made. Since 1979, joint distributing agents receive the royalties from the CRT and divide them among ASCAP, BMI, and SESAC according to a confidential formula. Letter form I. Fred Koenigsberg, Senior Attorney for ASCAP, to Robert K. Erlanger (Feb. 22, 1984).

III. The Compulsory License Fee

A. *The Copyright Royalty Tribunal—1980 Rate Adjustment Proceeding*

Section 804(a) of the 1976 Act requires the CRT to periodically review the level of the compulsory license fee.[45] In determining the level of a reasonable fee, the CRT must attempt

> (A) To maximize the availability of creative works to the public;
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> (B) To avoid the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
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> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[46]

The first royalty rate adjustment proceeding commenced in January 1980 as required by section 804.[47] The congressional mandate to review the royalty rate only two years after the effective date of the 1976 Act suggests that the $8 fee was only intended as an initial compromise. Whether the rate would be increased or held at $8 was left to the CRT's discretion.[48]

Rate adjustment hearings were conducted in April and May of 1980, and proposed findings of fact and conclusions of law were presented in September 1980.[49] The arguments of the performing rights societies in favor of increasing the license fee were found to be more persuasive than those of AMOA which favored maintaining the $8 fee.

1. Arguments of the Performing Rights Societies

ASCAP and SESAC, in a joint brief, contended that a reasonable annual compulsory license fee should be $70, with annual adjustments beginning in 1982 to reflect changes in the

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45 *See* 17 U.S.C. § 804(a) (1982).
46 *Id.* § 801(B)(1)(A-D).
47 *See* 46 Fed. Reg. 885 (1981) (codified at 37 C.F.R. pt. 306 (1983)).
48 *See* H.R. Rep. No. 1476, *supra* note 13, at 5789.
49 *See* 46 Fed. Reg. 885 (1981).

Consumer Price Index (CPI).[50] They supported this proposal by analogizing their fee to other free market licensing fee negotiations regularly conducted between copyright owners and users of mechanical music, such as owners of restaurants and bars or location owners; background music services, such as music piped into an elevator; and foreign jukebox operators.[51]

Mechanical music includes cassettes played on an establishment owner's personal tape deck. An owner negotiates with each performing rights society for the right to play its repertory of copyrighted songs at his location. The lowest negotiated fee paid to ASCAP alone for mechanical music was $70.[52] Similarly, the annual rate for background music played in locations comparable to those which have mechanical music was approximately $52 for ASCAP alone.[53] Again, a location owner negotiates with each society for the right to play its repertory as background music. Finally, under the last free marketplace example, ASCAP's survey of nineteen countries revealed that the average fee paid by jukebox operators to copyright owners was approximately $96 per year.[54]

ASCAP and SESAC concluded that a $70 compulsory license fee for the annual use of the combined repertories of ASCAP, SESAC, and BMI was not unreasonable given the fees paid in the three free marketplace examples.[55] BMI, however, asked for a more conservative annual fee of $30.[56] This fee was derived from a narrow reading of the congressional legislative history of

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50 *Id.*

51 *Id.* The ASCAP witness, Dr. Robert R. Nathan, who was qualified as an expert economist with extensive experience in the market for performing rights in musical works, testified that a regulatory agency should consider the concept of value in the marketplace in similar or parallel economic circumstances to set a license rate. *See* ASCAP and SESAC, Proposed Findings of Fact and Conclusions of Law Before the Copyright Royalty Tribunal, at 19–20 (Sept. 16, 1980).

52 *See* 46 Fed. Reg. 885 (1981). The performing rights societies generally do not coordinate the granting of licenses. In order to play most copyrighted songs in public, licenses would have to be obtained from each society. *See supra* note 6.

The sum of the fees charged to establishments such as restaurants and bars by ASCAP, BMI, and SESAC is $190. If all three repertories were licensed at once, the total fee would only be $140 as the result of administrative savings. 46 Fed. Reg. 885 (1981).

53 46 Fed. Reg. 886 (1981). The $52 figure was calculated on a 1971 base of $27 adjusted for inflation. ASCAP licenses about 700 background music operators who have approximately 130–140,000 subscribers. ASCAP and SESAC, *supra* note 51, at 25.

54 46 Fed. Reg. 886 (1981). Foreign fees ranged from $31.70 per box in Greece to $2000 per box in Paris. The nineteen countries included England, France, West Germany, Greece, Belgium, Italy, Holland, and Sweden. ASCAP and SESAC, *supra* note 51, at 26–27.

55 *See* 46 Fed. Reg. 885–86 (1981).

56 *Id.* at 886. BMI's base was the $19.70 fee recognized by the Senate as a reasonable fee in 1975. BMI then applied the CPI to the base for each succeeding year during 1975–80.

the 1976 Act and CPI adjustments.[57]

The CRT, in evaluating the proposals of the societies, found most appealing the ASCAP/SESAC analogy to free marketplace negotiated fees. Although the CRT rejected a direct link between the marketplace and the level of the fee, it accepted market negotiated fees as a "benchmark to be weighed together with the entire record and the statutory criteria."[58] BMI's approach was rejected as being incompatible with the CRT's statutory mandate for determining fee adjustments.

2. Argument of the AMOA

AMOA, in contrast to the performing rights societies, argued that the $8 fee should not be adjusted. It contended that the jukebox industry could not afford an increase in the license fee.[59] The data from an AMOA survey showed that jukebox operation was a moribund industry.[60] Furthermore, United States Department of Commerce data showed a 49% decline in the number of registered jukeboxes from 1973 to 1975;[61] and data from another source compared a small increase in the average jukebox price per play with the large CPI increase between 1940 and 1980.[62]

The CRT was unpersuaded by AMOA's argument. AMOA's

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57 *Id.* BMI General Counsel, Edward Chapin, stated that BMI's membership would accept the ASCAP/SESAC $70 fee proposal. ASCAP and SESAC, *supra* note 51, at 31–32.

58 46 Fed. Reg. 888 (1981).

59 *See id.* at 886–87.

60 *Id.* at 886. The AMOA retained Peat, Marwick, Mitchell and Company (PMM&Co.), an accounting firm, to conduct the survey. The survey was based on a Price Waterhouse questionnaire which had been used in coin-machine industry surveys in 1952, 1959 and 1967. A PMM&Co. witness testified that serious problems with many of the questions had been discovered after the survey had been conducted. ASCAP and SESAC, *supra* note 51, at 34–35. *See generally id.* at 35–40 (detailed criticism of the PMM&Co. survey methodology).

The survey elicited 485 responses. By extrapolation, it was estimated that there were between 3,246 and 5,025 jukebox operators and between 250,817 and 387,813 jukeboxes. An operator's annual expenses were $673, leaving an average annual profit of $88. *Id.* at 42.

ASCAP's analysis of the AMOA figures presented a different picture. Noting the operators' practice of splitting jukebox revenues 50–50 with the location owners, ASCAP doubled an operator's revenue to include the unreported share given to the location owner and arrived at a total average annual revenue of $1508 per jukebox. Assuming that he incurred no maintainence expenses, the location owner's share of the revenue, $754, would have been pure profit. Adding the reported profit of $88 with the unreported profit of $754 would have resulted in a total average annual profit of $842. *Id.* at 42–43.

61 46 Fed. Reg. 886 (1981). The number of boxes dropped from 75,000 units shipped in 1973 to 38,000 units in 1975.

62 *Id.* (citing a report by Professors Sequin and Malone of Notre Dame University). While the CPI increased 452% the average price per play increased 150%.

survey was rejected as unreliable because of a low response rate and conflicting data from other industry surveys.[63] Furthermore, AMOA's witnesses were rejected as generally unrepresentative of the jukebox industry.[64]

The AMOA figures required more extensive analysis. For example, if the decline in registered jukeboxes between 1973 and 1975 was caused by the general economic effect of the 1973 oil embargo, the jukebox industry could not have been characterized as dying. Again, a comparison of average price per play and CPI increases was of limited value unless price increases on other coin-operated machines during the same period were also examined.

3. The CRT Decision

After evaluating the arguments of the copyright owners and jukebox operators, the CRT concluded that the $8 fee originally set by Congress did not meet the statutory requirement that copyright owners receive a fair return for their creative endeavors.[65] Accordingly, a majority of three commissioners[66] set a new fee of $25 for 1982-83 and $50 for 1984-86.[67] Although the CRT was prohibited from convening a new rate adjustment proceeding until 1990,[68] it held that the $50 fee would be adjusted on January 1, 1987 to reflect CPI changes during the 1981-86 period.[69] The majority noted that the $50 fee could have been put into effect immediately rather than in 1984, but that the graduated fee afforded the jukebox industry the opportunity to adjust to "compulsory licensing at marketplace rates."[70]

In separate findings of fact and conclusions of law, Commissioner James concurred with the majority that the fee should be raised, but he disagreed over the amount of the increase.[71] Commissioner James believed that the issue before the CRT was marketplace value and, therefore, the CRT was compelled to analogize, in determining its fee, to those instances where licenses are negotiated in the free market. License fees paid by

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63 *Id.* at 888.
64 *Id.*
65 *See* 17 U.S.C. § 801(b)(1)(B) (1982).
66 *See supra* note 3.
67 46 Fed. Reg. 889 (1981).
68 *See* 17 U.S.C. § 804(a)(2)(C) (1982).
69 46 Fed. Reg. 889 (1981).
70 *Id.* at 888 (citing ASCAP and SESAC, *supra* note 51, at 3).
71 *Id.* at 890. In a separate unexplained conclusion, Commissioner Garcia determined that the fee should have been raised to $30 for 1982–83 and to $60 for 1983–84.

identical or similar users would provide the "only credible" evidence in the record to establish "a reasonable fee."[72] According to Commissioner James, "[t]he majority, in essence, appears to have reached a conclusion based on an ability to pay theory."[73] In addition, the ability of jukebox operators to split their revenue with the location owners contradicted their claim of not earning enough revenue to afford a license fee of more than $8.[74] In conclusion, Commissioner James would have set a minimum annual fee of $130 per jukebox.[75]

Although Commissioner James offered the strongest economic argument, the majority made a political decision consistent with its statutory mandate of balancing the interests of composers and publishers with those of jukebox operators. James' $130 fee proposal may have been economically reasonable, but it would have represented an immediate and substantial increase over the $8 fee which had gone into effect only three years earlier. The majority's $50 fee determination would have less shock impact on jukebox operators. Congress had used the same shock impact reasoning in setting the $8 fee when it lifted the jukebox royalty exemption in 1976.

B. *Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*

Under the 1976 Act, any party to a CRT rate adjustment proceeding has the right to appeal directly to the Circuit Courts.[76] The Seventh Circuit's decision in *Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*[77] was the direct result of an appeal by AMOA and ASCAP of the CRT's 1980 rate adjustment.

AMOA claimed that the CRT "acted arbitrarily and capriciously or without support in substantial evidence" in rejecting its argument for retention of the $8 fee.[78] It maintained that Congress did not intend the $8 fee to be a temporary rate and, therefore, any party seeking to change it had the burden of proof of justifying the increase.[79] The societies did not meet this burden. Furthermore, AMOA claimed that the CRT erred in adjust-

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72 *Id.*
73 *Id.* at 891.
74 *See id.*
75 *Id.*
76 *See* 17 U.S.C. § 810 (1982).
77 676 F.2d 1144 (7th Cir.), *cert. denied*, 459 U.S. 907 (1982).
78 *Id.* at 1154.
79 *See id.* at 1153–54.

ing the fee upward when the evidence indicated that an increase would contribute to a further decline in the jukebox industry.[80]

ASCAP appealed the CRT decision on the ground, *inter alia*, that the fee increase to $50 fell below the "zone of reasonableness" requirement which the CRT was bound to follow pursuant to section 801 of the 1976 Act.[81] According to ASCAP, the "zone of reasonableness" was in the $70-140 range.[82]

The Seventh Circuit denied the petitions of both AMOA and ASCAP. The court found that the Tribunal's conclusions pass muster either under the "arbitrary and capricious" standard or the "substantial evidence standard."[83]

The performing rights societies and AMOA carried an equal burden of proof in validating or invalidating the $8 fee.[84] AMOA failed to convince the court that retention of the $8 fee was legislatively mandated or would be ruinous to the jukebox industry.[85] The court agreed with the CRT that the AMOA survey "should be accorded little weight."[86] It also found that the CRT had "correctly concluded that no special legislative imprimature is attached to the $8.00 fee."[87] The jukebox operators' contention that a higher fee would result in a further decline in the jukebox industry was harshly swept aside by the court. It stated:

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80 *See id.* at 1152–53.

81 *See id.* at 1156.

82 *Id.* at 1156–57.

83 *Id.* at 1151–52. The "arbitrary and capricious" standard is the general standard of review required by the Administrative Procedure Act (APA) for informal rule making. *See* 5 U.S.C. § 706(2)(A) (1982). The standard for judicial review provides that the reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, [and] capricious . . . ."

The "substantial evidence" standard is required by the APA, (5 U.S.C. § 706(2)(E) (1982)) for review of an APA formal rulemaking or an APA formal adjudication with an "on the record . . . agency hearing." 5 U.S.C. § 553(c) (1982); 676 F.2d at 1150.

The court found that the most appropriate standard for review in this case was the "arbitrary and capricious" standard but that the CRT decision would be valid under either standard. Following its previous analysis in Illinois v. United States, 668 F.2d 923 (7th Cir. 1981) ('Mopac'), *cert. denied*, 455 U.S. 1000 (1982), the court found that where proceedings were carried on pursuant to a statute that did not, as in this case, require public hearings and the complexity of the issues and factual evidence required a careful analysis of the record, the 'distinction between [the arbitrary and capricious] standard and the substantial evidence test is without practical significance.' 676 F.2d at 1152 (citing *Mopac*, 668 F.2d at 930).

84 676 F.2d at 1154. The CRT had initiated the rate adjustment proceeding, consequently, it determined that neither the operators nor the societies carried the burden of proof. *See* 46 Fed. Reg. 887 (1981).

85 *See* 676 F.2d at 1153–55. The court cited S. REP. No. 473, 94th Cong., 1st Sess. 96–97 (1975), *reprinted in* 13 GROSSMAN, *supra* note 12, at 96–97, in which the Senate Committee on the Judiciary held that $19.70 was a reasonable fee for the compulsory license. In order to ease the passage of the 1976 Act, the Senate agreed to go along with the $8 fee supported by the House. *See* 676 F.2d at 1154.

86 676 F.2d at 1154.

87 *Id.*

> Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase. But to accept the proposition that AMOA may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable is, we believe, unsound and unjust.[88]

ASCAP also failed to convince the court that the new $50 fee was not within the "zone of reasonableness," even though it noted that ASCAP and SESAC "presented the most credible and relevant evidence before the Tribunal."[89]

The Seventh Circuit upheld the CRT's decision in all respects. As a practical matter, the court probably would not have overruled the rate adjustment if it had been $20 or even $100. It recognized that "[r]atemaking is an art, not a science."[90] A ruling reversing a CRT decision would have quickly debilitated the rate adjustment mechanism so painstakingly created by Congress in the 1976 Act.

IV. The Player Act

The Player Act, which was proposed as a consequence of jukebox operators' frustrations over adverse decisions by the CRT and the Seventh Circuit in *Amusement and Music Operators*, would have completely amended section 116 of the 1976 Act. Senator Edward Zorinsky, on behalf of the AMOA, introduced the Player Act to

> correct [the] abuses of the Copyright Royalty Tribunal, to protect an important segment of the Nation's small businessmen—jukebox operators, to help insure that copyright owners will continue to receive royalties for their recordings played on jukeboxes, and to maintain jukeboxes as an inexpensive form of entertainment for the American people.[91]

The performing rights societies strongly opposed the Player Act. BMI noted that "[l]ike a child shuttling between parents in an

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88 *Id.* at 1154–55.

89 *Id.* at 1157.

90 *Id.* at 1159. The Court of Appeals noted that "if Congress entrusts a novel mission to an agency and specifies only grandly general guidelines for the agency's implementation of legislative policy, judicial review must be correspondingly relaxed." National Cable Television v. Copyright Royalty Tribunal, 724 F.2d 176, 181 (D.C. Cir. 1983) (cable broadcasting rate determination). "The functions Congress has assigned to the Tribunal require [the court] to accord a large measure of deference to its substantive rulings." *Id.* at 181–82.

91 S. 1734, 98th Cong., 1st Sess., 129 Cong. Rec. S11,449–50 (daily ed. Aug. 1, 1983) (introductory remarks by Senator Zorinsky) [hereinafter cited as *Introductory Remarks*].

attempt to get a particularly favorable decision, the coin-machine industry—having lost its arguments before the Tribunal and the courts—is now attempting a return to the congressional apron strings."[92] The Player Act represented special interest legislation.

Under the Player Act, the jukebox manufacturer or importer would have been required to pay a one-time fee of $50 for new jukeboxes.[93] Jukebox operators would also have been required to pay a one-time fee of up to $25 for each "used" jukebox in their possession on the effective date of the Player Act;[94] the actual fee for each used jukebox would have depended upon its remaining years of useful life.[95] Jukebox operators would have been absolved of any responsibility for new jukeboxes purchased after the Player Act's effective date. The responsibility for royalty fees would have eventually shifted entirely to jukebox manufacturers and importers.[96]

The Player Act was, in reality, designed to free jukebox operators from the burden of registering their boxes with the government. Contrary to the assertion of Senator Zorinsky, the Player Act would not have made it any more likely that copyright owners would have "continued to receive royalties for their recordings" than they have under the current section 116.[97] In fact, the Player Act would have decimated the minimal royalties currently received by copyright owners. A $50 one-time royalty fee would have been insufficient to compensate copyright owners. Each song's share of the $50 fee would have become progressively smaller as different records were added to the jukebox over time; at the end of the jukebox's useful life each copyright owner would have collected his infinitesimal cut of the small fee. Under this system, some composers and publishers would have had to wait up to fourteen years or more to receive their share of the $50 royalty.[98] For example, *Love Is A Bat-*

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92 Broadcast Music, Inc., The Coin-Operated Phonorecord Player Copyright Act of 1983: A Position Paper, at 2 (Oct. 28, 1983) (available from BMI, New York City).

93 *See* Player Act, *supra* note 4, at § 116(d)(1). If a new "Player Act" is proposed in the 99th Congress, it will not contain a one-time buy-out fee. This provision was successfully opposed by the copyright owners. Telephone interview with Fuchs, *supra* note 4.

94 Player Act, *supra* note 4, at § 116(d)(2).

95 *Id.*

96 The willingness of manufacturers to shoulder the burden of paying for compulsory licenses is unimpressive. *See Hearings*, *supra* note 6 (statement of Jerry Gordon, President of Distributor Operations, Rowe International, Inc., at 4). Jukebox purchase prices could easily be increased 1% to cover the cost of a $50 annual compulsory license. Thus, manufacturers would not sacrifice anything.

97 *Introductory Remarks*, *supra* note 91, at S11, 449.

98 At the 1980 CRT rate adjustment proceeding, it was stated that the average life of a Rock-Ola jukebox was fourteen years, but it was " 'guessed,' without statistical sup-

tlefield,[99] recorded by Pat Benatar, was added to jukebox X in early 1984. Assuming that the Player Act had become effective January 1984 and this jukebox's useful life would end in 1995, the composers and publishers would not realize their share of the $50 royalty until after 1995 when all the songs played on jukebox X, during the eleven year period, became known.

Senator Zorinsky's second claim that the Player Act would have improved the administration and enforcement of the compulsory license by "eliminating the CRT entirely"[100] was also unfounded. First, the CRT adjusts compulsory license fees for the production and distribution of records, cable subscriptions, and public broadcasting, as well as for jukeboxes.[101] Second, unless jukebox operators and performing rights societies negotiate license fees in the free marketplace and establish their own licensing system, a tribunal is needed to administer the collection and distribution of jukebox royalties. Prior disputes among the performing rights societies over royalty distribution[102] attest to the need for such a tribunal. The Register of Copyrights is not equipped to be a tribunal nor should it be.

The sponsors of the Player Act intended its fee scheme and administrative improvements to redound to the benefit of "a beleaguered industry of small businessmen . . . ."[103] Although "small businessmen" are not defined by the proponents of the bill, a small jukebox operator has been classified as one who owns fewer than forty jukeboxes.[104] However, since all jukebox operators also own other coin-operated machines,[105] a small jukebox operator may not necessarily be a "small businessman" as commonly defined. This is especially true in a cash industry, like the jukebox industry, where an accurate accounting of revenue per operators is impossible.

In the final analysis, the Player Act did not offer any benefits to copyright owners. It did offer relief to jukebox operators, as "small businessmen," unprotected by the 1976 Act.

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port" that the average life of a Rowe jukebox was five to six years. ASCAP and SESAC, *supra* note 51, at 63.

The cost of a jukebox depreciates over a period of five years. *Hearings*, *supra* note 6 (statement of Don Van Brackel, past President of AMOA, at 3–4).

99 Michael Chapman and Holly Knight, composers; Chinnichap Publishing/Careers Music (BMI) and Makiki Publishing Co. Ltd./Arista Music (ASCAP), publishers.

100 *Introductory Remarks*, *supra* note 91, at S11,449.

101 *See* 17 U.S.C. §§ 111, 115, 118 (1982).

102 *See supra* note 44.

103 *Introductory Remarks*, *supra* note 91, at S11,449.

104 46 Fed. Reg. 886 (1981).

105 *See infra* text accompanying note 121.

A. *Position of the Proponents of the Player Act*

AMOA contends that the jukebox industry will not survive the new $50 fee unless legislative relief is forthcoming.[106] The more than 525% increase in the license fee from $8 to $50 over a six year period will hasten the end of an industry[107] that is already suffering from:

1) increased manufacturing and servicing costs, including record prices;
2) loss of suitable locations for jukeboxes due to changing patterns of social activities;
3) widespread replacement of jukeboxes by other forms of entertainment, such as sound systems, radio, television, discos, and live performances; and
4) the inability to increase prices per play to keep pace with inflation.[108]

AMOA also sees the current section 116 as unworkable because it leaves operators vulnerable to infringement claims which are "zealously" pursued by the societies.[109] Operators who have violated copyrights on hundreds of songs through unlicensed jukeboxes are subject to severe penalties. Section 504(c)(1) of the 1976 Act, recognizing the gravity of copyright infringement, allows an award of between $250 and $10,000 for *each* infringement "as the court considers just."[110] AMOA ignores the fact that those operators who have paid the fee and obtained the compulsory license need not worry about copyright infringement liability.

The performing rights societies zealously pursue copyright infringers only to a certain extent. While a society could conceivably

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106 *See* AMOA, *supra* note 5, at 2. However, BMI remarked that jukebox "industry spokesmen are habitually crying 'dying industry' and 'poverty.' Those cries of 'Wolf!' have been echoing through the halls of Congress for over 50 years and since appearances before the 69th Congress in 1926, have been repeated again and again to lawmakers during at least 10 Congressional sessions." BMI, *supra* note 92, at 2.

107 AMOA, *supra* note 5, at 2. The jukebox industry supports its position with misleading arguments. For instance, a jukebox manufacturer has stated that "[u]nder the previous $8.00 annual fee, it took 32 plays of a machine to pay for the copyright royalty. Under the current fee, it takes 200 plays." *Hearings*, *supra* note 96, at 3.

Assuming an average jukebox revenue of $1832 in both 1978, the effective date of the 1976 Act, and 1983, the new $50 fee would require an increase in revenue of only 2.3% over a six year period (for 1978, $8/$1832=0.4% and for 1983, $50/$1832=2.7%). *See infra* text accompanying note 132.

108 *Hearings*, *supra* note 96, at 2–3. Between 1979 and 1983, total jukebox operating costs rose 153%. *Hearings*, *supra* note 6 (statement of Edward M. Cramer, President of BMI, at 5). However, the cost of a compulsory license as a percentage of total expenses only rose from 1.0% in 1979 to 2.5% in 1983. *Id.*

109 AMOA, *supra* note 5, at 5. "In many cases, ASCAP or BMI enforcers have demanded and secured payments in excess of $2000 for at most a $25 violation." *Id.*

110 17 U.S.C. § 504(c)(1) (1982).

base an infringement action on the approximately two hundred songs whose copyrights have been violated by the unregistered box, it would be imprudent to do so. In *Broadcast Music, Inc. v. Fox Amusement Co.*,[111] an action was only based on claims of copyright infringement of fifty-seven songs on eleven unlicensed jukeboxes.

The proponents of the Player Act do not view increased compliance with section 116 as the solution to "excessive" judgments. Rather, they believe that a less expensive fee would encourage compliance with section 116.[112] This contention is valid, however, only if one assumes that operators avoid compliance with section 116 because of the amount of the fee; the basis for this assumption has yet to be established. Furthermore, those operators still ignorant of the 1976 Act seven years after its effective date are just as likely to be unaware of a new section 116 and will therefore remain liable for copyright infringement on the same jukeboxes. A more feasible solution to "excessive" judgments would be for AMOA to take a more active role in insuring that is members comply with the current section 116.

B. *Positions of the Opponents of the Player Act*

ASCAP presented the most articulate argument for rejecting the Player Act. The Society asserted that the Player Act would have denied continuing royalty payments for continuing use.[113] It would have bought-out the copyright owner's right to receive continuous payments through an imposition of a one-time fee, which would have frozen the compulsory license rate. A one-time fee was specifically rejected by Congress "in light of inevitable changes in economic circumstances."[114] In addition, the Player Act would have created difficulties in enforcing section 116 of the 1976 Act, because it would have resulted in reduced license registrations and would have rewarded past defiance of the law by granting a general amnesty to those who had not previously paid their fees.[115] Finally, the Player Act acknowledged the untenable claims that the jukebox industry is in financial

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111 *Fox Amusement Co.*, 551 F. Supp. at 106.

112 *See Introductory Remarks*, *supra* note 91, at S11,449.

113 ASCAP, *supra* note 37, at i–iii.

114 *Id.* at i; *see* BMI, *supra* note 92, at 6. "The true economic value of intellectual property used on a continuing basis cannot be arbitrarily determined in advance so as to justify any mandate that the payment for its use be only a one-time payment." *Hearings*, *supra* note 6 (statement of Morton David Goldberg, past Chairman, Section of Patent, Trademark and Copyright Law of the American Bar Association, at 2).

115 ASCAP, *supra* note 37, at i.

difficulty.[116]

ASCAP's most compelling argument was that the Player Act would have bought-out the copyrights of composers and publishers. If the useful lives of jukeboxes were exact, a one-time fee would not necessarily be a "buy-out." For example, a $50 fee for a jukebox with a definite life of ten years would result in a license fee equivalent to $5 per year. Although this $5 per year fee would be unreasonably low under the 1976 Act,[117] it would, nevertheless, represent a continuous payment of $5 per year over the ten year useful life of the box. But in the real world, the useful lives of jukeboxes are indeterminate, varying by manufacturer and usage. Conceptually, it is impossible to allocate a yearly fixed stream of income from a one-time license fee to a jukebox of indeterminate life. Thus, the Player Act precludes the idea of a continuing royalty payment by buying-out the right to use copyrighted material over the entire life of a jukebox through a one-time fixed fee.

Approval of a jukebox royalty "buy-out" requires congressional determination of a final, immutable license fee. Congress clearly has the power to set the level of a compulsory license fee or to eliminate jukebox royalty payments altogether. However, under the 1976 Act, Congress has chosen to remove itself indefinitely from the determination of royalty payments not only for jukeboxes but also for record manufacturing and distribution, cable system subscription, and public broadcasting.[118] Congressional involvement in the royalty procedure would violate the spirit of the 1976 Act and would debilitate its chosen mechanism, the CRT, as an independent arbiter adjusting license fees in a changing economic environment.

Beyond these negative conceptual changes the Player Act would have made in copyright law, ASCAP's and BMI's opposition to the bill addressed its underlying premise. The Player Act had been proposed in order to extend economic relief to an industry that does not need it. In fact, a true picture of the economic condition of the jukebox industry emerges when the figures from industry surveys are analyzed.

V. Economic Analysis of the Jukebox Industry

A detailed analysis of the jukebox industry's figures permits

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116 *Id.* at i, 6–7.
117 *See* 17 U.S.C. § 801(b)(1) (1982).
118 *See supra* note 101.

a proper evaluation of operators' claims of an inability to maintain profits while having to pay a $50 license fee. The Gaertner Report, which used the AMOA 1981 and 1983 Cost of Doing Business Surveys, is the most recent source of data.[119] The purpose of the report is "to provide economic and statistical information concerning (1) the current and projected state of the jukebox industry in the United States, and (2) the potential impact of the imposition of a $50 . . . fee per jukebox . . . ."[120]

A. *Jukebox Ownership*

The Gaertner Report reveals, perhaps unintentionally, that there is no jukebox industry. There exists a jukebox component of a coin-operated machine industry. AMOA's surveys establish that no single coin-machine operator solely owns jukeboxes.[121]

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[119] J. Gaertner, A Report On the Economic State of the Jukebox Industry (Sept. 1983) (available from AMOA, Oak Brook, Ill.) [hereinafter cited as Gaertner Report].

The 1981 AMOA survey upon which this report is based was the one used for the 1980 CRT rate adjustment proceeding. According to BMI, the 1983 survey suffers from the same "methodological flaws and design biases [as the first survey] which completely invalidate their conclusions." BMI, *supra* note 92, at 9.

Only 93 out of 641 AMOA members responded to the 1983 survey; only 33 out of 93 responses provided per jukebox income figures. Such a small number of responses cannot represent 10,000 jukebox operators. *Hearings*, *supra* note 6 (statement of SESAC at 6).

For the purposes of this Note, the AMOA surveys will be accepted as valid, but the conclusions drawn by the Gaertner Report will be critically analyzed. The data will be regarded as most favorable to the jukebox operators.

[120] Gaertner Report, *supra* note 119, at 2.

[121] *Id.* at 3–4.

TABLE I
NUMBER OF OPERATORS REPORTING
A GIVEN BUSINESS MACHINE COMPOSITION

	1983		1981	
	Number	Percent	Number	Percent
ONLY Jukeboxes	0	0	0	0
ONLY Amusement Games (Video and other)	19	20.9	3	4.1
ONLY vending (and other)	0	0	0	0
ONLY Jukeboxes games	32	35.2	19	26.0
ONLY Games, vending (and other)	5	5.5	1	1.4
Jukeboxes, games, vending (and other)	35	38.4	50	68.5
	[91]	100.0	[73]	100.0

Id.

All jukebox operators also own games and/or vending machines.[122]

The Report then attempts to minimize the finding that there are no exclusive jukebox operators by concluding that there may be an accelerating "shift in emphasis away from jukeboxes and toward video games" among coin-machine operators.[123] The figures show that jukeboxes accounted for 16.7% of the total machines owned per operator in 1980 but only 12.1% of the total machines owned in 1982.[124] However, the number of total machines owned per operator increased by 22.1% from 1980 to 1982.[125] If operators had the same number of jukeboxes in 1982 as they had in 1980, jukeboxes would have accounted for only 13.6% of the total number of machines in 1982.[126] Even if the number of jukeboxes per owner had *not* declined during the 1980-82 period, there still would have been a 4.6% decrease in jukebox ownership as a percent of total machines owned due to an increase in total machine ownership during the same period. Thus, there is no basis for concluding that there was a dramatic decrease in jukebox ownership from 1980-82. The figures do reflect a heightened interest in video games but not at the expense of jukeboxes.

B. *Jukebox Revenues*

It is a common practice for coin-machine operators to split jukebox revenues with the owner of the location where the machine is placed.[127] The current trend is toward a 60-40 split in favor of the operator although a 50-50 split is still prevalent.[128]

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[122] *Id.*

[123] *Id.* at 12. Gaertner would attribute this shift to the increases in the level of the license fee.

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TABLE II
MACHINES PER OPERATOR
(Average Responses)
As of December 31

	1982		1981		1980		1979	
	n	%	n	%	n	%	n	%
Jukeboxes	65	12.1	79	16.7	73	16.7	75	18.1
Games	354	66.2	275	58.0	224	51.1	192	46.4
Vending and Other	116	21.7	120	25.3	141	32.2	147	35.5
TOTAL	535	100	474	100	438	100	414	100

Id. at 4.

[125] *See id.*

[126] *Id.* Seventy-three jukeboxes out of 1982's total of 535 machines.

[127] *See* 46 Fed. Reg. 888 (1981).

[128] ASCAP, *supra* note 37, at 22.

Any discussion of jukebox revenues must consider this practice of jukebox revenue division.

Based on past practices, it is highly unlikely that reported revenue figures include operator cash splits with location owners.[129] This was certainly true in the 1982 survey where operators were informed that the results were to be used for lobbying purposes.[130] According to the Gaertner Report, total reported jukebox revenues for the average operator decreased from $947 per box in 1981 to $916 per box in 1983.[131] If it is assumed, however, that the jukebox operators divided revenues on a 50-50 basis with the location owners and did not include the split revenue in the total reported revenue, the accurate per box revenue becomes $1894 in 1981 and $1832 in 1983 by simply doubling the reported figures.[132]

Significantly, no revenue figures were presented in the report for video or vending machines. Since no operator owns only jukeboxes, this absence is meaningful because the important number is the total revenue for all machines owned by the average operator. Although jukebox revenues declined 3.3% from 1981 to 1983,[133] an increase in video game revenues would have offset the jukebox revenue loss by increasing total coin-machine revenue.

C. *Jukebox Profits*

The Gaertner Report presents profits for jukeboxes only and not for other coin-operated machines. Per box profits increased from $72.58 in 1981 to $130.86 in 1983.[134] To understand fully the nature of the profits, the location owner's unreported revenue share must be taken into consideration. If one assumes the jukebox operator carries all the expenses associated with the jukebox, the location owner's share is pure profit. If the unreported location owner's revenue figures of $947 in 1981 and $916 in 1983 are combined with the reported profit figures, the actual profit per jukebox will rise from $1019.58 in 1981 to

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129 *See* ASCAP and SESAC, *supra* note 51, at 42–43.

130 BMI, *supra* note 92, at 9.

131 Report, *supra* note 119, at 6. These profit figures are at variance with at least one other source which stated that the average jukebox earns $4800 annually. *High Tech Clip Jukebox Bows*, BILLBOARD, July 30, 1983, at 30. Another source put average jukebox earnings at $2366 per year. *Hearings*, *supra* note 6 (statement of Senator D'Amato, at 2) (citing REPLAY, Apr., 1984).

132 50%(x)=$947, x=$1894; 50%(x)=$916, x=$1832.

133 $916/$947=.967−1=(3.3)%.

134 Report, *supra* note 119, at 7.

$1046.86 in 1983.[135]

The Gaertner Report minimizes the significance of the figures because the operators are unable to reconcile their profits with their claims of unprofitability. Gaertner accounts for the improved profitability by concluding that operators have become more selective in placing jukeboxes, and consequently, the more suitable locations result in an increased return per box.[136] The Report also attempts to disparage the prospect of future jukebox profits. On the one hand, the Report admits that "[i]t is meaningless to attempt to predict other key variables which might impact on jukebox profitability over the next several years such as inflation, increased or decreased play, etc."[137] On the other hand, the Report adds a caveat to this admission by finding that jukebox profits will always be constrained by the operators' inability to raise prices to keep pace with inflation.[138]

Contrary to the assertion of jukebox operators, jukebox prices have risen in the past without any apparent deleterious effect on the popularity of jukeboxes. It is not unusual to find a jukebox in one location offering one song per quarter while another at a different location is offering two songs per quarter. Coin-machine operators could, for example, eliminate the quarter as a playing option and increase the number of plays to five for two quarters. Even if the number of people playing songs were to decline, this would most likely be offset by an increase in the incremental revenue per player.

The jukebox operators' concern over high expenses and marginal profits appears contrived in light of the incidental results of an undercover investigation in Chicago. A tavern, "The Mirage," was run by reporters from the *Chicago Sun-Times* for four months during 1977 in an attempt to uncover corrupt municipal inspectors and officials.[139] An unexpected result of the operation was that the reporters were exposed to coin-machine salesmen and their illegal sales techniques.

Most of the coin-machine salesmen visited "The Mirage" unsolicited.[140] In exchange for permission to place pinball machines and a jukebox in the tavern, they offered a choice of $1000

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135 In 1981, $947+$72.58=$1019.58; in 1983, $916+$130.86=$1046.86.

136 Gaertner Report, *supra* note 119, at 8. The Report notes that 25% of the operators have experienced losses from their jukebox operations. *Id.* at 8–9.

137 Gaertner Report, *supra* note 119, at 9.

138 *Id.*

139 *See* ASCAP and SESAC, *supra* note 51, at 69–70. The story is recounted in Z. SMITH & P. ZEKMAN, THE MIRAGE (1979).

140 SMITH, *supra* note 139, at 48–52.

in cash, purchase of the liquor license or the initial liquor inventory, or illegal loans.[141] The salesmen admitted that their offers were illegal under Chicago ordinances.[142] The operator eventually selected placed two pinball machines and a jukebox in the tavern and, in return, offered a $1200 kickback.[143]

The investigation further revealed that it was standard practice for an operator to "skim" profits. After half the weekly revenue from the machines was split with the tavern owners, only half of the operator's share was reported for tax purposes.[144] On one occasion, the salesman decided not to report any of the revenue taken from the machines.[145] Claims of jukebox operation unprofitability lose all credibility when coin-machine salesmen offer attractive monetary inducements to influence machine placements and then "skim" off the profits.

D. *Jukebox Registrations*

The Gaertner Report's final declining jukebox industry argument is supported by the falling level of jukebox registrations. Registrations declined by 14% from 1978 to 1982,[146] and only about one-third of the total boxes were registered in 1978.[147] Yet Gaertner states that "[t]hese figures tend to support the proposition that the industry is declining."[148] An equally plausible inference is that operators are accelerating their non-compliance with the compulsory licensing requirement. Operators are engaging in more sophisticated methods of fee avoidance. For example, an operator might register one-third of his machines but retain the licenses instead of affixing them to the boxes in the manner required by section 116.[149] If a performing rights society finds any of the machines without the affixed license, the operator merely claims that he had neglected to affix the purchased license.[150] The operator then affixes the license to the "discovered" machine from his stock pile of "emergency" licenses.[151] It

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141 *Id.* at 49.
142 *Id.*
143 *Id.* at 85.
144 *Id.* at 100.
145 *Id.* at 171.
146 Gaertner Report, *supra* note 119, at 10. Registrations were 145,535 in 1978; 138,798 in 1979; 137,845 in 1980; 135,452 in 1981; and 125,000 in 1982. *Id.* The total number of jukeboxes is between 251,000 and 388,000 (46 Fed. Reg. 886 (1981)) or even as high as 500,000. ASCAP, *supra* note 37, at 32.
147 *See supra* note 146. 125,000/388,000=32%.
148 Report, *supra* note 119, at 10.
149 Koenigsberg interview, *supra* note 6.
150 *Id.*
151 *Id.*

is highly improbable that more than one-third of the operator's jukeboxes will be discovered under current enforcement procedures.

E. *Report Summary*

The jukebox financial data in the Gaertner Report is incomplete and the findings inconclusive. In the absence of comprehensive data for all coin-operated machines, a conclusive analysis of jukebox figures is impossible. Consequently, claims of a dying jukebox industry and the inability to afford the new $50 license fee have little validity.

If there are coin-machine operators whose businesses are so marginal that the $50 fee will drive them out of business, it is best for the health of the coin-machine industry that they cease operations. The Seventh Circuit correctly stated in *Amusement and Music Operators* that copyright owners should not be deprived of royalties to save the few marginal operators whose revenues cannot cover their costs.[152] Marginal operators regularly go out of business in every industry. There is no sound economic reason why coin-machine operators should be an exception.

VI. Improving the Flow of Royalty Payments

A. *The Present System*

Compulsory license fee determination and registration under the current section 116 is a workable scheme. The Player Act, however, embodies the coin-machine operators' dissatisfaction with the present method of compulsory licensing. From the copyright owners' perspective, the current system, which tolerates up to two-thirds noncompliance,[153] is not effectively managed.

If the present system is to succeed, as a practical matter, the performing rights societies must improve their enforcement efforts. ASCAP alone has already brought several hundred suits against operators.[154] Court awarded damages plus legal fees have run from five to one hundred times the amount a society would have received from a single fee payment.[155] Although litigation is time consuming and complicated, it is an effective means of

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152 *See* 676 F.2d at 1154–55.

153 *See* ASCAP, *supra* note 37, at 8.

154 *Id.* at 7. ASCAP claims to have won or settled every action brought for copyright infringement against jukebox operators.

155 Damages are based on the $50 license fee effective January 1, 1984.

compensating copyright owners for the infringement of their songs.

The performing rights societies have limited resources with which to enforce all of the different licensing arrangements they have with the various users of copyrighted songs.[156] Jukebox royalty enforcement can only be improved if other more lucrative and easier-to-enforce areas of royalty collection, such as mechanical music licensing, are sacrificed. Currently, jukebox royalties account for only one-percent of the total revenue collected by the performing rights societies.[157]

The new license fee of $50, double the previous amount, may make enforcement of section 116 more economically attractive to the societies.[158] If every jukebox in the country were to be registered today, assuming the existence of 400,000 jukeboxes,[159] total revenue would amount to $20 million, less administrative expenses. Alternatively, if these numbers are unattractive, the membership of the societies could make the short-term political decision to improve jukebox royalty enforcement, at their own expense, to promote the principle that their copyrights are inviolable.

B. *Open Marketplace Licensing*

During the 1980 rate adjustment proceeding, open marketplace negotiation to determine the amount of the compulsory license fee was suggested as an alternative to the present system.[160] There are at least three open marketplace models. Each model proposal requires separate negotiations between coin-machine operators and each performing rights society.[161]

The first model proposal is identical to an arrangement now in effect under section 118 of the 1976 Act between copyright owners and public broadcasters.[162] Both parties are subject to the rate adjusting power of the CRT, but they may preempt the

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156 Koenigsberg interview, *supra* note 6.

157 Telephone interview with I. Fred Koenigsberg, Senior Attorney for ASCAP (Mar. 13, 1984) and with Edward Chapin, General Counsel for BMI (Mar. 21, 1984). The latest annual royalty collection by the CRT was approximately $2.86 million in 1983 and $4.52 million through June 8, 1984. *Hearings*, *supra* note 6 (statement of David Ladd, Register of Copyrights at 9).

158 The fees collected through June 8, 1984 already represent a 58% increase over the total fees collected for 1983. *See supra* note 157.

159 *See supra* note 146.

160 *See supra* pp. 11–12.

161 The jukebox operators and copyright owners are already conducting separate negotiations over fees. *See supra* note 4.

162 *See* 17 U.S.C. § 118(e)(1) (1982).

CRT through a voluntary fee agreement.[163] If they fail to reach an accommodation, the CRT machinery goes into effect.[164] AMOA and each performing rights society might choose to voluntarily agree to the terms and rate of a compulsory license, or in the case of disagreement, submit to the CRT for a fee adjustment determination. Each society would have recourse to the CRT in the face of AMOA intransigence. AMOA, on the other hand, could avoid the "abuses" of the CRT by reaching voluntary agreements with the societies.

The second open marketplace model proposal would entail negotiations between AMOA and each performing rights society without recourse to a federal government body. This solution has already been suggested by ASCAP and BMI as a response to AMOA's dissatisfaction with the current system.[165] Under this model, as with the first model, a fee negotiated by AMOA under a voluntary agreement would serve as a coin-industry standard even if an individual operator were not a member of AMOA.

If AMOA and ASCAP could not agree on a reasonable fee, one would ultimately be determined by a district court under the terms of ASCAP's domestic consent decree.[166] The burden of proof would be on ASCAP to establish the reasonableness of any

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163 *Id.*

164 *Id.*

165 *See* ASCAP, *supra* note 37, at 37; BMI, *supra* note 92, at 7.

166 United States v. ASCAP, 1940–43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941), *modified in* United States v. ASCAP, 1950–51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

> A consent decree is a final judgment which is entered in a government antitrust suit for injunctive relief before any testimony has been taken in the case and on the consent of the government and the defendant or defendants without the trial of the issues raised in the government's complaint or an adjudication of any of the issues raised in the complaint. In form, it is the same as a decree entered in a litigated case.

Injunctive Relief, 2 TRADE REG. REP. (CCH) ¶ 8811 (Jan. 6, 1975).

A consent decree may also be negotiated during the pre-filing period. The government notifies a prospective defendant of the nature and grounds of a civil complaint to be filed against it. The defendant can then agree to participate in negotiations prior to the filing of the complaint. 6 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES § 1.4 (G. Stengel ed. Supp. 1979).

ASCAP's consent decree was entered pursuant to an antitrust suit by the Department of Justice. The suit arose as a result of economic pressure on composers and publishers to join a performing rights society and because of ASCAP's position as the only major performing rights society until BMI was formed in 1939. *See* S. ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 31 (1954).

"[T]he decree guides nearly every aspect of [ASCAP's] operations." S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 166 (1977). The substance of the decree deals primarily with conditions of ASCAP membership. Essentially, ASCAP is required "to accept any applicant for membership who, as a writer has at least one song regularly published or commercially recorded, or as publisher, actively engages in the business and whose musical publications have been 'used or distributed on a commercial scale for

fee it requests.[167] Any operator who does not agree with an ASCAP or AMOA proposed fee may join the court proceeding. However, if an individual operator were to wait for the court to decide on a reasonable fee before challenging the cost of a license, the court would probably not be sympathetic.

BMI operates under a less restrictive consent decree[168] than ASCAP while SESAC does not operate under any consent decree. Neither society can be compelled to issue a jukebox license for the use of its repertory. It is unlikely, however, that they would not reach some accommodation with AMOA. If individual operators do not adhere to the AMOA negotiated fee standard, BMI and SESAC would have to bring an action against each operator without having a court adjudicated fee standard upon which to rely.

The second model has the disadvantage of making an infringing operator's identification more difficult. In the first model, which would be governed by the 1976 Act, location owners would have to identify infringing operators upon written request.[169] Under the second model, copyright owners would have the difficult task of finding infringing jukebox operators without the help of location owners.

The final and most practical open marketplace model proposal would involve direct negotiations between the performing

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at least one year.' " *Id.* ASCAP members are also free to resign and join another performing rights society if they so choose.

The consent decree also governs the licensing of ASCAP's repertory. Under § IX, "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested." United States v. ASCAP, 1950–51 Trade Cas. ¶ 62,595, at 63,754 § IX. If a reasonable fee is not agreed upon within sixty days from the time the request is received, the applicant may apply to the United States District Court for the Southern District of New York for a determination of a reasonable fee. Pending the completion of any negotiations or proceedings, the applicant has the right to use any of the songs in the ASCAP repertory without payment but subject to a final order or judgment. *Id.*

167 United States v. ASCAP, 1950–51 Trade Cas. ¶ 62,595, at 63,754 § IX.

168 *See* United States v. BMI, 1940–43 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941), *modified in* United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966).

BMI had only been in existence about two years at the time the decree was issued. Although BMI's consent decree was much less restrictive than ASCAP's due to BMI's youth, it was necessary to place the society under some restrictions to give the members of both major societies equal freedom of membership rights.

169 Within one month after the receipt of a written request, the location owner must disclose the identity of the operator of the unlicensed jukebox at his location. *See* 17 U.S.C. § 116(a)(1)(B) (1982).

At least one court has held that an uncooperative location owner may be held liable as a contributory infringer. *See* Stewart v. Southern Music Distrib., 503 F. Supp. 258 (M.D. Fla. 1980); *see also* Gershwin Publishing Corp. v. Columbia Artists Mgt., 443 F.2d 1159 (2d Cir. 1971).

rights societies and owners of locations such as bars, restaurants, and taverns. Historically, the societies and location owners have cooperated in mechanical licensing agreements.[170] The new arrangement for jukebox licensing would be similar to the mechanical music licensing system. Under that system, each society sets its own reasonable fee for the mechanical license and then deals directly with the location owner.[171] Under the proposed system, each society would determine its own minimum jukebox license fee which could be adjusted, if necessary, through negotiations with individual location owners. Indeed, the market may well support a fee of over $50 per license. The societies would be responsible for informing location owners of the new system and location owners would be responsible for compliance with the new arrangement.[172]

This model would benefit the societies because the location owner is easier to identify than the jukebox operator.[173] In some instances, the location owner is the jukebox operator. The location owner would then be held directly responsible for copyright infringement. Thus, copyright owners would benefit from more effective enforcement of the jukebox licenses. The societies might also negotiate higher jukebox fees with those location owners who already pay $70 to ASCAP alone for a mechanical license.[174]

Location owners would not necessarily be at a greater disadvantage under this model. Under the current 50-50 operator-location owner split system, the location owner essentially pays for at least half of the license fee, with the operator taking the fee "off the top" of the jukebox revenues.[175] If the location owner were to pay the full fee but no longer lose the equivalent of half the fee "off the top," he would be at no greater disadvantage than before. The new fee arrangement would require adjustments between the location owners and jukebox operators.[176]

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170 *See* 46 Fed. Reg. 885 (1981).

171 *Id.*

172 Compliance with the new arrangement would also require that the location owners pay state and local taxes on the jukeboxes. Frequently, the taxes amount to more than the $50 license fee. For instance, Tucson charges an annual tax of $150 per jukebox and Berkeley $100 per jukebox. *Hearings*, *supra* note 6 (statement of ASCAP, at 52).

173 If the operator's sticker is not on the jukebox, as required by § 116, as a matter of law, his identity can only be determined through the location owner. In almost every case, in order to determine the identity of the location owner, an agent of a society need only go to his establishment.

174 *See* 46 Fed. Reg. 885 (1981).

175 *See supra* text accompanying notes 127–28.

176 The jukebox operators would also have to reimburse the location owners for state

Finally, jukebox operators would benefit from this model because they would no longer bear the responsibility for a jukebox license. Unfortunately, without a licensing system, the federal government would have to find a new means of discovering the amount of taxable revenue earned by jukebox operators. Perhaps manufacturers and importers could be pressured into revealing their buyers and exact machine sales.

VII. CONCLUSION

Jukeboxes have been an important part of American recreational life. Further, they have also been a significant outlet for single-record sales.[177] Perhaps at some time in the future, jukeboxes will be complemented or replaced by other technologies such as music video machines.[178] Whatever the fate of jukeboxes[179] or single sales, copyright owners must now receive reasonable compensation for the public performance of their songs.

This Note has maintained that there is no convincing evidence of a decline in jukebox profitability and that copyright owners are clearly not receiving the reasonable royalty payments to which they are entitled under the 1976 Act. Coin-machine operators are engaging in widespread techniques of license fee avoidance.

The Player Act would have been an unacceptable solution. While a few marginal coin-machine operators would benefit from not having to pay a fee for new jukeboxes, the vast majority of operators can easily afford a $50 license fee. Certainly, if the goal of the Player Act was to allow operators to circumvent jukebox registration for tax evasion purposes, this is impermissible, if only because it would be achieved at the expense of the copyright owners.

The present system of royalty enforcement is ineffective. It is important to note that up to two-thirds of the operators have not complied with the 1976 Act; apparently the rewards of noncompliance are great. Unless the societies allocate more resources to enforcing the copyrights, and the courts award dam-

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and local taxes, see *supra* note 172, which the operators pay now if their jukeboxes are registered.

177 Low estimates of the percent of total singles sales sold to operators are 40–50% of country music singles and 20–30% of pop and R&B singles. Terry, *Jukebox Biz Is In A Fatal Decline: Diskeries Are No Help to Ailing Industry*, VARIETY, Dec. 2, 1981, at 1, 110.

178 *See* BILLBOARD, *supra* note 131.

179 *See* Terry, *supra* note 177. *But see* Sippel, *Jukebox One-Stops See Upturn*, BILLBOARD, Sept. 10, 1983, at 1; *Hearings*, *supra* note 172, at 34 (citing "The Bear Wakes Up," PLAY METER, Apr. 15, 1984).

ages to the maximum allowed under section 504[180] of the 1976 Act, there will be little incentive to comply with the law.

A licensing relationship between the societies and location owners would be the best solution. The level of the fee would be determined by the marketplace. Although the fee might not necessarily be higher than the current $50 per jukebox, it would at least be easier to enforce. Location owners would not suffer financially and operators would not have to register their jukeboxes with the federal government.

Robert K. Erlanger

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180 *See supra* text accompanying note 110.