DAT'S ALL FOLKS: *CAHN V. SONY* AND THE AUDIO HOME RECORDING ACT OF 1991 — MERRIE MELODIES OR LOONEY TUNES?*

I. INTRODUCTION

On July 11, 1991, after years of acrimonious debate concerning unauthorized home taping and the introduction of digital recording technology to the United States, representatives of the electronics and music industries agreed to support compromise legislation that would resolve the dispute. This legislation will, *inter alia*, prohibit infringement actions for the unauthorized noncommercial audio recording of copyrighted works and establish royalty payments on the sale of digital recording equipment and media.[1] The crux of the debate revolved around the conflicting pecuniary interests of the music industry (artists, publishers, and record companies) on one hand, and the electronics industry (equipment manufacturers and merchants) on the other. A stalemate had developed out of the music industry's long-standing efforts to secure compensation for losses caused by unauthorized home taping, and the electronics industry's equally long-standing efforts to resist any royalty or compulsory licensing solution to the home taping phenomenon. Finally, after an attempted legislative solution stalled in 1990,[2] a group of songwriters and music

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[1] *See* Eben Shapiro, *Electronics and Music Companies Near Accord on Digital Recording*, N.Y. TIMES, July 10, 1991, at A1, D6. *See also* Eben Shapiro, *Accord on Digital Taping Now Faces Congress Debate*, N.Y. TIMES, July 12, 1991, at D1, D4; Copyright Coalition, press release, July 11, 1991; *Bills Would Permit Home Audio Taping With Royalties on Digital Audio Copying*, 42 Pat. Trademark & Copyright J. (BNA), No. 1042, at 329 (Aug. 8, 1991).

The Electronic Industries Association/Consumer Electronics Group ("EIA/CEG"), a trade association based in Washington, D.C., represented the electronics manufacturers. The music industry, in the form of a broad-based group known as the Copyright Coalition, was represented by the National Music Publishers Association ("NMPA"), the industry association of American music publishers. Copyright Coalition, press release, *supra*.

The agreement contemplated a two percent royalty on the wholesale price of Digital Audio Tape ("DAT") recorders, with a ceiling of $8 per unit, and a royalty of six cents per unit on the sale of blank DAT cassettes. Eben Shapiro, *Accord on Digital Taping Now Faces Congress Debate, supra*, at D4. These would be collected by the Copyright Office and distributed by the Copyright Royalty Tribunal according to the following formula (approximate figures): 38 percent to record companies, 26 percent to performers, 17 percent to songwriters, 17 percent to music publishers, 1.75 percent to the American Federation of Musicians ("AFM"), and 1 percent to the American Federation of Television and Radio Artists ("AFTRA"). *Id.* at D4.

[2] S. 2358/H.R. 4096, 101st Cong., 2d Sess. (1990). Copyright interests opposed the bill for its lack of a royalty provision. *See infra* notes 154-57 and accompanying text.

publishers filed a class-action lawsuit alleging contributory copyright infringement against Sony Corporation ("Sony") and its subsidiaries.[3] In exchange for an agreement by Sony and other manufacturers to support legislation that included royalties on digital audio recording equipment and software, Sony and the National Music Publishers Association ("NMPA") announced on July 11, 1991, a court-approved settlement dismissing without prejudice the songwriters' lawsuit, *Cahn v. Sony Corp.*[4]

Less than one month later, Senator DeConcini (D-Ariz.) and Representative Brooks (D-Tex.) introduced the Audio Home Recording Act of 1991 ("AHRA").[5] This bill, beside being the codi-

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[3] Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991). The suit was styled as a class action "on behalf of all owners of copyrights in musical compositions, and all transferees of the exclusive rights to authorize the making of sound recordings and the distribution of phonorecords, who are entitled to receive mechanical royalties from record companies licensed by The Harry Fox Agency, Inc." Complaint ¶ 10, *Cahn* (No. 90 Civ. 4537).

The named plaintiffs, in addition to famed lyricist Sammy Cahn, included Jac Music Co., Inc. (licensor of music composed by Hal David), Fort Knox Music, Inc., Trio Music Co., Inc., and Peer International Corporation. Defendants with Sony Corporation were its subsidiaries Sony USA, Inc. and Sony Corporation of America.

The plaintiffs in *Cahn* sought declaratory and injunctive relief against the manufacturers, importers, and/or distributors of DAT recording equipment and blank DAT cassettes. *Id.* ¶¶ 1, 3. The complaint asserted contributory and vicarious liability against the defendants for direct infringement by consumers who, using defendants' products, made unauthorized recordings of copyrighted works. *Id.* Under the terms of the settlement, defendants agreed to collaborate with plaintiffs in actively supporting legislation that would incorporate a U.S. royalty/technology solution to the DAT home copying controversy. NMPA press release, July 11, 1991. See section V *infra* for a detailed discussion of the case.

[4] *Cahn*, No. 90 Civ. 4537.

[5] S. 1623/H.R. 3204, 102d Cong., 1st Sess. (1991). The Senate bill, introduced August 1, and the House bill, introduced August 2, were identical. Both sought to amend title 17 of the United States Code by appending to it "Chapter 10—Digital Audio Recording Devices and Media."

In addition to prohibiting infringement and contributory infringement suits against digital or analog noncommercial consumer recording of copyrighted works (§ 1002) and establishing royalty payments on sales of digital recording equipment and media (§§ 1011-16), the Act mandates (§§ 1021-22) implementation of the Serial Copy Management System ("SCMS") (for a full discussion, see section VI *infra*). SCMS is a technical response to the home taping phenomenon that allows a digital recorder to make copies from original analog or digital sources (first-generation copying), but prevents further digital reproductions to be made from the first-generation copy (serial copying). See Technical Reference Document accompanying the Digital Tape Recorder Act of 1990, at 136 CONG. REC. E376 (Feb. 26, 1990) for detailed information regarding the operation of SCMS. The Technical Reference Document for the Audio Home Recording Act of 1991, S. 1623 *supra*, originally appeared in section V of the Act, and will be published in the Federal Register pursuant to section 1022(a). It is also reprinted in both the House and Senate Reports. *See* S. REP. No. 294, 102d Cong., 2d Sess. 17-30 (1992); H.R. REP. No. 780, 102d Cong., 2d Sess., pt. 1, at 32-50 (1992).

The actual drafting of the legislation was accomplished by a group of twelve lawyers who represented various interested parties, and was the result of extensive negotiations that began in early 1991. Interview with Charles J. Sanders, NMPA Counsel, in New York, N.Y. (Sept. 20, 1991). The represented parties included: the Copyright Coalition,

fication of the *Cahn v. Sony* settlement agreement,[6] represents the most recent legislative attempt to alleviate the tension between copyright law and the rapid proliferation of innovative technologies.[7]

Essentially, that tension revolves around the competing goals of copyright: encouraging access to and dissemination of intellectual expression on one hand, and ensuring an abundant supply of such expression by protecting the incentive (*i.e.*, remuneration) for authorship on the other. The end that both goals serve is the public's benefit. The question concerning technology is whether its promotion of one goal, dissemination, will cripple another goal, authorship. Modern duplication technologies, from photocopiers to tape recorders and recordable compact discs, challenge copyright law by placing the power of manufacturing reproductions beyond the control of copyright owners, and into the public domain. Ironically, while these technologies are contributing to a tremendous increase in the overall dissemination of information, they have simultaneously rendered the copyright owners' exclusive rights to reproduce and distribute their works—reserved under the 1976 Copyright Act—practically meaningless.[8]

This Note explores four central issues concerning AHRA

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the NMPA, the EIA, Tandy Corporation, and the Recording Industry Association of America ("RIAA"). *Id.*

[6] *See* S. REP. No. 294, *supra* note 5, at 33. "[I]n June 1991, a historic compromise was reached by all of the parties to the audio home taping dispute. The suit against Sony was subsequently dropped. The compromise was incorporated into a legislative proposal and introduced in the Senate and the House. . . . S. 1623 embodies the compromise . . . ." *Id. See also* H.R. REP. No. 780, pt. 1, *supra* note 5, at 19.

[7] See *infra* notes 138-157 and accompanying text for a synopsis of pertinent legislation proposed since 1981. In the period from October 1981 to June 1984 alone, Congress considered sixteen proposals to amend title 17 regarding the home taping issue. *Home Audio Recording Act: Hearings on S. 1739 Before the Senate Comm. on the Judiciary and its Subcomm. on Patents, Copyrights and Trademarks*, 99th Cong., 1st and 2d Sess. 27, 68-69 (1986) (statement of Ralph Oman, Register of Copyrights, October 30, 1985).

[8] The exclusive rights in copyrighted works are granted in section 106 as follows:

> Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
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> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
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> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1988) (Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541).

and the effect of technology on copyright law. The first is whether unauthorized noncommercial home duplication of copyrighted works is either exempt from copyright law or constitutes "fair use" under existing law.[9] The second is whether copyright proprietors are entitled to compensation, either directly or through some form of compulsory license, for income lost due to unauthorized copying (as suggested by AHRA). The third is whether the Audio Home Recording Act properly balances the public's interest in the free flow of information with the copyright proprietors' exclusive right to reproduce and distribute their works. Finally, it explores whether mandatory copy-protection technology in conjunction with a royalty or license fee on the sales of blank recording tape and recording equipment is the proper remedy. Section II briefly examines the history of American copyright law and its response to developing technologies. Section III discusses the doctrines of fair use and contributory infringement, and argues that practices such as home copying, which totally supplant a segment of the market for a copyrighted work, cannot constitute fair use. Section IV briefly explores the licensing and royalty scheme extant in the American music industry. Section V analyzes the issues underlying *Cahn v. Sony*[10] as a paradigm for the home taping controversy. Section VI examines the proposed Audio Home Recording Act of 1991,[11] and concludes that although copyright owners are entitled to compensation for the technological erosion of their § 106 rights, the combined imposition of mandatory Serial Copy Management System ("SCMS") circuitry along with the proposed royalty

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[9] The doctrine of fair use is codified in section 107 of the Copyright Act as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1988), *as amended by* Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128, 5132.

[10] No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991). *See infra* notes 96-134 and accompanying text.

[11] S. 1623/H.R. 3204, 102d Cong., 1st Sess. (1991). *See infra* notes 158-242 and accompanying text.

scheme fails to strike a fair balance between the interests that American copyright law seeks to protect. Finally, section VII suggests alternative remedies to the thorny problems confronted by the 1991 Act.

II. TECHNOLOGY AND COPYRIGHT

The law of copyright has become increasingly intertwined with the development of technology. This is unsurprising because Anglo-American copyright law originated as a response to new technology, *viz.*, the printing press.[12] As new technologies have developed, copyright law has been forced to evolve. For example, inventions such as photography, motion pictures, sound recording, radio, television, and computers have all led to revisions or amendments of American copyright law.[13] AHRA and *Cahn v. Sony* demonstrate that technological innovation continues to challenge both Congress and the courts.

In addition to the close relationship between the law of copyright and technology, there is a tension between the law's potentially powerful repressive impact and freedom of expression. This relationship underlies the arguments of those who question the legitimacy of copyright as an instrument of public policy; *i.e.*, as a means of accommodating the sometimes conflicting interests of the author, the government, and the public.[14] Indeed, the first British copyright laws, which were introduced shortly after the arrival of the printing press in the late 1400s,[15] were devised as instruments of censorship whose primary purpose was to inhibit the spread of the Protestant Reformation.[16]

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[12] *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 430 (1984) (noting the nexus between technology and copyright law).

[13] See *infra* notes 23-27 and accompanying text for a listing of American copyright statutes.

[14] LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 3-4 (1978). They "see[ ] its origin in such suspect matters as religious censorship, royal printing patents, state control of political dissent, and the protection of special interests like those of artisans in certain guilds or those of booksellers in cartel-like associations." *Id.* at 4 (footnote omitted). "[C]opyright has the look of being gradually secreted in the interstices of the censorship." BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 4 (1967). For an analysis of the conflicts between copyright and free speech, see Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (arguing for a "definitional balancing" approach to resolving free speech/copyright tensions that would not permit expropriation of authorship under the guise of the First Amendment); Jessica D. Litman, *Bare-Faced Mess: Fair Use and the First Amendment*, 70 OR. L. REV. 211 (1991).

[15] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW, OTA-CIT-422, 65 (1989) [hereinafter OTA 1989 STUDY].

[16] ALAN LATMAN ET AL., COPYRIGHT FOR THE NINETIES 1 (3d ed. 1989). For a thorough treatment of the development of copyright in England prior to the Statute of

In response to abuses of the printers' monopoly, known as the Stationers' Company, Parliament enacted the Statute of Anne in 1710.[17] This legislation wisely divested copyright from printers, who were licensed and controlled by the Crown, and instead granted it to authors. The copyright period was fourteen years, but could be renewed for a single additional term; it therefore provided a maximum of twenty-eight years' protection.[18] Removing the copyright from a monopoly dominated by the Crown helped to forestall repressive government misuses of copyright. The Statute of Anne formed the foundation upon which American copyright law was eventually built.[19]

The United States Constitution empowers Congress to promote science and useful arts by granting to creators for limited periods a proprietary right in their creations.[20] This clause rests on three main pillars: first, that the *purpose* of copyright is to benefit society by promoting the increased availability of artistic and scientific works; second, that its *mechanism*, which provides authors with a financial incentive to create, is economic; and third,

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Anne, see John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, 10 CARDOZO ARTS & ENT. L.J. 455 (1992). The Crown had conferred enormous power upon a printers' monopoly known as the Stationers' Company, however:

> [t]he reason for granting such sweeping powers to the Stationers' Company was no mere benevolence. In 1559 Elizabeth I made the purpose quite explicit in a set of Injunctions on the book trade. The Company's role was to control the output of the press, and to ensure that no book was printed unless it was properly licensed by the censors appointed by the Crown.

Id. at 459 (footnotes omitted).

17 8 Anne ch. 19, 1710 (Eng.).

18 *Id. See* OTA 1989 STUDY, *supra* note 15.

19 *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION, OTA-CIT-302 (1986) at 34-36. This can be confirmed by comparing the purpose clause of the first federal copyright act passed by Congress in 1791, Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831), with that of the Statute of Anne enacted in Great Britain eighty years earlier, 8 Anne, ch. 19, 1710. The Statute of Anne stated its purpose and means as: "An Act for the encouraging of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." *Id.* The purpose clause of the first American copyright act is practically identical: "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

The relationships between copyright, technology, and freedom of expression have not gone unnoticed. "The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in the means of dissemination, on the other." *Sony*, 464 U.S. 417, at 430 n.12 (quoting the foreword to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, vii-viii (1967)).

20 "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

that its *instrumentality* is the author.[21] Inherent within this scheme, however, is a tension between an author's property interest and the public's interest in access to that property.[22]

In 1790, the first Congress enacted a federal copyright statute that provided for the protection of authors' rights.[23] The Act underwent major revisions in 1831, 1870, 1909, and 1976.[24] Interim amendments were enacted in 1802, 1856, 1865, 1891, 1897, and 1971.[25] Since the last major revision in 1976, over 400 copyright bills have been introduced,[26] and the Act has been amended no less than fourteen times.[27] Technological advances

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21 SELTZER, *supra* note 14, at 8.

22 This is what any copyright statute must seek to resolve. Congress is, and has been, aware of the problem.

> In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909), *quoted in* HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION 5 (Comm. Print 1961) *and in* SELTZER, *supra* note 14, at 10.

23 Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) (assuring protection for 14 years to the author or his assigns of any book, map, or chart, provided that: 1) title was recorded prior to publication; 2) record of title was published in at least one newspaper for four weeks; and 3) a copy of the work was deposited with the Secretary of State within six months of publication).

24 *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (amended 1870) (including copyright protection for musical compositions and extending the term and scope of copyright); Act of July 8, 1870, ch. 230, 16 Stat. 198 (repealed 1909) (designating the Library of Congress as the locus of copyright activities, including deposit and registration requirements, and extending protection to artistic works); Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (codified and reenacted by Act of July 30, 1947, ch. 391, 61 Stat. 652, amended 1976) (permitting registration of certain unpublished works and extending copyright duration and renewal from 14 to 28 years, amended by Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 to provide a copyright in sound recordings); Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1988)) (modifying the term of copyright and codifying the common law concept of "fair use" as a limitation on the exclusive rights of the copyright proprietor).

25 *See* Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (extending protection to prints); Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (adding dramatic compositions, including a right of public performance); Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (adding photographs); Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106 (making copyright protection available to foreigners).

26 OTA 1989 STUDY, *supra* note 15, at 3.

27 Act of Aug. 5, 1977, Pub. L. No. 95-94, 91 Stat. 653, 682 (providing for deposit to the Treasury of fees collected by the Register of Copyrights); Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2676 (amending § 201(e) to allow for involuntary transfers by government organizations pursuant to title 11 of the Bankruptcy Act); Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028 (amending § 101 to include a definition of "computer program" and creating § 117 to allow for limited program copying); Act of May 24, 1982, Pub. L. No. 97-180, 96 Stat. 91, 93 (amending § 506(a) to provide for criminal infringement penalties); Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (amending § 601(a) to allow for the importation and distribution of nondramatic literary material after 1986); Act of Oct. 25, 1982, Pub. L. No. 97-366, 96 Stat. 1759 (amending § 708 copyright registration fees); Act of Oct. 4, 1984, Pub. L. No. 98-450,

have been, and will continue to be, the driving force behind these periodic updates in copyright as new inventions render older laws obsolete.[28]

Historically, the law of copyright has responded as new technologies have received both judicial and legislative treatment.[29] Today, the law is challenged not only with confronting the latest revolutionary advances in technology, but also with anticipating ever more frequent technological developments. Video cassette recorders, personal computers, compact discs ("CDs"), minidiscs (recordable CDs), digital tape recorders, and digital broadcasting have remade, and are remaking, the traditional copyright landscape. Other devices and processes yet to be developed will continue to reshape it in the future. The copyright owner's exclusive rights "to reproduce the copyrighted work in copies or phonorecords" and "to distribute copies or phonorecords of the

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98 Stat. 1727 (Record Rental Amendment Act of 1984, prohibiting unauthorized phonorecord rentals); Act of Aug. 27, 1986, Pub. L. No. 99-397, 100 Stat. 848 (amending § 111(f) regarding the local service area of primary transmitters for low-power television stations); Act of Oct. 31, 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Berne Convention Implementation Act of 1988); Act of Nov. 5, 1988, Pub. L. No. 100-617, 102 Stat. 3194 (extending Record Rental Amendment Act of 1984 an additional eight years, § 109 note); Act of Nov. 16, 1988, Pub. L. No. 100-667, 102 Stat. 3949 (Satellite Home Viewer Act of 1988, creating a new § 119 regarding the limitation of exclusive rights for the secondary transmissions of superstations); Act of July 3, 1990, Pub. L. No. 101-318, 104 Stat. 287 (Copyright Fees and Technical Amendments Act of 1989, raising the registration fee to $20); Act of July 3, 1990, Pub. L. No. 101-319, 104 Stat. 290 (Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989); Act of Nov. 15, 1990, Pub. L. No. 101-553, 104 Stat. 2749 (Copyright Remedy Clarification Act, subjecting States and their employees to infringement suits); Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 (Visual Artists Rights Act of 1990, creating § 106A rights of attribution and integrity); Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (Architectural Works Copyright Protection Act); Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134 (Computer Software Rental Amendments Act of 1990, prohibiting unauthorized rental of computer software).

28 "From its beginning, the law of copyright has developed in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 430-31 (1984) (footnotes omitted).

29 *Id.* at 430 n.11.

> Thus, for example, the development and marketing of player pianos and perforated rolls of music, *see White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, *see Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U.S.C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study, *see Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F. 2d 125, 129 (CA2 1982).

Id.

copyrighted work to the public by sale or other transfer of ownership"[30] have been severely eroded by the wide availability of inexpensive, high-quality reproduction equipment. Further, the private nature of home copying and the minuscule damage caused by an individual act of infringement make judicial enforcement highly problematic. Nevertheless, aggregate damages can be enormous.[31] Although unauthorized reproduction is common, inherent characteristics of the currently dominant analog recording technology hamper infringement to a limited extent. Under analog, serial copying is circumscribed by the inevitable deterioration of subsequent recordings. Newer digital technologies exacerbate the problem from the copyright proprietor's perspective because they enable the creation of perfect reproductions that will not deteriorate in quality when subsequent copies are made from a first-generation source.[32] Both the opportunity and the incentive for unauthorized taping are thereby increased.[33] Copyright owners are concerned that these technologies will make record piracy an uncontrollable cottage industry, thereby depriving them of substantial income and, thus, the incentive to create.[34]

III. Fair Use or Foul Play

A. *Fair Use*

The primary purpose of American copyright law is to promote the public welfare by creating an economic incentive for intellectual pursuits.[35] Although the principle of copyright represents an author's property interest,[36] the law of copyright seeks to balance it with the public's sometimes conflicting interest in

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30 *See* 17 U.S.C. § 106, *supra* note 8.

31 *See infra* notes 58-63 and accompanying text.

32 *See* Complaint ¶ 33, Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991).

33 *Id.*

34 The ultimate detriment under this scenario falls on the public, as fewer works would be available for public consumption. Composers, due to lost revenue (and therefore sustenance), would be less able to devote themselves to their craft, while music publishers would lose some ability to promote, and provide financial support for, unestablished artists. *See id.* ¶ 31.

35 Mazer v. Stein, 347 U.S. 201 (1954). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' " *Id.* at 219.

36 Fox Film Corp. v. Doyal, 286 U.S. 123 (1932). "The production to which the protection of copyright may be accorded is the property of the author . . . ." *Id.* at 127. "Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit . . . ." *Id.* at 130.

the widest possible dissemination of intellectual expression.[37]

Striking that balance, however, has proven to be a difficult and elusive task.[38] For despite the language of the Constitution[39] and of the statute,[40] which describe an "exclusive right," copyright protection is by no means absolute.[41] It is circumscribed in part by the common-law doctrine of fair use, first enunciated by Justice Story in the 1841 case of *Folsom v. Marsh*.[42] One hundred thirty-five years later, the fair use doctrine was codified in § 107 of title 17.[43] Courts employ fair use analysis to balance the com-

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[37] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984). "[T]his task [defining the scope of the limited monopoly granted to copyright holders] involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand . . . ." *Id.* *See also* SELTZER, *supra* note 14, at 18-23 (criticizing the codification of fair use in § 107 of title 17); Michael Plumleigh, Comment, *Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire*, 37 UCLA L. REV. 733 (1990) (arguing that unauthorized home taping constitutes fair use); A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47 (1989); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988) (criticizing fair use doctrine and advocating judicial and legislative reform); Stephen L. Carter, *Copyright Protection, the Right to Privacy, and Signals That Enter the Home*, 3 CARDOZO ARTS & ENT. L.J. 289 (1984) (arguing that the Constitution protects the right to reproduce copyrighted works in the home absent compensation to the rights-holder); Thomas D. Lasky, Note, *"Give to the Invention its Meaning and Worth": The Case for Compensating the Copyright Proprietor for Unauthorized Reproductions of Audio and Video Works for Home Use*, 30 WAYNE L. REV. 155 (1983); Melville B. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505 (1982) [hereinafter Nimmer, *Betamax Myth*] (arguing that private home use does not vitiate otherwise infringing conduct); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (advocating a three-part test for determining fair use).

[38] *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 345-47 (C.C.D. Mass. 1841) (No. 4901).

> [T]he question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used . . . . Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work . . . . So, it has been decided that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author. But, then, what constitutes a fair and bona fide abridgment . . . is one of the most difficult points . . . which can well arise for judicial discussion.

Id. at 344-45 (citations omitted). Making that determination is still difficult today. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (noting the problematic nature of fair use doctrine).

[39] U.S. CONST. art. I, § 8, cl. 8, *supra* note 20.

[40] 17 U.S.C. § 106 (1988).

[41] *See* 17 U.S.C. § 107 (1988) *as amended*, *supra* note 9. *See also* 17 U.S.C. §§ 108-120 *as amended* (*see supra* note 27) (describing limitations on the exclusive rights of §§ 106, 106A).

[42] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (reluctantly finding infringement for the putatively educational use of 319 letters written by George Washington). Justice Story established the meaning of fair use that is still adhered to today. "In short, we must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may *prejudice the sale, or diminish the profits*, or supersede the objects, of the original work." *Id.* at 348 (emphasis added).

[43] 17 U.S.C. § 107 (1988) *as amended*. For the text of § 107, see *supra* note 9. Unfortunately, § 107 sheds no light on the meaning or application of the fair use doctrine. It

peting interests of author and public. But the precise parameters of what is a fair, and therefore non-infringing, use of copyrighted material have escaped easy definition, leading most courts to agree with Judge Learned Hand's characterization of the doctrine as "the most troublesome in the whole law of copyright."[44]

Fair use has been described as a " 'privilege in others than the owner . . . to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright].' "[45] The question of whether unauthorized, but apparently noncommercial, home duplication of copyrighted materials falls within its ambit is a central issue in the on-going home copying debate. Significantly, in the case law prior to its 1976 codification,[46] the subject matter of fair use had always concerned the use by a *second author* of a *first author's* copyrighted work; where a work was merely reproduced for its intrinsic use, simple infringement, not fair use, was ordinarily applied.[47]

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fails to provide any definition of fair use, and, by not offering any priority to the four fair use "factors," it implies that there is no priority order to their consideration. Moreover,

> by listing along with universally acknowledged examples of fair use (criticism, comment, and news reporting) those expansive and ambiguous uses (teaching, scholarship, research) that have raised issues having to do with significant exemptions from copyright, expressly dealt with as such in various ways in the statute, it thoroughly muddies the distinction between fair use and exempted uses.

SELTZER, *supra* note 14, at 19.

44 Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Other courts agree. "The doctrine is . . . so flexible as virtually to defy definition." Time, Inc. v. Bernard Geis Assoc's, 293 F. Supp. 130, 144 (S.D.N.Y. 1968). "The search for a coherent, predictable interpretation applicable to all cases remains elusive." Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991).

45 Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966) (quoting HORACE BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944)), *cert. denied*, 385 U.S. 1009 (1967).

46 17 U.S.C. §§ 101-810 (1988) (Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541). Fair use principles are stated in § 107. The doctrine of "fair use" evolved as a defense to copyright infringement. Before 1976, there were few, if any, statutory exemptions to the owner's exclusive rights under copyright law. In cases where others sought the unauthorized use of a copyrighted work for purposes such as criticism, commentary, parody, education, or news reporting, the broad protection of the copyright statute potentially had the effect of inhibiting, rather than encouraging, the availability to the public of creative and scientific works. To restore a balance between the interests of the public and those of the copyright owners, courts began to recognize a "fair use" defense to claims of infringement. *See* Nimmer, *Betamax Myth*, *supra* note 37, at 1505, 1507-08.

47 SELTZER, *supra* note 14, at 24. Some examples include: Whitol v. Crow, 309 F.2d 777 (8th Cir. 1962) (teacher reproduced copies of his own arrangement of a copyrighted song); Public Affairs Assocs., Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960) (separate speeches collected and published in a new work); Leon v. Pacific Tel. and Tel. Co., 91 F.2d 484 (9th Cir. 1937) (copyrighted telephone directory rearranged numerically); Hill v. Whalen & Martell, Inc., 220 F. 359 (S.D.N.Y. 1914) (cartoon characters used in stage production). *But see* Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), *aff'g*,

The statute sets out four factors to be considered in fair use analysis. The first concerns the purpose and character of the copyrighted work's use by the second author. Commercial uses—directly or indirectly for profit—militate against a finding of fair use, while nonprofit or educational uses weigh in favor of such a finding.[48] The second factor focuses on the nature of the copyrighted work. Where the work has a factual basis (*e.g.*, reports, biographies, and educational materials), a broader view of fair use will generally apply, while less latitude is given regarding works of the imagination (*e.g.*, fictional literature, film, drama, and music).[49] The third factor concerns the extent and quality of the portion taken from the copyrighted work by the second author. Presumably, smaller and insignificant takings are to be tolerated, while substantial ones are not.[50] The final factor pertains to the effect of the taking *vis-à-vis* the value, or potential value, of the copyrighted work. A use that has little or no effect upon the market value of the copyrighted work more likely will be considered a fair use.[51]

The essence of fair use doctrine concerns reasonable expec-

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by a sharply divided court, 487 F.2d 1345 (Ct. Cl. 1973) (wholesale reproduction and distribution of copyrighted journal articles by government agencies held to be fair use).

48 The distinction, however, is not the bright line that it might first seem to be. Rather, the Supreme Court has found that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). Moreover, "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony*, 464 U.S. at 451.

49 *Harper & Row*, 471 U.S. at 563. "Copying a news broadcast may have a stronger claim to fair use than copying a motion picture." *Sony*, 464 U.S. at 455 n.40. "[T]he scope of fair use is greater with respect to factual than non-factual works." New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 157 (2d Cir. 1990). *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1532-33 (S.D.N.Y. 1991) (citing cases).

50 The *Sony* Court noted that the copying of an entire work militates against a finding of fair use. 464 U.S. at 450.

Professor Seltzer considers the language of § 107(3) ("the amount and substantiality of the portion used in relation to the copyrighted work as a whole") to be problematic.

> [T]his wording . . . tries too hard, losing accuracy and making for both a redundancy and a begging of a question. A formulation that identifies a factor to be considered in the same neutral mode as the other factors would omit the word "substantiality" . . . . It is a consideration of that relationship, along with the others, that might result in a finding of substantiality—but substantiality itself is the ultimate fact to be found. That is, if a use is substantial it cannot be fair use. A substantial taking is the definition of *infringement*.

SELTZER, *supra* note 14, at 35.

51 *Sony*, 464 U.S. at 450-51. *See supra* note 37 and accompanying text.

tations of cost and access.[52] From the author's perspective, fair use concerns the foreseeability of a particular cost-free use of his or her work. From the public's perspective, fair use is the normal expectation that an author's "exclusive right" will not prevent access to the work for the advancement of knowledge and the arts.[53]

In evaluating the four fair use factors specified by § 107,[54] "[c]ourts have generally placed most emphasis on the fourth factor, the effect of the use upon the potential market for or the value of the copyrighted work."[55] Professor Nimmer has argued that the fourth fair use factor "emphatically contradicts any claim that . . . home recording may constitute fair use."[56] This follows from the observation that home copying displaces sales of recorded products. Although exact measurement of pecuniary damage suffered by copyright owners as the result of home recording is elusive, the Office of Technology Assessment ("OTA") estimates a sales displacement rate in the recorded music market of approximately twenty-two percent.[57] According to the Recording Industry Association of America ("RIAA"), retail losses from home taping amounted to $1.5 billion in 1984.[58] More recently, the American Society of Composers, Authors, and

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[52] SELTZER, *supra* note 14, at 28-48.

[53] Professor Seltzer posited the issue in terms of "dual risk." "In a particular instance, their dual risk might be posed by a pair of questions: Is this use within the risk the author was taking that he would not be paid? Is this use within the risk society was taking that the author would assert control of access?" *Id.* at 30. Seltzer, applying this analysis, has proposed the following rewrite of the statute's § 107 fair use provisions:

> Fair use is use that is necessary for the furtherance of knowledge, literature, and the arts AND does not deprive the creator of the work of an appropriately expected economic reward.
>
> . . . .
>
> In determining whether the use made of a work in a particular case deprives its creator of such a reward, account should be taken first of the nature of the copyrighted work and then of the purpose, character, and extent of the use.

Id. at 31, 36 (citation omitted).

[54] 17 U.S.C. § 107. For the text of § 107, see *supra* note 9.

[55] Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980). *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968); 3 NIMMER ON COPYRIGHT, § 13.05(a)(4), at 13-102.4 (1992).

[56] Nimmer, *Betamax Myth*, *supra* note 37, at 1523.

[57] OTA 1989 STUDY, *supra* note 15, at 158. The OTA survey found that: 1) 57% of those who taped from a pre-recorded source within the previous year thought that they could have purchased it instead; 2) 77% responded that a purchase would have been in addition to, rather than in place of, other recordings; and 3) 49% said that had they been unable to tape, they would have purchased the pre-recorded works they desired. The OTA arrived at the 22% sales displacement figure by combining these results (.57 × .77 × .49). *Id.*

[58] *Id.* at 171. These figures were disputed by another interested party, the Electronic Industries Association ("EIA"). *Id.* The EIA offered its own study concerning to the

Publishers ("ASCAP") estimated that home taping results in music industry losses of "as much as $1.9 *billion* per year."[59] And in 1990, a study conducted by the Roper Organization[60] estimated lost sales on approximately 322,500,000 recordings.[61] It concluded that unauthorized home-made recordings compete heavily with legitimate purchases,[62] and predicted that digital recording will cause infringing activities to escalate.[63]

Nonetheless, in the analogous context of home VCR taping, the Supreme Court held in *Sony Corp. of America v. Universal City Studios*[64] (the *Betamax* case) that noncommercial "time-shifting" of copyrighted programs broadcast over free television does not impair the value of the copyrighted work, and therefore may be considered fair use.

> Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.[65]

Accordingly, a use which *does* or *could* have a demonstrable effect on the potential market for a copyrighted work will prevent a finding of fair use. The *Sony* Court found that "[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown . . . ."[66]

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effects of home audio taping; the OTA, however, concluded that neither was sufficient as a basis for policy-making, and conducted its own investigation. *Id.* at 174-75.

[59] THE REGISTER OF COPYRIGHTS, REPORT ON THE COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES 36 (Oct. 1991) [hereinafter REGISTER'S REPORT].

[60] The Roper Organization, Inc. is a public opinion and marketing research concern. Its study, *Report on Home Audio Taping and Projected DAT Use* [hereinafter Roper *Report*], was commissioned by the Copyright Coalition, and submitted to the Senate Subcommittee on Communications during hearings on S. 2358 (*see infra* note 131) in the 101st Congress. *See Digital Audio Tape Recorder Act of 1990: Hearings on S. 2358 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (1990) [hereinafter *1990 DAT Hearings*].

[61] *See* REGISTER'S REPORT, *supra* note 59, at 35; Roper *Report*, *supra* note 60, at 8.

[62] Roper *Report*, *supra* note 60, at 8.

[63] *Id.* at 1, 13-14.

[64] 464 U.S. 417 (1984).

[65] *Id.* at 450-51. Essentially, the *Sony* Court found that the respondent-plaintiff had failed to demonstrate cognizable pecuniary harm.

[66] *Id.* at 451. Moreover, "a use that supplants *any part of the normal market* for a copy-

The available evidence indicates that copyright proprietors—of both audio recordings and the underlying works embodied in them—satisfy this test. Therefore, noncommercial home copying cannot be fair use. Rather, it is a ubiquitous form of copyright infringement that literally causes billions of dollars in damage to copyright holders every year.[67]

B. *Contributory Infringement*

Contributory infringement occurs when a person knowingly induces, causes, or materially contributes to a third party's directly infringing activity.[68] Although copyright law, unlike patent law,[69] does not expressly provide for third-party infringement liability, this has not prevented courts from imposing it.[70] By borrowing either from accepted principles of tort law or from patent law, courts have found contributory infringement or vicarious liability in a variety of copyright situations.[71] For example, *Gershwin*

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righted work would ordinarily be considered an infringement." Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 568 (1985) (quoting S. REP. No. 473, 94th Cong., 1st Sess. 65 (1975) (emphasis added)). "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Id.* at 569.

[67] This conclusion is not accepted universally. *See, e.g.*, John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other Than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS U. L.J. 647 (1984); Carter, *supra* note 37, at 289; Plumleigh, *supra* note 37, at 733, 742.

[68] Gershwin Publishing Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

[69] Under the Patent Act, an infringer is anyone who "actively induces the infringement of a patent." 35 U.S.C. § 271(b) (1988). "Contributory" infringers are made liable for the acts of direct infringers in the following paragraph. 35 U.S.C. § 271(c) (1988).

[70] "The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." *Sony*, 464 U.S. at 435 (footnote omitted).

Gross v. Van Dyk Gravure Co., 230 F. 412 (2d Cir. 1916) (where the maker, printer, and seller of an infringing photograph were found jointly liable) was probably the first case to state this principle. "Why all who unite in an infringement are not, under the statute, liable for the *damages* . . . we are unable to see. . . . [Since] all united in infringing, all are responsible for the damages resulting from the infringement." *Id.* at 414.

[71] "[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony*, 464 U.S. at 435.

See, e.g., Kalem Co. v. Harper Bros., 222 U.S. 55 (1911) (film producer liable for infringing exhibition by theater). "If the defendant did not contribute to the infringement it is impossible to do so except by taking part in the final act." *Id.* at 63. Shapiro, Bernstein & Co., v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1964) (department store held liable for the infringing sale of pirated records manufactured and sold by its concessionaire); Elektra Records v. Gem Elec. Distribs., 360 F. Supp. 821 (E.D.N.Y. 1973) (retail store owner found liable for in-store duplication of copyrighted musical works where employees helped customers to reproduce copyrighted recordings); Screen Gems—Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966) (ad agency, radio station, and packaging agent could each be liable as a contributory in-

Publishing Corp. v. Columbia Artists Management, Inc.[72] held that an artists management concern is liable for, and can be compelled to pay, performance license fees when its artists perform copyrighted works publicly for profit without the copyright proprietor's permission.

Unfortunately, the boundaries between direct infringement, contributory infringement, and vicarious liability are hazy. In terms of third-party liability, the distinction seems to turn on the third party's right to control the conduct of the direct infringer. Where the third party can control the direct infringer's actions and stands to benefit financially from the infringement, vicarious liability will attach.[73] For contributory infringement to apply, however, the third party's right to control the direct infringer's conduct and the derivation of a direct benefit are not required.[74] An illustration is *Telerate Systems v. Caro*,[75] where the court found contributory infringement when defendant's licensees used its computer program for an unauthorized download of plaintiff's copyrighted financial information.

In the context of AHRA and *Cahn v. Sony*, the doctrine of contributory infringement is pivotal. It was the basis of the complaint in *Cahn*.[76] Under AHRA, it is a cause of action that henceforth will be foreclosed to copyright owners of musical compositions and sound recordings.[77]

If present law provides no express exemption or fair use exception for the wholesale unauthorized and uncompensated copying of copyrighted music (as this Note, the plaintiffs in *Cahn*, and Nimmer argue), then under both the statute and the caselaw, the defendants in *Cahn*, as parties who knowingly induce, cause, and materially contribute to another's direct infringing activity, could be liable as contributory infringers. AHRA, while failing to resolve the underlying issue of whether unauthorized, noncommercial copying constitutes copyright infringement, will

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fringer if its knowledge, or reason to know, of the infringing nature of the records could be shown).

72 443 F.2d 1159 (2d Cir. 1971).

73 *See* RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 781 (8th Cir. 1988) and RCA Records v. All-Fast Sys., 594 F. Supp. 335, 339 (S.D.N.Y. 1984) (manufacturers of commercial audio cassette duplicators held vicariously liable for in-store duplication of copyrighted works where they retained ownership of the machines).

74 For contributory infringement "[t]he standard of knowledge is objective: 'Know, or have reason to know.' " Casella v. Morris, 820 F.2d 362, 365 (11th Cir. 1987) (quoting Gershwin Publishing Corp. v. Columbia Artists Mgt., 443 F.2d 1159, 1162 (2d Cir. 1971)).

75 689 F. Supp. 221 (S.D.N.Y. 1988).

76 Complaint ¶ 3, Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991).

77 S. 1623, *supra* note 5, § 1002. See *infra* note 160 for the text of § 1002.

prevent the owner of a music or sound recording copyright from claiming contributory infringement against the manufacturer or distributor of copying equipment.[78] This is the result of AHRA's unprecedented exclusion of unauthorized, "noncommercial" music copying from the general scope of copyright.[79] Such is the price paid by music publishers and record companies for the manufacturers' support of a royalty compensation system.

IV. American Licensing and Royalty Structure

Inasmuch as AHRA creates a new royalty pool based, for the first time, on sales of recording equipment and blank media, a brief examination of the current licensing and royalty system is necessary. Copyright owners are compensated for the use of their property by means of royalties and license fees.[80] The 1976 Act grants to certain copyright owners the exclusive right "to perform the copyrighted work publicly."[81] Performing rights organizations such ASCAP, Broadcast Music Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC") collect and distribute royalties based on these performances to their members.[82] Such royalties are collected primarily by means of "blanket licenses," which the performance rights organizations issue to clubs, theatres, and broadcasters. In general, the

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78 *Id.* *See* S. Rep. No. 294, *supra* note 5, at 51-53 (1992). Although the Senate Report asserts that a key purpose of the legislation "is to insure the right of consumers to make analog or digital audio recordings of copyrighted music for private, noncommercial use," *id.* at 51, it makes clear that such an unprecedented departure from copyright principles is a narrow one that will affect music copyright owners exclusively.

> In crafting this legislation, the committee intends to address the long-standing issue of audio recording, and only audio recording. There is no intention to establish generally applicable principles of copyright law. . . . [Section 1002] does not purport to resolve, nor does it resolve, whether the underlying conduct is or is not infringement. The committee intends the immunity from lawsuits to provide full protection against the specified types of copyright infringement actions, but it has not addressed the underlying copyright infringement issue . . . .

Id. at 52.

79 S. 1623, *supra* note 5, § 1002(a); S. Rep. No. 294, *supra* note 5, at 51. Unfortunately, AHRA fails to properly balance copyright interests. Instead, it condones wholesale expropriation of authorship without compensation, at least in the analog domain, to copyright owners.

80 *See* OTA 1989 Study, *supra* note 15, at 103-35.

81 17 U.S.C. § 106(4) (1988). The Act specifies that "public performance" means:

> (1) to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work . . . whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (1988).

82 OTA 1989 Study, *supra* note 15, at 112.

blanket license fees paid by radio and television broadcasters are based on a percentage of the broadcaster's net revenues, and allow the licensee utilization of the entire repertory of songs in the licensor's catalogue for a period of years.[83] The existence of performance rights organizations and the blanket licensing system has simplified and economized music licensing; blanket licenses enable users to perform copyrighted music without individually negotiating a license with each copyright owner or keeping a detailed log to account for each performance. The system apparently works quite well; nearly ninety-five percent of the music performed in the United States is licensed by ASCAP and BMI.[84]

Copyright owners are also compensated through "compulsory" licenses.[85] Compulsory licenses to record, and within limits to perform, copyrighted musical compositions may be obtained by anyone after the copyright owner, or its assignee, has authorized making or distributing the protected composition within the United States.[86] The licensee must then pay the copyright owner royalties on recordings that are made and distributed under the license.[87] These are known as "mechanical" royalties. Such royalties are paid to copyright owners, by record companies directly and by the public indirectly, based on sales of recordings and the length of the pieces recorded, according to rates set by the Copyright Royalty Tribunal ("CRT").[88]

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[83] *Id.* at 113-14.

[84] *Id.* at 112.

[85] *Id.* at 109, 113.

[86] *Id.* at 109; 17 U.S.C. § 115(a)(1) (1988).

[87] 17 U.S.C. § 115(c). "[T]he royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. . . . [and also] for every act of distribution of a phonorecord by or in the nature of rental, lease, or lending, by or under the authority of the compulsory licensee." *Id.* § 115(c)(2)-(3). The compulsory license procedures and conditions for non-dramatic musical works are set out in detail under 17 U.S.C. §§ 115-16. Notice that the copyright owner's opportunity to either negotiate a market-based use fee, or to withhold its property, is foreclosed by the compulsory license mechanism. The owner's detriment is directly proportional to demand, and consequently falls most heavily on the owners of popular properties.

[88] OTA 1989 STUDY, *supra* note 15, at 109-10. The 1976 Copyright Act created the Tribunal to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. 17 U.S.C. § 801 (1988) *amended by* Act of July 3, 1990, Pub. L. No. 101-318, § 3(b), 104 Stat. 288. The royalty amount is set biennially (on November 1 of every odd year through 1995, to take effect on January 1 of the following year) by the CRT, and is based upon changes in the Consumer Price Index. 37 C.F.R. § 307.3(e)(1)-(3). In 1987 the CRT adopted the mechanism for adjustment of royalty rates from a joint proposal submitted by the NMPA, the RIAA, and the Songwriter's Guild of America. *New Statutory Mechanical Rate*, NMPA News & Views, Fall 1991, at 11. That system is designed to adjust the mechanical rate based upon changes in the cost of living as determined by the Consumer Price Index (all urban consumers, all items). *Id.* However, the rate can go no lower than the rate in effect in 1986-87, and is limited to a maximum upward adjustment in any period

The Harry Fox Agency, a subsidiary of the NMPA, acts as a central clearing house for music publishers by authorizing the manufacture and distribution of records that embody copyrighted compositions owned or controlled by the publishers. It licenses copyrighted musical compositions for use in commercial recordings, audio-visual works (motion pictures, television, etc.), broadcast commercial advertising (jingles), syndicated radio broadcasts, and other public use recordings.[89] It also collects and disburses mechanical royalties for most American publishers.[90] The Harry Fox Agency licenses approximately seventy-five percent of the music used in the United States.[91]

As the foregoing discussion illustrates, composers, performers, and music publishers are dependent to a large extent on record sales to generate income. Consequently, every record sale supplanted by home recording results in lost income to copyright owners.

Since 1971, phonorecords of copyrighted works have been the subject of two independent copyrights. One is the copyright in the underlying work, *i.e.*, the musical composition itself, which has been protected since the 1831 Copyright Act.[92] The other is a copyright in the sound recording, *i.e.*, the actual sounds fixed in the phonorecord. This more limited right, created by the 1971 amendment of the 1909 Copyright Act,[93] excludes any right of performance, in contrast to the rights in the underlying musical work.[94] The distinction between the limited copyright in sound

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of 25 percent. 52 Fed. Reg. 22637 (June 15, 1987 *as corrected by* 52 Fed. Reg. 23546 (June 23, 1987)). The current rate (for recordings sold on or after January 1, 1992) is the greater of 6.25 cents for each copyrighted work or 1.2 cents per minute of playing time or fraction thereof. Cost of Living Adjustment of the Mechanical Royalty Rate, 56 Fed. Reg. 56157 (Nov. 1, 1991) (to be codified at 37 C.F.R. § 307.3(f)). The rate, however, is subject to negotiation between the user (e.g., a record company) and the copyright owner. In practice, this means that all but the most popular songwriters are forced to accept something less than the statutory rate; the difference is additional profit to the user. *See* OTA 1989 STUDY, *supra* note 15, at 110.

89 OTA 1989 STUDY, *supra* note 15, at 110-11.

90 *Id.* For a general discussion of performing rights organizations, licenses and mechanical rights, see SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 196-216, 237-47 (BPI Communications, Inc., 6th ed. 1990).

91 *Id.*

92 Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

93 Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. The 1971 Sound Recording amendment, which sets forth the scope of exclusive rights in sound recordings, is presently codified at 17 U.S.C. § 114. See *infra* note 94 for the partial text of section 114.

94 Section 114 states, in pertinent part:

> (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and *do not include any right of performance* under section 106(4).
>
> (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is *limited to the right to duplicate the sound recording*

recordings and the broader grant of rights in the underlying work is pivotal to the arguments of the home taping debate. It is especially significant in evaluating the often repeated, but clearly erroneous, claim that the 1971 amendment and its legislative history support an exemption for unauthorized home taping.[95]

V. *CAHN V. SONY*

A. *The Case*

On July 9, 1990, lyricist Sammy Cahn and three music publishers sued Sony Corporation, seeking declaratory and injunctive relief on a theory of contributory copyright infringement and vicarious liability.[96] The *Cahn* suit revisits many of the same issues that confronted the Supreme Court in *Sony v. Universal*.[97] If not for *Cahn's* disposal through a court-approved stipulation of settlement,[98] the case would have been the first judicial determi-

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> in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture *the actual sounds fixed in the recording*. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, *even though such sounds imitate or simulate those in the copyrighted sound recording*.

17 U.S.C. § 114 (1988) *as amended* (emphasis added). For the text of § 106, see *supra* note 8. Seeking parity with composers and publishers as to performance rights has been a long-range goal of the recording industry, and has been advocated by the Copyright Office since 1978. *See* REGISTER'S REPORT, *supra* note 59, at 141, 150-57 (analyzing the 1971 Sound Recording amendment, *supra* note 93, and persuasively arguing for extending the performance right to sound recordings).

95 The language used to support this position appears in the House Report on the 1971 amendment, H.R. REP. No. 487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1572 (*see infra* notes 117-19 and accompanying text), but was never adopted by the Senate, and was conspicuously absent from reports concerning the general revision of copyright law in 1976. "[W]hile the Congress adopted wholesale in 1976 many sections of the 1971 House report on sound recordings, the passage regarding home recordings was pointedly omitted." REGISTER'S REPORT, *supra* note 59, at 58. "[I]t is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use." H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679. Nimmer, *Betamax Myth*, *supra* note 37, at 1508-17. Nonetheless, the exemption and fair use arguments are still made. *See* Affidavit of Jeffrey P. Cunard ¶¶ 14-18, Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991); Seth D. Greenstein, *Contributory Infringement the Second Time Around: The Copyright Case Against Digital Audio Tape Recorders* (pt. 1) 3 J. PROPRIETARY RIGHTS 2 (July 1991); Plumleigh, *supra* note 37.

96 No. 90 Civ. 4537. *See generally*, Greenstein, *supra* note 95 (arguing that plaintiff's contributory infringement claim would ultimately fail).

97 464 U.S. 417 (1984). The *Cahn* suit also sought judicial resolution of questions left unanswered by the *Sony* Court; *viz.*, whether there is either a statutory exemption or a fair use defense for private, noncommercial home taping under the 1976 Copyright Act.

98 See *infra* note 134 for a discussion of the settlement's terms.

nation regarding the legality of unauthorized noncommercial home audio taping.

In *Cahn*, the plaintiffs sought a declaration that: 1) unauthorized home taping of their copyrighted musical compositions on DAT recorders constituted an infringement of copyright under the 1976 Act;[99] and 2) defendants "are or will be liable for contributory infringement through their provision to consumers . . . of DAT recorders and/or blank DAT cassettes designed and intended for the unauthorized taping of copyrighted musical compositions."[100] In addition, plaintiffs sought injunctive relief to prevent defendants from manufacturing, importing, and distributing consumer DAT recorders and blank tape in the United States.[101]

The plaintiffs in *Cahn* argued that home taping supplants phonorecord purchases.[102] Therefore, because the incomes of composers and music publishers depend on mechanical royalties, which in turn depend on an accurate accounting of sales, every home copy that substitutes for the purchase of a copyrighted recording results in lost income to the copyright owners.[103] Further, the plaintiffs asserted that unauthorized home taping is a widespread practice, which deprives them of substantial revenue and, therefore, the means to practice their craft.[104]

Although plaintiffs grieved the revenue lost to unauthorized taping, and asserted that the practice ultimately harms the public by providing a disincentive for the creation of new musical compositions,[105] their complaint conceded the impracticality of attempting to prevent analog home taping.[106] Instead, their action

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99 17 U.S.C. §§ 101-810 (1988).

100 Complaint ¶ 3, *Cahn* (No. 90 Civ. 4537).

101 *Id.*

102 *Id.* ¶ 26. Several studies have confirmed their position. *See, e.g.*, OTA 1989 STUDY, *supra* note 15, at 158 (suggesting a sales displacement rate of 22%, or possibly less); REGISTER'S REPORT, *supra* note 59, at 43 ("copying of prerecorded works does and will displace sales of authorized copies"); Roper *Report*, *supra* note 60, at 8 ("it is clear that home-recorded tapes compete heavily with purchased tapes as a source of music").

103 Complaint ¶¶ 25, 26, *Cahn* (No. 90 Civ. 4537).

104 *Id.* ¶¶ 27, 30, 31.

105 *Id.* ¶ 31.

106 *Id.* ¶ 32. NMPA President Edward P. Murphy explained the rationale during the 1990 hearings in response to Senator Inouye's query as to why no suit was brought against analog taping.

> I used to operate one of the largest printing companies in the United States for the production of sheet music. . . . until the photo copying machine came along. . . . [G]radually sales dropped. People said do not worry about it because the copies were bad, they were poor.
>
> You know, that business has closed down today. The company I operated does not exist. I might add the creator's product—sheet music—that used to be manufactured today is hardly there. It is not there because quality

focused on defendants' introduction of new technology designed to profit directly from the home taping phenomenon.[107] Insofar as that activity constitutes infringement, the defendants are liable, under plaintiffs' theory, as either contributory or vicarious infringers. This is critical to their argument, and would apparently apply to both analog and digital media. Yet, the *Cahn* suit targeted the digital domain exclusively. Behind this strategy is the conviction that analog technology will soon be obsolete.[108] Additionally, plaintiffs fear that, absent some intervening action, digital recording will destroy whatever control copyright owners currently retain over the reproduction and distribution of their works.[109] These factors help explain the exclusion of analog media from the royalty provisions in the 1991 Act.[110]

Plaintiffs assert that digital audio is substantively different than its analog counterpart due to digital's inherently superior quality. According to the complaint, because the digital process "enable[s] a taper for the first time to make unauthorized perfect copies. . . . with virtually no loss of sound quality in the copying process[,]" digital recorders "afford an entirely new opportunity and incentive for unauthorized taping and virtually all purchasers will use them to copy pre-recorded copyrighted music."[111]

> made the difference. The copying machines made the difference in quality then, and today the quality is quite high on photo copies . . . .
>
> So I think the argument may be made that while people who were involved in the industry years ago were sleeping at the switch and saying, oh, well, because of the poor quality at that time analog copies are not going to hurt us terribly. Digital technology, because it gives a perfect copy . . . in this case, we must defend our rights and we must do it now, not wait until the technology because [*sic*] entrenched.

1990 DAT Hearings, *supra* note 60, at 261 (testimony of Edward P. Murphy, President, NMPA). The plaintiffs' position rests upon the realization that the harm caused by analog taping has already been done. It is supported by the belief that within ten years analog taping will be obsolete, having gone the way of the gramophone. Interview with Charles J. Sanders, NMPA Counsel, in New York, N.Y. (Sept. 20, 1991).

107 Complaint ¶ 32, *Cahn* (No. 90 Civ. 4537).

108 Interview with Charles J. Sanders, NMPA Counsel, in New York, N.Y. (Sept. 20, 1991).

109 *See supra* note 106.

110 See section VI *infra* for a discussion of the Audio Home Recording Act of 1991.

111 Complaint ¶ 33, *Cahn* (No. 90 Civ. 4537). The last assertion refers to the Roper *Report*, *supra* note 60, at 1, which found that "100% of those interested in using DAT equipment for taping will use it to tape prerecorded music." Further, "those surveyed predicted that they would copy more prerecorded music if they owned a DAT machine than they currently copy in analog format." REGISTER'S REPORT, *supra* note 59, at 24.

The contention that the digital format somehow presents a *greater* threat to copyright owners than that extant in the analog domain is problematic. Both the OTA 1989 STUDY, *supra* note 15, and the REGISTER'S REPORT, *supra* note 59, declined to make concrete predictions of future home taping behavior regarding a technology not yet prevalent in the market. The REGISTER'S REPORT, however, did state its belief that "home taping will increase in the digital era because the homemade digital copy will be the acoustical equal of the authorized marketed copy[,]" *id.* at 31, and that "the introduction

The plaintiffs also argued that unauthorized taping is an infringement of copyright,[112] that DAT has no substantial non-infringing uses,[113] and that defendants, "[b]y manufacturing, importing and/or distributing DAT recorders and/or blank DAT cassettes . . . and by inducing, causing, encouraging and enabling consumers to tape copyrighted musical compositions," are contributory infringers of plaintiffs' copyrights.[114]

Sony's answer denied the substantive allegations of the complaint and raised six affirmative defenses, three of which are pertinent here:[115] first, that noncommercial home audio taping is not proscribed under the 1976 Copyright Act; second, that such taping is a fair use under the Act; and finally, that the sale of digital audio products does not constitute contributory copyright infringement because DAT is capable of substantial non-infringing uses.[116]

These contentions form the nucleus not only of the *Cahn* suit, but of the entire home taping controversy. Relying primarily on two House Reports to support their positions, audio manufacturers and their allies have argued earnestly for years that the legislative histories of the Sound Recording Act of 1971 and the Copyright Act of 1976 demonstrate either an express exemption or fair use treatment for unauthorized home taping.[117] Ironi-

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of digital audio and digital recorders will at least sustain the current amounts of lost sales, and will probably increase the lost sales, even though there is insufficient evidence to measure the exact magnitude of that loss." *Id.* at 41-42.

112 Complaint ¶ 42, *Cahn* (No. 90 Civ. 4537).

113 *Id.* ¶ 43.

114 *Id.* ¶ 46.

115 The remaining three affirmative defenses were laches, unclean hands, and failure to state a claim upon which relief can be granted. *Id.* Answer at 7-8.

116 *Id.* The mention in both the complaint and the answer of "substantial non-infringing uses" is a thinly veiled reference to the Supreme Court's language in *Sony v. Universal*, 464 U.S. 417 (1984). In analogizing the contributory infringement and staple article of commerce doctrines from patent law to copyright law, the Court stated that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Id.* at 442.

117 The House Report on the Sound Recording Act of 1971 states that:

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

H.R. REP. No. 487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566,

cally, copyright owners and those arrayed on the other side of the issue rely on the same authorities to support the opposite positions.[118] The Copyright Office, and most other commentators, have come down squarely on the side of the copyright owners.[119]

Although the *Cahn* suit was settled prior to argument on the merits,[120] to some extent counsel for Sony argued the substance of their case in its opposition to plaintiffs' motion for expedited discovery.[121] Defendants first argued that "plaintiffs have failed to allege any facts showing immediate and irreparable harm" that would be sufficient to state a cause of action for contributory infringement.[122] Second, they argued that there is laches because "plaintiffs . . . have waited for over thirty years to make a judicial challenge to non-commercial home audio taping."[123] Third, cit-

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1572. In addition, the 1976 House Report asserts that "[s]ection 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

118 In discussing whether the 1971 House Report indicated an exemption for home taping, Professor Nimmer has observed that the 1971 amendment to the Sound Recording Act

> was limited to the creation of a copyright in sound recordings and did not purport to affect the copyright in the underlying musical work. Consequently, any audio home recording exemption . . . would apply only to the sound recording copyright, not to the copyright in the composition that was the subject of the sound recording. Assuming such a limited exemption, a person who made an unauthorized home recording of a phonograph record would not be liable for infringing the sound recording copyright but would still be liable for infringing the copyright in the underlying work.

Nimmer, *Betamax Myth*, *supra* note 37, at 1509. According to Nimmer, the most persuasive argument against the existence of an exemption for home taping can be found in the language of the House Report itself:

> The Committee's statement that "it is not the intention . . . to restrain . . . home recording," if read in context, reveals that the Committee never intended to create a special exemption for audio home recording. The passage in which the home recording remark appears states that "it is the intention of the Committee that this limited [sound recording] copyright not grant any *broader* rights than are accorded to other copyright proprietors under the existing title 17. . . ." This language emphasizes the point that the 1971 Amendment extends to the owners of sound recording copyrights the *same* statutory protection already granted to the owners of musical composition copyrights. . . . [Therefore] it is clear that the Amendment did not create a *new* exemption for home recording.

Id. at 1510-11 (emphasis added).

119 "[T]he Copyright Office concludes that there does not exist an exemption for home recordings in the current Copyright Act, nor is there conclusive evidence demonstrating that Congress intended home recording to be a sanctioned fair use under the current Act." REGISTER'S REPORT, *supra* note 59, at 54.

120 *See* Stipulation of Settlement (July 10, 1991) and Final Order and Judgment (July 10, 1991), *Cahn* (No. 90 Civ. 4537).

121 *See* Defendants' Memorandum In Opposition To Plaintiffs' Motion For Expedited Discovery (July 12, 1990) [hereinafter Opposition Memo] and Affidavit of Jeffrey P. Cunard (July 12, 1990) [hereinafter Opposition Affidavit], *Cahn* (No. 90 Civ. 4537).

122 Opposition Memo at 3, *Cahn* (No. 90 Civ. 4537).

123 *Id.* at 4-5. Opposition Affidavit ¶¶ 4, 5, *Cahn* (No. 90 Civ. 4537).

ing the 1971 House Report noted previously,[124] defendants averred that home recording is exempt from copyright under the 1976 Act.[125] Fourth, they asserted that DAT recorders are functionally indistinguishable from analog recorders.[126] Fifth, defendants contended that "the issues . . . raised in this action belong, not in the courts, but in the Congress, where those issues have long been vetted."[127] Next, they argued that home taping of copyrighted music is a "fair use" under § 107 because it is a non-commercial activity, and it is therefore ruled by *Sony v. Universal*.[128] Finally, defendants asserted that "home taping . . . benefit[s] the recording industry and composers" by stimulating sales of pre-recorded music and by promoting new artists and recordings.[129]

> This action is about something that . . . is entirely commonplace and wholly unremarkable for the American public: noncommercial, home audio taping. Throughout the entirety of this period, several generations and untold models of tape recorders and blank audio tape have been distributed, marketed and sold. Now, literally tens of millions of tape recorders can be found throughout the United States and hundreds of millions of blank audio cassettes are sold each year.

Id. ¶ 4. From the plaintiffs' perspective, this statement is merely evidence of the tremendous harm they have sustained from unrestricted and uncompensated home taping.

124 H.R. REP. No. 487, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1572.

125 Opposition Memo at 5 n.2; Opposition Affidavit ¶¶ 14-17, *Cahn* (No. 90 Civ. 4537). Even if the 1971 House Report stood for the proposition claimed by the defendants, why they believe it survived the general revision of the Copyright Act in 1976 is unclear.

126 Opposition Memo at 5-6, *Cahn* (No. 90 Civ. 4537).

> The introduction of DAT recorders into the United States changes absolutely nothing in terms of the relationship between the manufacturers of recording technology, the producers of music and sound recordings and the American consumer.
>
> . . . .
>
> The DAT technology is, in all respects, identical to the analog tape recorder, except that it is a "digital" . . . rather than an analog technology. . . .
>
> In short, the distribution and sale of DAT recorders and blank DAT cassettes in the United States present no novel issues. The distribution, marketing, sale, use and capabilities of DAT recorders and blank DAT cassettes and of conventional analog tape recorders and blank audio cassettes are in all relevant aspects essentially identical.
>
> . . . .
>
> DAT recorders are functionally indistinguishable from analog recorders . . . . From the perspective of the copyright law, the digital recording of copyrighted works is indistinguishable from analog recording because both result in copies that listeners would regard as aurally close to the originals.

Opposition Affidavit ¶¶ 6, 8, 9, 13, *Cahn* (No. 90 Civ. 4537).

127 Opposition Memo at 6, *Cahn* (No. 90 Civ. 4537).

128 464 U.S. 417; Opposition Affidavit ¶¶ 18-19, *Cahn* (No. 90 Civ. 4537). "[H]ome taping is not a commercial activity . . . and . . . is, therefore, permitted under the Copyright Act. . . . [L]ike other non-commercial uses of copyrighted works in the privacy of the home, [it] is not an infringement of copyright." *Id.* ¶ 18.

129 Opposition Affidavit ¶¶ 21, 27, *Cahn* (No. 90 Civ. 4537). Michael Plumleigh recently made a similar argument in the context of a fair use analysis:

The chain of events that prompted the *Cahn* suit, discussed more fully below, is important to keep in mind. The proximate cause, however, was Sony's importation of consumer DAT recorders[130] following Congress's failure to enact the Digital Audio Tape Recorder Act of 1990.[131] The consumer electronics and recording industries supported the 1990 Act, which would have mandated that every consumer DAT recorder be equipped with SCMS protection.[132] It was opposed by songwriters and publishers because it lacked a royalty provision.[133] The settlement of *Cahn* was contingent upon the manufacturers' support for the Audio Home Recording Act of 1991.[134] It is substantially similar to the proposed 1990 Act with the addition of a royalty provision.

> The analysis of market effects should consider the benefits derived by the industry and copyright owners from home taping. Home taping helps the dissemination goals of copyright by making creative works available to as much of the public as possible. This increased exposure will undoubtedly generate more sales of copyrighted works. . . . [H]ome taping . . . actually stimulates prerecorded music purchases, and home tapers actually purchase more recorded music than those who do not tape. This type of home taping exposes consumers to music they *might* not normally purchase or hear if they had to pay for it first, but it is *possible* that a favorable exposure could lead to additional purchases of prerecorded music.

Plumleigh, *supra* note 37, at 759 (emphasis added) (citations omitted). Nevertheless, the speculation that home taping *might* stimulate sales is not compensation for sales *actually* lost as a result of that practice. Significantly, those in the business of creating and marketing recorded music are in sharp disagreement with Plumleigh's conclusion. Presumably, if home taping actually stimulated sales of pre-recorded music, a suit like *Cahn* would never have been initiated.

130 *See* Reply Memorandum Supporting Motion for Expedited Discovery ¶ 2(d), *Cahn* (No. 90 Civ. 4537) [hereinafter Reply Memorandum].

131 S. 2358/H.R. 4096, 101st Cong., 2d Sess. (1990).

132 *Id.* The Act prohibited the "manufacture or distribu[tion of] any digital audio tape recorder or digital audio interface device which does not conform to the standards and specifications . . . [of] the serial copy management system." *Id.* § 3(a)(1). Further, the Act provided that "[n]o person shall manufacture or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent . . . the serial copy management system." *Id.* § 3(b).

Although these provisions addressed the piracy concerns of the RIAA, the Act failed to satisfy the creative community's desire for royalty compensation, and consequently they opposed it. *1990 DAT Hearings*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 2-3). This is unsurprising since S. 2358 and H.R. 4096, the companion bill, merely represented an agreement between the RIAA and the EIA known as the "Athens Agreement." *Id.* at 15. The Athens Agreement of July 28, 1989, was a worldwide software/hardware agreement to make joint recommendations to governments regarding DAT technology. *Id.* Neither songwriters nor music publishers were parties to it.

133 *1990 DAT Hearings*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 2-3).

134 S. 1623/H.R. 3204, 102d Cong., 1st Sess. (1991). *See* Stipulation of Settlement; Final Order and Judgment, *Cahn* (No. 90 Civ. 4537). In exchange for defendants' agreement to actively support royalty legislation, to issue a press release announcing that support, and to refrain from any activity that would conflict with efforts to enact it, plaintiffs agreed to the dismissal of the action without prejudice. Stipulation of Settlement at 5-7.

B. *The Context*

To better understand *Cahn v. Sony* and the Audio Home Recording Act of 1991, a review of recent legislative and technological developments will be helpful.[135] Inasmuch as no court in the United States has ruled on the legality of unauthorized home audio taping, the definitive legal status of that activity is presently unsettled.[136] The ultimate issue of whether an author should be compensated for the unauthorized noncommercial home taping of his copyrighted material has yet to be addressed by the American copyright statute.[137]

Legislative movement to exempt home audio and video taping from copyright liability, and to provide some protection for copyright owners in the form of either compulsory licensing or royalty payments on recorder hardware and software, began in earnest after the Ninth Circuit held Sony liable for contributory copyright infringement on October 19, 1981.[138] Three days after the Ninth Circuit handed down its decision in the *Sony* case, Senator DeConcini (D-Ariz.) and Representative Parris (R-Va.) introduced legislation to exempt private noncommercial home video taping from copyright liability.[139] Subsequently, Senator Mathias (D-Md.) and Representative Edwards (D-Calif.) introduced amendments that would have required the manufacturers of audio and video recorders and tape to pay royalties to copyright owners.[140] Although hearings were held before the Judiciary Subcommittees in both houses of Congress from November of 1981 through September of 1982,[141] when the 97th Congress ad-

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135 See S. REP. No. 294, *supra* note 5, at 30-33 for a brief overview of the legislative history leading to AHRA.

136 In contrast, Germany settled the issue many years ago. Prior to 1965, when the German Parliament placed a royalty on recorders, the German courts litigated the question of whether home taping was an infringement of copyright, and concluded that it was. Ernest A. Seemann, *Sound and Video-Recording and the Copyright Law: The German Approach,* 2 CARDOZO ARTS & ENT. L.J. 225, 249-53 (1983).

137 The issue, however, has engendered international discussion, and many other nations already have legislation in place to deal with it. *See infra* notes 190-91 and accompanying text.

138 Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981), *rev'd by a divided court,* 464 U.S. 417 (1984), *reh'g denied,* 465 U.S. 1112 (1984).

139 S. 1758/H.R. 4808, 97th Cong., 1st Sess. (1981).

140 *Id. See* [Transfer Binder—New Developments 1977-1986] Copyright L. Rep. (CCH) ¶¶ 20,163 (Amendment No. 1331, Mar. 1, 1982); 20,164 (Amendment No. 1333, Mar. 4, 1982).

141 *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary,* 97th Cong., 1st & 2d Sess. (1982); *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982).

journed on December 23, the home taping bills died in Subcommittee.

The royalty/compulsory license legislation was resurrected during the following session by Senator Mathias and Representative Edwards.[142] However, after the Supreme Court's reversal of the Ninth Circuit in the *Sony* case,[143] these bills met their end in Subcommittee when the 98th Congress adjourned on October 12, 1984.

About seven months later, Senator Mathias and Representative Morrison (R-Wash.) introduced the Home Audio Recording Act, which would have required royalty and compulsory license payments to music copyright owners on the sale of audio recorder hardware and blank media.[144] In November 1985, Sony announced its plan to market consumer Digital Audio Tape recorders.[145] Early in the next year the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks approved Senate Bill 1739, but amended it to eliminate the blank tape royalty provision.[146] Despite the Reagan Administration's announced position at a hearing concerning Senate Bill 1739 that "compensation should be afforded for unauthorized copying,"[147] the hearing on the companion House Bill 2911 was canceled in September, and both bills died in committee when the 99th Congress adjourned on October 18, 1986.

Early in the next session, Senators Gore (D-Tenn.) and Wilson (R-Calif.) and Representative Waxman (D-Calif.) introduced legislation to require the inclusion of copy-code scanners—a copy protection device developed by CBS—in all DAT recording devices distributed in the United States.[148] After Joint House and Senate Judiciary Subcommittee Hearings on House Bill 1384 and Senate Bill 506 were held in the spring of 1987,[149] the Sub-

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142 S. 31/H.R. 1030, 98th Cong., 1st Sess. (1983).

143 Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

144 S. 1739/H.R. 2911, 99th Cong., 1st Sess. (1985).

145 The © Copyright Coalition, Home Taping Judicial and Legislative Chronology 1976 - 91 (1991). *See* H.R. REP. No. 780, 102d Cong., 2d Sess., pt. 1, at 18 (1992).

146 *Home Audio Recording Act: Hearings on S. 1739 Before the Senate Comm. on the Judiciary and its Subcomm. on Patents, Copyrights and Trademarks*, 99th Cong., 1st and 2d Sess. 643 (1986) (opening statement of Chairman Strom Thurmond, Aug. 4, 1986).

147 *Id.* at 650 (statement of Donald J. Quigg, Assistant Secretary and Commissioner of Patents and Trademarks, Aug. 4, 1986). The administration, however, opposed S. 1739 due to the bill's royalty provisions. Instead, it advocated solving the problem of uncompensated home audio copying through mandatory use of the CBS "copy-code" system. *Id.* at 644-54.

148 S. 506/H.R. 1384, 100th Cong., 1st Sess. (1987).

149 *Copyright Issues Presented by Digital Audio Tape: Joint Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary and the Subcomm. on Courts,*

committee Chairmen—Representative Kastenmeier (D-Wis.) and Senator DeConcini (D-Ariz.) respectively—requested that the National Bureau of Standards ("NBS") test the effectiveness of the copy-code system.[150] Almost one year later, on March 1, 1988, the NBS released a study showing that the copy-code system could not function without degrading sound quality.[151] This effectively killed the legislation. The Recording Industry Association of America ("RIAA") then threatened to sue any manufacturer distributing DAT in the United States.[152] On June 30, 1988, House Judiciary Committee member Hamilton Fish (R-N.Y.), along with Senator DeConcini and Representative Kastenmeier, requested that the OTA conduct a survey of home taping.[153] Both Senate Bill 506 and House Bill 1384 died in Subcommittee when the 100th Congress adjourned.

The legislative effort began anew on February 22, 1990, when Representative Waxman introduced the Digital Audio Tape Recorder Act of 1990.[154] That legislation would have mandated implementation of SCMS for DAT recorders.[155] It was referred to the Committee on Energy and Commerce. Shortly thereafter, on March 28, Senator DeConcini introduced the companion bill.[156] It was referred to the Committee on Commerce, Science, and Transportation. During hearings on Senate Bill

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Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987) [hereinafter *Joint Hearing on Digital Audio Taping*].

150 136 CONG. REC. E338 (daily ed. Feb. 22, 1990) (statement of Rep. Kastenmeier). The Congressman's statement, introducing the ill-fated 1990 Act, is a concise exposition of the legislative debate surrounding home-taping and DAT. Official testing of the copy-code system became necessary after the EIA and the Home Recording Rights Coalition ("HRRC") challenged its efficacy during the 1987 Joint Hearing on S. 506 and H.R. 1384, *supra* note 149. The study's $150,000 cost was borne equally by the recording and consumer electronics industries. *1990 DAT Hearings*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 7). The copy-code system tagged a recording for copy-protection by means of an integrated circuit ("IC") that deleted, or "notched," a specified frequency (3840 Hz) from the recording. The IC would scan tapes and prevent copying if it detected a "notch" at that frequency. *Id.*

151 *1990 DAT Hearings*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 6-8). The NBS found that the copy-code system degraded audio quality, was easily defeated, and operated improperly over half the time, either allowing recording of supposedly protected material or preventing a recording of unprotected material. John Burgess, *U.S. Report May Boost Digital Audio Recording; System to Prevent Pirating Said to Fail*, WASH. POST, Mar. 2, 1988, at F1.

152 Howard Reich, *DAT's Entertainment: Sound-Testing the Controversial Digital Tape Player*, CHI. TRIB., Mar. 27, 1988, Zone C (Arts), at 12; John Burgess, *supra* note 151, at F1.

153 [New Developments, Nov. 1989] 2 Copyright L. Rep. (CCH) ¶ 20,560, at 11,493.

154 H.R. 4096, 101st Cong., 2d Sess. (1990).

155 *Id.* The synopsis reads, "H.R. 4096—A BILL To implement a serial copy management system for digital audio tape recorders." *Id.*

156 S. 2358, 101st Cong., 2d Sess. (1990).

2358, conducted by the Communications Subcommittee, copyright owners expressed their opposition to the legislation because it did not address the royalty issue.[157] When the 101st Congress adjourned, these SCMS bills died in Subcommittee.

VI. THE AUDIO HOME RECORDING ACT OF 1991

A. *Basic Provisions*

The Audio Home Recording Act of 1991[158] is the latest legislative attempt to resolve some of the competing tensions that confront contemporary copyright law. AHRA approaches these problems in three broad areas.[159] First, it prohibits both direct and contributory infringement actions based on noncommercial consumer recording of copyrighted works in either digital or analog media.[160] Second, it establishes a royalty payment system for sales of digital recording equipment and media.[161] Finally, it

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157 *1990 DAT Hearings*, *supra* note 60.

158 S. 1623/H.R. 3204, 102d Cong., 1st Sess. (1991), *supra* note 5.

159 For a section-by-section analysis of AHRA, see *The Audio Home Recording Act of 1991: Hearing on S. 1623 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 14-22) [hereinafter *Hearing on S. 1623*]. The Senate and House Reports later offered their own analyses. *See* S. REP. No. 294, *supra* note 5, at 45-73; H.R. REP. No. 873, 102d Cong., 2d Sess. 16-26 (1992).

160 S. 1623, *supra* note 5, § 1002. This section provides:

> § 1002. Prohibition on certain infringement actions
>
> (a) CERTAIN ACTIONS PROHIBITED.—
>
> (1) GENERALLY.—No action may be brought under this title, or under section 337 of the Tariff Act of 1930, alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device or a digital audio recording medium, or an analog audio recording device or analog audio recording medium, or the use of such a device or medium for making audiograms. However, this subsection does not apply with respect to any claim against a person for infringement by virtue of the making of one or more audiograms, or other material objects in which works are fixed, for direct or indirect commercial advantage.
>
> (2) EXAMPLE.—For purposes of this section, the copying of an audiogram by a consumer for private, noncommercial use is not for direct or indirect commercial advantage, and is therefore not actionable.
>
> (b) EFFECT OF THIS SECTION.—Nothing in this section shall be construed to create or expand a cause of action for copyright infringement except to the extent such a cause of action otherwise exists under other chapters of this title or under section 337 of the Tariff Act of 1930, or to limit any defenses that may be available to such causes of action.

Id.

161 S. 1623, *supra* note 5, §§ 1011-16. Analog equipment and media are specifically excluded. Manufacturers, importers, and distributors of non-professional digital audio recording devices and media would be obligated to make royalty payments. *Id.* § 1011(a)(2). The royalty due for digital audio recording devices would be two percent of the "transfer price" (manufacturer's actual entered value at United States Customs for imports or FOB the manufacturer for domestic products pursuant to § 1001(14)(a)).

mandates incorporation of the Serial Copy Management System into all non-professional digital audio recording equipment that is manufactured, imported, or distributed in the United States.[162]

B. *A Critique*

The Act represents the feasible settlement of a contentious issue that is ripe for resolution.[163] Nearly all the interested parties were represented in the negotiations that led to drafting the

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Id. § 1012(a)(1). The royalty is subject to a minimum of $1 and a maximum of $8 per unit, except for integrated units containing more than one device, which have a maximum royalty of $12. *Id.* § 1012(a)(3). For digital audio recording media the rate would be three percent. *Id.* § 1012(b). No royalty would be due on returned or exported merchandise, and payments already made on such merchandise would be credited. *Id.* § 1012(c). The Copyright Office opposed the return credit provision because it would enormously complicate the calculation of royalties. *See Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 44-45).

Under the Act, the Copyright Office is responsible for receiving and administering the collected royalties, S. 1623, *supra* note 5, § 1013, while the Copyright Royalty Tribunal is charged with distributing the fund to the various claimants, *id.* § 1015. The royalty payments are divided into two funds, the Sound Recordings Fund (66⅔%), *id.* § 1014(b)(1), and the Musical Works Fund (33⅓%), *id.* § 1014(b)(2).

The Sound Recordings Fund is allocated as follows: 2⅝% to the AFM (or any successor entity) for the benefit of nonfeatured (*i.e.*, "session") musicians; 1⅜% to AFTRA (or any successor entity) for the benefit of nonfeatured vocalists; the remainder of the fund is to be distributed 40% to featured artists and 60% to other "interested copyright parties" (*e.g.*, record companies). *Id.* § 1014(b)(1). The Musical Works Fund is allocated 50% to music publishers, and 50% to writers. *Id.* § 1014 (b)(2)(B)(i),(ii). The initial annual royalty take has been estimated at 100 million dollars. I. Lichtman, *Digital Pact a Watershed Event, Says SGA's Weiss*, BILLBOARD, July 27, 1991, at 28.

162 S. 1623, *supra* note 5, §§ 1021-22. SCMS is a hardware system that permits copies to be made from original copyrighted digital or analog sources, but prevents subsequent digital copies to be made from first-generation digital reproductions. What this means for consumers is that SCMS will allow them to make DAT recordings, but not to make copies of those recordings.

> SCMS is implemented via three sets of inaudible subcodes in the digital signals which track (1) whether copyright protection is asserted [via SCMS only] over the signal; (2) whether the signal emanates from an "original" source . . . or a copy of such a source; and, (3) what kind of device is sending the incoming signal.

Greenstein, *supra* note 95, at 3 (footnotes omitted). The Act does not apply to "professional" equipment, which may operate free of SCMS. S.1623, *supra* note 5, §§ 1001(3)(a), 1001(10). A complete description of SCMS can be found in the Technical Reference Document for the Audio Home Recording Act of 1991, which appears in Section V of AHRA, and will be published in the Federal Register pursuant to section 1022(a). It is partially drawn from a similar document published in connection with the unenacted 1990 bill. *See* Technical Reference Document accompanying the Digital Tape Recorder Act of 1990, at 136 CONG. REC. E376 (daily ed. Feb. 26, 1990). The current Technical Reference Document may also be found in S. REP. No. 294, 102d Cong., 2d Sess. 17-30 (1992) and in 138 CONG. REC. S8416 (June 17, 1992).

163 The Copyright Royalty Tribunal, which is the agency responsible under AHRA for distributing royalties, finds it workable and well thought out insofar as it relates to CRT operations. The CRT does not take a position for or against the legislation. If asked by Congress, the CRT will only testify as to the feasibility of its implementation. Telephone Interview with Robert Cassler, General Counsel, Copyright Royalty Tribunal (Oct. 9, 1991).

legislation.[164] It enjoys the broad support of a wide variety of interests, including manufacturers, merchandisers, importers, distributors, consumer groups, music publishers, copyright owners, record producers, performing rights organizations, and talent unions.[165] It is supported by the Copyright Office.[166] It will bring, after much delay, an innovative and useful technology to market in the United States.[167] Nevertheless, it must still be assessed in light of copyright's ultimate purpose: the advancement and dissemination of knowledge for the public's benefit.

Viewed from this perspective, the Act does not merit an unqualified endorsement. Copyright owners are clearly entitled to relief from damages caused by unauthorized, uncontrolled, and uncompensated uses of their copyrighted properties. AHRA's royalty provisions seek to provide that relief. Equity should not permit equipment manufacturers and merchants to reap huge profits at the expense of American creators whose works are the final cause behind equipment sales. The public, however, is equally entitled to the widest possible availability of those same works, and therefore has an interest in the free flow of informa-

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164 Interview with Charles J. Sanders, *supra* note 5.

165 As of October 28, 1991, the following groups had endorsed the Act: Department of Professional Employees—AFL-CIO; American Federation of Musicians; American Federation of Television and Radio Artists; American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; Car Audio Specialists Association; Consumer Recording Rights Committee; Electronic Industries Association; Home Recording Rights Coalition; International Society of Certified Electronic Technicians; National Association of Independent Record Distributors & Manufacturers; National Academy of Recording Arts & Sciences; National Association of Retail Dealers of America; National Association of Recording Merchandisers; National Academy of Songwriters; National Consumers League; National Electronics Sales & Services Dealers Association; National Music Council; National Music Publishers Association; National Retail Federation; Nashville Songwriters Association International; Professional Audio Retailers Association; Recording Industry Association of America; Society of European Stage Authors and Composers; and the Songwriters Guild of America. *Hearing on S. 1623*, *supra* note 159 (statement of Jason S. Berman, President, Recording Industry Association of America at 10, addenda).

166 Although the Copyright Office has recommended the bill's enactment, it has not enthusiastically endorsed a mandatory SCMS.

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

REGISTER'S REPORT, *supra* note 59, at 159 (emphasis added). The Copyright Office has been reluctant to support copy-protection systems wholeheartedly because it recognizes that the public's right to make reasonable uses of protected material, including reproduction, would be restricted by them. *See infra* note 171.

167 The market referred to is the nonprofessional consumer one. Professional DAT recorders have been available for several years and are now common.

tion. Arguably, that interest is compromised by the Act's mandatory imposition of the serial copy management system.[168] Thus, AHRA's combination of both blank media royalties *and* compulsory technical restrictions on recording equipment creates an imbalance in the interests that copyright seeks to protect. If copyright owners are properly compensated for the unauthorized reproduction of their property through royalties on recording hardware and blank software, copy-protection systems are needless.[169] Conversely, if they are protected from uncompensated home taping through technical copying restrictions on recording hardware and software, additional royalties are redundant.

One answer to this argument might be that SCMS does not prevent *all* copying, but rather merely inhibits *serial* copying. Under SCMS an unlimited number of copies can be made from an original source. The system only prevents further reproductions from a first-generation copy.[170] However, if royalties are paid on the sale of all digital hardware and blank software, the copyright owner will have already been compensated for unauthorized reproductions. That compensation will be paid by all

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168 S. 1623, *supra* note 5, § 1021. AHRA prohibits the manufacture, importation, and distribution of any digital audio recording or interface device not in compliance with SCMS standards and specifications. *Id.* § 1021(a). In addition, the Act outlaws circumvention of SCMS, *id.* § 1021(b), and inaccurate encryption of phonorecords designed to obstruct SCMS operation, *id.* § 1021(c).

Remedies for violations of the Act are set out in § 1031. Any interested copyright or manufacturing party injured by a violation, or the United States Attorney General, may bring a civil action in federal district court. *Id.* § 1031(a). Temporary and permanent injunctions, damages, costs, attorney's fees, and other forms of equitable relief are available. *Id.* § 1031(b)(1)-(5). Statutory damages for failure to pay a royalty range from up to $100 per device and $4 per medium, *id.* § 1031(d)(1)(A)-(B), while willful violations could become liable for damages of up to $500 per device and $15 per medium. *Id.* § 1031(d)(3)(A). Damages of up to $1,000,000 could be awarded for the importation, manufacture, or distribution of a digital recording or interface device without SCMS. *Id.* § 1031(d)(2). For SCMS violations, a complaining party may recover actual damages, or statutory damages of not less than $1000 nor more than $10,000 per device. *Id.* § 1031(d)(2)(A)-(B)(i). Damages for willful SCMS violations are capped at $5,000,000; innocent violations have a $250 floor. *Id.* § 1031(d)(3)(B)-(d)(4).

169 Of course, the nice question then becomes, what constitutes proper compensation? In the context of royalty regulation this is a difficult problem because accurate quantification of losses caused by home-copying are problematic. *See* OTA 1989 STUDY, *supra* note 15, at 30.

170 This means that SCMS will, in all likelihood, be ineffective in reducing home taping.

> Limitations on serial copying, or making copies of the copies, prevents chain-letter-like copying, and simply demands that the copier go back to an original to make any desired copies—one after the other. Independently, it appears that consumers have made this decision already. Thus, if current practices persist, very little copying will be prevented.

1990 DAT Hearings, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 10).

DAT purchasers, regardless of whether their uses infringe, are exempt, or are a legitimate fair use of the copyrighted work. Furthermore, SCMS is non-discriminatory, and could restrict a consumer's right to copy recordings of his *own* creation or of public domain material.[171] Such technical restrictions are temporally unlimited, unlike the underlying copyrights in the compositions and recordings, and are therefore in conflict with the "limited times" provision of the Copyright Clause. These factors militate strongly against a solution that incorporates both hardware/software royalties and copy-protection systems.

The recording industry has a two-pronged response to these arguments. The first is that AHRA's modest royalties alone are insufficient to compensate for the anticipated actual losses attributable to DAT. The second is that royalties cannot affect their primary concern, *i.e.*, the prevention of digital cloning and easy piracy.[172] Presumably, however, these concerns could be alleviated either by increasing the royalty (which is exceedingly modest under AHRA), by extending it to analog devices, or by implementing an alternative technical solution. A technical solution that does not artificially restrict taping capability, but instead merely allows for remuneration to copyright owners, would be preferable from the standpoint of the public's interest in the free flow of information.

The debit-card system,[173] a technical solution that has been

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[171] During the 1987 *Joint Hearing on Digital Audio Taping, supra* note 149, the Copyright Office made a similar point in arguing for a royalty, rather than the copy-code, solution to the home-taping issue.

> The copy-code scanner does not understand "fair use"; it does not comprehend limited educational or library-based copying which we might all agree was otherwise acceptable. And, as a precedent, we doubt whether such an all-or-nothing approach to the right of the public to reproduce reasonable portions of works should be encouraged. . . . [W]ork can fall into the public domain and the copying restraint will obviously live on and on. . . . [T]his sort of approach may be at variance with the spirit of the "Limited Times" provision of the Constitution.

Id. at 159 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services).

[172] *Hearing on S. 1623, supra* note 159 (statement of Jason S. Berman, President, Recording Industry Association of America, at 8).

> We need the SCMS provision because the royalties provided for in the bill will not even approach what we believe to be our actual financial losses—and, of course, would do nothing to prohibit digital cloning, always a foremost concern of the music industry. SCMS defuses this most uniquely dangerous threat posed by digital audio recording devices.

Id.

[173] For a discussion, see *Senate Panel Weighs Merits of Bill to Limit Copying by DAT Recorders*, 40 Pat. Trademark & Copyright J. (BNA), No. 985, at 157 (June 14, 1990).

advanced by the Copyright Office in the past,[174] is just such an alternative, and deserves serious consideration. This system incorporates a pre-paid royalty card that could read digital information from the recording being taped, and deduct a specified amount for each song or album that is recorded. When the value of the card is exhausted it could either be renewed, exchanged, or replaced. The technology for such a system is already in use. For example, Metro farecards, photocopy machine farecards, and student food farecards are all commonplace.

When compared to SCMS, the advantages of the debit-card system are manifest. Unlike SCMS, it would remunerate copyright owners fairly while simultaneously ensuring the widest possible dissemination of works to the public. It would leave fair use and exempt use unrestricted. It is economically efficient and requires no government oversight or administration. Moreover, it obviates the need for blank tape or recording equipment royalties and the associated problem of how to exempt non-infringing uses from them.

On the other hand, if a hardware/software royalty system is enacted, it should extend to analog devices and be implemented

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174 *See 1990 DAT Hearing, supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 13-14, 43-44).

> [A] debit system would dramatically alter the landscape. Record and tape stores would be involved in collecting the fees for the system, and the consumer would pay in advance for any copies he or she wished to make . . . . The machine would automatically debit for the copy, and perhaps read specific information about the particular recording on the card. This would be a marketplace solution. It would require no government collection, distribution, or administrative oversight. And it would solve the problem forever, not just for the short haul. It also avoids the fatal political problem the blank tape royalty runs into—how to exempt people who use blank tape for non-infringing purposes. Under a debit system, people who record uncopyrighted material would pay nothing.

Id. at 43-44. In earlier years, the Copyright Office consistently supported a royalty solution as opposed to hardware restrictions.

> Going back to the early 1960's, the Copyright Office has long supported a system that would pay songwriters and record companies for lost sales from excessive private copying. We have never supported an effort to outlaw private copying. . . .
>
> So, instead of urging Congress to impede the freedom of consumers to enjoy the fruits of technology, the Copyright Office has always . . . preferred a royalty solution to the entire home taping problem, and that is why we prefer a royalty solution to the DAT problem. . . .
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> . . . .
>
> Congress can't ignore the fact that a failure to act means that Japanese electronics manufacturers will reap huge profits for [*sic*] America's open markets while our composers, musicians and record producers get the moral equivalent of a stick in the eye.

Joint Hearing on Digital Audio Taping, supra note 149, at 143 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services). Five years later, Congress had still failed to act—to the detriment of America's creative community.

in the absence of copy-protection. This would greatly increase the royalty fund by broadening the participation base, and consequently make a lower royalty rate possible. Moreover, it would stimulate both dissemination and authorship. The increased royalties presumably will provide the incentive for increased authorship; the public will benefit through both the expanded production of creative works and through their inexpensive dissemination, which would be guaranteed by the absence of copy-protection. Compared to these benefits, the burden on consumers (*i.e.*, a modest royalty) would be *de minimis*.

AHRA, however, takes neither of these approaches. Instead, while it establishes royalties on a relatively narrow range of digital hardware and software,[175] it broadly prohibits infringement actions based on both digital *and* analog recordings.[176] Furthermore, AHRA, for the first time, completely insulates home recording from direct and contributory infringement actions, but does not reach the underlying issue of whether such conduct constitutes infringement.[177] This discriminates against music copyright owners,[178] undercuts the essence of copyright, and glosses over the major aggregate damages that result from the multiplication of minor harms.[179] Fortunately for the manufacturing interests, these provisions will foreclose any future *Cahn v. Sony*-style lawsuits because the *sine qua non* of contributory infringement is direct infringement. Unfortunately for the public, however, the negotiations that led to the manufacturers' long-resisted acquiescence to equitable royalties also resulted in mandatory copy-protection.

To properly evaluate AHRA, one should be aware that the legislation was not drafted by Congress.[180] Rather, its provisions and its language are the result of extended negotiations between parties with large financial interests in the bill that Congress may ultimately enact.[181] Those parties are the record industry (producers), the songwriters and music publishers (creators and their agents), and the consumer electronics industry (manufacturers, distributors, and retailers). The AHRA provisions that mandate

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175 S. 1623, *supra* note 5, §§ 1011, 1012.

176 *Id.* § 1002.

177 *Id.*

178 Although these copyright holders will receive royalties based on future sales of digital hardware and software, they will receive nothing from the sale of analog equipment, from which, of course, their damages originate.

179 *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 569 (1985).

180 The actual drafting of AHRA was the work of twelve lawyers representing the various interested parties. Interview with Charles J. Sanders, *supra* note 5.

181 *Id.*

SCMS are the result of negotiations between the manufacturers and the producers—the Athens Agreement[182]—and are virtually unchanged from the 1990 Act.[183] The royalty provisions speak to the interests of the creators and the producers. These are the result of a "negotiation" between the creators and the manufacturers, *viz., Cahn v. Sony*.[184]

This, of course, does not necessarily foreclose AHRA from benefitting the public. Consumers will benefit from the availability of new recording technologies and, hopefully, from a greater diversity of creative works. But these benefits will inure to them only insofar as they are congruent with the common interests of AHRA's authors. In a system where Congress delegates its drafting duties to self-interested parties, such a result is unavoidable.[185]

To protect the public interest, therefore, where legislation is drafted by interested parties, Congress must scrutinize it most carefully.[186] Here, assuming AHRA is passed substantially unchanged, Congress should exercise continued oversight either by requiring renewal of the SCMS provisions, or by enacting royalties while postponing a mandatory technical solution until a proper evaluation of other less restrictive means is complete.

Another aspect to the constellation of interests that coalesced to produce AHRA is the internal conflict in the posture of certain manufacturers. Since the inception of the home copying debate, equipment manufacturers have vigorously and successfully resisted the repeated efforts of copyright interests to enact

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182 *1990 DAT Hearing, supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 15).

183 *Compare* S. 2358, 101st Cong., 2d Sess. § 3 (1990) *with* S. 1623, 102d Cong., 1st Sess. § 1021 (1991). The language in § 3(c) of the 1990 Act regarding professional model products appears substantially unchanged in AHRA § 1001(11).

184 No. 90 Civ. 4537 (S.D.N.Y. July 11, 1991). See *supra* section V for a discussion of the *Cahn* case.

185 *See generally* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

186 One witness raised precisely this issue at the recent House Hearing on AHRA. *The Audio Home Recording Act of 1991: Hearing on H.R. 3204 Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of Jessica Litman, Professor of Law, Wayne State University, at 2) [hereinafter *Hearing on H.R. 3204*].

> Because the substance of the bill was worked out and the language of the bill was drafted with little or no Congressional input, however, it is very important that Congress, in deciding whether to enact the bill, make an independent assessment of whether it serves the public interest. Industry representatives are just doing their jobs when they propose legislation that they believe will benefit their industries. Your job is to ascertain whether that legislation will benefit the public at large. Those inquiries are not the same.

Id.

royalty legislation.[187] In fact, the manufacturers' success in that endeavor is what led copyright owners to pursue a technological solution to the home copying problem.[188] Only now that some of the largest and most powerful Japanese manufacturers have themselves acquired substantial American copyright holdings have they acquiesced on the royalty question.[189]

C. *The International Angle*

One of the stronger arguments for passage of AHRA is that without it American authors and copyright owners generally will be unable to share in the royalties already being collected in other nations. Seventeen countries have enacted legislation to compensate copyright proprietors for unauthorized reproduction of their works;[190] several others are considering such legislation.[191] Most, however, will distribute the proceeds to foreign interests only on the basis of reciprocity.[192] Therefore, American authors and their successors in interest have much to gain from AHRA. It will allow them to participate in foreign royalties generated by the enormous worldwide demand for their property.[193]

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187 See section V *supra* for a legislative chronology and a discussion of arguments underlying the debate.

188 *Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 10); *1990 DAT Hearing*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 5).

189 In 1988, Sony spent $2 billion in purchasing CBS Records, and in 1989, another $3.4 billion for Columbia Pictures Entertainment. In December of 1990, the Matsushita Electric Industrial Company acquired MCA for $6.13 billion, and in February of 1991, Nippon Columbia bought the Savoy jazz record label. *Japanese Buy Savoy Label*, N.Y. TIMES, Feb. 28, 1991, at D8. Matsushita, the world's largest manufacturer of consumer electronics, and its rival Sony together control over 25% of the American movie market. David E. Sanger, *The Deal for MCA; Politics and Multinational Movies*, N.Y. TIMES, Nov. 27, 1990, at D1; Geraldine Fabrikant, *The Deal for MCA; $6.13 Billion MCA Sale to Japanese*, N.Y. TIMES, Nov. 27, 1990, at D1; Peter J. Boyer, *Sony and CBS Records: What a Romance!*, N.Y. TIMES, Sept. 18, 1988, § 6 (Magazine), at 34. The irony here revolves around the speculation by some analysts that Sony's motivation in buying CBS Records (the world's largest record company and developer of the copy-code copy-protection system) was to eliminate a powerful opponent of unrestricted DAT copying. Jacques Neher, *Japan Takes DAT Recorders on Road—Gingerly*, CHI. TRIB., Dec. 20, 1987, Zone C (Business), at 3.

190 As of August, 1991, the following countries had some kind of royalty or tax in place: Argentina, Australia, Austria, the Congo, The Federal Republic of Germany, Finland, France, Gabon, Hungary, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, Zaire, and Bulgaria. *Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 37).

191 These countries include Belgium, Denmark, Italy, Japan, and, of course, the United States. *Id.*

192 *Id.* at 38, 40. To establish a method of balancing the interests of authors with those of users, and to encourage the creation of new work, international organizations such as the European Commission now advocate the harmonization of compensatory systems. *Id.* at 38-39.

193 Outside of the United States, piracy of intellectual property is not the exception, it

Not surprisingly, foreign collection and distribution schemes vary. Some collect only on the sales of blank tape, while others include fees on the sale of recording equipment as well.[194] Significantly, in nearly all the countries that have enacted such legislation, the royalty payments apply to both analog and digital media.[195] In Germany, for example, the proposed digital royalty rate is quadruple the analog rate.[196]

Proposals to compensate copyright owners for unauthorized copying have been debated for years.[197] In the view of the European Community, the introduction of digital technology, with its potential to stimulate infringement, added urgency to the need for action.[198] The European Economic Commission ("EEC") found the 1989 Athens agreement, and the SCMS solution it advocated, to be an insufficient response to the issues raised by digital home copying.[199] The EEC, however, did not view the imposition of levies on blank tape as the ideal solution either.[200] Instead, it supported a system that had been suggested by the Copyright Office prior to AHRA; *viz.*, a credit- or debit-card system, which would not only limit unauthorized copying, but would insure direct payment by the taper for each digital copy made.[201] In any case, the existence and proliferation of reciprocal royalty systems currently operating internationally makes a persuasive argument for timely enactment of AHRA or some variant thereof. Passage would afford American creators a fair share of the income that their works generate worldwide, and would simultaneously help keep royalty rates at a modest level by widen-

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is the rule. The result in lost revenues to American companies is approximately $15 billion annually. William E. Schmidt, *A Third-World Rule on Video: Copy It and Sell It,* N.Y. TIMES, Aug. 18, 1991, at A1, A12.

194 Australia, Austria, the Congo, Finland, France, Gabon, Hungary, the Netherlands, Sweden, and Turkey collect royalties on blank tape sales only. Argentina, Germany, Iceland, Norway, Portugal, Spain, and Zaire place royalties on both the tapes and the equipment. *Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 37, Appendix I). Distributions to authors, performers, producers, and national art/cultural funds vary widely. *Id.*

195 *Id.* at 2.

196 *Id.*

197 OTA 1989 STUDY, *supra* note 15, at 120-35.

198 *See Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 39) (*citing* Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology—Issues Requiring Immediate Action*, COM(88)72 final ¶ 3.91, at 127).

199 *Id.* at 34-35. See also *1990 DAT Hearing*, *supra* note 60 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, at 31-39) for a discussion of foreign positions regarding compensation systems and technical solutions.

200 *Hearing on S. 1623*, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 35).

201 *Id.* See *supra* note 174 for the Copyright Office's view of the auto-debit system.

ing the royalty base. Lower marginal rates are certainly in the consumers' interest. Notably, in countries that have established royalties on blank tape and/or equipment, none have combined them with technical restrictions on recording equipment.

D. *Support and Opposition*

On October 29, 1991, the Senate Subcommittee on Patents, Copyrights, and Trademarks concluded hearings on AHRA.[202] Three weeks later, on November 21, the Senate Judiciary Committee ordered the bill favorably reported with an amendment in the nature of a substitute.[203] The House held hearings concerning the identical companion legislation, House Bill 3204, on February 19, 1992.[204] In the Senate Hearing only two of nine witnesses expressed opposition to AHRA, while most of the others enthusiastically supported its passage. Similarly, in the House Hearing only two of nine witnesses opposed the bill's enactment.[205]

One witness who testified against AHRA at the Senate Hearing[206] also testified against its predecessor at the hearing on Senate Bill 2358 in 1990.[207] Philip Greenspun, an engineer, argued that the Act's SCMS provisions will burden small American manufacturers for the benefit of large Japanese concerns who will collusively manipulate the market in the SCMS integrated circuit in order to control the American consumer audio industry.[208] He predicted that the merger of computer and DAT (*i.e.*, the future use of PCs to read and write digital audio) would quickly make SCMS superfluous, and that it could be easily and inexpensively

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202 *Hearing on S.1623*, *supra* note 159; 137 CONG. REC. D1327 (daily ed. Oct. 29, 1991).

203 137 CONG. REC. D1484 (daily ed. Nov. 21, 1991). The changes were technical ones concerning the Act's reporting requirements, and conformed to Copyright Office recommendations that were made during the hearing.

204 *Hearing on H.R. 3204*, *supra* note 186; *Digital Audio Taping Bill Gets Enthusiastic Reception at House Hearing*, 43 Pat. Trademark & Copyright J. (BNA) No. 1069, at 343 (Feb. 20, 1992); Bill Holland, *Audio-Recording Bill Gets Warm House Reception*, BILLBOARD, Feb. 29, 1992, at 1, 81.

205 *Hearing on H.R. 3204*, *supra* note 186. One witness, copyright law Professor Jessica Litman, explicitly avoided supporting or opposing it. *Id.* (statement of Jessica Litman, at 1).

206 *Hearing on S. 1623*, *supra* note 159 (statement of Philip Greenspun, Research Assistant, Massachusetts Institute of Technology).

207 *1990 DAT Hearing*, *supra* note 60, at 169 (statement of Philip Greenspun, President, Isosonics Corp.).

208 *Hearing on S. 1623*, *supra* note 159 (statement of Philip Greenspun, Research Assistant, Massachusetts Institute of Technology, at 6). To support the accusation of market manipulation he cited a recent GAO study, INTERNATIONAL TRADE—U.S. BUSINESS ACCESS TO CERTAIN FOREIGN STATE OF THE ART TECHNOLOGIES (1990). *Id.*

circumvented until then.[209] Further, he assailed AHRA's elaborate procedures to distinguish professional from consumer models[210] as vague, arbitrary, and unworkable, and he argued that the royalty and SCMS provisions unfairly burden non-infringing DAT users.[211]

During the House Hearing, another witness expressed the reservation that AHRA's definitions of "digital audio interface device,"[212] "digital audio recording device,"[213] and "digital audio recording medium"[214] are overly broad.[215] In his view, these definitions could be interpreted to apply to general-purpose computing subsystems that will not be used for infringing activities.[216]

Only one witness remained neutral regarding AHRA's enact-

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209 *Hearing on S. 1623*, *supra* note 159 (statement of Philip Greenspun, Research Assistant, Massachusetts Institute of Technology, at 12-13).

210 S. 1623, *supra* note 5, § 1001(11).

211 *Hearing on S. 1623*, *supra* note 159 (statement of Philip Greenspun, Research Assistant, Massachusetts Institute of Technology, at 7-9).

212 S. 1623/H.R. 3204, *supra* note 5, § 1001(3).

> A 'digital audio interface device' is any machine or device, now known or later developed, whether or not included with or as part of some other machine or device, that supplies a digital audio signal through a nonprofessional interface, as the term 'nonprofessional interface' is used in the Digital Audio Interface Standard in part I of the technical reference document or as otherwise defined by the Secretary of Commerce under section 1022(b).

Id.

213 *Id.* § 1001(4).

> A 'digital audio recording device' is any machine or device, now known or later developed, of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—
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> (A) professional model products and
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> (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

Id.

214 *Id.* § 1001(5)(A).

> A 'digital audio recording medium' is any material object in which sounds may be fixed, now known or later developed, in a form commonly distributed for ultimate sale to individuals for use by individuals (such as magnetic digital audio tape cassettes, optical discs, and magneto-optical discs), that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

Id.

215 *Hearing on H.R. 3204*, *supra* note 186 (statement of Dr. Irwin L. Lebow, Private Communications Consultant, at 5).

216 *Id.* (statement of Irwin L. Lebow, at 6). "[C]are must be taken to write legislation that will not penalize computer manufacturers and owners who are not in the audio business at all but use the same technology." *Id.*

ment.[217] She did, however, raise several issues that deserve congressional notice. Professor Jessica Litman argued that a bill drafted by industry representatives warrants a higher level of congressional scrutiny to insure that it serves the public interest.[218] She specifically questioned whether AHRA's definitions of digital audio recording "device" and "medium" were overly broad.[219] In addition, she warned of the dangers in legislating mandatory SCMS.[220] Whether the specific requirements set out in the technical reference document will be sensible as applied to future technologies is impossible to predict, and the Commerce Department's authority under AHRA to amend those regulations is relatively narrow.[221] Professor Litman suggested, *inter alia*, separating the royalty provisions from the SCMS provisions, enacting royalties while phasing in SCMS, and including a sunset clause for SCMS so Congress could evaluate it prior to making it a permanent feature of copyright law.[222] Congress should accept her sensible advice.

The overwhelming consensus among the witnesses, however, was fervently in AHRA's favor. Most hailed the Act as an historic compromise, and predicted that great benefits to both the public and to industry would flow from it.[223] Its proponents

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217 *Hearing on H.R. 3204*, *supra* note 186 (statement of Jessica Litman, Professor of Law, Wayne State University, at 1).

218 *Id.* (statement of Professor Litman, at 6). She averred that resolution of home-copying's legal status is an issue primarily concerning manufacturers, producers, and authors—not consumers—because any rights that may exist to prevent private copying are essentially unenforceable. *Id.* (statement of Professor Litman, at 2). This factor is precisely the reason why rights-holders have sought a royalty solution to the unauthorized copying problem: while technology neutralized their "exclusive right" to reproduce and to distribute their works, the law failed to provide adequate redress for what has become commonplace infringement, yet it allowed a windfall to manufacturers who make that infringement possible. Contrary to Professor Litman's implication, however, the public does have an interest in resolving the legal status of private copying. In the instant case, they would gain access both to technologies previously denied to them, and to a presumably wider selection of creative products.

219 *Id.* (statement of Professor Litman, at 3).

220 *Id.* (statement of Professor Litman, at 7).

221 *Id.* (statement of Professor Litman, at 3, 7). The Secretary of Commerce may act to amend or modify the technical reference document "upon petition by an interested manufacturing party or an interested copyright party . . . after consultation with the Register." S. 1623/H.R. 3204, *supra* note 5, § 1022(b). The incorporation and implementation of SCMS is set out in sections 1021 and 1022. *Id.*

222 *Hearing on H.R. 3204*, *supra* note 186 (statement of Professor Litman, at 9). She also noted that Congress would eventually be obligated to approach the unauthorized private copying issue comprehensively for all copyrighted works. *Id.* (statement of Professor Litman, at 8).

223 *See Hearing on S. 1623*, *supra* note 159; *Hearing on H.R. 3204*, *supra* note 186. The Copyright Office concluded:

> The Copyright Office fully endorses the principles of the proposed AHRA. We commend the parties for their historic compromise, and recommend favorable action by Congress. The proposal seems sound, fair, and

represent the interests of all the groups potentially affected by the bill, including consumers.[224] Its support in both houses of Congress is impressive, with thirty-five co-sponsors in the Senate[225] and sixty in the House of Representatives.[226]

On March 25, 1992, Representative Cardiss Collins (D-Ill.) introduced House Bill 4567, the Audio Home Recording Act of 1992,[227] a new version that basically conformed to the amended Senate Bill 1623.[228] It was referred to the House Energy and Commerce Committee, the Ways and Means Committee, and the Judiciary Committee.[229] The Energy and Commerce Subcommittee on Commerce, Consumer Protection, and Competition held hearings on March 31, 1992[230] and approved an amended version on May 12.[231] The Energy and Commerce Committee cleared the bill on June 2[232] for consideration by the full House and issued its report on August 4.[233]

Meanwhile, the Senate Judiciary Committee filed its report

> workable. All creative and proprietary interests are accommodated by the compromise. Consumers will benefit from the diversity of creative works and from new recording technologies. The record companies will sell more products. The public will have more music to enjoy. Everyone seems to benefit. At last, the American creators will share the profits from this wonderful technology, not just the equipment manufacturers.

Hearing on S. 1623, *supra* note 159 (statement of Ralph Oman, Register of Copyrights and Associate Librarian for Copyright Services, at 46-47). Other witnesses echoed these sentiments, albeit with more passion and self-congratulatory bravura.

224 The Senate heard from the following witnesses, among others: Debbie Gibson, Recording Artist; John V. Roach, Chairman, Tandy Corp.; Linda Golodner, Executive Director, National Consumers League; Jay Berman, President, RIAA; Gary Shapiro, Group Vice-President, CEG/EIA; Edward P. Murphy, President and CEO, NMPA, President and CEO, The Harry Fox Agency. *Hearing on S. 1623*, *supra* note 159. In addition, the House interviewed among others: Barry Manilow, Songwriter and Performer; Stanson G. Nimiroski, Vice President, Pitman Manufacturing, Sony Music Entertainment, Inc.; Joseph Smith, President and CEO, Capitol-EMI Music, Inc.; George David Weiss, President, Songwriters Guild of America. *Hearing on H.R. 3204*, *supra* note 186.

225 138 CONG. REC. S1919 (Feb. 20, 1992).

226 138 CONG. REC. H933 (Mar. 3, 1992); *Hearing on H.R. 3204*, *supra* note 186 (opening statement of William J. Hughes, Chairman, Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary); Bill Holland, *Audio-Recording Bill Gets Warm House Reception*, BILLBOARD, Feb. 29, 1992, at 1, 81.

227 H.R. 4567, 102d Cong., 2d Sess. (1992); *see* 138 CONG. REC. E823 (Mar. 25, 1992) (remarks by Rep. Collins).

228 44 Pat. Trademark & Copyright J. (BNA) No. 1084, at 108 (June 4, 1992).

229 44 Pat. Trademark & Copyright J. (BNA) No. 1087, at 171 (June 25, 1992).

230 *Hearings on H.R. 4567 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. (1992); 138 CONG. REC. D371 (Mar. 31, 1992).

231 138 CONG. REC. D551 (May 12, 1992); 44 Pat. Trademark & Copyright J. (BNA) No. 1084, at 108 (June 4, 1992).

232 138 CONG. REC. D651 (June 2, 1992); 44 Pat. Trademark & Copyright J. (BNA) No. 1084, at 108 (June 4, 1992).

233 H.R. REP. No. 780, 102d Cong., 2d Sess., pt. 1 (1992); 138 CONG. REC. H7384 (Aug. 4, 1992); 44 Pat. Trademark & Copyright J. (BNA) No. 1092, at 324 (Aug. 6, 1992).

on June 9.[234] And on June 17, Senator DeConcini offered a substitute amendment that substantially conformed the Senate version to House Bill 4567;[235] it passed the Senate on the same day.[236]

Then, on July 31, the House Judiciary Subcommittee on Intellectual Property and Judicial Administration approved its own amendment in the form of a substitute to House Bill 3204.[237] This version cleared the full Judiciary Committee on August 11,[238] and their report was filed on September 17.[239] In the meantime, on September 16, the House Ways and Means Committee approved another amended version of House Bill 3204.[240] One week later, the House passed the Judiciary's version of 3204 under a suspension of the rules on September 22, 1992.[241] The Senate quickly resolved the remaining minor discrepancies and passed AHRA on October 7, thereby clearing it for presidential

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234 S. REP. No. 294, 102d Cong., 2d Sess. (1992).

235 138 CONG. REC. S8397 (June 17, 1992); 44 Pat. Trademark & Copyright J. (BNA) No. 1087, at 171 (June 25, 1992).

236 138 CONG. REC. S8422 (June 17, 1992); 44 Pat. Trademark & Copyright J. (BNA) No. 1087, at 171 (June 25, 1992).

The amendment, No. 2431, made the following changes, among others, to Senate Bill 1623: 1) the definition of "audiogram" was amended to exclude spoken word recordings and general purpose computer programs, thereby focusing the legislation on musical recordings only; 2) the definition of "digital audio recording medium" was modified to clarify when such media are primarily for consumer use; 3) the definition of "digital audio interface device" was narrowed to avoid inclusion of certain peripheral computer devices; 4) the provisions of § 1014(b)(1), which allocated portions of the sound recordings fund to the American Federation of Musicians ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") for the benefit of non-featured musicians and vocalists, were amended to require that such funds be deposited into independently administered escrow accounts for distribution to both union and non-union performers; and 5) the language in the bill regarding the 50-50 royalty split between writers and music publishers was modified so that contractual obligations will not be overridden where such would be inconsistent with the international obligations of the United States.

237 138 CONG. REC. D972 (July 31, 1992). This revised version of H.R. 3204 is similar to S. 1623 and H.R. 4567 in that it also allows performers to receive royalties directly from independently administered escrow accounts. It differs from the other Senate and House bills by deleting all allusions to the Technical Reference Document, which describes the SCMS implementation standards. In contrast, the revised H.R. 3204 merely describes the function of SCMS, and then grants the Secretary of Commerce regulatory power to determine which systems meet the statutory requirements. 44 Pat. Trademark & Copyright J. (BNA) No. 1092, at 324 (Aug. 6, 1992).

238 138 CONG. REC. D1051 (Aug. 11, 1992).

239 H.R. REP. No. 873, 102d Cong., 2d Sess., pt. 1 (1992).

240 *Home Audio Taping Bill is Passed by House*, 186 Daily Rep. for Executives (BNA), at d29 (Sept. 24, 1992). The Ways and Means Committee version included an amendment to cross-reference proposed § 1002 with § 337 of the Tariff Act of 1930 "to ensure that Section 337 remains a self-contained statute with respect to the subject matter that may be litigated thereunder." *Id.*

241 *Id.* The House passed the Judiciary Committee's version, but incorporated the § 337 provision that the Ways and Means Committee approved.

approval and, ultimately, enactment.[242]

VII. CONCLUSION

Despite the tremendous support enjoyed by AHRA, and the compelling present need for some kind of legislation, its critics have raised important issues. The bill would be much improved by either replacing SCMS with an auto debit system, or by eliminating the SCMS requirement while extending royalties to analog media and equipment. If Congress approves SCMS, or any other technical solution, that provision should include a sunset clause so that legislative action will be unnecessary when, or if, it proves a failure.

The preferred solution would be to excise the SCMS requirement. That would eliminate the arbitrary distinction between "professional" and "consumer" products, and with it the need to artificially restrict the usefulness of an innovative technology. Insuring public access to innovations in science and the useful arts is a guiding principle of intellectual property law, but public access to scientific innovation need not be sacrificed to insure the survival of creative incentive. AHRA royalties can serve as that incentive until a more comprehensive solution is implemented, and in the interim American authors can share in the monies already being collected internationally for reproductions of their works. Ideally, such a solution would guarantee remuneration to rights-holders for unauthorized copying, and would also exact the consideration from putative infringers.

The closest available alternative is the debit-card system. It could be phased in gradually and used with or without hardware and software royalties. It is a market-oriented solution that does not require government collection, distribution, or oversight of royalties. It is also probably the least expensive technical alternative from the public's perspective because the technology is already in use and is the most adaptable alternative in terms of adjustments for fair use and exempt use. Further, the on-going revolution in communications technology is on the verge of integrating computer, telephone, television, and broadcasting devices. This development could foreseeably replace current delivery systems with one where consumers download copyrighted properties by means of satellite, cable, or telephone line.

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242 *Intellectual Property, Senate Passes Home Audio Taping Bill, Clearing Measure for White House*, 197 Daily Rep. for Executives (BNA), at d17 (Oct. 9, 1992).

Some type of debit or credit card system for royalty payments would be particularly suited for this likely eventuality.

The question concerning technology and copyright is whether the law can adapt to the revolution in communications technology. The tension to be resolved is still between advancing one copyright goal, dissemination, with or at the expense of another goal, creative production. Given the fact that copyright is limited both temporally and otherwise, and that eventually all protected works devolve to the public domain, the bundle of rights inherent to intellectual property deserve effective protection from technological emasculation. Although AHRA is indeed an historic compromise among the interested parties, it must still be measured by conformation to constitutional copyright purposes. That purpose would be served more faithfully if the SCMS provisions were deleted from the bill and royalties were extended to analog media. In the alternative, both copy-protection and hardware/software royalties could be replaced by the implementation of an automated debit-card system.

Gary S. Lutzker

ADDENDUM

President Bush signed AHRA into law on October 28, 1992. 9 Int'l Trade Rep. (BNA) No. 44, at 1888 (Nov. 4, 1992). It was assigned Public Law No. 102-563. 45 Pat. Trademark & Copyright J. (BNA) No. 1105, at 32 (Nov. 12, 1992).