
Joel L. McKuin

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol16/iss2/4

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

by

JOEL L. McKUIN*

Table of Contents

I. Home Taping: The Problem and its Legal Status ....... 315
   A. Constitutional and Statutory Background ........... 315
   B. Home Taping or Home "Taking"?: The History of Home Taping's Legal Status ...................... 318
   C. New Technologies Sharpen the Home Taping Problem ................................................. 321
      1. The DAT Debacle ........................................ 321
      2. Other New Technologies ............................. 322
   II. The Audio Home Recording Act of 1992 (AHRA) .... 325
      A. Serial Copy Management System (SCMS) ............ 325
      B. Royalties on Digital Hardware and Media .......... 326
      C. Prohibition of Copyright Infringement Actions .... 328
   III. Analysis and Critique of AHRA ...................... 328
      A. Analysis of Protections Provided by AHRA .......... 329
         1. SCMS ............................................. 329
            a. Unlimited Home Copying ............................ 329
            b. Banning Unauthorized Home Digital Copying ................................................ 330
         2. Royalties on Home Taping ............................ 330
            a. International Aspects ............................. 330
            b. AHRA's Royalty Provisions ....................... 332
         3. The Division of Royalties and Passive Law Making ............................................ 336
         4. Preclusion of Copyright Infringement Actions .. 340
      B. AHRA: Two Missing Elements .......................... 341

* J.D. 1993, Harvard Law School; B.A. 1990, Union College. Associate, Mitchell, Silberberg & Knupp, Motion Picture and Television Department, Los Angeles.
1. Royalties on Home Analog Recording ............ 341
2. No Performance Right in Sound Recordings ... 344
IV. Conclusion .............................................. 347
Introduction

In 1942, R. Buckminster Fuller, an American philosopher, engineer and visionary set out to discover whether scientific achievements occurred in any regular or predictable pattern. He studied the speed of travel, the discovery of the elements and the speed at which inventions were adopted for common use. It took 150 years for the steam engine, 50 years for the automobile, 25 years for the radio, 15 years for the transistor and 5 years for the microchip to become commonplace. The technological trend remains unmistakable: Advanced societies are continuing to embrace new technologies for everyday use at a pace that increases exponentially.

Such a rapid adoption of new technologies is taking place in the area of information technology, from the speed and volume of transmission to storage capacity. As Alvin Toffler, a noted commentator, acknowledged: "More diversity and change equals more information, equals more technology to handle the information, leading to still more diversity and change." The possibilities are exciting, especially for those involved in areas of high technology development and manufacturing. Emerging technologies, however, present threats to the livelihood of creative individuals and current or future copyright owners. Nevertheless, those individuals are still eager to participate in the ongoing information revolution. If history is an accurate indicator, however, they have a valid reason to fear that Congress will supply inadequate legal protections for their creative works. This prediction is especially true for musical artists and producers of sound recordings.

This Article focuses on the inadequate protection of sound recordings from unauthorized noncommercial home taping. For years, producers of recordings have watched as millions of people annually have made over one billion cassette recordings of copyrighted sound recordings. This widespread practice of unauthorized home taping...
not only intuitively seems unfair, but also has harmed the recording industry and society as a whole. First, home taping has displaced some of the demand for prerecorded material. People who make their own tapes from broadcasts or phonorecords belonging to friends, family members or libraries are less likely to purchase original recordings. This usurpation of demand for records has harmed the recording industry economically: performers, vocalists, composers and record companies are all affected. Second, allowing people, some of whom have not even purchased an original record, to make unauthorized copies of copyrighted musical recordings is intuitively wrong and unfair. Creative producers do not labor to have their works purloined by home tapers. Third, and perhaps most important, home taping of copyrighted works has harmed society. Home taping decreases the funds available to the recording industry for the development of new musical acts, thereby decreasing the amount of records made overall.

Despite these important reasons for compensating the recording industry for home taping, until recently Congress did nothing to address the problem. On October 28, 1992, President Bush signed the Audio Home Recording Act of 1992 (hereinafter AHRA or the Act) into law. AHRA places a small royalty on digital sound recording media and equipment. The Act also requires manufacturers of digital recorders to incorporate circuitry that prevents serial copying. Finally, the Act bars infringement suits based on private copying performed in accordance with the Act.

Although the Act is a step in the right direction, it inadequately protects musical performers and copyright holders. For example, the

7. Id.
8. A "phonorecord" is described by the Copyright Act as the material object in which sounds are fixed. 17 U.S.C. § 101 (1988). In this Article, the term "record" is used to denote a "phonorecord."
9. There has been disagreement over the aggregate economic effects of home taping. The findings of the latest study, the 1989 OTA REPORT, are ambiguous. See supra note 6. For example, one of the contracted reports concluded that the presence of home copying does cut into demand for recorded material, but that it stimulates prices charged for prerecorded formats because the originals are worth more since they can be used to generate copies. Id. at 183. The 1989 OTA REPORT is not particularly useful because it compares societal welfare assuming unmitigated home taping with societal welfare assuming an absolute ban on home taping. The Report's conclusions inadequately consider the economic effects of a less draconian measure, royalty on tapes and recording equipment. Appropriately, the final words of the 1989 OTA REPORT, which appear in boldface, are: "It is potentially misleading to base policy on an estimate of one of several harms or benefits." Id. at 207.
Act only applies to digital media and equipment—it imposes no royalties on analog recording tape and equipment. Yet the inequities and economic loss presented by home taping will continue to emanate from analog home taping for the foreseeable future. In addition, the Act does not create a performance right in sound recordings, even though this has been recommended by the Copyright Office and scholarly commentators for almost two decades. The adverse effects to the recording industry resulting from the Act's deficiencies will increase over the next few years as new technologies in digital audio transmission and recording are introduced and become popular.

This Article argues that producers of American recorded music are inadequately protected from home taping under American copyright law. Specifically, the shortcomings of AHRA, the latest attempt at breathing equity into the Copyright Act, will be explored. Additionally, the Article suggests that certain emerging technologies make the need more acute for both protections from analog home taping and a performance right in sound recordings. This Article makes proposals for legal reform to remedy these shortcomings. The pre-AHRA legal status of home taping will be investigated, and recent developments in digital recording and transmission technologies will be reviewed. The analysis demonstrates that in 1992, Congress had both an opportunity and a duty to supply the creators of American recorded music with a better system of protection from home taping than is provided under AHRA.

I

Home Taping: The Problem and its Legal Status

A. Constitutional and Statutory Background

Copyright law is essentially a system of property. As with real property, proprietors of copyrights are granted certain rights of dominion over their “property.” Whereas a landholder's primary concern is trespass, a copyright holder's primary concern is unauthorized copying of his or her work.


In order to encourage authors to create new works, article I, section 8 of the United States Constitution authorizes Congress to grant exclusive rights to holders of copyrights.\textsuperscript{14} Article I provides: "The Congress shall have power . . . [t]o 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."\textsuperscript{15} In the seminal case of \textit{Mazer v. Stein},\textsuperscript{16} the Supreme Court acknowledged:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.\textsuperscript{17} Thus, it is believed that the benefits society derives by protecting copyright holders' works justify the limited monopoly granted under federal copyright law.\textsuperscript{18}

Pursuant to this economic incentive philosophy, Congress, under the Copyright Act, established the rights that prevent others from depriving authors and publishers of the fruits of their labors.\textsuperscript{19} The latest federal copyright regime, the Copyright Act of 1976,\textsuperscript{20} implemented constitutionally sanctioned protections for authors against unauthorized copying of "original works of authorship."\textsuperscript{21}

Five distinguishable exclusive rights are reserved for the copyright holder in § 106 of the 1976 Act.\textsuperscript{22} The two statutory rights relevant to this Article are the right to copy a work (§ 106(1))\textsuperscript{23} and the right to publicly perform it (§ 106(4)).\textsuperscript{24} The exclusive rights created in § 106 are subject to important limitations found in §§ 107 through

\textsuperscript{14} U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{15} Id.
\textsuperscript{16} 347 U.S. 201 (1954).
\textsuperscript{17} Id. at 218. \textit{See also Copyright Law Revision: Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, H.R. Serial 36, Part 1 (1975) (testimony of Irwin Karp) (describing the copyright clause as an "independent, entrepreneurial property-rights system of writing and publishing").}
\textsuperscript{18} It should be noted that not all commentators share this view. \textit{See, e.g.,} Stephen Breyer, \textit{The Uneasy Case for Copyright}, 84 HARV. L. REV. 281 (1970) (arguing that the limited monopoly created for copyright law is unjustified).
\textsuperscript{19} Id.
\textsuperscript{22} Id. § 106.
\textsuperscript{23} Id. § 106(1).
\textsuperscript{24} Id. § 106(4).
120 of the Act. Two of these exceptions are central to this Article: the “fair use” exception, and the express denial of a performance right in sound recordings.

The fair use exception, contained in § 107 of the Act, essentially is an affirmative defense to an infringement claim. It is applicable primarily in areas of nonprofit education, research and scholarship, where public policy favoring the dissemination of information will be furthered by the infringing activity.

Section 107 identifies four factors to be considered in “determining whether the use made of a work in any particular case is a fair use.” These factors are: (1) the commercial or noncommercial nature of the use, (2) the nature of the copyrighted work, (3) the amount of the work used and (4) the effect of the use upon the potential market for the copyrighted work. Courts have identified the fourth statutory factor, that is, the economic effect of the allegedly infringing activity on the potential market for the protected work, as “undoubtedly the single most important element of fair use.” The question of the economic effect of home copying on the recording industry has dominated the debate over home taping in both the scholarly journals and Congress.

The arguments for and against finding home taping a fair use will not be repeated at length since not only have such arguments been presented many times before, but also AHRA makes the debate irrelevant by deeming noncommercial taping a noninfringing activity. However, it should be noted that the second, third and fourth statutory factors strongly favor the recording industry’s position that home

---

25. Id. §§ 107-120.
26. Id. § 107.
29. Id.
audio taping is not a fair use. First, musical recordings consist of precisely the creative “nature” that the Copyright Act is intended to protect and encourage. Second, home tapers copy individual songs in their entirety and often copy entire albums.34 Finally, studies support the assertion that home taping causes economic harm to copyright holders.35

The other exception relevant to the home taping issue is the express statutory denial of the § 106(4) performance right in the case of sound recordings.36 Under this exception, found in § 114 of the 1976 Act, once a sound recording is produced, purchasers are free to perform the recording anywhere without paying either the sound recording copyright owner, or the performers, a fee.37 This is contrary to the treatment of composers of the underlying works who enjoy the protection of the performance right through a compulsory licensing scheme. As will be explored below, the exception to the performance right created by § 114 is relevant to the home taping debate because the exception, combined with the prevalence of uncompensated analog home taping, denies record producers and performers adequate compensation for their contributions. This phenomenon will likely be exacerbated as new digital delivery technologies are introduced.38 Under-compensation for high quality home taping and the omission of performance rights in sound recordings will represent a double economic blow to the creators of American music.

B. Home Taping or Home “Taking”?: The History of Home Taping’s Legal Status

Before the Philips Company introduced the audio cassette format in 1963, home copying of sound recordings was not a common occurrence. Indeed, because sound recordings did not enjoy federal copyright protection until 1972, to the extent that home copying occurred, it was a noninfringing activity.39 During that period, record piracy

34. The 1989 OTA REPORT found that 48% of home tapers taped albums in their entirety. See 1989 OTA REPORT, supra note 6, at 155.
35. The 1989 OTA REPORT found that 38% of taped albums represented would-be purchases. 1989 OTA REPORT, supra note 6, at 206 n.117. Respondents in the OTA survey reported that nearly five out of every ten taped albums are would-be purchases, but that one of these five would displace another purchase, leaving the net effect at approximately four out of every ten. Id. This is roughly the same figure reported in a 1982 study sponsored by Warner Communications, Inc. Id.
37. See id.
38. See infra Part I.C.2.
39. This is true even though home copying arguably infringed the copyrights in the underlying musical compositions.
(i.e., making unauthorized recordings for commercial use) and not home copying, posed the greatest threat to the recording industry. By the early 1970s, it was calculated that 60% of the records and tapes in New York were illegally pirated copies. Indeed, in 1971, a bootleg recording of Jimi Hendrix made it to the top half of the LP charts.

In 1971, Congress enacted the Sound Recording Amendment, extending copyright protection to sound recordings for the first time. By adopting the Amendment, Congress finally recognized that “sound recordings are clearly within the scope of the ‘writings of an author’ capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue.” However, the Amendment was aimed at record pirates, not home tapers. Congress made it clear in the Amendment’s legislative history that home taping for private use was not considered infringing activity.

This development obviously took the wind out of the sails of those who argued that home taping constituted infringement. This argument, however, was revived after Congress enacted the Copyright Act of 1976, which superseded the 1971 Amendment. Beyond the 1976 Act’s general fair use provision, nothing in its text or legislative history suggested that home taping was considered a noninfringing activity. In fact, the legislative history of the Act did not even refer to the House Report of the 1971 Amendment. Professor Nimmer found this omission, as well as the House Report of the 1976 Act which stated that the Act “is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction

---

40. Chesterman, supra note 1, at 37.
41. See id.
44. Although the text of the Sound Recording Amendment contained no reference to home taping, the House Report states: “Specifically, it is not the intention of the Committee to restrain the home recording, from broadcast or from tapes or records, of recorded performances, where home recording is for the private use and with no purpose of reproducing or otherwise capitalizing commercially on it.” H.R. REP. No. 487, 92d Cong., 1st Sess. 7, reprinted in 1971 U.S.C.C.A.N. 1566, 1572.
45. Nimmer, Dispelling the Betamax Myth, supra note 31, at 1509-10. Professor Nimmer also points out that the Sound Recording Amendment of 1971 applied only to sound recordings and did not affect the existing copyright in the underlying musical work. Id. Thus, home tapers still would infringe the copyright in the musical composition even after the 1971 Amendment. Id. at 1509. See also Michael Plumleigh, Comment, Digital Audio Tape: New Fuel Stokes the Smoldering Home Taping Fire, 37 UCLA L. REV. 733, 737, n.16 (1990).
46. Id.
beyond the normal and reasonable limits of fair use,"\textsuperscript{47} to be significant.

The 1976 Act's bare treatment of the home taping issue as well as its codification of the fair use doctrine shaped the debate over home taping for two decades. While scholars, the recording industry and electronics manufacturers bickered over whether home copying was fair use, repeated bills were introduced in Congress to institute royalties on blank tapes and/or to require equipment manufacturers to adopt electronic copy management systems.\textsuperscript{48} Despite intense lobbying efforts by groups like the Recording Industry Association of America (RIAA), none of these legislative efforts advanced beyond the committee stage.

Amidst this atmosphere of intense lobbying, the recording industry and performing artists aligned and argued that home taping of records was infringement, plain and simple.\textsuperscript{49} They argued that § 106 of the Copyright Act reserves the exclusive right of copyright owners to copy a protected work, and home taping clearly infringes that exclusive right.\textsuperscript{50} A large amount of home taping represents a lost sale of the original product. The recording industry and performing artists argued that private home taping costs the industry over a billion and a half dollars in annual record sales.\textsuperscript{51} The economic harm argument bolstered the recording industry's claim that private taping was an infringement, and not fair use.\textsuperscript{52}

The home electronics and blank cassette tape manufacturers claimed that not only was home taping of copyrighted materials not a serious problem for the recording industry, but also that home taping actually helped to stimulate record sales.\textsuperscript{53} They insisted that people would share music with their friends, who would then purchase an original recording for themselves. Regardless of whether home taping harmed the recording industry, they argued home taping was a fair


\textsuperscript{50} See 17 U.S.C. § 106(1).

\textsuperscript{51} See Brennan, supra note 31, at 100.

\textsuperscript{52} See supra note 28-35 and accompanying text.

\textsuperscript{53} Id.
use, since it was noncommercial by nature and did not cause economic harm to copyright holders. Their claim was strengthened by the 1984 Supreme Court decision in the *Sony Betamax* case. In that case, the Court held that home recording of television broadcasts for the purpose of "time-shifting" (i.e., watching a program at a later time) was a fair use.

The hotly-disputed issue of whether home taping is fair use was never litigated, since both sides opted to lobby Congress for statutory protection rather than risk an adverse judicial decision. Despite the possible negative implications of the *Sony Betamax* case on the record industry's position, the recording industry occupied the higher legal, and certainly moral, ground. As the 1980s came to a close, the record producers had the benefit of a bargaining chip that they had previously lacked in their fight with the electronics industry.

C. New Technologies Sharpen the Home Taping Problem

1. The DAT Debacle

By the late 1980s, the electronics manufacturers were eager to introduce new home digital audio recording products to the United States. In 1987, the hardware for the first digital home recording format, DAT, was available in Japan and Europe. By late 1992, two new formats, Philips's Digital Compact Cassette (DCC) and Sony's MiniDisc were ready for shipment. However, it would not be feasible (nor legally advisable) for manufacturers to market these digital recorders in America unless two barriers were removed. First, the record industry had to market prerecorded products in new formats that were compatible with the new machines. Such prerecorded material in new formats was thought to be necessary to make the new DCC and MiniDisc machines a more desirable investment for wary consumers, who only had recently been told that the compact disc (CD) would be state of the art well into the future. Second, the threat of vicarious copyright infringement suits by record producers and composers had to be removed. This unusual set of circumstances provided the recording industry with the leverage vis-a-vis the electronics manufacturers that it had always lacked. By taking advantage of this leverage, the recording industry could extract concessions concerning serial copy protection and home copying royalties from the electronics manufacturers in return for removing the two barriers to the successful marketing of digital recorders.

54. *Id.*
56. *See supra* Introduction.
In 1989, the International Recording Industry and the Consumer Electronics Industry reached a compromise during their meeting in Athens, Greece. As a result of the compromise, manufacturers of DAT machines were to insert Serial Copy Management Systems (SCMS) into all consumer DAT recorders. As explained in Part III.A of this Article, SCMS prevents users of equipped machines from making digital recordings of first generation copies of musical recordings, but allows an unlimited number of copies to be made from the original source. Additionally, the so-called Athens compromise stipulated that the recording industry could continue to seek a royalty solution for home taping.

In 1990, Samuel Cahn and four music publishing companies that were dissatisfied with the Athens compromise filed a class action infringement suit against Sony Corporation of America in an attempt to bar DAT technology from the United States. This case would have determined the legal status of home audio taping had the parties not settled out of court in July 1991. Sony, as well as other electronics manufacturers, agreed to support a royalty scheme for digital recording media and equipment in exchange for the class dropping its suit. The settlement provided that Sony would support legislation on the issue, thus breaking the lengthy lobbying struggle between the recording industry and the electronics manufacturers. The terms embodied in the Athens compromise and the Sony-Cahn settlement ultimately became the Audio Home Recording Act of 1992.

2. Other New Technologies

AHRA was enacted just before two important new digital recording formats, Philips's DCC and Sony's MiniDisc, were introduced. While it is widely believed that the market can ultimately support only one of these formats, the format that succeeds in commanding market attention is likely to be the home taping format of choice well into the

58. Teitelbaum, supra note 32, at 19, 23; Oman's Remarks, supra note 57, at 468.
59. Id. at 30.
60. Id. at 30-31.
61. Id. at 31.
62. Id. at 31.
future.\textsuperscript{64} The older, original DAT format, which suffered from an expensive design based upon videotape machines, will probably not be marketed as a consumer item. All of these machines are capable of making near-perfect recordings. When interfaced with a pure digital source (e.g., a CD player with a digital as opposed to an analog output) the copies are identical.

In addition to coinciding with the launch of DCC and MiniDisc, the AHRA was introduced at a time when important advances in broadcasting, satellite and cable technologies were waiting in the wings. First, some cable operators already offer music channels to subscribers. One company in Los Angeles, Digital Musical Express (DMX) transmits thirty channels of CD-quality digital music to subscribers of forty cable-television systems throughout America.\textsuperscript{65} Like radio stations, the thirty DMX channels are devoted to relatively narrow sub-genres of music, thus conforming closely with listeners' tastes.

The next infrastructure to facilitate delivery of CD-quality sound to the home will probably involve fiber optic networks. These networks could offer enormous capacity compared with conventional copper wire telephone lines and coaxial cabling used in today's cable systems.\textsuperscript{66} Fiber optic networks could, for example, simultaneously carry voice telephone communications, high speed data services, CD-quality audio and high definition television into private homes.\textsuperscript{67} Thus, it can be expected that telecommunications companies will engage in the business of delivering music to their subscribers.

Either delivery system may be used to provide listeners with uninterrupted music, since subscription fees obviate the need for advertising and automation obviates the need for announcers. For example, the DMX service currently in operation carries uninterrupted music,\textsuperscript{68} while a display on the remote control shows what is being played.\textsuperscript{69}

In addition, either system may provide "pay-per-play" services. One Florida cable operator already provides a pay-per-play service

\textsuperscript{64} Although it is too early to make accurate predictions, by 1995, Philips's DCC format is expected to outsell Sony's MiniDisc by almost two to one. \textit{Philips DCC Portable Player Sales Reportedly to Outpace Sony MiniDisc}, \textit{AFX News}, April 21, 1993. Could it be that Sony, as it did with its failed Betamax format, again has put its money on the wrong format?

\textsuperscript{65} \textit{No Money Down; The Digital Transmission of Music is a Passport to Something. The Question is What}, \textit{The Economist}, Jan. 3, 1992, at 13 [hereinafter \textit{No Money Down}]. The service costs $10 a month, and was expected to be introduced in Europe by mid-1992 via satellite.

\textsuperscript{66} 1989 OTA \textit{Report}, \textit{supra} note 6, at 53.

\textsuperscript{67} \textit{Id}.

\textsuperscript{68} \textit{No Money Down}, \textit{supra} note 65.

\textsuperscript{69} \textit{Id}.
that allows subscribers to view music videos on demand. This service provides a selection of up to 1000 music video titles, which scroll across the bottom of the television screen. The viewer can order a particular music video by dialing a local 976-number and entering the code for the desired song. As of 1989, a New York-based firm planned to introduce a cable radio service whereby an optional channel would allow pay-per-play reception of either new album releases or special concerts.

Finally, once the radio broadcasting industry reaches an agreement regarding technical standards, digital audio broadcasting (DAB) will replace analog broadcasting as the dominant mode of transmitting music to listeners over the airwaves. In addition to offering significant advantages to radio reception in automobiles, a quality DAB signal will sound the same as a CD. This is in stark contrast to current AM and FM signals, which suffer from low dynamic capabilities, "fizz," multipath and fading problems, as well as incomplete coverage of the spectrum of frequencies detectable by the human ear.

Some of these advances may pose new threats to record producers. There are two types of potential threats which may be presented as a result of two different characteristics. First, the high quality of these new dissemination systems, some of which will transmit pure digital signals, will facilitate equally high quality, possibly perfect, home taping. Second, some of these systems will offer features, such as uninterrupted music, pay-per-listen and music formats which are closely tailored to the listeners' particular tastes. These features, in addition to facilitating home taping of sound recordings, may make some of these dissemination systems attractive substitutes for prerecorded music in any format. Record producers have reason to fear

70. Id.
71. Id.
72. 1989 OTA REPORT, supra note 6, at 53.
73. Id. In 1989, the company reportedly was negotiating blanket licenses with BMI and ASCAP and having discussions with record company executives, who traditionally have been unreceptive to pay-per-play home delivery systems.
74. Germany will probably be the first country to begin the switch-over to DAB, and by 1995, digital stations should be available in the United States. Some developing and formerly communist countries may adopt commercial digital networks without first having developed analog ones. No Money Down, supra note 65, at 13.
75. Id.; see also U.S. COPYRIGHT OFFICE, THE COPYRIGHT OFFICE STUDY ON DIGITAL AUDIO BROADCASTING AND CABLE SERVICES, reprinted in THIRD ANNUAL COPYRIGHT OFFICE SPEAKS: CONTEMPORARY COPYRIGHT AND INTELLECTUAL PROPERTY ISSUES 89, 90 (1991) [hereinafter COPYRIGHT OFFICE DAB STUDY].
76. See id. at 90. FM stereo signals do not contain frequencies at the upper end of the spectrum, that is, between 15,000 and 20,000 hertz.
that both of these aspects could result in softened consumer demand for their products.

II  
The Audio Home Recording Act of 1992 (AHRA)

By enacting the Audio Home Recording Act of 1992 (AHRA), Congress apparently has ended the two-decade-old debate over whether private home taping of copyrighted sound recordings is either fair use or infringement. Ironically, Congress ended this debate without deciding the issue. Section 1008 of AHRA precludes copyright infringement actions based upon the manufacture or noncommercial use of both digital and analog home recording devices and media.\footnote{17 U.S.C. § 1008.} Thus, private home taping in any medium neither infringes the copyrights in sound recordings, nor infringes the copyrights in the underlying musical compositions. Nevertheless, Congress did not answer the question of whether home copying was fair use or infringement prior to the legislation.

As earlier explained, AHRA is merely the codification of agreements between the recording industry and audio equipment manufacturers. The Act, which finally opened the door for the safe marketing of digital home taping equipment\footnote{The Act does not apply to professional digital recording devices. 17 U.S.C. § 1001(3)(A).} and media, essentially consists of three components: (1) electronic copying controls, (2) royalties levied on recording equipment and media and (3) a prohibition of copyright infringement actions based on home copying. These three important components will be described prior to making a critical analysis of the Act.

A. Serial Copy Management System (SCMS)

Section 1002 of AHRA prohibits importing, manufacturing or distributing home digital recording devices unless they are equipped with a Serial Copy Management System (SCMS). An SCMS is a computer chip that allows the user of a digital audio recorder to make only one copy of digital source material. Thus, an SCMS allows one to record a CD any number of times onto different Digital Compact Cassettes (DCCs) or MiniDiscs; however, no additional digital recordings can be produced from those first generation copies. The SCMS encodes digitally recorded copies with information that will prohibit further copying by any machine equipped with an SCMS. Home digital
copies made from analog source materials also are encoded with information by the SCMS.\textsuperscript{79}

The object, as well as the effect, of an SCMS is to allow unlimited copying from the original recording while preventing second or third generation perfect copies of source material from being freely copied and disseminated. Because an SCMS does not affect the distribution or use of analog tape recorders and media, it will still be possible to make serial copies with analog tape recorders. However, the quality of such recordings quickly deteriorates with each generation.

Presumably in response to critics who claimed that any technical solution to the home copying dilemma would be futile,\textsuperscript{80} the Act prohibits importing, distributing or even manufacturing any device that could circumvent an SCMS.\textsuperscript{81} Section 1009 gives parties the right to sue in federal court for violations of the SCMS provisions as well as the royalty provisions. That section authorizes courts to award actual and statutory damages, as well as equitable relief, including impounding the infringing equipment or media.\textsuperscript{82}

\textbf{B. Royalties on Digital Hardware and Media}

Besides mandating the SCMS technological measures, the Act requires royalties to be paid on digital recording devices and the digital media used by such devices.\textsuperscript{83} A 2\% royalty will be levied against the "transfer price"\textsuperscript{84} of digital recorders, with a minimum royalty of $1 and a maximum of $8 per machine.\textsuperscript{85} Additionally, a 3\% royalty will be levied against digital recording media such as DAT, DCC and MiniDiscs. In both cases, the royalties will be paid only once by either the manufacturers, importers or distributors. The royalties will be de-


\textsuperscript{80} See, e.g., Digital Audio Tape Recorder Act, 1990: Hearings on S. 2358 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. 219 (1990) [hereinafter \textit{1990 DAT Hearings}] (statement of Edward P. Murphy, President National Music Publishers' Association, Inc.) (claiming that SCMS "can be defeated at any cost, without having to enter or alter the equipment in any way, and with no more expertise than an accomplished hobbyist").

\textsuperscript{81} 17 U.S.C. § 1002(c).

\textsuperscript{82} \textit{Id.} § 1009.

\textsuperscript{83} \textit{Id.} § 1004.

\textsuperscript{84} 17 U.S.C. § 1001(12) defines "transfer price" as "the actual entered value at United States Customs," or in the case of a domestic product, "the manufacturer's transfer price (FOB the manufacturer...)." In this Article, current retail prices of digital media and equipment are used for simplicity and for comparative purposes.

\textsuperscript{85} 17 U.S.C. § 1004. The maximum royalty is $12 for physically-integrated units containing more than one digital audio recording device.
posed into the United States Treasury and the Copyright Royalty Tribunal will administer the distribution.\textsuperscript{86}

The royalties collected will be distributed to owners of copyrights in sound recordings, performers, music publishers and composers.\textsuperscript{87} Specifically, § 1006(b) provides that the royalty payments must be divided into two funds: the “Sound Recordings Fund” and the “Musical Works Fund.”\textsuperscript{88} The Sound Recordings Fund is allocated \(66\frac{2}{3}\%\) of the total royalties collected. Two and five-eighths percent of that share will be distributed to “nonfeatured musicians” who have performed on sound recordings distributed in the United States.\textsuperscript{89} One and three-eighths percent of the Sound Recordings Fund will be distributed to nonfeatured vocalists.\textsuperscript{90} Forty percent of the remaining funds in the Sound Recordings Fund will go to “featured recording artists” while the other 60% will go to the copyright owners in the sound recordings (usually record companies) distributed in the United States in both digital or analog formats.\textsuperscript{91} Thus, the featured recording artists will receive 25.59 % of the total royalties, and record companies will receive 38.83 %.

The remaining \(33\frac{1}{3}\%\) of the total royalties will be allocated to the Musical Works Fund.\textsuperscript{92} This fund will be distributed equally among music publishers and writers. Thus, publishers and writers each will receive \(16\frac{2}{3}\%\) of the total royalties collected.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
Division of Royalties expressed as percentages of total royalties collected: & \\
\hline Record Companies & 38.83\% \\
Featured Recording Artists & 25.59\% \\
Music Publishers & 16.66\% \\
Writers & 16.66\% \\
Nonfeatured Musicians & 1.75\% \\
Nonfeatured Vocalists & .92\% \\
\hline
\multicolumn{2}{|c|}{100.41\%} \\
\hline
\end{tabular}
\caption{TABLE I:}
\end{table}

The Act does not prescribe exactly how the individual members of the various groups of royalty recipients will divide royalties between themselves. Section 1007(a)(2) permits all interested parties within a group entitled to royalties under § 1006(b), free of antitrust liability, to proportionately divide the royalty payments between

\textsuperscript{86} Id. § 1005.
\textsuperscript{87} Id. § 1006(b).
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
themselves. Section 1007(a)(2) also provides that royalty claimants may file joint or individual claims, or designate a common agent to receive payment and negotiate on their behalf. Presumably, some system of determining entitlement to a group's royalties will be adopted along the lines of schemes used by BMI and ASCAP, the composers' performance rights societies.

C. Prohibition of Copyright Infringement Actions

The third component of the Act is a provision that prohibits copyright infringement actions based upon the manufacture or non-commercial use of both digital and analog home recording devices and media. The importance of this provision can be gleaned only when it is viewed in the light of the bitter two-decade debate over home taping between the electronics and music industries. The prohibition effectively ends the debate over the legality of private home copying of musical material; home copying is now legal under federal copyright law.

III
Analysis and Critique of AHRA

AHRA provides copyright holders and performers with protections that will prove to be even more necessary as digital recording formats become popular for home use. Additionally, the Act and its underlying industry agreements have opened the door for the introduction of new technologies, including two new prerecorded music formats, the DCC and the MiniDisc. Thus, the Act not only benefits the royalty recipients, but also allows society to enjoy significant benefits. The Act, however, fails to provide record producers with the protection they deserve from home copying. This is especially true in view of the lack of a performance right in sound recordings. In the following subparts, this Article will analyze and critique the Act.

---

93. Id. § 1007(a)(2).
94. Id.
95. Id. § 1008. Section 1008 provides that “[n]o action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.” See id.
96. Prior to the AHRA, scholarly commentators (and interest groups) argued over whether home audio taping of music constituted copyright infringement. The Supreme Court’s 1984 decision in the Sony Betamax case did not end the conjecture. See infra note 130.
First, it will assess the nature and operation of the major provisions contained in the Act. Second, it will suggest elements that should have been built into the Act but were not.

A. Analysis of Protections Provided by AHRA

AHRA is essentially comprised of three elements: (1) SCMS, (2) royalties and (3) a bar on infringement actions based on home taping. These three elements of the Act will be considered individually.

1. SCMS

Adopting the SCMS was a wise choice from an economic and policy standpoint. At least two inferior alternatives existed. First, Congress could have rejected the idea of limiting serial copying and instead relied solely on blank tape royalties to compensate record producers for home copying. Second, Congress could have banned unauthorized home digital copying outright.

a. Unlimited Home Copying

Congress would have considerably weakened the Act’s protection of record producers’ economic livelihood had it failed to adopt some form of serial copy restriction enforced by technical requirements. Indeed, the SCMS aspect of the Act arguably was more significant than the royalty aspect in quelling record producers’ fears of home digital recording technology.

Prior to the emergence of consumer digital audio recording technology, record producers had some comfort in knowing that, while quality first generation analog recordings could be made from their products, sound quality in successive generations quickly declined as noise and distortion increased and dynamic range decreased. However, home digital recording poses a significantly greater economic threat to the recording industry than that posed by analog home recording. This is partially because of the perfect fidelity retained in first generation digital home copies of musical recordings. But the greater threat emanates from the possibility that additional perfect successive or serial copies might be made from homemade recordings. This could obviate the need for consumers to purchase original authorized recordings. The record companies feared that a chain of perfect digital copies of sound recordings could be created through

---

97. See 1989 OTA REPORT, supra note 6, at 44-47.
98. Id. at 46; Eric Fleischmann, The Impact of Digital Technology on Copyright Law, 70 J. PAT. & TRADEMARK OFF. SOC’Y 6 (1988).
trading with friends, neighbors or even swap clubs. These perfect copies would further reduce the demand for original recordings.

The SCMS alleviates this fear somewhat by precluding serial copying. Yet, the system allows unlimited copying from the original recording. Thus, an acceptable balance is struck whereby the home copying seen as the most acceptable form (i.e., place shifting for private use, or even making a copy for a friend) is freely allowed, while unlimited serial copying (i.e., a friend making copies for her friends and so on) is precluded. In essence, the SCMS cuts to the heart of how digital recording technology differs from analog recording; that is, the ability to make perfect successive, not merely first generation, copies without sound quality degradation. A royalty levy alone could not address this capability of perfect serial copying.

b. Banning Unauthorized Home Digital Copying

The SCMS technology could have been harnessed to prevent digital home copying of copyrighted works altogether. While the recording industry initially favored this solution, it was forced to recognize that its position did not take into account one necessary element prompting Congress to enact legislation: public opinion. Most Americans see nothing wrong with home taping, as long as it is for private, noncommercial use, including sharing among friends. Furthermore, a ban on digital home taping of prerecorded material would have killed the market demand for the new formats of digital recording equipment, thereby depriving society of this valuable new technology. Thus, it was correctly perceived that prohibiting serial copying would provide record producers with adequate protection, as long as a royalty on blank tapes was instituted to compensate copyright holders for first generation taping.

2. Royalties on Home Taping

a. International Aspects

A look at other modern, industrialized countries reveals that adopting blank tape royalties and, in many cases, recording equipment royalties is the current trend. As of March 1992, twenty-one countries

99. The record company's paradigmatic worst nightmare is the college dormitory, where it is widely believed (and the author's experience verifies this belief) that students create sizable cassette recording libraries of each others' CDs.

100. The 1989 OTA REPORT states that 75% of the individuals polled believed that it is acceptable to make a tape for one's own use. A smaller majority also thought it acceptable to tape a copy for a friend. 1989 OTA REPORT, supra note 6, at 163.

101. Id. at 147 n.17.
had adopted royalty systems on blank audio and video tapes: Australia, Austria, Bulgaria, Cameroon, Congo, Czechoslovakia, Gabon, Germany, Finland, France, Hungary, Iceland, Italy, Kenya, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and Zaire.102 Germany, Iceland, Norway, and Spain have royalties on audio and video hardware, and Kenya levies royalties on audio hardware.103

The amount of royalties levied under these countries' laws varies widely, as does the breakdown of royalty distribution among the various claimants. Additionally, the basis for the blank tape royalties (i.e. recording time, flat rate per tape, etc.) varies. Lawmakers in these countries, however, are evidently unified in their conviction that considerations of fairness to artists and record producers make royalties on home taping a necessary element of any system of copyright.

Adopting such royalties in the United States makes greater economic sense than perhaps in any other country for several reasons. First, in the face of the multi-billion dollar annual U.S. trade deficit, entertainment remains one of this country's most successful exports. Indeed, U.S. songwriters, composers, musicians and record companies produce approximately one-half of the recordings listened to (and copied) throughout the world.104 Thus, unlike other countries which import more music than they create, a sizeable percentage of the royalties collected in the United States will stay in the United States.105 Second, some countries, including Australia, Finland, Iceland, and possibly Italy,106 only pay royalties to foreign claimants on a reciprocal basis.107 That is, only record companies, recording artists and authors whose home countries have royalty schemes that benefit foreign claimants are paid royalties. Despite the dominance of American artists and record labels throughout the world, millions of dollars in foreign blank media and recorder royalties were denied to American music creators because of the lack of American reciprocity. Thus,

103. STERLING, supra note 102, at § 20.28.
105. Id. However, some countries do not pay royalties to foreign claimants, even when such claimants' home countries do pay royalties to foreign claimants. In these jurisdictions, U.S. claimants will not receive foreign royalties, even though royalties created under the AHRA are paid to claimants irrespective of their citizenship.
106. The issue was undecided in Italy at the time of this writing.
aside from the arguments supporting the compensation of record producers for home taping, it was simply unsound trade policy to deny our domestic recording industry the "free money" represented by foreign royalties.

One final point should be noted regarding the international aspect of the United States’ enactment of a home taping royalty scheme. Although English language information on the subject is sparse, apparently some of the countries mentioned above that have adopted royalties on blank tapes do not pay royalties to foreign claimants—irrespective of reciprocity considerations. AHRA, however, neither contains a reciprocity requirement nor discriminates based upon a claimant’s country of origin. AHRA, therefore, gives the United States the moral wherewithal to press foreign countries to include American record companies, performers and composers in their royalty pools. Such pressure should be imposed as soon as possible to maximize the benefits that the creators of American recorded music will receive from the United States’ adoption of home taping royalties.

b. AHRA’s Royalty Provisions

As explained in Part II.B, the royalties established under AHRA are based upon a percentage of the transfer price of digital recording media and equipment. The Act institutes a 2% royalty on consumer digital recording equipment and a 3% royalty on digital recording media such as DAT, DCC and MiniDisc. A royalty on digital media and recorders is needed to compensate record companies, performers and composers for home copying of their works. It simply does not make sense, however, to base the royalty on a percentage of a price.

The rate of royalties such as those created by AHRA is set in a somewhat arbitrary manner. Studies that attempted to measure the economic harm caused by analog home taping yielded conflicting results (probably due, in larger part, to the interested sponsors rather than the raw survey results). The recording industry and the electronics industry disagreed on whether any such harm existed at all. Furthermore, there is no reason to believe that the economic effect of home analog taping accurately predicts the effect digital home taping, once it becomes popular, will have on the demand for prerecorded

110. The 1989 OTA REPORT concluded that the almost one dozen studies on home taping were insufficient as a basis for policy making. 1989 OTA REPORT, supra note 6, at 170-76. Most of the prior studies, either sponsored by the RIAA or the Home Recording Rights Coalition (HRRC) suffered from methodological flaws, and perhaps more importantly, the sponsors denied access to the raw survey data for independent analysis. Id.
material. The ability to make perfect digital copies at home may reduce the demand for recordings to a greater extent than did the analog taping practices. Even this intuitive assertion depends on many unknown factors, such as the extent to which consumers care about sound quality, the price of blank digital media relative to prerecorded material and the value consumers place on owning an original copy of an album instead of a homemade copy. Other factors, such as the willingness of consumers to spend time making home recordings, also play a role in determining the amount of a properly-figured royalty.

The inevitable arbitrary nature of choosing a royalty rate is apparent given the complicated and yet largely unquantifiable factors that must be considered in setting a royalty rate. AHRA, however, injects an unnecessary aspect of arbitrariness into the royalty scheme by basing the royalties upon the prices of the digital media and recording equipment. The prices charged for products will decrease dramatically as sales increase and the products become commonly owned consumer items.

A prime example of this phenomena is the compact disc. When first introduced in 1983, CDs were priced at about $30\textsuperscript{111} and first-generation CD players were priced at well over $1000. Today, CDs may be purchased for less than half of their original price, and players may be purchased for as little as $79.\textsuperscript{112} The royalties collected per sales unit will decline as prices fall, since the royalties levied in AHRA are based upon percentages of the prices charged for these products.

Indeed, the amount of the royalties collected may fall to a pittance as prices drop. For example, it would not be unreasonable to expect that the price of a blank DCC will be $4 or $5 in a few years—less than half of the current price. Calculated as a percentage of retail prices, the 3% royalty that is to be split between the six recipient groups under the Act would amount to a mere $.12 to $.15, while under today's prices those same recipients receive $.30 or more. The philosophy behind levying royalties, such as those instituted under AHRA, is that royalty recipients are entitled to compensation for each home recording of their copyrighted works. This philosophy is belied when the royalty is based on a value that is certain to decrease.

Another factor accentuates this anomaly. Over the next decade, new means of digitally broadcasting and otherwise transmitting copy-

\textsuperscript{111} Alan Siegal, (Si Si) Je Suis un Rock Star, BREAKING INTO THE MUSIC BUSINESS 121, n.1 (1986).
\textsuperscript{112} See, e.g., Advertisement for the electronics retailer “Fretter,” BOSTON GLOBE, April 9, 1992, at 35.
righted musical works to audiences will be introduced. These delivery technologies, which are available today, include digital audio broadcasting (DAB), transmission over existing cable television networks and transmission over fiber optic networks that will be installed by telephone companies, cable companies and other providers of communication services. These transmission technologies, some of which will involve pay-per-listen systems or systems capable of noninterrupted transmission of music recordings, will facilitate CD-quality digital home copying. This possibility accentuates the problem of the declining royalty base which will occur under AHRA, since home tapers will be able to make perfect recordings of music without the purchase of even one original copy of the recording. Thus, while per-unit royalties collected under AHRA decline as prices of digital recording equipment and media fall, record producers and performers also may suffer losses from decreased sales of original recordings due to the substitute means of product delivery in pure digital form to their audiences.

An additional anomaly that results if royalties are based on prices of digital equipment and media is that manufacturers will offer diverse product lines whose prices will vary greatly. Additionally, the American audiophile companies, such as Krell Digital, Mark Levinson and McIntosh, will inevitably offer very high-priced versions of digital recorders while Japanese manufacturers will concentrate on less expensive models. Because AHRA's royalty scheme is price-based, a higher royalty will be levied against expensive recorders than that levied against less expensive ones. This progressive effect might be attractive if AHRA were intended to be an extension of the tax code, because it would put a greater burden on those who presumably could afford it. However, the purpose behind AHRA is to compensate royalty beneficiaries for home copying of their works. In essence, a perfect copy is a perfect copy. Royalty recipients should be compensated uniformly for uses of their works, regardless of the cost of the machine making the copy. The fact that blank digital media will also be offered in various grades at various prices with corresponding royalties being

113. See supra Part I.C.2.
114. Id.
115. This point is illustrated by the prices of esoteric CD players currently offered by these firms. For example, Krell Digital's Reference 64 CD player, which digitally oversamples the CD 64 times (the standard being 4 or 8 times) carries a retail price of $12,500. Annual Equipment Directory, AUDIO, Oct. 1992, at 128.
116. Admittedly, the variability in the actual royalties collected will be minimized by virtue of the $8 maximum royalty on equipment set by AHRA. See 17 U.S.C. § 1004. The actual royalties collected will vary as equipment prices fall to a level that will not implicate this maximum limit.
applied, further highlights the rather arbitrary nature of AHRA’s royalty scheme.

At least two superior alternative methods of calculating the royalties created under AHRA were available, the first being preferable to the second. First, the blank media royalty could have been set as a dollar amount per minute of recording time. Many of the countries that have adopted blank tape royalties have chosen such a scheme. This method, like the method adopted under AHRA, would levy a proportionally higher royalty on the heaviest home tapers. However, unlike the adopted regime, this method would require that a value be placed on the ability to record a certain amount of copyrighted material and that the royalty levied would accurately correspond with this valuation. Such a result, unlike the solution adopted in AHRA, would be consistent with the philosophy underlying the concept of royalties on blank recording media.

This recording time method for determining the royalties could not be applied to the recording equipment. A second alternative method of setting a blank media royalty could be, and was, applied to the recording equipment royalty in AHRA. Under that scheme, the amount of the royalty would be based on a percentage of unit prices. A minimum dollar amount would be set—either in absolute terms, or variable, depending upon the recording time—below which the royalty may not fall. This would ensure that the beneficiaries under AHRA would receive royalties commensurate with a set minimum valuation of the ability of home tapers to copy copyrighted works.

Likewise, AHRA’s digital recorder royalty has its own deficiencies. Although, unlike the blank media royalty, it is subject to a minimum royalty amount of $1 per machine, this statutory minimum is too low. Today, even with regard to the least expensive MiniDisc digital recorder, which costs approximately $900, the applicable 2% royalty would amount to about $18. The actual royalty collected, however, would be reduced to the statutory maximum of $8 per

117. The blank tape royalties in France, Germany and Austria are based on this system. STERLING, supra note 102, § 20.28.

118. This assumes that blank media capable of longer recording times would be priced relatively higher than media capable of only short recording times.

119. A statutory minimum royalty of $1 applies to the digital recording device royalty. 17 U.S.C. § 1004. This provision is probably meaningless, as it is unlikely that the price of a digital recorder will be available for the $50 price that would reflect a $1 royalty.

120. Tony Lafaro, CD’s “Kid Brother” Has Capability to Record, THE OTTOWA CITIZEN, Apr. 24, 1993, at 12. Sony’s first portable MiniDisc recorder/player carries a retail price of $899. Id. A playback-only model is offered at $699. Id.
machine. If digital recording equipment follows the course of the CD player, inexpensive machines costing under $200 may be available in the future, thereby reducing the applicable royalty by 50%, to $4 or less. A $4 royalty for a machine that may facilitate thousands of perfect clones of copyrighted musical recordings over the course of its useful life is inequitable. Beyond this subjective assessment, AHRA's royalty provisions are objectively arbitrary. The royalties collected per unit of blank media or digital recorder will undoubtedly decline as the prices on which these royalties are based fall.

3. The Division of Royalties and Passive Law Making

The inherently arbitrary nature of setting royalty rates, which stems in part from the lack of dependable data regarding home taping and its economic effect on copyright holders and performers, was explored above. Without such data, it is impossible to establish a royalty rate that accurately compensates people for their artistic endeavors. This observation is equally applicable to the other compulsory licensing provisions of the Copyright Act. However, an aspect of AHRA which has been largely ignored is the fact that the imposition of royalties for record producers is more a matter of pure public policy than an accurate “estimate” of the harms caused by home taping. The relevant question is largely a subjective one: How much do producers of recorded music deserve to be compensated when someone makes a copy of their recordings?

The concept of “harm” in relative terms was never addressed during the two-decade debate over home taping. Instead, both the recording industry and the electronics manufacturers focused on the “harms” (or lack thereof) caused by home taping, as opposed to the harm caused by the lack of compensation. In the late 1970s and the 1980s, each side commissioned numerous studies to prove that home taping did or did not cause economical harm to record producers.

The recording industry, however, should have emphasized an altogether different concept of “harm” to further its position in favor of

---

121. See 17 U.S.C. § 1004 (establishing a maximum royalty of $8 per digital recording device and $12 for units with more than one audio recording device).
122. The argument that more royalties will be levied in the aggregate as the digital recording formats become more popular misses the point. It fails to rebut the charge that a royalty system based upon a fluctuating unit price is inconsistent with the philosophy that a blank tape royalty should be designed to compensate record producers in an amount that closely corresponds to the incidence of home taping.
124. See supra notes 48-55 and accompanying text.
125. See 1989 OTA REPORT, supra note 6, at 139-43.
home taping royalties. Record producers were harmed to the extent they were not compensated for home taping of their works. It is a matter of determining the proper baseline or starting point. If the proper baseline is that record producers should be compensated when others make unauthorized copies of their protected recordings, then they are "harmed" to the extent they are not compensated. A version of this argument appears in Justice Blackmun's dissenting opinion in the Sony Betamax case, where he discussed the fourth statutory factor of "fair use." In considering the effect of "time shifting" with home videotape recorders (VTRs) on the "potential market" for the plaintiffs' audio-visual works, Blackmun noted:

The development of the VTR has created a new market for the works produced by the Studios. Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. [The Studios] therefore can show harm from VTR use simply by showing that the value of their copyrights would increase if they were compensated for the copies that are used in the new market.

Justice Blackmun's point applies equally to home audio taping. Manufacturers of home taping equipment and media benefit from their customers' ability to copy protected works without compensating copyright proprietors. To the extent record producers deserve compensation for home copying, they are harmed when they are denied compensation.

Given the largely subjective aspect of setting royalties, reasonable minds may differ as to whether a 2% royalty for recorders and a 3% royalty for digital media will produce a fair return for recipients under AHRA. Similarly, reasonable minds may differ as to whether the division of royalties between the six groups of recipients strikes a fair balance. Predictably, the record companies take the largest amount, almost 40%, under the statute. In addition to the record companies' considerable bargaining power, the large royalty share may be partially explained by the fact that the two proponents of digital recording hardware, Sony and Philips, also own significant interests in major record companies. Apart from evoking the humorous image of Sony paying itself a hardware royalty, this relatively recent change

127. Sony, 464 U.S. at 498 (Blackmun, J., dissenting).
in the landscape of the music software industry goes far to explain the electronics industry's willingness to accommodate the recording industry in deciding the legal status of home recording after years of disagreement.130

Predictably, the smallest percentage of the royalties goes to nonfeatured vocalists (.92%), while nonfeatured musicians receive only slightly more (1.75%). Arguably, this division is equitable, as these latter groups have no formal proprietary interest in the copyrights. The proper considerations, however, are: (1) the extent to which these groups are injured by home taping practices and (2) the extent to which these groups deserve compensation for unauthorized copying of their performances. If home taping significantly cuts into the demand for prerecorded music, then everyone engaged in the recording industry is injured, since there is less revenue with which to produce recordings and pay performers. Thus, vocalists and musicians who earn their living playing at recording sessions, often for paltry sums, and who usually receive no royalties based on record sales, will suffer economic harm.131 Since the division of royalties among the interested parties was a policy decision, equitable considerations may have favored granting a larger percentage of the royalties collected to nonfeatured vocalists and musicians.

Also, from a policy standpoint, it would have been desirable to set aside a portion of the royalties collected under AHRA to support the recording and performance of under-funded or less popular music.132 It can be presumed that the groups of royalty recipients will divide their portion of the royalties between themselves based upon some estimation of popularity—record sales, for example. This in turn should compensate record producers and artists in an amount that reflects the frequency with which their music is copied. However, such a method of dividing the royalties necessarily will result in the

130. Some commentators strongly believed that the court in the Sony Betamax case would have held that home audio taping was a fair use had the issue been litigated. E.g., Teitelbaum, supra note 32, at 19, 31. But see Page, supra note 32, at 459; Fein, supra note 31, at 658 n.59. The electronics manufacturers correctly believed that an agreement on royalties was preferable to years of costly litigation which could have delayed the introduction of DCC and MiniDisc to U.S. markets.

131. Jonathon King, Jazz: America's Classical Music, at 6 (on file at Harvard Law School, to be published in ASCAP Copyright Law Symposium, 1993). Jazz musicians frequently are paid $500 or less by the smaller record companies to perform on an entire album. Id.

132. In France, 25% of the royalties levied on home taping are devoted to the promotion of audio/visual productions and performances. 1990 DAT Hearing, supra note 80, at 66. Also, Iceland and Sweden's royalty schemes provide that 15% and 26%, respectively, of the royalty pools be devoted to such cultural funds. Id. at 66-68.
most popular (and wealthy) acts receiving most of the royalties, while
the creators of less popular genres will receive very little of the royalty
pie. This is arguably consistent with the "economic philosophy" that
is said to underlie the copyright clause of the Constitution. But,
surely, the authors of the copyright clause had more than commercial
success in mind when they provided that Congress "shall have power
... [t]o promote the Progress of Science and useful Arts. . .".133

Promoting "progress" might have been more appropriately ac-
complished by devoting a portion (10% or 20%, perhaps) of the royalty
pool to support musical genres that do not enjoy wide commercial
success. These would include classical music (4.4% of record sales in
1992), jazz (4%), gospel (2.7%), as well as other styles that command
even less of the record market, such as folk music.134 This view of
"progress" would honor the diversity of musical genres as an impor-
tant value in American music and should have been promoted by
AHRA.

Given the history of AHRA's enactment, the division of royalties
and the amount of royalties provided in the Act were a result of barg-
gaining among the interested parties rather than a conscious policy
choice by Congress. The percentage of royalties granted to the vari-
ous parties under the Act is merely a reflection of relative bargaining
power. Congress' passive method of "policy making" was inappro-
priate, given that the results of the bargaining among the parties now
have the force of federal law. What if determinations of official policy
in other areas, such as civil rights, were left exclusively to bargaining
among interested parties? Such a privatized conception of public pol-
cymaking would ignore important American values like democracy
and equity. In some cases, governmental intervention is essential to
tip the balance in favor of those who lack bargaining power. Con-
gress' abdication of its lawmaking function in the case of home taping
resulted in a law that may be inferior to what could have been possible
if Congress debated and enacted a "law" rather than rubber stamping
an "agreement" between interested industries. This observation is
even more evident in the third element of AHRA: the provision
prohibiting copyright infringement actions based upon the manufac-
ture or noncommercial use of both digital and analog home recording
devices and media.135

134. Larry Flick, Country Gobbling Greater Share of Music, BILLBOARD, Apr. 10, 1993,
at 1. Dominating record sales were Rock (33.2%), Urban Contemporary (16.7%), Country
(16.5%) and Pop (11.4%). Id.
4. Preclusion of Copyright Infringement Actions

Section 1008 of AHRA precludes any party from bringing a copyright infringement action based upon home taping. Unlike the other provisions of AHRA, § 1008 applies to both digital and analog home taping practices.

With respect to new digital recording technologies, § 1008 was clearly warranted. A major impetus of the Act was to provide safe legal passage for the manufacture, sale and ultimate use of home digital recording devices. The electronics manufacturers accomplished this by entering into agreements with the recording industry regarding royalties and copy management, thereby assuaging fears of home digital recording. However, § 1008 was required to ensure that future infringement suits would never be brought.

This does not explain why § 1008 precludes infringement suits based upon unauthorized home analog taping of copyrighted music. This short section effectively ended the debate over whether home analog taping of copyrighted recordings is infringement or fair use that was initiated in 1972, when copyright protection was extended to sound recordings. Pursuant to § 1008, home taping is neither; instead, it was deemed legal and not an infringement.

The recording industry was sold short, since § 1008 effectively precludes it from seeking royalties on analog home taping. The reason for this is twofold. First, home taping is now legal, and thus the threat of copyright infringement litigation is removed. Such litigation, based upon a theory of vicarious liability, might have been an effective way to force a royalty system for analog taping on the electronics industry, either through settlement or victory. Second, § 1008 effectively removed the recording industry’s power to lobby Congress for an analog tape royalty. Its strongest argument for instituting such a royalty (i.e., that home taping is not only economically damaging, but is also copyright infringement) has been negated. The recording industry may be disabled from approaching Congress again on the analog home taping issue, since home taping is now considered a noninfringing activity.

136. Id.
137. Id.
138. The legislative history of the Act states that “[t]he purpose of [the AHRA] is to provide a legal and administrative framework within which digital audio recording may be made available to consumers.” H.R. REP. No. 102-873(1), 102d Cong., 2d Sess. (1992), reprinted in 138 CONG. REC. 9 (1992).
139. See supra Part I.C.1.
The extension of § 1008's reach to analog taping was, like the provisions concerning royalties, not a conscious policy choice made by Congress (except, perhaps, a conscious choice to wash its hands of the issue after years of hearings and failed bills). Rather, it was the result of the private bargaining that took place between the various interested parties. The recording industry was forced to give up its fight for home analog taping compensation in return for the compromise on digital recording royalties and SCMS.

At worst, Congress could have written § 1008 to preclude only infringement actions based upon the manufacture or use of digital recording equipment and media. Such a result would have been consistent with the primary purpose of the Act—to address the new problems presented by digital home recording technology and thereby open U.S. markets to the new digital recording formats. At best, in addition to including § 1008, Congress could have brought the home taping debate to a fair conclusion by extending AHRA's royalty provisions to include analog, as well as digital, home taping equipment and media. This alternative is discussed in the following section, which addresses two elements that would have made AHRA a superior conclusion to the home taping problem.

B. AHRA: Two Missing Elements

Congress saved itself a lot of time and energy by rubber stamping the agreement reached between the recording and electronics industries. Unfortunately, this led to an incomplete piece of legislation that fails to provide the creators of American recorded music with an adequate level of protection from home taping. Congress failed to include two elements in AHRA that, in fairness to those involved in the recording business, should have been part of any legislative scheme aimed at rectifying the inequity presented by home copying of protected musical recordings. Those two elements are: (1) royalties on analog home taping equipment and media and (2) a performance right in sound recordings.

1. Royalties on Home Analog Recording

AHRA, in a sense, is a very forward-looking piece of legislation. First, analog modes of musical reproduction, broadcasting and transmission eventually will give way to superior digital methods for performing these functions. Digital CDs already have made impressive inroads on their analog counterparts. Record albums can hardly be found in retail stores and floor space devoted to CDs continues to chip away at what, as recently as 1990, was the most popular prer-
recorded format: the analog cassette tape developed some thirty years ago by Philips. Thus, by attaching a royalty to digital home recording equipment and media, the recording industry will be compensated for home copying as digital recording formats take hold in the marketplace. Consumers will replace their analog cassette recorders with superior digital ones as digital means of performing home recording become increasingly affordable. As this technological transition occurs, the beneficiaries of the royalties created by AHRA will receive greater compensation, consistent with the increase in digital home recording.

AHRA is forward-looking in another sense. Congress insisted that AHRA's royalty and copy management provisions apply not only to existing digital formats, such as DAT, DCC and MiniDisc, but also to any future means adopted for home digital audio recording. This aspect of the Act protects AHRA's royalty scheme from future circumvention and it averts the need for amendments as new formats are introduced.

These aspects of the Act should benefit future recipients of royalties as American consumers turn to digital audio recording formats. However, the fact remains that it may take one, two or even three decades for digital recording formats to become widely popularized. Until digital recording devices and media enjoy deep market penetration, the threat from home copying will continue to emanate from users of analog, not digital recorders.

In 1988, for example, 94% of Americans had access to cassette players, most of which were capable of recording. In 1992, CDs represented 56.1% of the market for prerecorded music, up from 49.6% in 1991 and 42.5% in 1990. “Cassettes dropped from 43.3% of the market in 1991 to 37.3% in 1992. As recently as 1988, cassettes had 55.1% of the market while CDs accounted for only 28.5%. LPs were down to a mere 1.2% of the market in 1992.” The numbers for 1993 undoubtedly will show that the CD made further inroads on the other formats.


In 1992, for example, only 12,420 DAT machines were sold in the United States, as contrasted with the sale of 1,432,886 analog cassette decks. Home CD Player Sales Fell 14.6% in 1992, CONSUMER ELECTRONICS, Mar. 22, 1993, at 10.

Yet, songwriters, performers and copyright holders will continue to be uncompensated for the more than one billion instances

141. Flick, supra note 134. In 1992, CDs represented 56.1% of the market for prerecorded music, up from 49.6% in 1991 and 42.5% in 1990. Id. “Cassettes dropped from 43.3% of the market in 1991 to 37.3% in 1992. As recently as 1988, cassettes had 55.1% of the market while CDs accounted for only 28.5%. LPs were down to a mere 1.2% of the market in 1992.” Id. The numbers for 1993 undoubtedly will show that the CD made further inroads on the other formats.


143. In 1992, for example, only 12,420 DAT machines were sold in the United States, as contrasted with the sale of 1,432,886 analog cassette decks. Home CD Player Sales Fell 14.6% in 1992, CONSUMER ELECTRONICS, Mar. 22, 1993, at 10.

144. 1989 OTA REPORT, supra note 6, at 147.

145. Id. In 1978, approximately 38% of Americans had access to cassette players.
of home copying of their copyrighted works that occur each year in this country alone.\textsuperscript{146}

AHRA's omission of royalties for analog home taping could have additional adverse consequences for American artists and producers with respect to countries that have reciprocal royalty provisions.\textsuperscript{147} American copyright owners and performers probably will be excluded from foreign royalty pools, at least to the extent such royalties represent analog tapes and equipment, because the AHRA does not levy any royalties on analog tapes and equipment. Home recording media and equipment currently sold in the United States and abroad are almost exclusively of the analog variety. As a result, it will be some time before American record producers attain any foreign benefits, let alone domestic benefits, from AHRA. Given the United States' dismal trade performance in recent years, denying its successful music industry access to foreign royalties is an indefensible result of AHRA's omission of analog home taping royalties.

The problem of analog home taping is exacerbated when one considers that new technologies for high quality digital transmission of music into the home that are just over the horizon. As suggested in Part I.C, digital audio broadcasting, digital cable transmission and fiber optic lines will make CD-quality music available to consumers without necessitating a single purchase of a prerecorded music format. The availability of such high quality sources of prerecorded music allows high quality recordings to be made in the home using existing analog cassette recorders. Such home recordings may serve as replacements for original prerecorded products. Indeed, Niro Nakamichi, president of Nakamichi Corporation, says that "in actual listening, the average audio maker's DAT deck doesn't really outperform our better [analog cassette] decks."\textsuperscript{148} Thus, producers of prerecorded music may suffer from lost record sales as the analog home taping problem persists or is exacerbated by the availability of high quality digital sources.

Congress therefore should have applied AHRA's royalty provisions to analog recording equipment and blank tapes. Because it failed to do so, AHRA's significance for copyright owners will be minimal for the foreseeable future. Only when the slow process of con-

\textsuperscript{146} Id. at 153-54. The OTA REPORT estimated that there were "approximately 439 million broadcast takings and 578 million takings from prerecorded music formats" in the year prior to the survey. \textit{Id.}

\textsuperscript{147} Currently, Australia, Finland and Iceland's tape royalties are conditioned on reciprocity. Italy is considering the matter. \textit{Digital Audio Recording Hearings}, supra note 107, at 137.

sumer changeover to digital recording formats nears completion will the royalties collected pursuant to AHRA come close to adequately compensating record companies, composers and recording artists for the widespread home copying of their works.

2. No Performance Right in Sound Recordings

United States copyright law does not mandate that performers and copyright owners in sound recordings be compensated for public performances of their works.\(^\text{149}\) Despite this fact, authors and composers have long enjoyed a performance right, subject to a compulsory licensing scheme. Existing law, therefore, results in an anomaly when a commercial broadcaster, for example, plays a sound recording over the air for profit, because the performers and the sound recording copyright holders receive nothing, while the songwriters and publishers are compensated.

The denial of a performance right to record producers and performers never has been adequately explained. The reluctance to grant the performance right in sound recordings may be attributed in part to the lobbying power of those who would be adversely affected: radio and television broadcasters. These special interests, along with jukebox operators and background music services, have derived significant profits by freely exploiting sound recordings without compensating copyright holders and performers.\(^\text{150}\)

The recording industry has unsuccessfully attempted to persuade Congress to rescind § 114 since Congress enacted the 1976 Copyright Act.\(^\text{151}\) The industry has failed to convince Congress despite the Register of Copyright’s 1978 recommendation that “section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended to both performers (including employees for hire) and to record producers as joint authors of sound recordings.”\(^\text{152}\)

The omission of a sound recording public performance right, like uncompensated home analog taping, denies a necessary source of income to performers and record companies. In contravention of the economic philosophy behind our copyright system, the omission of the

\(^{149}\) The sound recording exception to the § 106 performance right is found in § 114 of the 1976 Copyright Act.

\(^{150}\) D’Onofrio, supra note 12, at 169.

\(^{151}\) For example, H.R. No. 1805, 97th Cong., 1st Sess. (1981) was introduced, which would have granted a performance right to the copyright holders in sound recordings subject to compulsory licensing.

sound recording performance right denies performers and record companies the fruits of their labor.

Many musicians who perform on sound recordings are paid a shockingly small amount for their labors.\textsuperscript{153} Jazz musicians, for example, frequently are paid $500 or less by the smaller record companies to perform on an entire album.\textsuperscript{154} Additionally, although some may harbor less sympathy for the record companies, the fact remains that a full 84\% of the records released do not even recover their production costs.\textsuperscript{155} Record companies depend on the revenues from a small number of hit albums to "subsidize the losers, to finance new recordings by unknown artists, and, hopefully, to make a profit."\textsuperscript{156} Thus, besides providing much-needed income to underpaid session musicians, bestowing the public performance right in sound recordings could allow record companies, especially the smaller ones, to invest in new acts or less commercially viable genres. Congress, if it addressed this issue, would rectify the "free ride" radio broadcasters currently receive at the expense of the music industry.

Radio broadcasters argue that airplay of sound recordings promotes sound recordings and helps generate sales.\textsuperscript{157} Thus, the broadcasters claim they provide record companies and recording artists with invaluable free advertising and are not enjoying a "free ride." This assertion does not hold true for the vast majority of performers. Many recordings receive a significant amount of airplay, but have negligible sales.\textsuperscript{158} Folk music, classical, and older recordings fall into this category.\textsuperscript{159} One survey indicated that 55.8\% of the advertising revenues generated from six major radio markets were earned by playing "oldies."\textsuperscript{160} Because sales of "oldies" are negligible, the "free advertising" provided by the broadcasters is worth little. Thus, the radio broadcasters receive the "free ride," not the recording industry.\textsuperscript{161}

\begin{itemize}
\item[(\textsuperscript{153})] King, supra note 131, at 6.
\item[(\textsuperscript{154})] Id.
\item[(\textsuperscript{155})] Recording Industry Association of America, Report: Audio Home Taping—The Need For a Legislative Solution 2 (1981).
\item[(\textsuperscript{156})] Id.; see Fein, supra note 31, at 652.
\item[(\textsuperscript{158})] Id.
\item[(\textsuperscript{159})] Id.
\item[(\textsuperscript{161})] Other evidence of this is that Top 40 radio stations usually add only five or six new songs to their play lists each week, whereas, even as of 1975, about 900 songs were released weekly. Copyright Law Revision, Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1320-21 (1975) (statement of RIAA). Also, many radio stations do not
\end{itemize}
The problem represented by the omission of a performance right in sound recordings will be exacerbated over the next few years as sophisticated means of digitally disseminating music are introduced. First, the demand for prerecorded music may soften, since consumers will be able to enjoy CD-quality sound over the airwaves or via cable and fiber optic lines. Second, record sales might be further displaced if subscribers to these new services make their own high quality audio recordings from them. This scenario is likely to occur, since many of these new music delivery systems will feature uninterrupted music, or even pay-per-play technology.¹⁶²

The Copyright Office concluded that present levels of radio broadcast home taping, and subsequent revenue losses, may increase as a result of these emerging systems of delivering music to listeners' homes.¹⁶³ The Copyright Office recommended that an amendment to the 1976 Copyright Act should be adopted to create a performance right in sound recordings in addition to levying royalties on digital recording media and equipment.¹⁶⁴ Unfortunately, Congress routinely ignores the recommendations of the Copyright Office. In 1978, for example, Congress failed to act on the Register of Copyright's recommendation that § 114 be amended to provide performance rights in sound recordings, subject to compulsory licensing.¹⁶⁵

Even if widespread dissemination of music by digital means does not depress sales of sound recordings, "the authors and copyright owners of the recordings are unfairly deprived by existing law of their fair share of the market for performance of their works."¹⁶⁶ This argument, like its counterpart in the home taping debate,¹⁶⁷ is convincing because it does not depend upon an elaborate showing of "actual economic harm" or, in this case, the lack of a benefit from broadcasting, as such harm is usually envisaged. Rather, the argument highlights what is the essence of our system of copyright: creators of protected works must be compensated for others' use of their works in such a way that will encourage the creators to continue to make valuable contributions to society. Finally, in the performance right context, another argument suggested in the home taping context should be re-

¹⁶² See supra note 157, at 137.
¹⁶³ See supra Part I.C.2.
¹⁶⁵ Id.
¹⁶⁷ Id. (citations omitted).
¹⁶⁸ See supra notes 146-147 and accompanying text.
"harm" is a relative concept. Regardless of whether or not broadcasting helps stimulate demand for musical recordings, copyright owners and performers are "harmed" by the lack of a performance right. They are being denied the compensation they would receive if the performance right were recognized.

Although one may disagree over which argument in favor of a performance right is most persuasive, the fact remains that sound recording copyright proprietors and performers are being denied an important source of income. This is especially true in light of the lack of royalties on analog home taping. The damage caused by the lack of both a performance right in sound recordings and royalties on home analog taping will only increase as new means of disseminating digital representations of music are popularized. Thus, Congress should have addressed both issues when it adopted AHRA.

IV
Conclusion

AHRA represents a first step in addressing the unfairness presented by unauthorized home taping of musical recordings. Like many first steps, the Act is too little, too late. Although the creators of American music will be somewhat protected from losses caused by digital home taping, the Act fails to rectify the fundamental unfairness presented by analog home taping. Further, Congress missed a prime opportunity to implement additional fairness measures in U.S. intellectual property law when it failed to bestow performance rights in sound recordings for copyright owners and musical performers. These two omissions from AHRA will result in the continued under-compensation of recording artists and record companies for uses of their works. The significance of this for society should not be underestimated. The most basic premise of our system of copyright is that creators should be protected from unauthorized uses of their works in a manner that will encourage them to continue to make important societal contributions. Lord Mansfield stated it aptly:

We must take care to guard against two extremes, equally prejudicial; the one, that men of ability, who have employed their time in the service of the community, may not be deprived of their just merits, and the reward of their labor and ingenuity; the other that the world may not be deprived of improvements, nor the progress of the arts retarded.168

Digital recording technology is merely one development that will expose shortcomings in the legal protection of intellectual property

168. Lynman Ray Patterson, Copyright in Historical Perspective 244 (1968).
rights in this country. It is widely believed that "electronic highways" will replace the record retailers and videocassette rental businesses. In the future, people will use interactive communications systems to order entertainment products that will be instantaneously downloaded through networks onto computerized home entertainment systems. Private bargaining between entertainment interests and the providers of such delivery services will help structure protections for intellectual property owners. However, Congress must not, as it did in the case of home audio taping, abdicate its responsibility of ensuring that the bargains that are reached result in fair compensation for the creators. In the spirit of Lord Mansfield's comments, Congress must respond in a timely manner to protect American creators of entertainment from future technological advancements and the threats such advancements may pose.