

Chapter 5

Copyright Royalties for Music and Sound Recordings

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Chapter 5

Copyright Royalties for Music and Sound Recordings

A royalty is a payment made to a copyright owner or performer for the use of his property. It may be based on an agreed-on percentage of the income arising from the use of the property or on some other measure. This chapter describes the different systems that have been devised or proposed to collect and distribute royalty payments to copyright owners and performers.

The first section addresses how recording companies pay royalties to performers.

The second section discusses how copyright owners of musical works (e.g. songwriters, publishers) collect royalties on "compulsory" and "mechanical" licenses granted to the companies that make recordings of their music. It also examines how these copyright owners receive royalties from public performances of their recorded music.

Various performing rights organizations collect and distribute royalties. The third section describes these organizations and the mechanisms they use to provide these services.

In the United States, copyright owners of sound recordings (e.g., record companies, performers) do not have the right to be compensated for public performances of their work. The fourth section discusses the arguments for and against providing compensation to copyright owners in sound recordings.

As home copying has become more prevalent, there have been proposals in the United

States to place a **fee on** blank tapes or recording equipment to compensate composers, authors, musicians, artists, recording companies, and producers or production companies for private copying. The final section provides a detailed discussion of one proposed blank-tape levy scheme and the proposed system for allocating the royalties it would generate. In addition, the final section overviews tape-levy schemes either proposed or implemented in France, Australia, Belgium, the United Kingdom, Hungary, Iceland, West Germany, and Sweden. Tape-levy schemes for Austria, Finland, Portugal, Spain, and Norway are also considered.

ROYALTIES FROM THE SALE OF RECORDINGS

Recording artists are compensated in three ways for their services. *First*, they are paid union scale for their performances as determined, for vocalists by the American Federation of Television and Radio Artists (AFTRA) and, for instrumentalists by the American Federation of Musicians (AFM). Rates for feature artists are negotiable; backups are covered by labor agreements.² *Second*, artists are eligible to receive a share of the royalties from the sale of the recording. This share is determined by the contractual agreement negotiated either between the artist and the recording company or the artist and his or her producer, depending on the type of contracts. *Third*, artists receive advances, ranging from

¹Material for this section is incorporated from: Alan H. Bomser and Fred E. Goldring, "Current Trends in Record Deals," 1984 *Entertainment, Publishing, and the Arts Handbook*, Michael Myer and John David Viera (eds.) (New York, NY: Clark Boardman Company, Ltd., 1984), pp. 167-173; Sidney Shemel and M. William Krasilovsky, *This Business of Music* (New York, NY: Billboard Publications, 1985) (with 1987 update); Alan Siegal, "(Si Si) Je Suis un Rock Star," *Breaking in to the Music Business* (Port Chester, NY: Cherry Lane Books, 1986), pp. 89-133; Harold Vogel, "The Music Business," *Entertainment Industry Economics: A Guide for Financial Analysis* (New York, NY: Cambridge University Press, 1986), pp. 131-157; Dick Weissman, "Record Company Contracts," *The Music Business: Career Opportunities and Self-Defense* (New York, NY: Crown Publishers, Inc. 1979), pp. 52-59; Adam White (ed.), *Inside the Recording Industry. An Introduction to America's Music Business* (Washington, DC: Recording Industry Association of America, 1988); and interviews with record company executives.

²J. Golodner, personal communication, advisory panel meeting at OTA, Apr. 24, 1989.

³See ch. 4 for a more detailed description of recording contracts.

\$15,000 to well over \$1,000,000 for established artists, to help them with initial expenses.⁴ These advances are, however, recoupable from the artists' future earnings.

Recording Contracts and Royalties

The four general types of recording contracts typically used in negotiations, either between the artist and the recording company or the artist and the producer, are conventions agreed to by both parties before work commences on a particular album. The artist's bargaining power may be contingent on such factors as whether he is a beginning artist or a superstar. Each type of contract stipulates what requirements each party must fulfill and how payment is to be made to those entitled to a share of the royalties.

Recording Contracts

In the *exclusive artist* recording contract, where the recording company directly signs the artist to the label, the recording company pays all costs of production and advances some money to the artist to help him pay for initial expenses. The artist receives royalties directly from the recording company, but only after all production costs and advances have been recovered.

In the *"all-in" artist* contract, the artist is signed to the recording company, but furnishes his own independent producer. Royalties from the sales of recordings (after all costs and advances are recouped) are paid directly to the artist, who then pays the producer from

his share. The average royalty for a beginning pop/rock artist is 12 to 13 percent of the retail sale price, with 2 to 3 percent of that going to the producer; for a well-known artist, the minimum is 14 to 15 percent, and often 17 to 20 percent,⁵ with 4 percent going to the producer.⁷ These rates, however, may escalate after a specified number of sales.

In the *production contract*, the recording artist works with an independent production company, which then signs with a recording company. The production company pays for the costs of the "demos" or "masters," which are then submitted to the recording company. The recording company pays all costs of production either directly or indirectly: it either advances funds to the production company or pays the costs directly. The production company, producer, and/or the artist may *also be* granted an advance to help cover any additional costs. After all costs are recovered and all advances are recouped, the recording company pays the production company an "all-in" royalty, out of which the production company pays the artist and/or producer. The artist and producer are paid the percentage of the royalties stipulated in their contracts.⁸ Royalty payments for the artist typically range from 10 to 12 percent of the 13 to 18 percent that the production company receives from the recording company.⁹

Under terms of a *master purchase contract*, the production company sells the masters of a sound recording to the recording company. The production company is reimbursed for all costs incurred in the manufacturing of the masters. Before any royalties are paid to the production company, however, these costs

⁴H. Rosen, Recording Industry Association of America, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 1.

⁵H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989.

⁶H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 2.

⁷Recording company executive, personal communication, Feb. 29, 1988.

⁸H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 3.

⁹Ibid.

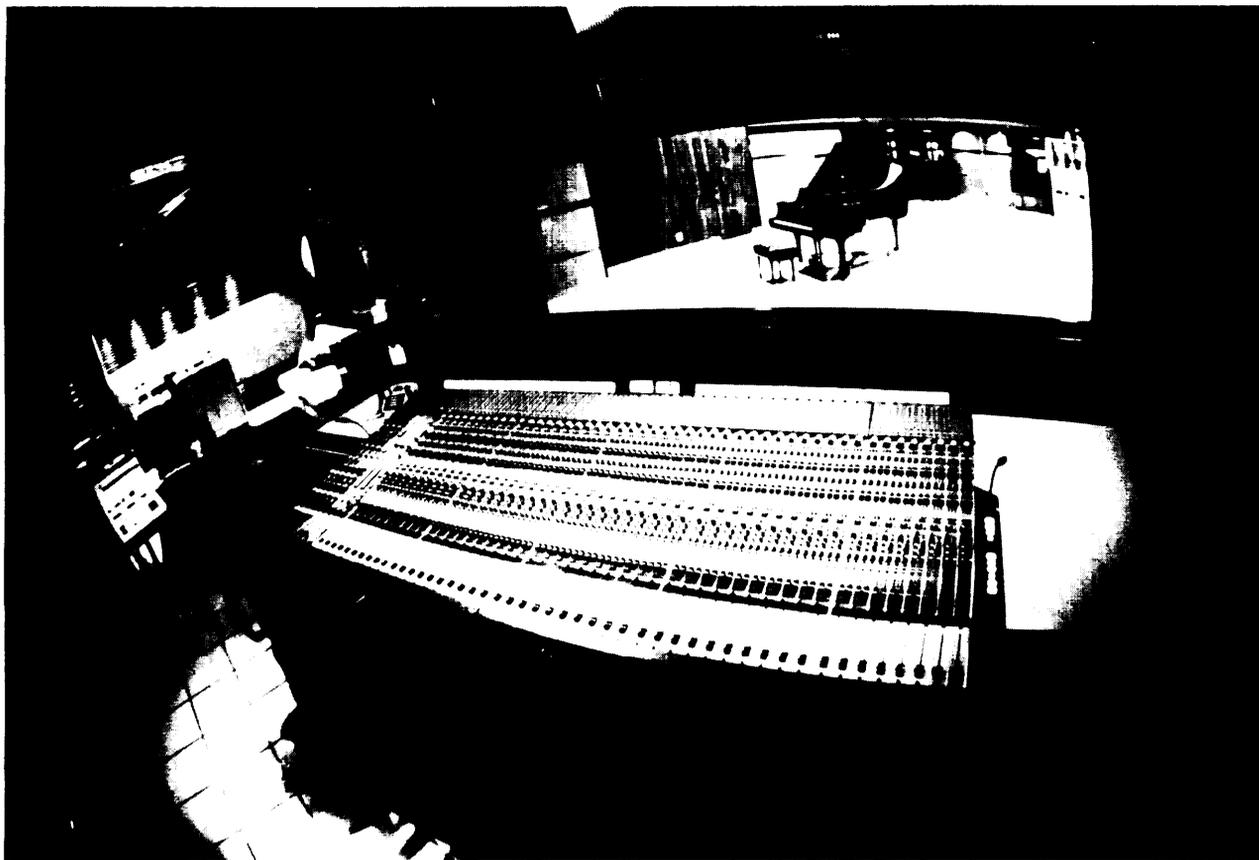


Photo Credit: The Robb Family, Cherokee Recording Studio

Modern recording studio.

and any other advances paid to the production company must be recouped. Then, the production company receives royalties based on 100 percent of the recordings sold, which usually account for 85 to 90 percent of shipments.¹⁰ The artist, in turn, is paid through his production company.

Royalty Base

Royalties are either based on the manufac-

turer's suggested retail list price (e.g., \$8.98) or are doubled when based on the wholesale price (\$3.90 to \$4.00), which could result in nearly a 28-percent rate for the artist (since wholesaling does not involve any packaging deductions).¹¹

Recording companies pay royalties not on the number of recordings shipped, but on those recordings actually sold.¹² Most recording companies will also withhold a certain percentage of royalties for what they call

¹⁰Ibid.

¹¹Bomser and Goldring, op. cit., footnote 1, p. 170; record company executive, personal communication, Feb. 29, 1988.

¹²Shemel and Krasilovsky, op. cit., footnote 1, p. 4.

“reasonable returns” in anticipation of unsold recordings likely to be returned. If recordings are not returned, royalties are paid.¹³ Oftentimes, returned recordings are either recycled or redistributed at reduced prices. The artist receives minimal or no royalties on redistributed albums, since they are sold at the manufacturing cost or less.¹⁴

Artists receive no royalties on recordings given to radio stations or record stores for promotion. Recording companies believe that these free promotional albums expose the recording to a wider audience, which may then purchase its own copies.

Record Club Sales¹⁵

Artists are usually paid half of the recording company’s receipts for record club sales,¹⁶ and no royalty on “bonus” or “free” albums given away to the club’s subscribers. Record clubs normally obtain a license for the masters and pay a royalty to the recording company based on 85 percent of sales— a royalty of approximately 9.5 percent of the club’s member price, less a packaging deduction.¹⁷ Record club owners argue that they should not have to pay royalties for free albums since they are providing the recording company with an alternative means for distribution. They deem it necessary to make special offers and bonuses as incentives to subscribers because of large membership turnovers. An artist can, however, negotiate a clause in the contract that limits the number of albums that can be given away as bonuses.

Foreign Sales

Royalties from foreign sales are usually computed at a rate approximately half that of sales in the United States. The lower foreign royalty rate reflects the fact that companies without foreign affiliates must lease their products to other firms for foreign distribution. The U.S. recording company receives the royalties and then distributes a portion to the artist based on 100 percent of sales. In cases where the company has its own foreign subsidiary, there is no royalty paid to a third party, and the artist receives up to 75 percent of the domestic rate. Some companies with their own foreign affiliates may lease their products to a subsidiary if it is believed that the product will not sell in the foreign territory.¹⁸

Packaging

Packaging deductions are part of the contract negotiations and may vary considerably.¹⁹ Deductions typically range from 10 to 12 percent of the retail price for records, 15 to 20 percent for cassettes, and 25 to 30 percent for compact disks, depending on the cost of the cover and artwork.²⁰ Since the recording company assumes the packaging costs, it believes that the artist should be paid royalties only on the music and not on the artwork. Yet, except in instances where there are very low record or tape sales, the costs for the cover and artwork are much lower than the packaging deduction.²¹

¹³H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 4.

¹⁴Ibid.

¹⁵Material taken from Shemel and Krasilovsky, op. cit., footnote 1, p. 57.

¹⁶H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 5.

¹⁷Shemel and Krasilovsky, op. cit., footnote 1, p. 57.

¹⁸Weissman, op. cit., footnote 1, p. 53.

¹⁹H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 6.

²⁰Bomser and Goldring, op. cit., footnote 1, p. 170.

²¹Ibid.

Royalties From the Sale of CDs²²

When compact discs (CDs) were first introduced in the United States in 1983, their retail selling price was somewhere in the 30 dollar range²³ because of their high manufacturing and production costs. Since recording companies did not expect a high volume of CD sales for the first few years, they paid the same royalty on CDs that they paid on comparable vinyl LPs, regardless of the differences in their prices. They usually followed this practice for the first 3 years of the contract, after which they renegotiated the royalty on CD sales to reflect any changes in the market place.²⁴ Some companies, however, renegotiated rates 3 years from the release of the artist's first CD rather than from the beginning of the contract period.²⁵ Recording companies deducted 25 percent for packaging, a higher percentage than the typical deduction for conventional LPs.²⁶ This practice continued for 2 or 3 years. Some successful artists were able to negotiate a "favored-nations" clause that would automatically increase their royalty payments if the recording company increased its royalty rates for newly signed artists.

Recording companies have recently had to reconsider the issue of CD royalties. With the initial costs of research and development now recovered, the cost of raw CD production has

dropped.²⁷ Price margins are decreasing²⁸ and manufacturing costs for the discs themselves are down to about \$1.29. As a result, CD prices are gradually beginning to drop as sales rise. The format's enormous success has come in large part from sales to relatively affluent, older consumers who purchase CD players and then replace their favorite LPs with CDs.

With higher profit margins than records or tapes, CDs have become the most profitable format for companies: a CD that may have cost \$5 to \$6 to produce and distribute will sell for \$10 or more. Artists are beginning to demand higher rates for CD royalties now that the contractual clauses allowing for automatic increases are beginning to expire.³⁰

Recording companies, forced to reevaluate their royalty payment systems, face several problems. First, there are no "suggested retail list prices" *per se* for most CDs,³¹ as compared to the suggested retail prices listed for LPs. Most recording companies pay a royalty rate on LPs based on their suggested retail list prices, which remain fairly constant, rather than on their wholesale prices, which constantly change. Using this royalty basis, wholesale prices can be raised without affecting retail prices. For CDs without a suggested retail price, however, the recording companies base royalties on the constantly changing wholesale prices of CDs.

²²Material for this section was taken from Steve Fiott, "Declaration of Independents," *Digital Au&o*, vol. 5, No. 3, November 1988, p. 36; Sidney Shemel and M. William Krasilovsky, *This Business of Music*, op. cit., footnote 1, pp. 7-8; Jean Rosenbluth and Ken Terry, "CD Royalties on the Upswing: Most Acts Benefit From Lower Costs," *Billboard*, vol. 100, No. 4, Jan. 23, 1988, pp. 1, 84; Alan Siegal, "(Si Si) Je Suis un Rock Star," op. cit., footnote 1, pp. 120-123, and interviews with record company executives.

²³Siegal, "(Si Si) Je Suis un Rock Star," op. cit., footnote 1, p. 121.

²⁴*Ibid.*, p. 121; interview.

²⁵Siegal, "(Si Si) Je Suis un Rock Star," Op. Cit., footnote 1, p. 121.

²⁶Shemel and Krasilovsky, op. cit., footnote 1, p. 7; Rosenbluth and Terry, op. cit., footnote 22, p. 84.
²⁷Fiott, op. cit., footnote 22, p. 36.

²⁸*Ibid.*

²⁹Record company executive, personal communication, June 21, 1988.

³⁰Rosenbluth and Terry, op. cit., footnote 22, pp. 1, 84; interview.

³¹The following is based on personal communication with a record company executive, Dec. 13, 1988.

There was some disagreement among advisory panel members as to the prevalence of CD list prices and the degree to which they correspond to retail prices.



Photo Credit: Ed Asmus, Courtesy of MTS, Inc.

Compact discs have become a profitable format

The problem is further complicated because recording companies charge various distributors different prices. Retailers are charged higher prices for items than are sub-distributors, since subdistributors must also warehouse the merchandise. Subdistributors comprise 95 percent of a recording company's clients; the other 5 percent are retailers. To compensate for the decrease in royalties caused by the lower prices charged to sub-distributors (the current subdistributor price is approximately \$9.00),³² a provision called a "CD uplift" is usually applied to this price. The "CD uplift" increases the wholesale price

125 percent over the original wholesale price, less a packaging deduction of approximately 20 to 25 percent. Using the increased wholesale price, the royalty rate is then based on a percentage of sales. The artist is paid a percentage of that royalty base - usually 12 to 15 percent - depending on the provisions of the recording contract. No royalties are paid on free or promotional copies of CDs.

With the uplift, an artist might earn more royalties from a "premium" CD than from the same analog recording.³³ Once a CD is discounted, however, royalties may be drasti-

³²Record company executive, personal communication, Dec. 13, 1988.

³³Record company executive, personal communication, June 21, 1988.

cally reduced.³⁴ As in the case of LP album cut-outs, the artist is entitled to only half of the full royalty rate, less a packaging deduction.

In general, recording industry observers see CD royalty rates continuing to rise, especially now that the initial research and development costs of the CD have been written off.³⁵

ROYALTIES FROM MUSIC USED IN RECORDINGS

*Compulsory Licenses*³⁶

The Copyright Act of 1976 grants the copyright owner of a musical composition the exclusive right to be the first to record and distribute phonorecords of the protected composition within the United States, or to authorize others to record and distribute.³⁷ Once that right has been exercised, anyone who makes and distributes a competing rendition of the musical composition must obtain what is called a “compulsory” license from the copyright owner and must pay royalties on phonorecords made and distributed under the license. While ensuring copyright owners the opportunity to be the first to record and distribute their works and providing them payment for all subsequent uses, the compulsory licensing system also prevents copyright owners from monopolizing the future use of a musical composition.

Licenses set forth the conditions and royalties for each recording made and distributed. The new recording must be distinguishable

from the original-duplication or direct rerecording of the original without permission of the copyright owner constitutes copyright infringement. In addition, the phonorecord must be distributed to the public for private use only. A compulsory license does not authorize the licensee to distribute phonorecords for commercial use, such as background music services, nor does it authorize the public performance of the musical composition.

To obtain a compulsory license, the intended user must notify the copyright owner within 30 days after the phonorecords are manufactured and before they are distributed. If the copyright owner is not known, the licensee files a notice with the U.S. Copyright Office. Generally, a copyright owner must be identified in the registrar or other public records of the Copyright Office in order to collect royalties from a compulsory license.

Although the intended purpose behind the compulsory license was to encourage the flow of creativity by ensuring certain rights to the copyright owner, some people think that compulsory licenses restrict creativity. Canada recently abolished their compulsory license for just this reason.³⁸

Mechanical Royalties

Record companies must make automatic payments to songwriters and publishers for the right to make and sell copies of their recorded works. A copyright owner receives a statutory royalty rate depending on the length of the song, the number of songs on the al-

³⁴Rosenbluth and Terry, *op. cit.*, footnote 22, p. 84.

³⁵*Ibid.*

³⁶Material for this section is taken from: Robert Thorne, “Compulsory Licensing: The Music Makers as Money Makers,” *1985 Entertainment, Publishing and the Arts Handbook*, John David Viera and Michael Meyer (eds.) (New York, NY: Clark Boardman Co., Ltd., 1985), pp. 281-294.

³⁷Title 17, U.S. Code, section 115.

³⁸Staff member of Copyright Office, personal communication, Feb. 6, 1989.

bum, and net sales of the recording.³⁹ These deductions, called “mechanical royalties,” are taken from the record company’s receipts, and not from the artist’s share.⁴⁰

The Copyright Royalty Tribunal determines mechanical royalty rates, which it adjusts every 2 years on the basis of the Consumer Price Index. The current rate is 5.25 cents for each musical composition or one cent per minute or fraction thereof, whichever is greater. The rate cannot be adjusted below 5 cents per musical composition or .95 cents per minute, nor can it rise more than 2 percent per adjustment period.⁴¹

Compulsory mechanical license fees are seldom set at the statutory level, however. The user can often negotiate a lower rate with the copyright owner. For example, when the owner is related to the recording artist, the record company may pay rates only three-quarters of the statutory rate. Also, certain classes of recordings, such as recordings distributed free, may be exempted.⁴² In addition, an artist’s contract often provides for future songs either written or cowritten by him to be brought under the recording company’s “control.” Recording companies often secure reduced mechanical royalty rates for these “controlled compositions.”

*Harry Fox Agency*⁴³

The Harry Fox Agency was established in 1927 and is a wholly-owned subsidiary of the National Music Publishers’ Association (NMPA).⁴⁴ It currently represents over 6,000 publishers, not all of whom belong to NMPA. The agency is responsible for authorizing recording companies to make and distribute phonorecords of copyrighted music owned or controlled by the publishers. It licenses approximately 75 percent of U.S. music on records, tapes, CDs, and imported phonorecords, plus music used in films, on T.V., or in commercials. The agency also collects and distributes mechanical royalties for most U.S. publishers.

The Harry Fox Agency licenses copyrighted musical compositions for commercial records, tapes, CDs, etc. distributed:

- to the public for private use;
- for use in audio/visual works (synchronization), including motion pictures, broadcast and cable T.V. programs, and CD videos;
- for use in broadcast commercial advertising;

³⁹Net sales equal gross sales, less returns. Record company executive, personal communication, June 2, 1989.

⁴⁰H. Rosen, RIAA, letter to J. Winston, OTA, May 2, 1989. Enclosure with comments on draft ch. 4, p. 13.

⁴¹“The Harry Fox Agency, Inc.: Licensing Service of the National Music Publishers’ Association,” pamphlet published by the Harry Fox Agency, Inc., 1988, p. 6.

⁴²Alan H. Siegal, “Lexicon Plus,” *Breaking in to the Music Business* (Port Chester, NY: Cherry Lane Books, 1986), p. 14.

⁴³The following is taken from material contained in Shemel and Krasilovsky, op. cit., footnote 1; “The Harry Fox Agency, Inc.: Licensing Service of the National Music Publishers’ Association,” op. cit., footnote 41; and “The National Music Publishers’ Association,” pamphlet published by the National Music Publishers’ Association.

⁴⁴The National Music Publishers’ Association is one of three music publishers’ trade associations in the United States. The other two are: the Music Publishers’ Association of the U. S., specializing in educational and concert music, and the Church Music Publishers’ Association.

- for use in recordings for public use (i.e., background music, in-flight music, computer chips, syndicated radio services, and even novelty greeting cards).

It also licenses performing rights for theatrical motion pictures in the United States.

In addition to issuing licenses and collecting royalties, the Harry Fox Agency represents publishers in proceedings against delinquent licensees and infringers, and audits all licensed record companies and licensees who use copyrighted musical compositions. The agency serves as an information source, clearinghouse, and monitoring service for licensing musical copyrights. It maintains extensive files of information on the public domain status of compositions for purposes of issuing licenses. It also works with the international collection societies.

The Harry Fox Agency retains a commission from the royalties collected on behalf of its members: 4.5 percent from mechanical licenses from music; 10 percent on synchronization licenses for films, with a maximum of \$250 per composition; 10 percent of royalties on T.V., home video, and commercial synchronization licenses, with a maximum of \$2,000 per composition; and 10 percent on electrical transcription licensing (syndicated radio, background music, etc.), with a maximum of \$2,000 per composition.

ROYALTIES FROM THE PERFORMANCE OF RECORDED MUSIC

The 1976 Copyright Act gives copyright owners the exclusive right to perform their works publicly. The Act defines a “public” performance as one performed or displayed in a place open to the public or a place where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered, or any performance that is transmitted or otherwise communicated to the public, by any means or process, regardless of whether the public receives the transmission in the same location or time as the original performance.⁴⁵

Musical works are included as part of this right, but sound recordings are not. Thus, the copyright owner of a recorded song, such as the composer or music publisher, is entitled to be compensated for public performances, whereas the copyright owner of the sound recording, such as a record company, is not. Virtually every user other than the copyright owner who publicly performs music must obtain a license from the copyright owner, or be liable for infringement. The user is obligated to seek out the copyright proprietor and obtain permission, or to contact the appropriate performing rights society to obtain a license.⁴⁶

⁴⁵Title 17, U.S. Code, sec. 101.

⁴⁶Bernard Korman and I. Fred Koenigsberg, “performing Rights in Music and performing Rights Societies,” *Journal of the Copyright Society of the USA*, vol. 33, No. 4, July 1986, pp. 347-348.

Performing rights organizations were created to make the licensing of music both easier and more economical for the hundreds of thousands of commercial users of music.⁴⁷ Through the use of “blanket licenses,” users of music are able to perform copyrighted music without having to negotiate a separate license with each copyright owner, or having to keep logs to account for each performance.⁴⁸

Performing Rights Societies⁴⁹

There are three performing rights organizations in the United States – the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC). Each has its own system of determining how much airplay each recording receives and to how much of the collected revenues each copyright owner is entitled.

ASCAP, founded in New York in 1914, currently includes approximately 40,000 composers, lyricists, and music publishers.⁵⁰ It is the oldest and largest (in terms of billings)⁵¹ performing rights licensing organization in the United States and is wholly owned and op-

erated by its members. Its board of directors includes 12 writer directors, who are elected by writer members, and 12 publisher directors, who are elected by publisher members.

Broadcast Music, Inc.⁵² was formed in 1940 by a group of about 600 broadcasters who boycotted ASCAP music. BMI stresses an “open door” policy, inviting all writers to join, especially those in the fields of country and soul music. Currently, BMI has a membership of approximately 90,000 composers, writers, and publishers and a repertoire of over 1.5 million titles.⁵³ It is the world’s largest music licensing organization in terms of members or affiliates.⁵⁴

Together, ASCAP and BMI collect over 95 percent of all U.S. performing rights royalties. SESAC, Inc.,⁵⁵ which represents approximately 2,200 writers and 1,200 publishers, collects the remaining 5 percent of U.S. performing rights royalties.⁵⁶ SESAC has a smaller, more specialized repertoire than that of ASCAP and BMI⁵⁷ — about 155,000 songs.⁵⁸

Organizationally, SESAC also differs from ASCAP and BMI. As a private licensing company owned and run by the Heinecke family since 1930,⁵⁹ SESAC, after deducting operat-

⁴⁷“The ASCAP License: It Works for You,” pamphlet published by ASCAP; “BMI and the Broadcaster: Bringing Music to America,” pamphlet published by BMI, 1988.

⁴⁸Korman and Koenigsberg, op. cit., footnote 46, p. 335.

⁴⁹Material for this section was taken from: Korman and Koenigsberg, op. cit., footnote 46, pp. 332-367; ShemelandKrasilovsky, op. cit., footnote 1, pp. 182-201.

⁵⁰“ASCAP: The Facts,” a pamphlet published by ASCAP, 1987.

⁵¹Vogel, op. cit., footnote 1, p.135.

⁵²Material for this section is taken from “BMI And the Broadcaster Bringing Music to America,” op. cit., footnote 47.

⁵³“BMI and the Broadcaster: Bringing Music to America,” op. cit., footnote 47.

⁵⁴“BMI, Your Bridge to the World’s Greatest Music: A Guide to Music Listening,” a pamphlet published by BMI, 1987.

⁵⁵SESAC, inc. was formerly known as the Society of European Stage Authors and Composers. In those days, its repertoire was comprised mostly of American and European classics, along with religious and country music. They have since changed their name to reflect the expansion in their repertoire to include all categories of music. (“SESAC: Information for Prospective Writers and Publishers,” a pamphlet published by SESAC)

⁵⁶Vogel, op. cit., footnote 1, pp.135-136.

⁵⁷Jack C. Goldstein, “For th Record: Questions and Answers On the Performance of Copyrighted Music” (Houston, TX: Arnold, White & Durkee, 1987), p. 1.

⁵⁸Interview with SESAC executive, Feb. 9, 1989.

⁵⁹“SESAC: Information for Prospective Writers and Publishers,” a pamphlet published by SESAC.

ing costs and overhead expenses from the revenues it collects, distributes only half of the remainder to the copyright owner and retains the balance. GO ASCAP and BMI, on the other hand, are nonprofit organizations. After deducting operating expenses from royalty revenues collected, they distribute the balance to their members or affiliates. Recently, ASCAP's operating expenses have run about 18 to 19 percent of its total revenues⁶² and BMI's 15 to 16 percent.⁶³

Licenses⁶⁴

Both ASCAP and BMI charge radio and television broadcasters a licensing fee based on a percentage of the broadcaster's net revenues, rather than on the extent of the use of their music. Broadcasters pay fees either on a "blanket" license, which is based on a small percentage of the net revenues from sponsors of all programs, or on a "per program" license, which is based on a larger percentage of net revenues, but only on the specific programs licensed.⁶⁵ Both the "blanket" license and the "per program" license cover the entire repertoire of songs for a period of years. BMI also offers broadcasters a license for noncommercial use and one for noncommercial educational use.⁶⁶

SESAC, like ASCAP and BMI, licenses virtually the entire broadcasting industry.⁶⁷ But

whereas ASCAP and BMI base their broadcast licensing fees on the gross receipts of the station, SESAC bases its licenses on fixed determinants such as station location, hours of music broadcasting, and the station's advertising rates.

Other users of music—bars, restaurants, taverns, etc.—are also required to obtain a license from each performing rights society that represents the copyright holders of the music they are using. In the case of live performances, performing rights societies license the establishment owner rather than the musicians because they believe that it is the establishment owner who derives the ultimate benefit from the performance.⁶⁸ It is also more practical and much easier to track performances in establishments than to locate and license the musicians, who are rarely ever in the same place for a long period of time.⁶⁹

Because these users of music are harder to identify, locate, and contact than are broadcasters, who are licensed by the Federal Communications Commission (FCC), performing rights organizations sometimes send field representatives to visit establishments that might be using their music.⁷⁰ Often they learn about these establishments through local newspapers or magazines, or through word of mouth. ASCAP has 23 district offices⁷¹ lo-

⁶⁰Shemel and Krasilovsky, *op. cit.*, footnote 1, p. 154.

⁶¹Goldstein, *op. cit.*, footnote 57; Korman and Koenigsberg, *op. cit.*, footnote 46, p. 363; Shemel and Krasilovsky, *op. cit.*, footnote 1, p. 184.

⁶²Korman and Koenigsberg, *op. cit.*, footnote 46, p. 363.

⁶³BMI executive, personal communication, July 12, 1988.

⁶⁴Material for this section is taken from Korman and Koenigsberg, *op. cit.*, footnote 46, pp. 332-367.

⁶⁵Korman and Koenigsberg, *op. cit.*, footnote 46, p. 359.

⁶⁶"BMI and the Broadcasters: Bringing Music to America," *op. cit.*, footnote 47.

⁶⁷Shemel and Krasilovsky, *op. cit.*, footnote 1, p. 156.

⁶⁸Korman and Koenigsberg, *op. cit.*, footnote 46, p. 360.

⁶⁹*Ibid.*; see also Goldstein, *op. cit.*, footnote 57, pp. 6-7.

⁷⁰Korman and Koenigsberg, *op. cit.*, footnote 46, p. 360.

⁷¹*Ibid.*

cated throughout the country, and BMI has 9 regional offices,⁷² whose job it is to locate and license these establishments.

If an establishment refuses to obtain a license, yet continues to use copyrighted music without permission, legal action may follow.⁷³ Copyright infringers often end up paying more in statutory damages than they would have paid in licensing fees.⁷⁴ In addition, the infringer is still required to obtain a license to continue playing copyrighted music at the establishment.

Foreign Licenses⁷⁵

All three performing rights societies grant to their licensees the right to perform all works contained in their repertory, including works of foreign origin. Each has its own agreements with foreign performing rights societies. Most countries only have one performing rights society representing its writers and publishers, so that a single foreign society will usually represent all three U.S. societies. ASCAP, BMI, and SESAC collect fees in the United States from users of copyrighted foreign music on behalf of their respective foreign societies, and in return, these foreign societies collect fees in their country from users of copyrighted American music.

Songwriter Organizations

Songwriters may get additional help in collecting their royalties through membership in the Songwriters Guild.⁷⁶ The Songwriters Guild⁷⁷ is a voluntary national songwriters' association, comprising approximately 4,000 songwriters worldwide and representing all types of music, including motion picture and television scores as well as commercials. For those members who do not control their own publishing rights, the Songwriters Guild collects royalties from publishers for sheet music, song portfolios, recordings, tapes, motion picture, and television uses. Each year, the Guild selects one major music publisher and several small and medium-sized publishing firms and conducts thorough audits of their books. According to the Guild, over the years, they have recovered over \$6 million that might not otherwise have been paid to writers. The Guild also maintains records of royalty payments for 6 years and a file of all contracts submitted.

One stated goal of the Songwriters Guild is to develop the talents of young songwriters⁷⁸ and to protect them in their dealings with publishers.⁷⁹ It holds special seminars and workshops where writers share their ideas or

⁷²See "Songwriters and Copyright: Questions and Answers," a pamphlet published by BMI, 1987.

⁷³Korman and Koenigsberg, *op. cit.*, footnote 46, p. 362; Goldstein, *op. cit.*, footnote 57, p. 2.

⁷⁴Korman and Koenigsberg, *op. cit.*, footnote 46, p. 363; Goldstein, *op. cit.*, footnote 57, p. 8; The ASCAP License: It Works for You," *op. cit.*, footnote 47.

⁷⁵Material for this section is based on: Shemel and Krasilovsky, *op. cit.*, footnote 1, pp. 196-197; "BMI, Your Bridge to the World's Greatest Music: A Guide to Music Listening," *op. cit.*, footnote 54; and "ASCAP: The Facts," *op. cit.*, footnote 50.

⁷⁶American Guild of Authors and Composers, "Record World Salutes the 50th Anniversary of AGAC/The Songwriters Guild," newsletter published by the Songwriters Guild, Apr. 10, 1982.

⁷⁷The Songwriters Guild has gone through a number of name changes since its inception in 1931. It was first known as the Songwriters Protective Association until the mid-sixties, when its name was changed to the American Guild of Authors and Composers, and just recently it was expanded to AGAC/The Songwriters Guild.

⁷⁸The Guild maintains the AGAC Foundation, a nonprofit educational organization that provides young writers with the opportunity to learn about the music business through university scholarship grants and various Guild programs.

⁷⁹To protect the rights of songwriters in their dealings with publishers, the Songwriters Guild recommends the use of a standard guild contract (developed over the years), that extends the period in which the writer may recapture his/her foreign copyrights from 28 years to 40 years from the date of agreement (or 35 years from the initial release of the sound recording, whichever is earlier). In addition, the Guild contract contains provisions that give the writer a right of recapture if the publisher fails to obtain a recording of a song within a specified time period (not to exceed 12 months). Although the Guild encourages songwriters to use this form of contract in all of their dealings with publishers, songwriters do not make frequent use of this contract. Copyright Policy Planning Advisor, U.S. Copyright Office, personal communication, Feb. 6, 1989.

materials with peers and receive advice from professional songwriters, producers, recording artists, and music publishers.

For writers who choose to control their publishing rights, the Guild offers a service called the Catalogue Administration Plan (CAP). CAP assists songwriters in registering, assigning, and renewing copyrights; collects and pays royalties; and registers songs with one of the three performing rights societies. The fee for this service is 2 percent of the publisher's performance income and 7.5 percent of all other income.

In addition to a copyright renewal service, the Guild also provides other services, such as securing medical and life insurance, reviewing songwriting contracts, financially evaluating song catalogues, and administering estates to protect the heirs of its members. The Songwriters Guild also promotes legislation affecting songwriters' copyrights. It has advocated legislation raising the mechanical rates paid to publishers and songwriters by users of their songs.

Another major songwriters' organization, the National Academy of Songwriters⁸⁰ (NAS), formerly known as the Songwriters Resources and Services, does not become involved directly in the distribution of royalties to its members. NAS is a nonprofit organization dedicated to supporting and encouraging songwriters and to advancing the songwriting profession. It was founded in 1973 with the goal of providing songwriters the opportunity to meet and establish important relationships with music industry professionals and other songwriters. Its membership consists not only

of songwriters, but also of publishers, producers, artists, and recording company executives.

NAS manages several services that match songwriters to collaborators or songwriters to publishers, producers, and artists who are looking for songs. NAS also sponsors many activities that give members the opportunity to work with others in the songwriting community. It sponsors weekly workshops where members can have their songs critiqued by peers and representatives of major publishing and recording companies. For a nominal fee, songwriters outside of the Los Angeles area can mail in songs to be critiqued. In addition to operating a toll-free line for music-related questions, it also conducts seminars, where guests are invited to discuss the various aspects of songwriting.

NAS also assists in the development of local songwriting organizations throughout the country, and provides members with health insurance coverage, discounts on legal services, books, and tapes, and a 10-percent discount on classes offered in the UCLA Extension Songwriting Program.

Copyright Royalty Tribunal⁸¹

The Copyright Royalty Tribunal (CRT) was created by the Copyright Act of 1976 and began operations shortly before the effective date of the act. It currently is made up of three Commissioners,⁸² who are appointed by the President of the United States with the advice and consent of the Senate, three assistants, and a general counsel.

⁸⁰National Academy of Songwriters membership information.

⁸¹Material for this section is based on: Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 1988/89* (Washington, DC: U.S. Government Printing Office) June 1, 1988, p. 62; Copyright Royalty Tribunal, "Copyright Royalty Tribunal Summary Fact Sheet," November 1988; and Robert Cassler, CRT, letter to OTA, Apr. 28, 1989.

⁸²The CRT is authorized to have five Commissioners, but since September 1984, the Tribunal has never had more than three— a bill, H.R. 1621, is pending to reduce permanently the number of Commissioners to three. Two of the five initial Commissioners' terms were for 5 years; the other three Commissioners' terms are for 7 years — the purpose of this was to stagger the Commissioners' terms. (Robert Cassler, CRT, letter to OTA, Apr. 28, 1989.)

Box 5-A-Performing Rights Societies Logging Procedures

ASCAP

Each performing rights society has its own method of logging programs to determine the amount of royalties to be paid to its constituents. American Society of Composers, Authors and Publishers (ASCAP) surveys its users of recorded music to obtain a rough estimate of how much airplay a particular song receives. It conducts a complete census of all performances on network television, and in concert halls, educational institutions, certain wired-music services, and a group of nonbroadcast, nonconcert licensees such as circuses and ice shows. ASCAP must randomly sample all other performances.

For example, local television station performances are sampled by means of audiotapes, TV *Guide* listings, and cue sheets, which are detailed listings of all music on a program, usually furnished by the program producer. Each year 30,000 hours of local television programs are surveyed.

ASCAP samples over 60,000 hours of local radio hours each year. Local radio stations are tape-recorded in 6-hour segments. Outside consultants send taping schedules directly to the people in the field, so neither the stations nor ASCAP's office staff know in advance which stations are being taped or when. This system relies heavily on the ability of ASCAP'S staff to correctly identify each song when the tapes are analyzed—a time-consuming and costly task.¹

The majority of ASCAP's "general licensees" (e.g., restaurants, bars, etc.) are not surveyed because of the time and cost factors. Instead, ASCAP uses feature performances on radio and television as "proxies" for the distribution of these shares.

BMI

Broadcast Music Inc. (BMI) uses music broadcast by a scientifically chosen sample of stations as the basis for its quarterly distribution of royalties to songwriters, composers, and copyright holders.² Each licensee is asked to supply a station-prepared log of all music performed in a particular week, predetermined by BMI. The names of the writers and publishers as well as the name of the artist are recorded on this log, thus eliminating the problems with identifying each song. The station is notified in advance which week to log, and BMI strives to keep the list secret from publishers and writers. An independent accounting firm determines which stations are being logged and when, so that no BMI employee has prior knowledge of what stations are being logged.

For performances shown on television, BMI uses an extensive national database of information about network, syndicated, and cable programming and details the use of music in those programs listed by TV *Guide*.

SESAC

The Society of European Stage Authors and Composers (SESAC) does not have a system of accurate local station logging procedures. It relies instead on reviews of network logs, limited spot checking of local stations, and trade paper charts to determine the amount of airplay received by a particular song.

¹ Dick Weissman, "Performing Rights Societies," *The Music Business: Career Opportunities and Self-Defense* (New York, NY: Crown Publishers, Inc., 1979), p. 83.

²"BMI and the Broadcaster: Bringing Music to America," *op. cit.*, footnote 47.

Under the compulsory licensing provisions of the Act, the Tribunal is responsible for determining and distributing the copyright royalties collected for retransmissions of broadcast signals by cable systems and the public performance of music on jukeboxes. It is also responsible for determining the royalty rates or phonorecords and for certain public broadcast transmissions, although the distri-

bution of the royalties, in these cases, is left up to the parties involved. These transmissions involve the use of published, nondramatic compositions and pictorial, graphic, and sculptural works by noncommercial broadcasting stations. Royalties collected from the compulsory licenses for making and distributing phonorecords are distributed either directly to the copyright owners or their desig-

nated agents (in most cases, the Harry Fox Agency).

In recent years the Tribunal has been given the additional responsibilities of:

- distributing the satellite carrier copyright royalties granted by the Satellite Home Viewer Act of 1988, which allows for the retransmission of broadcast signals directly to satellite dish owners for private viewing; and
- monitoring private negotiations between music owners and jukebox operators for private jukebox licenses intended to supersede the jukebox compulsory license.

The CRT proceedings are intended to balance the relative harms and benefits among owners and users of copyrighted materials and to increase public access to creative works. Several years ago, however, the Tribunal was criticized for having failed to regulate copyright compulsory licenses as they were intended to be administered.⁸³ According to the CRT, however, these criticisms are unfounded, especially given the litigious nature of the parties involved.⁸⁴

PERFORMANCE RIGHTS IN SOUND RECORDINGS⁸⁵

Performance Rights Under U.S. Law

Sound recordings, as defined by public law, include all works that result from the fixation of a series of sounds (excluding those accompanying motion pictures or other audio-visual works) regardless of the nature of the material objects in which they are embodied (i.e., disks, tapes, or other phonorecords).⁸⁶

United States copyright law does not provide for copyright owners of sound recordings — usually performers, producers, or recording companies — to receive compensation for public performances of the recording. Authors and composers are, however, compensated for the public performance of their works through performing rights organizations.

Performers and producers have argued vehemently that U.S. copyright law should be amended to include a “performance right.” They believe that copyright holders of sound recordings do not receive fair compensation

⁸³The Copyright Royalty Tribunal Sunset Act of 1985 was referred to the House Committee on the Judiciary and its Subcommittee on Courts, Civil Liberties, and the Administration of Justice. This bill sought to terminate the services of the Copyright Royalty Tribunal and transfer its functions to the Register of Copyrights. Hearings were held, but no legislation emerged from the committee.

For more information, see U.S. Congress, House Judiciary Committee, *Copyright Royalty Tribunal and U.S. Copyright Office*, hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, July 11, Sept. 18, and Oct. 3, 1985 (Washington, DC: U.S. Government Printing Office, 1985).

⁸⁴Robert Cassler, CRT, letter to OTA, Apr. 28, 1989, p. 4.

⁸⁵Material for this section follows: Gary L. Urwin, “Paying the Piper: Performance Rights in Musical Recordings,” *Communications and the Law*, vol. 5, Winter 1983, pp. 3-57, U.S. Congress, House Judiciary Committee, *Performance Rights in Sound Recordings*, hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Serial No. 83, Mar. 29 and 30, May 24 and 25, 1978, U.S. Congress, House Judiciary Committee, *Performance Rights in Sound Recordings*, hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee Print No. 15, June 1978, in particular pp. 100-105, 114-117, 254-259, 328-351, 366-369, 570-576, and 580-589.

⁸⁶Siegel, “Lexicon Plus,” *op. cit.*, footnote 42, p. 20.

Box 6-B—Performing Rights Societies Distribution of Royalties to Members¹

Both ASCAP and BMI have developed their own complex formulas for converting the amount of airplay from a particular station into an index of national play during the time surveyed.²

ASCAP

The American Society of Composers, Authors and Publishers (ASCAP) assigns each performance a value depending on what type of performance it is, i.e., a feature, background, etc. Each performance is then weighted according to the size and importance of the logged station, time of day of program, etc. to determine the total number of performance credits. Each quarter, the total performance credits for writers as a group, and for publishers as a group, are divided into the respective dollars of distributable revenue to yield the dollar value of a performance credit for each group. On payment, ASCAP issues a detailed statement showing the title of the work surveyed, the number of performance credits earned, and the media on which the performance appeared.

ASCAP has two systems of payment for its writers. The “current performance” plan distributes the writer’s share of the money on the basis of his performance over the past four quarters. New writer members are initially paid on the “current performance” plan, with the option of switching to the “four-fund” basis after 3 full survey years. The “four-fund” system is a deferred payment plan based partly on current performances, but mostly on an average of performances over a period of 5 or 10 years.

Distribution of royalties to publishers is determined on a “current performance” basis only, in which the publisher is paid on an “on account” basis for the first three quarters, with adjustments being made in the fourth quarter.

BMI

Broadcast Music Inc. (BMI) affiliates are paid according to a published royalty payment schedule, which distinguishes between radio and television performances and between feature, theme, and background musical performances. A performance index is calculated for each performance, based on the number of times it is played on the radio and television stations, and the total revenue earned paid to the affiliates. BMI’s royalty payment schedule allows for bonus credits based on the number of times one’s works are played on the radio or television. Bonus credits are calculated on a song-by-song basis.

SESAC

The Society of European Stage Authors and Composers (SESAC) distribution system places less emphasis on actual surveys of performances on the air, and relies more heavily on the availability, diversity, growth, seniority, and commercial value of a publisher’s catalog and the promotional effort of the publisher himself. SESAC pays its writers and publishers incentives of \$240 each for any song recorded on a pop single and \$100 each for any song recorded on a pop album.³ Bonus credits are also awarded for song longevity, crossovers (songs appearing on more than one chart), and carryovers (those having earning power over a 1-year period).

¹ “ASCAP: The Facts,” op. cit., footnote 50; “BMI and the Broadcaster: Bringing Music to America,” op. cit., footnote 47; Korman and Koenigsberg, op. cit., footnote 46, pp. 332-367; Shemel and Krasilovsky, op. cit., footnote 1; “The ASCAP Survey and Your Royalties,” pamphlet published by ASCAP, 1986; and Dick Weissman, “Performing Rights Societies,” op. cit., footnote 76, pp. 82-87.

²Weissman, “Performing Rights Societies,” op. cit., footnote 76, p. 83.

³Shemel and Krasilovsky, op. cit., footnote 1, p. 185.

from broadcasters and other commercial users of their works. Performing rights in sound recordings has long been a hotly contested issue, with the first of many performance rights bills being introduced in 1925. A bill proposed in 1987 (H.R. 1805) would require broadcast-

ers, radio stations, and background music services to pay fees for the right to play copyrighted sound recordings in commercial operations. The system proposed in H.R. 1805 (97th Congress) would be administered by the Copyright Royalty Tribunal, with the assis-

tance of organizations such as the American Federation of Musicians, which maintains records of recording sessions, and performing rights societies (ASCAP, BMI, SESAC), which track performances of copy-right owner's works. Half of the license fees would be distributed to the copyright owners of the sound recordings. The other half would be distributed to the performers on the recording, to be divided equally among all the participants.

Under the proposed system, users of sound recordings would have the option of paying license fees either on a blanket, or per-use prorated basis. The blanket license fee for radio and television stations would be based on the licensee's net receipts from advertising sponsors during the year; other transmitters of sound recordings would be subject to fees equal to 2 percent of their gross receipts from subscribers. The fee for radio stations with net receipts of \$25,000 to \$100,000 would be \$250, \$750 for net receipts of \$100,000 to \$200,000, and 1 percent of net advertising receipts for amounts over \$200,000. Television stations with net receipts of \$1 million to \$4 million would be subject to license fees of \$750, and \$1,500 for receipts over \$4 million. Commercial users, such as bars and restaurants, would pay \$100 each year for each location in which sound recordings are used. Blanket licenses for all other users (with the exception of jukebox operators) would be established by the Copyright Royalty Tribunal within 1 year after the bill takes effect. Under the prorated per-use license, the CRT would determine the amount based on the extent of a licensee's use of recordings, with a maximum of 1 percent of gross receipts for radio and television broadcasters, and 2 percent for all other users.⁸⁷

Arguments for and Against Performance Rights

Broadcasters argue that performance royalties would pose a financial burden so severe that stations would be forced to choose high-income programming and abandon or curtail certain kinds of programming, such as public service or classical programs, that do not generate a set amount of advertising revenue. They further argue that they compensate performers with free air time, thus promoting record sales and increasing the popularity of the artists. Furthermore, the broadcasters argue that a performance right would only exacerbate any injustices in the status quo by increasing the income only of those who are already working and not those who are struggling to find work.

Performers, on the other hand, argue that even if they do benefit from free airplay, broadcasters nevertheless derive a commercial benefit from the performance, and performers are entitled to be compensated for that use. They argue that broadcasters rarely announce the names of songs over the air, much less the names of the artists performing the songs. They further argue that by allowing broadcasters to use their music on the air, they risk overexposing their works. In this situation performers argue that they are being forced to compete with, and risk being driven out of work by, their own recorded performances. They argue that if it were not for the widespread availability of their recordings, they would have many more opportunities to perform their works in person. Broadcasters argue, on the other hand, that a

⁸⁷For more information, see U.S. Congress, House Judiciary Committee, *Performance Rights in Sound Recordings*, op. cit., footnote 90, U.S. Congress, House Judiciary Committee, *Performance Rights in Sound Recordings*, op. cit., footnote 90, pp. 100-105, 114-117, 254-259, 328-351, 366-369, 570-576, and 580-589.

performer cannot possibly perform in person as many times as a recording is played over the radio and that airplay promotes, rather than substitutes for, live performances.

The performers also argue that the many background singers or instrumentalists in the band, who are also part of the recording, are not given any credit on the air. They believe that a performance right would provide at least some compensation to these performers since the proposed royalty would distribute equal income to all performers regardless of their role in the recording.

ROYALTIES FROM HOME TAPING

Proposals for a Home-Taping Levy in the United States

Much of the debate on home copying has focused on imposing some type of levy scheme to compensate rights holders for the imputed losses they suffer from the widespread availability and convenience of recording technologies. The U.S. music community has repeatedly proposed that a levy be imposed on blank tapes as well as on the recording equipment itself to compensate artists and others for losses due to home taping. The income generated from this levy would be distributed as royalties among those involved in the creation of recordings – the composers, authors, musicians, artists, and record companies, as well as the producer and/or production company. One proposed blank-tape levy scheme and the proposed system for allocating the royalties generated by it, are discussed in detail in box 5-E.

Proponents of a levy scheme for the United States often point to the international

scene, where levy schemes are already in use. They further argue that if American artists are to expect to be rightfully compensated for exported music products, then it is imperative that the United States impose some sort of reciprocal system so that other countries will be able to receive compensation for their works distributed in the United States. It is important to note, however, that international levy schemes will not have the same results in the United States that they have in European countries because of the political, legal, social, and commercial/market differences that exist within the various societies.⁸⁸

International Perspectives on Tape Levies

At the time of this writing, no retrospective comparative or evaluative studies examining existing levy schemes were available to OTA. Several of the levy schemes have been put into effect fairly recently, and an adequate period of time has not yet elapsed to yield a comprehensive or definitive evaluation of their long-term effects. Some figures have been released as to how much revenue has been collected by the various countries, however, and available statistics are incorporated wherever appropriate (see also tables 5-1 and 5-2). Efforts continue abroad to implement home-copying fees for audio and video copying.⁸⁹ The following sections spotlight some of the systems that have been put into place.

France

Under French copyright law, right holders (authors, performers, and producers) are granted the right to receive fair compensation

⁸⁸Mike Grubbs, Tandy Electronics, letter to OTA, Apr. 27, 1989.

⁸⁹For example, an amendment to the Netherlands' copyright law has been proposed to introduce a blank-tape fee. (*Intellectual Property in Business Briefing*, vol. 1, Issue 4, May 1989, pp. 3-4.)

Box 6-C—How Performance Royalties Are Distributed in Other Countries'

England – England guarantees the right of public performance for sound recordings to the producers of the work, but not to the performers appearing on the recording. Performers are, however, protected by criminal laws, which impose sanctions on those who violate the performer's right to public performance. Producers and performers assign their performance rights to Phonographic Performance Limited (PPL), which then licenses this right to users. PPL negotiates sound recording licensing fees with broadcasters and other users of copyrighted music.

Under British law, performers from other countries have no intellectual property rights in the public performance of their works, and thus, England does not make payments for the public performances of U.S. records either, although some companies do pay their American affiliates through contract.

Denmark – Like most European countries, Denmark does not consider performing rights for sound recordings a direct copyright, but rather a "neighboring" or "related" right. As such, the performance right is granted for a term of 25 years, rather than for the full term of copyright, which is life plus 50 years.

Denmark has strict rules regarding the eligibility requirements of performers and producers making claims to a share of the performance royalties. To receive remuneration for the public performance of their copyrighted works, copyright owners must become members of GRAMEX, the Danish collecting society, which represents the interests of the copyright holders in licensing negotiations with broadcasters and other users of copyrighted music.

Revenues from the royalty scheme are divided equally between the performer and the producer. Performers, however, are responsible for paying two-thirds of the administrative costs, since the calculation of performers' royalties requires more time and effort than that of producers' royalties. Payments to producers are transferred to the national recording-industry group, which then makes payments to individual labels based on record sales. Foreign producers receive payments either through Danish subsidiaries or affiliates.

West Germany – Like Denmark, West Germany treats the performance right as a secondary right and not as an exclusive right, thereby limiting protection to 25 years rather than the full term of copyright. But unlike other countries, West Germany recognizes the performer as the primary copyright holder of a sound recording, although the producer is eligible to share in the proceeds.

West Germany's system of collecting and distributing performance royalties is similar to that of most countries in that the copyright owner assigns his rights to a performance right society, which in turn, licenses this right to broadcasters and other users of copy-righted music. But whereas most other countries calculate payments on the basis of air play or play time, West Germany does not. This eliminates the high administrative costs associated with having to determine airplay. This type of system, however, does have implications for the distribution of royalties among foreign nationals. Because most countries do not determine payments based on the author's recording-related earnings as in West Germany, it is hard to compare systems.

¹Material for this section is taken from: U.S. Congress, House Judiciary Committee, *Performance Rights in Sound Recordings*, op. cit., footnote 90, pp. 178-186, 195-202, 202-207.

for the private reproduction of their copyrighted recordings.⁹⁰ In December 1986 the French Government imposed a levy on both audiotapes and videotapes. The levy is set at 1.50 FF (25 cents) per hour playing time for

audiotapes and 2.25 FF (37 cents) per hour playing time for videotapes. Seventy-five percent of income is distributed to the individual right owners; the remaining 25 percent must be used for the promotion of audio/

⁹⁰Material for this section was taken from: Yvonne Burckhardt, "Legislation On Private Copying in Europe and Its Implementation," lecture given by the General Secretary of FIM in Zurich, June, 1988; and Yvonne Burckhardt, "New' Right of Performers" (Zurich, Switzerland: International Federation of Musicians, March 1987).

Box 6-D- Copyright Clearance Center¹

One example of a U.S. organization that collects royalties for private copies is the Copyright Clearance Center (CCC). Although the CCC (to date) has focused on distributing income from licenses for photocopying rights, representatives feel that the CCC could also be adapted to the distribution of income from a home-copying levy.²

The Copyright Act of 1976 grants copyright owners the exclusive right to distribute and reproduce their published works; thus, the law requires that users of copyrighted materials first obtain permission from the copyright owners before making copies beyond the "fair use" principle, subject to exemptions for reproductions by libraries and archives.³ The task of obtaining permission beforehand, however, can be timeconsuming and inefficient on an individual basis. The CCC estimates that over 800 million pages of photocopies are made from copyrighted works each year by major corporations, and that most U.S. corporations rarely, if ever, obtain permission for their general photocopying needs.⁴

The CCC was established as a nonprofit agency in 1977 by publishers, authors, and users of photocopies in response to the needs of businesses requiring the immediate use of information. It was designed to accelerate the process of obtaining copyright permission while compensating copyright owners for copies of their works.

The CCC operates two services: 1) the Transactional Reporting Service, where each organization keeps track of how many copies are made of each work, and pays a license fee based on the number of transactions; and 2) the Annual Authorizations Service, a blanket license in which the company makes a single payment for authorization to make limitless copies of the works covered by the CCC.

The Transactional Reporting Service is designed to serve the needs of smaller organizations that only occasionally make copies of copyrighted material. Users of this service are required to record the number of copies made of specific works. Because users must record and report all copies made within the year, there are enormous administrative costs both in time and in effort.

The Annual Authorizations Service was established in 1983 in response to the needs of major U.S. corporations that reproduce substantial amounts of copyrighted material. The list of participants in this service has grown to 75 and includes several large corporations. A license obtained through this service permits organizations to make as many copies of participating publications as needed without the administrative burden of having to record each transaction. Projected annual use is calculated from the surveys by using statistical models. This service is currently the major source of payments to the CCC.

The licenses are granted for 1 year and are renewable for a second. The cost of the license is based on data from copying surveys conducted at corporate sites. According to Eamon T. Fennessey (President, CCC) the cost of these licenses can range from five to six figures.⁵ Corporations are limited to copying articles, journals, and parts of books; the copying of an entire book is prohibited. Licenses are granted for copying publications that are registered with the service and apply only to copies made for internal use.

Over 900,000 publications of approximately 6,200 publishers are currently registered with the CCC.⁶ By joining, a publisher designates the CCC to act as agent for those works that the publisher registers. No royalty can be collected for the copying of a work not registered. The CCC is responsible for licensing a nonexclusive right to corporations, handling license renewals, and processing publication additions, deletions, and fee changes. The fees are stated by the publisher, who receives reports on billings and collections as well as on each participating corporation's projected use of the publisher's works.

One stated goal of the CCC is to increase corporations' awareness of copyright protection. The CCC is a member of the International Federation of Reproduction Rights Organizations and shares rights agreements with international organizations such as the Copyright Licensing Agency in England, Centre Francais du Copyright in France, and Copyright Agency Ltd. in Australia. It also has agreements with West Germany and Norway.

Continued on next page

The CCC is currently considering collecting royalties for the copying of computer software, the copying of textual and database material by any type of technology via electronic access, and the collecting of royalties from universities and government bodies.

¹Material for this section is taken from: "Income from Copying," and "Publishers' Executive Summary: Royalty Payments Owed Under U.S. Law to Publishers World-Wide for Photocopying in U.S.A.)" pamphlets published by the Copyright Clearance Center, and Edwin McDowell, "Royalties from Photocopying Grow," New York *Times*, June 13, 1988.

²representative, personal communication, Apr. 28, 1989.

³Title 17, U.S. Code, Section 108.

"publishers' Executive Summary: Royalty Payments Owed Under U.S. Law to Publishers WorldWide for Photocopying in the U. S.A.," op. cit., footnote 1 above.

⁵McDowell, Op. Cit., footnote 1.

WCC representative, personal communication, April 28, 1989.

audiovisual productions and live performances. The proceeds of this levy are paid to a collecting society to be distributed among the various copyright holders: authors receive one-half of the proceeds from the audiotape levy, with the performers and producers sharing the remaining half equally between them. Proceeds from the videotape levy are distributed equally to all three parties.

Revenue from France's blank-tape levy boosted the gross income of the Societe des Auteurs, Compositeurs, et Editeurs de Musique (SACEM), the French authors' society, by 9.5 percent to 1.84 billion francs (\$305.9 million) in 1987.⁹¹ Of this amount, 1.23 billion francs (\$203.6 million) were collected in performance income, an increase of 7.3 percent over 1986, and 615 million francs (\$101.8 million) in mechanical income, up 14.3 percent from the previous year. Revenue

from the blank-tape levy itself amounted to 68.2 million francs (\$1.28 million) of the mechanical rights income. Of the 1.84 billion francs collected, 1.3 billion francs (\$215 million) were distributed among approximately 50,000 authors, composers, and publishers for the performance of about 450,000 works.

In 1988, France collected 400,860,313 francs (\$63,377,125) from its blank-tape levy. Of this amount, 103,185,757 (\$16,313,954) came from its audiotape levy.⁹²

The recent addition of the blank-tape levy was partially offset by the reduction of the value-added taxes (VAT) on both prerecorded and blank videocassettes and audiotapes.⁹³ The recording industry believes that this reduction will result in less revenue for the copyright holders, which runs counter to the aim behind the blank-tape levy. They feel that instead of focusing on the producers of blank

⁹¹The following is taken from Mike Hennessey, "Tape Levy Helps Lift SACEM Income," *Billboard*, vol.100, No. 30, July 23, 1988, p. 60.

⁹²J. L. Tournier, President, SACEM/SDRM, letter to OTA, May 25, 1989 (enclosures 1-3: IFPI tables).

⁹³Material for this section was taken from: Philippe Crocq, "French To Cut VAT Rates for Cassettes: Move Affects prerecorded Videos, Blank Audiotapes," *Billboard*, vol. 100, No. 43, Oct. 22, 1988, p. 91; and Philippe Crocq, "French VAT Cut on Prerecorded Vial: Not All It Was Cracked Up to Be," *Billboard*, vol. 100, No. 49, Dec. 3, 1988, p. 53.

Box 5-E-Details of Proposed Blank-Tape Levy in S.1739

A bill was proposed in the 99th Congress, S. 1739, to amend Title 17 of the U.S. Code with respect to home audio recording and audio recording devices. If enacted, the Home Audio Recording Act would legalize the home taping of copyrighted music in exchange for a modest levy on both the recording equipment and blank tapes. The one-time levy would be imposed on equipment and blank-tape manufacturers and importers and would be distributed through the Copyright Royalty Tribunal to the appropriate copyright holders of the recorded materials.

Determination of the Royalty Rate: The Home Audio Recording Act would require manufacturers and importers of recording equipment and blank audiotapes to pay a one-time levy per unit on the first sale or distribution of their product in the United States. The levy for audio recording devices would be set at 5 percent of the price for the first domestic sale, 20 percent of the price charged for dual audio recording devices, and 1 cent per minute of the maximum playing time or a fraction thereof in the case of blank media.

These fees would be subject to adjustment every 5 years, contingent on many different factors, among them, the following

1. the value to the individual of the right to reproduce copyrighted works;
2. the compensation that would have been received by the copyright holders if home copying were not possible;
3. the benefits derived by the consumers, manufacturers, and importers from the use and distribution of these audio-recording devices or media;
4. the projected impact on both copyright owners and consumers, as well as the impact on the structure and financial condition of the various industries involved; and
5. the relative roles of copyright owners, importers, and manufacturers with respect to creative and technological contribution to the development of sound recordings and musical works.

Other factors to be considered would include the objective of maximizing the creation of new sound recordings and musical works, reasonable estimates of the amount of audio recording devices or media not used for infringing purposes, and the development of new technologies for making audio recordings for private use.

Because these factors would be constantly changing, it might be necessary to distinguish among different kinds of audio recording devices or audio recording media and to establish different levies to ensure fair compensation to the copy-right holders.

Collection of the Royalties: The royalties from the levy would be collected by the Register of Copy-rights, to be deposited into the Treasury of the United States after reasonable administrative costs had been deducted. This pool of money would then be invested in interest-bearing U.S. securities, ultimately to be turned over to the Copyright Royalty Tribunal for distribution.

Administration of the Royalty System: The monies collected from the compulsory license fee would be distributed every year. The Copyright Tribunal would specify a 30-day period in which any person entitled to receive part of the royalty would file a statement of account for the previous year. To be eligible to receive a share of the royalty fees, the claimant would have to be the owner of the copyright of a musical work or sound recording that was included in either radio or television transmissions, or distributed to the public in the form of phonorecords or copies.

The claimants would then have to negotiate in good faith among themselves in an effort to reach a voluntary agreement on the distribution of the royalties. A number of options could be exercised in the negotiations—claimants might agree to the proportionate division of compulsory licensing fees among themselves, they might consolidate their claims and file them jointly or as a single claim, or they might appoint a common agent to receive payment on their behalf.

The Tribunal would then have to determine whether a controversy existed among the claimants over the distribution of the royalties. If no such controversy appeared to exist, the Tribunal would distribute all royalties, less administrative costs, to the entitled copyright holders, or to their designated agents. If a controversy did exist, the Tribunal would conduct an evidentiary proceeding to determine how the royalties should be distributed. All involved parties would be given the opportunity to present their views to the Tribunal. In the meantime, the Tribunal would be allowed to distribute all fees that were not in contention, as long as it withheld an amount sufficient to satisfy all claims still in dispute.

Continued on next page

The Tribunal would be responsible only for the first phase of royalty distribution, to the owners of the two copyrights encompassed in every recorded tune: the musical composition and the sound recording. The monies collected from the implementation of this bill would then be shared among all others responsible for the creation and production of a musical work on the basis of negotiated contractual agreements.

Proposal of the Music Community: The music community, consisting of record companies, songwriters, music publishers, and performers developed a model for the sharing and distribution of the home-taping royalties generated by this bill, which they believed would be fair and reasonable to all parties involved. They argued that their plan would ensure just compensation to those whose works were being reproduced without authorization and would provide incentives for the creation and dissemination of new musical works. To accomplish this goal, they proposed that a Musical Arts Endowment be created for the benefit of aspiring songwriters, musicians, and vocalists whose works have not yet been published or recorded. They also proposed that Creative Incentive Grants be awarded to those whose recorded works had not yet achieved widespread popularity.

Distribution of the Royalties: The first step in the proposed distribution system, after the royalties had been turned over to the Copyright Royalty Tribunal, would be to allocate 2 percent of the royalty pool to the Musical Arts Endowment to encourage and nurture new songwriters and recording artists, and to promote the development of new and experimental types of music. The money would be divided equally between The Songwriters Guild Foundation (for lyricists and composers) and the National Endowment for the Arts (for aspiring vocalists and musicians).

The remaining royalties would then be distributed among both copyright holders of the musical composition and sound recording and the union organizations representing musicians and vocalists. First, 2 percent of the royalties would be designated for funds to support musicians and vocalists (funds now in existence or to be established by the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA). Of that 2 percent, 1 3/4 would be assigned to AFM funds and 1/4 assigned to AFTRA funds.

The remaining royalties would be divided between the two copyright pools. Twenty-three percent of the royalties would be allotted to the Musical Composition Pool to be distributed among the lyricists, composers, and publishers, and 75 percent of the royalties would be allotted to the Sound Recording Pool to be distributed among the recording artists and record companies.

Each of these copyright pools would be further divided into separate funds—the airplay and record-sales pools. An annual survey would be conducted to determine what proportion of the royalties would be used to compensate copyright holders for their losses based on the amount of airplay a musical recording had received and for the sales that the recording had enjoyed. The royalties would be divided between these two funds based on the percentages dictated by the survey.

The airplay funds in both copyright pools would further be weighted to reflect the size of the audience. Either ASCAP or BMI would be able to provide the necessary information to achieve the appropriate weights. Both societies have developed their own formulas for distributing royalties to the appropriate copyright holders for the public performances of live music and music performed over the radio or television.

The weighting of the record sales pool would take into account the different economic impact that home taping would have if it displaced the sale of a front-line album as compared with the sale of a budget-line album. To account for the differential in loss, weighting would be done based on the price category of the phonorecord. The necessary pricing information could be obtained from record companies.

Of these royalties, 80 percent would be based on direct proportion and 20 percent on Creative Incentive Grants. These grants would be awarded to those most in need of additional incentives. Creative Incentive Grants would encourage the creation and dissemination of new musical works and would benefit creators, record companies, and music publishers. Eligibility for a Creative Incentive Grant would be determined on the basis of the total previous payments made on a proportional basis from the royalty pools for each musical recording. Those receiving the lowest percentage would be eligible for grants.

¹See U.S. Congress, Senate Judiciary Committee, *Home Audio Recording Acts* hearings before the Committee on the Judiciary and its Subcommittee on Patents, Copyrights, and Trademarks, Serial No. J-99-69, Oct. 30, 1985, Mar. 25 and Aug. 4, 1986.

tapes, the finance ministry should target the audio and video carriers. They suggest that the VAT rate be cut on records and prerecorded tapes, from 18 to 7 percent, so that the recording industry can continue its economic growth. It is estimated, however, that a cut in the VAT rate on records and prerecorded tapes would cost the government \$315 million a year in lost revenue.⁹⁴

Officials from the French IFPI (International Federation of Phonographic Industries) group, Syndicat National de l'Édition Phonographique (SNEP), also fear that tax reductions for blank audiotapes could further harm the recording industry, although they believe the reduction for videotapes may help spur sales of the new CD video format. A similar cut in VAT for recorded and prerecorded tapes in December of 1987 has been generally perceived as having helped revive the commercial record industry.⁹⁵

Australia⁹⁶

Australia is the first English-speaking country to approve a blank-tape levy. After a decade of lobbying by the record industry, the Australian Government imposed a blank-tape levy on audiotapes and legalized home taping of audio recordings. The Australian Government will not receive benefits from the levy, nor will it be responsible for its administration. A nonprofit agency monitored by the Australian Contemporary Music Development Co. has been established and a board of directors, chosen from the entertainment industry, has been appointed to administer collection and distribution of the levy. The initial

funding was provided by the Department of Employment, Education, and Training, and it is expected that 15 percent of the revenues generated from the blank-tape royalty will be used to fund the program.

Royalties will be distributed on the basis of already existing systems designed to calculate the amount of sales and airplay a particular recording enjoys. The amount of the levy has not yet been determined, but it is expected to be in the range of 20 to 50 Australian cents for each 60-minute cassette sold. Special exceptions will be made for groups and individuals who will not be using blank tapes to copy copyrighted music — groups such as schools and institutes for the blind. The Australian Record Industry Association estimates that the levy will raise millions of dollars, but much less than the 30 million Australian dollars per year that the recording industry claims to lose because of home taping.⁹⁷ Most of the royalties will be distributed to Australian artists, although royalties will also be distributed to those countries that operate under the same type of royalty system, including West Germany and France. The United States and England, although major suppliers of foreign music, will not be eligible to receive any revenues since they do not have reciprocal arrangements with Australia.

Belgium⁹⁸

In Belgium, a proposed levy on blank tapes would be based on 8 percent of the retail price of a blank tape. Revenues generated from this levy would be divided into equal parts, with

⁹⁴Crocq, "French To Cut VAT Rates for Cassettes: Move Affects Prerecorded Videos, Blank Audiotapes," *op. cit.*, footnote 93, p. 91.

⁹⁵*Ibid.*

⁹⁶Material for this section is taken from Glenn A. Baker, "Australian Gov't Approves Blank-Tape Royalty Plan," *Billboard*, vol. 100, No. 24, June 11, 1988, p. 76; and Debbie Krueger, "Oz Imposes a Blank-Tape Levy Giving Royalties to Disk Artists," *Variety*, vol. 331, No. 6, p. 84, June 1, 1988.

⁹⁷Krueger, *op. cit.*, footnote 96, p. 84.

⁹⁸Material for this section is taken from: Marc Maes, "Belgium Eyes Blank Tape Levy," *Billboard*, vol. 100 No. 44, Oct. 29, 1988, pp. 86, 88.

one part being distributed among the authors, artists, and manufacturers; and the other part going to the three language communities (Flemish, French, and German), who would use the money to support artists and cultural institutions in each community. The proposal also calls for an extension of the copyright period on author's works from 50 to 70 years, thereby enabling the three communities to benefit from the additional 20 years.

Belgramex, the Belgium federation of artists and manufacturers, has welcomed the proposals, but thinks that the levy should be based on the actual playing time of the tape, rather than the retail price. It would also like to see a levy on recording equipment. Belgramex believes that the revenues should be used to compensate those that are harmed (the manufacturers, artists, and authors) rather than distributed to the three language communities. It will be some time before new legislation is drafted, if at all.

United Kingdom

In England, the new Copyright, Patent, and Design Law of 1988 does not change the legality of home taping of copyrighted music, considered an infringement of copyright law.⁹⁹ Nor does the law impose a levy or tax on blank audiotape and videotape to compensate copyright owners for harms from home taping.¹⁰⁰ The British Government's decision not to support a blank-tape levy came 2 years after it had, in a "white paper," determined the imposition of a blank-tape levy to be the "best solu-

tion to the home-taping problem" and had promised to enact legislation accordingly.¹⁰¹

The U.K. Trade and Industry Minister, Kenneth Clarke, had argued that such a levy would be both "wrong and indefensible,"¹⁰² with the greatest weight falling unfairly on consumers, especially on groups such as the visually handicapped. He further argued that the inequities placed on the consumer would far outweigh any benefits resulting from the levy, with those that are already financially well-off receiving most of the benefits. In addition, he argued that administrative costs would be high and the collection and distribution of the proceeds would require a new bureaucracy.

Support for a levy was voiced by such groups as the British Music Copyright Reform Group (MCRG), the British record industry, and even the consumers themselves. The results of a U.K. opinion poll, announced on June 20, 1988 by the Music Copyright Reform Group, indicated that 60 percent of consumers regarded a 10-pence (18 cents) levy on blank tape as the best solution to the home-taping problem, 15 percent supported a spoiler device in prerecorded material, 2 percent favored prosecuting home tapers, and 23 percent had no opinion. The study also indicated that the more actively consumers are engaged in home taping, the more likely they are to support the royalty solution, which would legitimize home taping.¹⁰³

Some estimate that a home-taping royalty would produce the equivalent of \$12.25 million a year.¹⁰⁴ According to one estimate, the

⁹⁹The following is taken from: Nick Robertshaw, "U.K. Gov't Rejects Home-Tape Levy," *Billboard*, vol. 100, No. 20, pp. 3, 84; and "U.K. Kills Tape Tax," *TV Digest*, vol. 27, No. 44, Nov. 2, 1987, p. 15.

¹⁰⁰See ch. 3, pp. 35-38 for a more detailed description of the new copyright law.

¹⁰¹Robertshaw, "U.K. Gov't Rejects Home-Tape Levy," op. cit., footnote 99, p. 3.

¹⁰²Ibid.

¹⁰³Mike Hennessey, "U.K. Poll Shows Consumers Favor Blank Tape Levy," *Billboard*, vol. 100, No. 27, July 2, 1988, p. 84.

¹⁰⁴U.K. Group Urges Home Taping Levy: Musicians Join Major Drive to Win Over Gov't, " *Billboard*, vol. 100, No. 10, Mar. 5, 1988, p. 4.

recording industry suffers losses of approximately \$1.3 billion due to home taping, and 80 million of the blank tapes sold in 1987 were used to copy copyrighted music.¹⁰⁵ The MCRG estimates that 2.5 times as much music is being copied as is being sold.¹⁰⁶

Yet despite imputed home-taping losses, statistics released in 1988 by the British Phonographic Industry show that the recording industry is enjoying substantial growth and that the LP business is actually enjoying a resurgence. The sales value of shipments of U.K. recordings rose 23 percent to \$1.04 billion overall, with album sales rising 27 percent to \$887.7 million, CD sales up 75 percent to \$238.9 million, and cassette sales rising 24 percent to \$365.7 million.¹⁰⁷

Hopes were revived for a levy on May 24, 1988, when members of a parliamentary committee voted 12-10 in favor of an amendment empowering the government to introduce the controversial levy.¹⁰⁸ However, the House of

Commons approved a government amendment rejecting the levy provision, on June 25, by a vote of 134 to 37.¹⁰⁹ The MCRG then took its fight for a levy to the European Economic Community (EEC), with the aim of lobbying the EEC to adopt the levy solution.¹¹⁰ But the EEC, in a "green paper," decided instead that each government should follow its own views on the issue.¹¹¹

Canada¹¹²

The Canadian Government recently replaced its 1924 Copyright Act with a new act that grants artists the right to control their works and extends copyright protection to computer programs as well.¹¹³ The Copyright Act of 1924 contained provisions for a "compulsory" license, whereby recording companies could automatically obtain the right to record any song made and sold in Canada simply by paying a statutory royalty of 2 cents per playing surface.

¹⁰⁵Nick Robertshaw, quoting Simon Coombs, Conservative Parliament Member, "U.K. Gov't Rejects Home-Tape Levy," *op. cit.*, footnote 99, p. 3.

¹⁰⁶"U.K. Group Urges Home Taping Levy: Musicians Join Major Drive to Win Over Gov't," *Billboard*, vol. 100, No. 10, March 5, 1988, p. 4.

¹⁰⁷Peter Jones, "U.K. Sales Belie Dire Predictions: Despite Problems, Music Biz Shows Growth," *Billboard*, vol. 100, No. 22, May 28, 1988, pp. 1, 83.

¹⁰⁸Nick Robertshaw, "Hopes Revived for U.K. Tape Levy," *Billboard*, vol. 100, No. 24, June 11, 1988, p. 76.

¹⁰⁹Mike Hennessey, "U.K. Commons Rejects Tape Levy: IFPI Decries 'Moral Injustice'," *Billboard*, vol. 100, No. 31, Aug. 6, 1988, p. 3.

¹¹⁰J. J. Coopman, "Two Setbacks Hit U.K. Struggle for Blank Tape Levies," *Variety*, vol. 332, No. 5, Aug. 24, 1988, p. 104.

¹¹¹Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology — Copyright Issues Requiring Immediate Action*, COM (88) 172 final, Brussels, June 7, 1988.

¹¹²Material for this section is incorporated from: Earl Green, "Canada at Long Last is Replacing Copyright Act around since 1924," *Variety*, vol. 331, No. 8, June 15, 1988, p. 31; Kirk LaPointe, "Canada Passes Copyright Reforms," *Billboard*, vol. 100, No. 24, June 11, 1988, pp. 1, 78; Kirk LaPointe, "Commons: 'No More Delay' — Reform Bill Returns to Senate," *Billboard*, vol. 100, No. 22, May 28, 1988, p. 75; Kirk LaPointe, "Copyright Act Opens Door for New Mechanical Rates," *Billboard*, vol. 100, No. 26, June 25, 1988, p. 71; Kirk LaPointe, "New Elections Kill Broadcast Plan: Deal to Scrap Tariffs on Hold," *Billboard*, vol. 100, No. 42, Oct. 15, 1988, p. 72; Kirk LaPointe, "Senate Blasted for Copyright Stand: CRIA Head Decries 'Cultural Assassins'," *Billboard*, vol. 100, No. 21, May 21, 1988, p. 66; Kirk LaPointe, "Senate Digs In: Showdown May Loom on Copyright Bill," *Billboard*, vol. 100, No. 12 Mar. 19, 1988, p. 84; Kirk LaPointe, "Senate: 'No Deal on Copyright Bill' — Reform Advocates Suffer Major Setback," *Billboard*, vol. 100, No. 20, May 14, 1988, p. 70; Kirk LaPointe, "Senate Softens on Copyright Amendment Issue," *Billboard*, vol. 100, No. 23, June 4, 1988, p. 58; Chris Morris, "Canada Nears Mechanical Rates," *Billboard*, vol. 100, No. 30, July 23, 1988, pp. 1, 76; OTA staff interview with and materials received from the Canadian Musical Reproduction Rights Agency Ltd.

¹¹³See ch. 3, pp. 38-39 for a detailed description of the new copyright law.

The new Copyright Act gives publishers the right to grant a license on terms and at a rate stipulated by them, or to refuse to issue a mechanical license. The new act also provides a system to help writers and publishers negotiate and collect copyright fees. The 2-cent-a-song compulsory license has been abolished, giving creators and record companies the opportunity to negotiate new rates that are in line with rates in other countries.¹¹⁴

In addition, the new Copyright Act provides harsher penalties for copyright infringement. The previous maximum penalty was a \$200 fine. It is now set at \$25,000 and 6 months in jail on summary indictment and \$1,000,000 and 5 years in jail upon conviction on indictment.

The second installment of copyright legislation is expected to deal with the home copying of records, videotapes, and computer programs, the distribution of royalties from video rentals, cable fees for retransmission, and copyright protection for computer chips.

The recording industry, arguing that home taping has deprived them of millions of dollars in revenues, has fought long and hard for revisions to the old Copyright Act. The results of a recent consumer survey commissioned by the Music Copyright Action Group, which includes the country's leading trade organizations, indicate that home-taping losses to the recording industry may exceed \$600 million (Canadian) or 68 million in unit album sales.¹¹⁵ Previous studies estimated losses between \$50 million and \$100 million.¹¹⁶ In this first-ever consumer survey by the music busi-

ness, approximately 60 questions were asked of about 500 people in telephone conversations that averaged about 14 minutes. The findings revealed not only high incidence of home taping (63 percent of those surveyed in the 15 to 54 age group had made a home tape within the previous year), but also strong support for compensation to the copyright owner for income lost due to home taping, with the heaviest tapers favoring a blank-tape levy.

Despite these estimated losses, the Canadian recording industry has enjoyed its fifth straight year of revenue growth. The results of a Statistics Canada study¹¹⁷ show that in the year ending March 1987, both Canadian imports and exports had increased substantially and the industry experienced a 10.5 percent increase in revenues, despite a decline in the market share of albums, from 78 to 31 percent, with a slight rise in the market share for cassettes. CD sales tripled from 4 to 12 percent, providing the major boost in revenues.

Other Countries¹¹⁸

Hungary. - Hungary imposed a levy on blank tapes in 1983 that amounts to 8 percent of the selling price of a blank tape. Revenues from the levy system are distributed among the copyright holders of recordings, with 50 percent going to the authors, 30 percent to the performers, and 20 percent going to the producers of audio recordings. In the case of video recordings, 70 percent is distributed to the authors and 30 percent to the performers. The performers' shares are not individually

¹¹⁴After months of negotiation, the new mechanical rates (in effect until October 1990) were fixed at 5.25 Canadian cents per track for all records sold after Oct. 1, 1988, regardless of when the record was released. Extended works of more than 5 minutes will receive 1.05 cents for each additional minute or fraction thereof.

¹¹⁵Canadian Independent Record production Association (CIRPA), *A Study On Home Taping*, prepared on behalf of The Music Copyright Action Group, ISBN 0-921777-02-7, 1987.

¹¹⁶ & Kirk LaPointe, "Canada Study: Copying Is Rampant," *Billboard*, vol. 100, No. 12, Mar. 19, 1988, pp. 1, 106.

¹¹⁷Kirk LaPointe, "Stats Canada Surveys 8&87 Music Scene: Report Reveals Overall Strengthening of Industry," *Billboard*, vol. 100, No. 31, July 30, 1988, p. 62.

¹¹⁸Material for this section taken from: Yvonne Burckhardt, "Legislation on private Copying in Europe and Its Implementation," and Yvonne Burckhardt, "New Rights of Performers," op. cit., footnote 90.

distributed, but rather used for social purposes.¹¹⁹ The Bureau for the Protection of Authors' Rights collects the revenues from the levy and then transfers the amount due performers to the Association of Hungarian Art Workers' Unions, which distributes the funds. The purpose of the Association is to provide support to the profession, to performers of all ages, and to sponsor study trips, scholarships, festivals, etc.

Iceland.¹²⁰ - Iceland introduced a levy on blank audiotapes and videotapes, as well as on recording equipment in 1984. The levy was set at 10 Icelandic Kronen (19 cents) for audiotapes and 30 Icelandic Kronen (57 cents) for videotapes. The recording equipment is levied at four percent of the import price or the manufacturing price. Eighty-five percent of the total revenue collected is distributed; the remaining 15 percent is put into a cultural fund supervised by the Ministry of Education. The proceeds from the audiotape levy are collected by one body, and distributed to the performing artists and producers (46 percent), music authors (46 percent), and lyric writers (8 percent). The performers' share is deposited into a fund for the promotion of the profession, particularly for music schools.¹²¹

West Germany. - West Germany has a levy on blank tapes in addition to one on recording equipment. Erich Schulze, President and General Manager of Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), has commented that the introduction of a blank-tape levy has not had a negative impact on the competitive situation of West German or foreign tape manufacturers. On the contrary, he

asserts that product sales have risen steadily, while retail prices have actually declined considerably.¹²²

The levy is set at 2.50 Deutsche marks (\$1.35) for audio recording equipment, 18 DM (\$9.78) for video equipment, .12 DM (6 cents) per hour of recording time for audiocassettes, and .17 DM (9 cents) per hour of recording time for videocassettes. Revenues from this system, which took effect July 1, 1985, are distributed among the various collection societies for music authors (42 percent), performers and producers (42 percent), and lyric authors (16 percent). Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL), the performance rights society, distributes the proceeds according to the same scheme used for the distribution of revenues from the broadcasting of commercial records, with the performers receiving 64 percent of the share and the producers receiving the remaining 36 percent.

In 1985, West Germany collected 50 million DM (\$27,174,000), 16 million DM (\$8,695,000) of it in the audio field and 34 million DM (\$18,000,000) of it in the video field. Of this amount, the performing rights society received 3.9 million DM (\$2.1 million) from its audio recording equipment levy, and 2.4 million DM (\$1.3 million) from its blank-audiotape levy. In addition, GVL received 4.5 million DM (\$2.4 million) from its video equipment levy, and 2.1 million DM (\$1.1 million) from its blank-videotape levy. Of this amount, the performers received 64 percent and the producers 36 percent, which resulted in 8.2 million DM (\$4.4 million) being distributed among the performers.¹²³

¹¹⁹J. L. Tournier, op. cit., footnote 92, table 2.

¹²⁰The following section is taken from J.L. Tournier, op. cit., footnote 92, table 2.

¹²¹Yvonne Burckhardt, "Legislation on Private Copying in Europe and Its Implementation," op. cit., footnote 90, p. 10.

¹²²Erich Schulze, president and General Manager, GEMA, letter to OTA, June 7, 1989.

¹²³Yvonne Burckhardt, "Legislation on private Copying in Europe and Its Implementation," op. cit., footnote 90, pp. 5-6.

In 1987, West Germany collected 93,500,000 DM (\$50,080,343) in total blank-tape revenues; 28,600,000 DM (\$15,318,693) in the audio field.¹²⁴

Sweden. – Sweden, unlike the other countries discussed above, has introduced a tax system on blank tapes, in which the revenues collected from the tax go to the government, which decides what to do with the funds. The rate is set at 1.50 SKr (23 cents) per audiotape, and 15.00 Skr (\$2.35) per Videotape.¹²⁵ Two-thirds of the revenues collected are used for unspecified purposes; 80 percent of the remaining one-third is put into a cultural fund and the remaining 20 percent divided among the author (40 percent), performer (30 percent) and the producer (30 percent). The revenues due the performer are transferred to the performers' collection society (SAMI), which deducts half for administration costs and divides the other half according to the same scheme used for distributing revenues from the broadcasting of records. This leaves the performer with a relatively small share of the

revenues from the tape tax.

In 1986, the performers' collecting society, SAMI collected 900,000 SKr (\$154,800) from its tape tax, half of which was used for collective purposes and the rest distributed individually to performers.¹²⁶ From June 1987 to June 1988, Sweden collected 130,000,000 SKr (\$20,300,000) from its blank-tape tax. Of this amount, 3,000,000 SKr (\$470,000) was distributed to rights holders in the music field, and 848,000 SKr (\$132,700) to producers of phonograms. The state retained 127,000,000 SKr (19,830,000) as fiscal revenue.¹²⁷ The International Federation of Phonographic Industries notes that the amount distributed to right owners has remained unchanged for the past three years, while the total revenue collected has increased substantially.¹²⁸

Tables 5-1, 5-2, and 5-3 summarize the legislation and implementation of levies and taxes on private copying in Australia, Austria, Finland, France, West Germany, Hungary, Iceland, Norway, Portugal, Spain, and Sweden.

¹²⁴J. L. Tournier, op. cit., footnote 92, table 2.

¹²⁵Id., table 3.

¹²⁶Yvonne Burckhardt, "Legislation On Private Copying In Europe and Its Implementation," op. cit., footnote 90, P. 12.

¹²⁷J. L. Tournier, op. cit., footnote 92, table 3.

¹²⁸- - -

Table 5-1 .–Private Copying Royalties - Legislation and Implementation

Country	Date of law	Basis of royalty	Rate of royalty	Beneficiaries
Australia	Copyright Amendment Act 1989	Blank audio tape:	Not yet decided	Producers of phonograms Authors
Austria	Law No. 321 of 2 July 1980	Blank audio tape: Blank video tape:	AS 1.60/h (USD 0.12) Special rate:AS 2.40/h (USD 0.18), when no contract AS 2.56/h (USD 0.19) Special rate:AS 3.85/h (USD 0.29), when no contract.	Producers audio/video Authors Performers
Finland	Law No. 442 of 8 June 1984	Blank audio tape: Blank video tape:	FM 1.8/h (USD 0.41) FM 0.03/min FM 3.6/h (USD 0.82) FM 0.06/min	Authors Performers Producers audio/video
France	Law No. 85-660 of 3 July 1985	Blank audio tape: Blank video tape:	FF 1.5/h (USD 0.24) FF 2.25/h (USD 0.36)	Authors Performers Producers audio/video
Germany (Federal Republic)	1965 Copyright Law, as amended 23 May 1985	Blank audio tape: Blank video tape: Audio hardware: Video hardware	DM 0.12/h (USD 0.06) DM 0.17/h (USD 0.09) DM 2.50 per item (USD 1.34) DM 18.00 per item (USD 9.64)	Authors Performers Producers audio/video
Hungary	Decree No. 15 of 20 November 1982	Blank audio tape: Blank video tape:	8% of sale price 8% of sale price	Authors Performers Producers audio/video
Iceland	Law No. 78/1984 of 30 May 1984	Blank audio tape: Blank video tape: Audio hardware: Video hardware:	IK 10 per piece (USD 0.19) IK 30 per piece (USD 0.57) 4% of sale price 4% of sale price	Authors Performers Producers audio/video
Portugal	Law No. 45/85 of 17 September 1985	Blank audio tape: Blank video tape: Audio hardware: Video hardware:	to be decided	Authors Performers Producers audio/video
Spain	Law No. 22/1987 November 1987 Decree of 21 March 1988	Blank audio tape: Blank video tape: Audio hardware:	to be decided	Authors Performers Producers audio/video

Table 5-2.-Taxation on Private Copying

Country	Date of law	Basis of tax	Rate of tax	Total Revenue collected	Amount distributed to right owners	Amount retained by State as fiscal revenue
Norway	Law No 74 entered into force on 1 January 1982	Blank audio tape:	NOK 3.00 per tape (USD 0.44)	1988 tape levy NOK 45,000,000 (USD 6,621,900)	NOK 25,000,000 (USD 3,679,180) (NOK 4,000,000 or USD 588,600 for producers of phonograms)	NOK 15,000,000 (USD 2,207,500)
		Blank and pre-recorded video tapes:	NOK 15.00 per tape (USD 2.21)			
		Recording equipment: (audio/video)	N/A	Hardware: audio/video NOK 65,000,000 (USD 9,585,000)	Nil	NOK 65,000,000 (USD 9,565,000)
Sweden*	Law of 24 June 1982 (came into force 1 July 1982)	Blank audio tape:	SK 1.50 per tape (USD 0.23)	June 87/June 88 SK 130,000,000 (USD 20,300,000)	SK 3,000,000 (USD 470,000) to right owners in the music field including SK 848,000 (USD 132,700) to producers of phonograms	SK 127,000,000 (USD 19,830,000)
		Blank and pre-recorded video tapes:	SK 15.00 per tape (USD 2.35)			

NOTE. *It should be noted that the amount distributed to right owners has remained unchanged for the past three years whereas the total revenue collected by the State has increased substantially
Exchange rates at 13 March 1989

SOURCE: IFPI data provided by International Federation of Musicians, July 1989

Table 5-3.-Private Copying Royalties - Distribution

Country	Gross revenue	Distribution among right owners	Cultural fund/social fund
Australia	not yet implemented	Audio 2/3 producers 1/3 authors (producers have agreed to give 1/3 to performers)	15% Cultural/social fund
Austria	1988 Local currency Audio: AS 23,254,287 (USD 1,771,080) Video: AS 83,113,315 (USD 6,330,032) Total: AS 106,637,602 (USD 8,101,1 12)	Audio 17% producers of phonograms (LSG) 17% performers (recorded performances) (LSG) 3% performers (OSTIG - live performances) 63% authors (49% Austro-Mechana, 14% Literar Mechana & VG Rundfunk) Video 4% audio producers and performers (LSG) 3.9% performers (OSTIG - VBK) 14.8% authors (literary works) 28.7% authors (musical works) 22.8% film/video producers 25.8% broadcasters (VG Rundfunk)	51% of the total remuneration must be used for social and cultural purposes by collecting societies.
Finland	1987 Audio: FM 13,937,813 (USD 3,198,946) Video: FM 30,606,371 (USD 7,070,513) Total: FM 44,744,184 (USD 10,269,478)	(1/3 of total income distributed) Audio 25.5% producers of phonograms 25.5% performers 44% authors (musical works) 5% writers and publishers Video 12.8% authors (musical works) 3.2% producers of phonograms 6% recording artists 30% actors/choreographers/dancers 6% directors 12% authors (literary works) 30% journalists/interpreters/scenery and costume designers and cameramen	66% Cultural Fund for the promotion of national cultural investment in Finnish phonograms and video productions.
France	1988 Audio: FF 103,165,757 (USD 16,313,954)	(75% of income distributed to individual right owners) Audio 50% authors/publishers of musical works 25% performers 25% producers of phonograms	The collecting societies must use 25% of revenue for the promotion of audio/ audiovisual productions and live performances.

Table 5-3. - Private Copying Royalties - Distribution (continued)

Country	Gross revenue	Distribution among right owners	Cultural fund/social fund
Germany (Federal Republic)	1987 Audio: DM 28,600,000 (USD 15,318,693) Video: DM 64,900,000 (USD 34,761,650) Total: DM 93,500,000 (USD 50,080,343)	Audio 42% authors/publishers of musical works (GEMA) 269% performers (GVL) 15 1% producers of phonograms 16% authors of literary works (VG WORT) Video 21% authors/publishers of musical works (GEMA) 134% performers (GVL) 7.6% producers of phonograms (GVL) 8% authors of literary works (VG WORT) 50% film/video authors and producers	None by law but the collecting societies provide cultural funds and social welfare schemes
Hungary	Audio: FT 22,000,000 (USD 405,400) Video: N/A	Audio 20% record producers (Hungaraton) 30% performers 50% authors Video 70% authors and other copyright owners 30% performers	The share to performers must be used for social purposes and not for individual distribution.
Iceland	N/A	(85% of total revenue is distributed) Audio 23% producers of phonograms 23% performers 46% authors (musical works) 8% authors (literary works) Video Not available	15% Cultural Fund supervised by the Ministry of education
Spain	Not yet implemented	(80% of total revenue is distributed) to right owners Audio 40% authors 30% producers of phonograms 30% performers Video 40% authors 30% producers of videograms 30% performer	20% Cultural Fund