102D CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPT. 102-873 Part 1

AUDIO HOME RECORDING ACT OF 1992

SEPTEMBER 17, 1992.—Ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3204 which on August 2, 1991, was referred jointly to the Committee on the Judiciary, the Committee on Energy and Commerce, and the Committee on Ways and Means]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3204) to amend title 17, United States Code, to implement a royalty payment system and a serial copy management system for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Audio Home Recording Act of 1992".

SEC. 2. IMPORTATION, MANUFACTURE, AND DISTRIBUTION OF DIGITAL AUDIO RECORDING DEVICES AND MEDIA.

Title 17, United States Code, is amended by adding at the end the following:

"CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

"Sec.
"1001. Definitions.
"1002. Incorporation of copying controls.
"1003. Obligation to make royalty payments.
"1004. Royalty payments.
"1005. Deposit of royalty payments and deduction of expenses.
"1006. Entitlement to royalty payments.
"1007. Procedures for distributing royalty payments.
"1008. Prohibition on certain infringement actions.
"1009. Civil remedies.
"1010. Arbitration of certain disputes.

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"§ 1001. Definitions

"As used in this chapter, the following terms have the following meanings:

"(1) A 'digital audio copied recording' is a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

"(2) A 'digital audio interface device' is any machine or device that reads or sends copyright and generation status information from a digital musical recording.

"(3) A 'digital audio recording device' is any machine or device, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—

"(A) professional model products, and

"(B) dictation machines, answering machines, and other audio recording equipment that is designed or marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

"(4)(A) A 'digital audio recording medium' is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

"(B) Such term does not include any material object—

"(i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or

"(ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

"(5)(A) A 'digital musical recording' is a material object—

"(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

"(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

"(B) A 'digital musical recording' does not include a material object—

"(i) in which the fixed sounds consist entirely of spoken word recordings, or

"(ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

"(C) For purposes of this paragraph—

"(i) a 'spoken word recording' is a sound recording in which are fixed only a series of spoken words, except that the spoken words may be accompanied by incidental musical or other sounds, and

"(ii) the term 'incidental' means related to and relatively minor by comparison.

"(6) 'Distribute' means to sell, lease, or assign a product to consumers in the United States, or to sell, lease, or assign a product in the United States for ultimate transfer to consumers in the United States.

"(7) An 'interested copyright party' is—

"(A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a musical recording lawfully made under this title that has been distributed;

"(B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a musical recording a musical work that has been embodied in a musical recording lawfully made under this title that has been distributed;

"(C) a featured recording artist who performs on a sound recording that has been distributed; or

"(D) any association or other organization—

"(i) representing persons specified in subparagraph (A), (B), or (C), or

"(ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers.

"(8) To 'manufacture' means to produce or assemble a product in the United States. A 'manufacturer' is a person who manufactures.

"(9) A 'music publisher' is a person that is authorized to license the reproduction of a particular musical work in a sound recording.

"(10) A 'professional model product' is an audio recording device that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business, in accordance with such requirements as the Secretary of Commerce shall establish by regulation.

"(11) The term 'serial copying' means the duplication of a copyrighted musical work from a copy of a copyrighted digital musical recording. The term 'copy of a digital musical recording' does not include a digital musical recording that is distributed, by authority of the copyright owner, for ultimate sale to consumers.

"(12) The 'transfer price' of a digital audio recording device or a digital audio recording medium—

"(A) is, subject to subparagraph (B)—

"(i) in the case of an imported product, the actual entered value at United States Customs (exclusive of any freight, insurance, and applicable duty), and

"(ii) in the case of a domestic product, the manufacturer's transfer price (FOB the manufacturer, and exclusive of any direct sales taxes or excise taxes incurred in connection with the sale); and

"(B) shall, in a case in which the transferor and transferee are related entities or within a single entity, not be less than a reasonable arms-length price under the principles of the regulations adopted pursuant to section 482 of the Internal Revenue Code of 1986, or any successor provision to such section.

"(13) A 'writer' is the composer or lyricist of a particular musical work.

"§ 1002. Incorporation of copying controls

"(a) PROHIBITION ON IMPORTATION, MANUFACTURE, AND DISTRIBUTION.—

"(1) SYSTEM PROHIBITING COPYING.—No person shall import, manufacture, or distribute any digital audio recording device that does not contain the Serial Copy Management System or other system that prohibits serial copying of copyrighted works embodied in digital musical recordings.

"(2) DIGITAL AUDIO INTERFACE DEVICE.—No person shall import, manufacture, or distribute any machine or device that is designed or marketed for the primary purpose of, and that is capable of, playing back digital musical recordings, unless such machine or device contains a digital audio interface device.

"(b) DEVELOPMENT OF SYSTEM.—The Secretary of Commerce shall, not later than 45 days after the date of the enactment of this chapter, by regulation prescribe the requirements of the Serial Copy Management System or other system described in subsection (a)(1).

"(c) PROHIBITION ON CIRCUMVENTION OF THE SYSTEM.—No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a)(1).

"(d) ENCODING OF INFORMATION ON DIGITAL MUSICAL RECORDINGS.—

"(1) PROHIBITION ON ENCODING INACCURATE INFORMATION.—No person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording.

"(2) ENCODING OF COPYRIGHT STATUS NOT REQUIRED.—Nothing in this chapter requires any person engaged in the importation or manufacture of digital musical recordings to encode any such digital musical recording with respect to its copyright status.

"(e) INFORMATION ACCOMPANYING TRANSMISSIONS IN DIGITAL FORMAT.—Any person who transmits or otherwise communicates to the public any sound recording in digital format is not required under this chapter to transmit or otherwise communicate the information relating to the copyright status of the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

"§ 1003. Obligation to make royalty payments

"(a) PROHIBITION ON IMPORTATION AND MANUFACTURE.—No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice spec-

ified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

"(b) FILING OF NOTICE.—The importer or manufacturer of any digital audio recording device or digital audio recording medium, within a product category or utilizing a technology with respect to which such manufacturer or importer has not previously filed a notice under this subsection, shall file with the Register of Copyrights a notice with respect to such device or medium, in such form and content as the Register shall prescribe by regulation.

"(c) FILING OF QUARTERLY AND ANNUAL STATEMENTS OF ACCOUNT.—

"(1) GENERALLY.—Any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register of Copyrights, in such form and content as the Register shall prescribe by regulation, such quarterly and annual statements of account with respect to such distribution as the Register shall prescribe by regulation.

"(2) CERTIFICATION, VERIFICATION, AND CONFIDENTIALITY.—Each such statement shall be certified as accurate by an authorized officer or principal of the importer or manufacturer. The Register shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

"(3) ROYALTY PAYMENTS.—Each such statement shall be accompanied by the royalty payments specified in section 1004.

"§ 1004. Royalty payments

"(a) DIGITAL AUDIO RECORDING DEVICES.—

"(1) AMOUNT OF PAYMENT.—The royalty payment due under section 1003 for each digital audio recording device imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device.

"(2) CALCULATION FOR DEVICES DISTRIBUTED WITH OTHER DEVICES.—With respect to a digital audio recording device first distributed in combination with one or more devices, either as a physically integrated unit or as separate components, the royalty payment shall be calculated as follows:

"(A) If the digital audio recording device and such other devices are part of a physically integrated unit, the royalty payment shall be based on the transfer price of the unit, but shall be reduced by any royalty payment made on any digital audio recording device included within the unit that was not first distributed in combination with the unit.

"(B) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on the average transfer price of such devices during those 4 quarters.

"(C) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have not been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on a constructed price reflecting the proportional value of such device to the combination as a whole.

"(3) LIMITS ON ROYALTIES.—Notwithstanding paragraph (1) or (2), the amount of the royalty payment for each digital audio recording device shall not be less than $1 nor more than the royalty maximum. The royalty maximum shall be $8 per device, except that in the case of a physically integrated unit containing more than 1 digital audio recording device, the royalty maximum for such unit shall be $12. During the 6th year after the effective date of this chapter, and not more than once each year thereafter, any interested copyright party may petition the Copyright Royalty Tribunal to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Tribunal shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum.

"(b) DIGITAL AUDIO RECORDING MEDIA.—The royalty payment due under section 1003 for each digital audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 3 per-

cent of the transfer price. Only the first person to manufacture and distribute or import and distribute such medium shall be required to pay the royalty with respect to such medium.

"§ 1005. Deposit of royalty payments and deduction of expenses

"The Register of Copyrights shall receive all royalty payments deposited under this chapter and, after deducting the reasonable costs incurred by the Copyright Office under this chapter, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest under section 1007. The Register shall submit to the Copyright Royalty Tribunal, on a quarterly basis, such information as the Tribunal shall require to perform its functions under this chapter.

"§ 1006. Entitlement to royalty payments

"(a) INTERESTED COPYRIGHT PARTIES.—The royalty payments deposited pursuant to section 1005 shall, in accordance with the procedures specified in section 1007, be distributed to any interested copyright party—

"(1) whose musical work or sound recording has been—

"(A) embodied in phonorecords lawfully made under this title that have been distributed, and

"(B) distributed in the form of phonorecords or disseminated to the public in transmissions, during the period to which such payments pertain; and

"(2) who has filed a claim under section 1007.

"(b) ALLOCATION OF ROYALTY PAYMENTS TO GROUPS.—The royalty payments shall be divided into 2 funds as follows:

"(1) THE SOUND RECORDINGS FUND.—66⅔ percent of the royalty payments shall be allocated to the Sound Recordings Fund. 2⅚ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians or any successor entity) who have performed on sound recordings distributed in the United States. 1⅚ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States. 40 percent of the remaining royalty payments in the Sound Recordings Fund shall be distributed to the interested copyright parties described in section 1001(7)(C), and 60 percent of such remaining royalty payments shall be distributed to the interested copyright parties described in section 1001(7)(A).

"(2) THE MUSICAL WORKS FUND.—

"(A) 33⅓ percent of the royalty payments shall be allocated to the Musical Works Fund for distribution to interested copyright parties described in section 1001(7)(B).

"(B) Notwithstanding any contractual obligation to the contrary—

"(i) music publishers shall be entitled to 50 percent of the royalty payments allocated to the Musical Works Fund, and

"(ii) writers shall be entitled to the other 50 percent of the royalty payments allocated to the Musical Works Fund.

"(c) ALLOCATION OF ROYALTY PAYMENTS WITHIN GROUPS.—If all interested copyright parties within a group specified in subsection (b) do not agree on a voluntary proposal for the distribution of the royalty payments within each group, the Copyright Royalty Tribunal shall, pursuant to the procedures specified under section 1007(c), allocate royalty payments under this section based on the extent to which, during the relevant period—

"(1) for the Sound Recordings Fund, each sound recording was distributed in the form of phonorecords; and

"(2) for the Musical Works Fund, each musical work was distributed in the form of phonorecords or disseminated to the public in transmissions.

"§ 1007. Procedures for distributing royalty payments

"(a) FILING OF CLAIMS AND NEGOTIATIONS.—

"(1) FILING OF CLAIMS.—During the first 2 months of each calendar year after the calendar year in which this chapter takes effect, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Tribunal a claim for payments collected during the preceding year in such form and manner as the Tribunal shall prescribe by regulation.

"(2) NEGOTIATIONS.—Notwithstanding any provision of the antitrust laws, for purposes of this section interested copyright parties within each group specified in section 1006(b) may agree among themselves to the proportionate division of royalty payments, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf; except that no agreement under this subsection may modify the allocation of royalties specified in section 1006(b).

"(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—Within 30 days after the period established for the filing of claims under subsection (a), in each year after the year in which this section takes effect, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Tribunal determines that no such controversy exists, the Tribunal shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

"(c) RESOLUTION OF DISPUTES.—If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Tribunal shall, before authorizing the distribution of such royalty payments, deduct its reasonable administrative costs under this section.

"§ 1008. Prohibition on certain infringement actions

"No action may be brought under this title, or under section 337 of the Tariff Act of 1930, alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analogue recording device, or an analogue recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analogue musical recordings.

"§ 1009. Civil remedies

"(a) CIVIL ACTIONS.—Any interested copyright party injured by a violation of section 1002 or 1003 may bring a civil action in an appropriate United States district court against any person for such violation.

"(b) OTHER CIVIL ACTIONS.—Any person injured by a violation of this chapter may bring a civil action in an appropriate United States district court for actual damages incurred as a result of such violation.

"(c) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

"(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation;

"(2) in the case of a violation of section 1002, or in the case of an injury resulting from a failure to make royalty payments required by section 1003, shall award damages under subsection (d);

"(3) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof; and

"(4) in its discretion may award a reasonable attorney's fee to the prevailing party.

"(d) AWARD OF DAMAGES.—

"(1) DAMAGES FOR SECTION 1002 OR 1003 VIOLATIONS.—

"(A) ACTUAL DAMAGES.—(i) In an action brought under subsection (a), if the court finds that a violation of section 1002 or 1003 has occurred, the court shall award to the complaining party its actual damages if the complaining party elects such damages at any time before final judgment is entered.

"(ii) In the case of section 1003, actual damages shall constitute the royalty payments that should have been paid under section 1004 and deposited under section 1005. In such a case, the court, in its discretion, may award an additional amount of not to exceed 50 percent of the actual damages.

"(B) STATUTORY DAMAGES FOR SECTION 1002 VIOLATIONS.—

"(i) DEVICE.—A complaining party may recover an award of statutory damages for each violation of section 1002 (a) or (c) in the sum of not more than $2,500 per device involved in such violation or per device on which a service prohibited by section 1002(c) has been performed, as the court considers just.

"(ii) DIGITAL MUSICAL RECORDING.—A complaining party may recover an award of statutory damages for each violation of section 1002(d) in the sum of not more than $25 per digital musical recording involved in such violation, as the court considers just.

"(iii) TRANSMISSION.—A complaining party may recover an award of damages for each transmission or communication that violates section 1002(e) in the sum of not more than $10,000, as the court considers just.

"(2) REPEATED VIOLATIONS.—In any case in which the court finds that a person has violated section 1002 or 1003 within 3 years after a final judgment against that person for another such violation was entered, the court may increase the award of damages to not more than double the amounts that would otherwise be awarded under paragraph (1), as the court considers just.

"(3) INNOCENT VIOLATIONS OF SECTION 1002.—The court in its discretion may reduce the total award of damages against a person violating section 1002 to a sum of not less than $250 in any case in which the court finds that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1002.

"(e) PAYMENT OF DAMAGES.—Any award of damages under subsection (d) shall be deposited with the Register pursuant to section 1005 for distribution to interested copyright parties as though such funds were royalty payments made pursuant to section 1003.

"(f) IMPOUNDING OF ARTICLES.—At any time while an action under subsection (a) is pending, the court may order the impounding, on such terms as it deems reasonable, of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that is in the custody or control of the alleged violator and that the court has reasonable cause to believe does not comply with, or was involved in a violation of, section 1002.

"(g) REMEDIAL MODIFICATION AND DESTRUCTION OF ARTICLES.—In an action brought under subsection (a), the court may, as part of a final judgment or decree finding a violation of section 1002, order the remedial modification or the destruction of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that—

"(1) does not comply with, or was involved in a violation of, section 1002, and

"(2) is in the custody or control of the violator or has been impounded under subsection (f).

"§ 1010. Arbitration of certain disputes

"(a) SCOPE OF ARBITRATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to binding arbitration for the purpose of determining whether such device is subject to section 1002.

"(b) INITIATION OF ARBITRATION PROCEEDINGS.—Parties agreeing to such arbitration shall file a petition with the Copyright Royalty Tribunal requesting the commencement of an arbitration proceeding. The petition may include the names and qualifications of potential arbitrators. Within 2 weeks after receiving such a petition, the Tribunal shall cause notice to be published in the Federal Register of the initiation of an arbitration proceeding. Such notice shall include the names and qualifications of 3 arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select, and from potential arbitrators listed in the parties' petition. The arbitrators selected under this subsection shall constitute an Arbitration Panel.

"(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to arbitration under this section shall, on application of one of the parties to the arbitration, be stayed until completion of the arbitration proceeding.

"(d) ARBITRATION PROCEEDING.—The Arbitration Panel shall conduct an arbitration proceeding with respect to the matter concerned, in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record. Any party to the arbitration may submit relevant information and

proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

"(e) REPORT TO COPYRIGHT ROYALTY TRIBUNAL.—Not later than 60 days after publication of the notice under subsection (b) of the initiation of an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning whether the device concerned is subject to section 1002. Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

"(f) ACTION BY THE COPYRIGHT ROYALTY TRIBUNAL.—Within 60 days after receiving the report of the Arbitration Panel under subsection (e), the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel. The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly erroneous. If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting forth its decision and the reasons therefor. The Tribunal shall cause to be published in the Federal Register the determination of the Panel and the decision of the Tribunal under this subsection with respect to the determination (including any order issued under the preceding sentence).

"(g) JUDICIAL REVIEW.—Any decision of the Copyright Royalty Tribunal under subsection (f) with respect to a determination of the Arbitration Panel may be appealed, by a party to the arbitration, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this subsection shall not stay the Tribunal's decision. The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal, that the Arbitration Panel or the Tribunal acted in an arbitrary manner. If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings as provided in this section.".

SEC. 3. TECHNICAL AMENDMENTS.

(a) FUNCTIONS OF REGISTER.—Chapter 8 of title 17, United States Code is amended—

(1) in section 801(b)—

(A) by striking "and" at the end of paragraph (2);

(B) by striking the period at the end of paragraph (3) and inserting "; and"; and

(C) by adding the following new paragraph at the end:

"(4) to distribute royalty payments deposited with the Register of Copyrights under section 1003, to determine the distribution of such payments, and to carry out its other responsibilities under chapter 10."; and

(2) in section 804(d)—

(A) by inserting "or (4)" after "801(b)(3)"; and

(B) by striking "or 119" and inserting "119, or 1007".

(b) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by striking "As used" and inserting "Except as otherwise provided in this title, as used".

(c) MASK WORKS.—Section 912 of title 17, United States Code, is amended—

(1) in subsection (a) by inserting "or 10" after "8"; and

(2) in subsection (b) by inserting "or 10" after "8".

SEC. 4. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 3204 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

The purpose of H.R. 3204 is to provide a legal and administrative framework within which digital audio recording technology may be made available to consumers.

INTRODUCTION

Legislative consideration of proposals regarding home taping of copyrighted music in digital format began with two bills introduced in 1987, H.R. 1384 (Waxman, March 3rd) and S. 506 (Gore, February 5th), requiring that digital audio recording devices contain a copyguard system in order to be imported into or distributed in the United States. CBS Records had developed such a system, known as "Copycode". This controversial system would have removed a portion of the audio signal in order to prohibit the reproduction of copyrighted sound recordings and musical compositions embodied therein. The controversy over the Copycode system stemmed from disputes about whether it adversely affected the quality of the music and whether the system functioned effectively. These issues were explored at an April 2, 1987, joint hearing held by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice and the Senate Judiciary Committee's Subcommittee on Patents, Copyrights, and Trademarks.[1]

In response to questions raised about the Copycode System at the April hearing, the Subcommittees requested the National Bureau of Standards (NBS) to test the system. The results of this test were unfavorable. NBS found that the Copycode system adversely affected the quality of the sound, occasionally failed to prevent copying, and could easily be circumvented.

As a result of the deficiencies in the Copycode system, the Serial Copy Management System (SCMS) was developed. SCMS does not alter the audio signal. Instead, SCMS encodes information on the first copy of a "digital musical recording" as defined in Section 1001 of the bill. In conjunction with software and hardware specifications, copying from that copy is prohibited.[2] Because the information is only encoded on the first such copy made, an infinite number of copies can be made directly from the digital musical recording as purchased over-the-counter.

World-wide negotiations between record companies and hardware manufacturers were undertaken with the goal of facilitating, through implementation of SCMS, the importation and distribution of digital audio tape machines. On July 28, 1989, in Athens, Greece, an agreement between these two groups was announced. Under their agreement, mandatory incorporation of SCMS by legislation

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[1] "Copyright Issues Presented By Digital Audio Tape: Joint Hearing Before the Senate Subcommittee on Patents, Copyrights, and Trademarks of the Senate Judiciary Committee and the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee," 100th Cong., 1st Sess. (1987) [House Committee on the Judiciary Serial No. 6]. See in particular pages 54–61 (describing Copycode system); 69–85 (criticizing Copycode system).

[2] If the original tape is an analog formatted sound recording, one additional copy may be made because the transfer from analog to digital does not result in SCMS encoding under current technology. The encoding will thus occur at the next step, when the digital copy made from the analog source is itself copied.

would be sought. In April 1990, bills were introduced in Congress reflecting that agreement.[3]

At a June 1990 hearing on S. 2358, before the Subcommittee on Communications of the Senate Commerce, Science, and Transportation Committee, songwriters, music publishers, and performing rights societies opposed the legislation on the grounds that no provision was made for royalty payments and that the legislation must include all digital audio recording technology.[4] The opponents took their dispute to the courts the next month by filing suit against the Sony Corporation for contributory copyright infringement.[5]

Negotiations among record companies, hardware manufacturers, music publishers, songwriters, and performing rights societies then took place, resulting in agreement in June 1991. That agreement was reflected in two companion bills, H.R. 3204, introduced by Chairman Brooks and Subcommittee Chairman Hughes on August 2, 1991, and S. 1623, introduced by Senator DeConcini and numerous cosponsors on August 1, 1991.[6] The Subcommittee on Intellectual Property and Judicial Administration held hearings on H.R. 3204 on February 19, 1992. Testimony was received from: singer and songwriter Barry Manilow; Stanson Nimiroski, Vice President, Pitman Manufacturing, Sony Music Entertainment; Joseph Smith, President and CEO, Capitol EMI Music, Inc.; John Roach, President, Chairman of the Board and CEO, Tandy Corporation; George David Weiss, President, Songwriters Guild of America; Professor Jessica Litman, Wayne State University Law School; Dr. Irwin Lebow (engineer); and Wayne Green, publisher of "CD Review."

COMMITTEE VOTE

On August 11, 1992, a reporting quorum being present, the Committee ordered H.R. 3204 reported to the full House by voice vote, as amended.

LEGISLATIVE HISTORY

H.R. 3204 was introduced on August 2, 1991 by Mr. Brooks and Mr. Hughes, and was referred jointly to the Committees on the Judiciary, Energy and Commerce, and Ways and Means. Based on the hearing record developed during the 101st Congress and this Congress, the Subcommittee on Intellectual Property and Judicial Administration marked up H.R. 3204 on July 31, 1992.

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[3] H.R. 4096 (Waxman); S. 2358 (DeConcini), 101st Cong., 2d Sess.

[4] The Philips Corporation had announced plans for a Digital Compact Cassette player capable of playing both digital and analog tapes, and the Sony Corporation had announced plans to introduce a "Mini-Disc" player.

[5] *Cahn* v. *Sony Corporation*, 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990).

[6] On March 25, 1992, H.R. 4567, a similar bill, was introduced by Ms. Collins, and referred jointly to the Committees on the Judiciary, Energy and Commerce, and Ways and Means. On June 2, 1992, the Energy and Commerce Committee ordered H.R. 4567 to be favorably reported with an amendment in the nature of a substitute. On August 5, 1992, the Energy and Commerce Committee filed its report, H.R. Rep. No. 102-780, Part 1.

DISCUSSION

BACKGROUND

Issues concerning federal copyright liability for home taping of audio recordings may be traced to the early 1970's, when Congress first extended protection to sound recordings.[7] Language in this Committee's 1971 report [8] and in floor remarks,[9] gave support to those claiming that home taping does not constitute copyright infringement. Others,[10] however, have taken the position that home taping may be actionable, based on the absence of similar language in the 1971 Senate report and in any of the reports accompanying the 1976 Act.[11]

The issue of home taping arose again in 1984, when the Supreme Court decided *Sony Corporation of America, Inc.* v. *Universal City Studios, Inc.*[12] This case involved a suit for contributory infringement against the manufacturer of the Betamax viedocassette recorder for "time-shifting" of free, over-the-air broadcast programming by consumers. Based on the fact that the copyrighted works were broadcast on free television, the time-shifting purpose of the taping, and other factors, the Court permitted the copying as fair use.

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[7] Act of October 15, 1971, P.L. 92-140, 92d Cong., 1st Sess., 85 Stat. 391 (effective February 15, 1972).

[8] See H.R. Rep. No. 487, 92d Cong., 1st Sess. 7 (1971): "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions in the past 20 years." This language did not appear in the Senate report.

[9] 117 Cong. Rec. H34748-34749 (October 4, 1971):

> Mr. KAZEN. Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
>
> Mr. KASTENMEIER. Yes.
>
> Mr. KAZEN. In other words, if your child were to record off of a program which comes through the air on the radio or television, and then used it for his or her own personal pleasure, this use would not be included under the penalties of this bill?
>
> Mr. KASTENMEIER. This is not included in the bill. I am glad the gentleman raises the point.
>
> On page 7 of the report, under "Home Recordings," Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report.

For comments on this colloquy and a similar one at "Hearings on S. 646 and H.R. 6927 Before Subcommittee No. 3 of the House Committee on the Judiciary," 92d Cong., 1st Sess. 22-23 (1971), *see Sony Corp. of America* v. *Universal City Studios, Inc.*, 480 F. Supp. 429, 445-446 (C.D. Cal. 1979); rev'd, 659 F.2d 963, 968 n. 8 (9th Cir. 1981); rev'd, 464 U.S. 417, 470-474 (1984) (Justice Blackmun, dissenting).

[10] See Statement of Register of Copyrights Before the Subcommittee on Intellectual Property and Judicial Administration, House Committee on the Judiciary, February 19, 1992 at pages 3-10; Nimmer, "Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth," 68 Va. L. Rev. 1505 (1982).

[11] Compare H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) ("It is not intended to give [taping] any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use") with S. Rep. No. 94-473, 94th Cong., 1st Sess. 2d 66 (1975) ("The committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances, be considered fair use"). Additionally, the provisions of the 1971 Sound Recording Act did not and were not intended to survive the omnibus revision of the 1976 Act. See also May 25, 1971 letter from the Librarian of Congress, reproduced in H.R. Rep. No. 92-487, 92d Cong., 1st Sess. 10 (1971): "Upon enactment of the revision bill [this bill] would, of course, be merged into the larger pattern of the revised statute as a whole."

[12] 464 U.S. 417 (1984).

Although the precedential value of the *Betamax* decision for audio home taping has been sharply debated, the Court's ruling led to calls for a royalty regime for both video and audio works. Congress did not prove receptive to such proposals. The *Betamax* decision did coincide, though, with the introduction of digital audio recording technology, initially in the form of compact discs. Because compact discs could not be recorded over, they did not pose a significant home-taping issue.[13] This situation changed in 1987, with the development of digital audio tape (DAT) machines. Because of the digital nature of the medium, record companies believed that near perfect serial copies of DAT tapes could be made. Negotiations with hardware manufacturers to include copy prevention circuitry were unsuccessful, although the manufacturers did agree to adopt a different digital sampling rate for DAT machines than for compact discs, thereby making impossible direct CD to DAT copies.[14] At this point, the record companies sought their own technological solution, in the form of the CBS Copycode system discussed above.

H.R. 3204 AS INTRODUCED

As introduced on August 2, 1992, H.R. 3204 reflected the June 1991 agreement among record companies, hardware manufacturers, songwriters, music publishers, and performing rights societies. The essential elements of the agreement were:

An exemption from copyright infringement for consumers engaging in noncommercial copying of digital and analog music.

Inclusion of all digital recording technologies (DAT, DCC, Mini-Disc, etc.).

A requirement that these technologies include a system to prevent serial copying, with an exclusion for professional models.

Royalty payments for import or manufacture of digital audio recording devices set at 2 percent of transfer price with a minimum payment of $1 and a maximum payment of $8 for single machines and $12 for dual port machines.

Royalty payments for import or manufacture of digital audio recording media set at 3 percent of the transfer price.

Royalties to be divided into two separate funds as follows:

Music Works Fund (⅓ of the royalties): 50 percent to songwriters, 50 percent to music publishers;

Sound Recording Fund (⅔ of the royalties): 2⅝ percent to the American Federation of Musicians for the benefit of nonfeatured musicians, 1⅜ percent to the American Federation of Television and Recording Artists for the benefit of nonfeatured vocalists.

The remaining 96 percent to be divided as follows:

60 percent to record companies;

40 percent to featured performers.

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[13] See H.R. Rep. No. 100-776, 100th Cong., 2d Sess. 2 (1988) (in discussing the 1984 Record Rental Amendment, the Committee stated "although the advent of compact discs was foreseen, it was not predicted that they would eventually comprise a large part of the market for sales of prerecorded music").

[14] One could, though, copy a CD onto an analog tape, and then copy the analog tape on to a DAT tape. The quality of the copy would, however, deteriorate.

These elements were embodied in a 57-page bill that incorporated by reference a 37-page "Technical Reference Document" setting forth the specifications for the "Serial Copy Management Systems." [15] Obviously, H.R. 3204 as introduced contained a great many details beyond the essential features.

AMENDMENTS

In the period from the Subcommittee's February 19, 1992 hearing until its July 31, 1992 mark-up, considerable effort was made to improve the bill through redrafting. The Subcommittee succeeded in this effort, producing a 28-page bill that preserves the essentials of the agreement. The major amendments made to H.R. 3204 may be summarized as follows.

STRUCTURE OF THE BILL

H.R. 3204 as reported by the Committee rearranges the order of the sections of the bill as introduced to track more closely the flow of the obligations and penalties contained in the legislation. One section, section 1016 of the bill as introduced, was deleted in its entirety. This provision permitted privately negotiated alternative collection and distribution systems. The Committee deleted this provision after concluding that a statutory scheme will better protect the interests of individual composers and performers, and smaller publishers and record companies.

DEFINITIONS

Added definitions

A definition of "digital musical recording" has been added, with revisions reflecting exemptions for talking books and computer programs.

A definition of "serial copying" has been added reflecting the approach taken in new section 1002 permitting systems other than "Serial Copy Management System" to be implemented so long as they prevent serial copying of digital musical recordings.

Amended definitions

The definition of "interested copyright party" has been amended to include featured performers.

Deleted definitions

"Interested Manufacturing Party." This definitions was deleted principally in light of amendments made to the remedies section, discussed below under section 1009, and the deletion of the negotiated collection and distribution provision.

"Serial Copy Management System" and "Technical Reference Document." These definitions were deleted in light of the alternative forms for preventing serial copying, discussed below in the section-by-section analysis under section 1002, and the Committee's

[15] Under H.R. 3204 as introduced, the Technical Reference Document was to appear in this report and be published in the Federal Register by the Secretary of Commerce within ten days from the date of enactment. Although section 1022(a) of S. 1623 as passed also includes the Federal Register requirement, S. 1623 includes the Technical Reference as section 5 of the bill.

policy decision to avoid any inappropriate delegation of Congressional responsibility to private parties.

The definition of "Serial Copy Management System" in the bill as introduced referred to the system for regulating serial copying by digital audio recording devices as set forth in the "Technical Reference Document," or to a system covered by an order of the Secretary of Commerce, or to a system that conformed to the requirements of old section 1021(a)(1)(C). This was less a definition and more an incorporation of the "Technical Reference Document." The Technical Reference Document does not, however, contain a definition of the "Serial Copy Management System." Instead, the Technical Reference Document describes the functional and technical characteristics of that system, while also containing narrative discussion of other issues, such as copying of analog source, material, that raise important policy questions.

After consideration review of the Serial Copy Management System and the Technical Reference Document, the Committee concluded that any incorporation of the entire Technical Reference Document directly into legislation or indirectly through an agency regulation is inconsistent with Congress's responsibility to make the policy decisions implied by that document. Nor does the Committee believe that the "Serial Copy Management System" need be the sole serial copying regulation system. Accordingly, both definitions have been deleted.

Although current section 1002(a)(1) specifies that the "Serial Copy Management System" is an acceptable system for preventing serial copying, the term is left undefined. The Committee intends the term "Serial Copy Management System" to be construed as meaning only the functional and technical characteristics as set forth in the Technical Reference Document, as reproduced in the report of the Energy and Commerce Committee, H.R. Rep. No. 102-780, Pt. 1, 102d Cong., 2d Sess. 32-50 (1992). This citation to that Technical Reference Document should not be construed as incorporating by reference that entire document. The Committee intends merely to provide interested parties with a convenient place to review the technical and functional characteristics of the "Serial Copy Management System."

OTHER DELETIONS

The Committee deleted a provision found in section 1002(b)(4) of the bill as introduced which would have given the Secretary of Commerce authority to issue an order approving standards and specifications for regulating the serial copying of copyrighted works input through an analog converter contained in a digital audio recording device in a manner equivalent to that currently used for copyrighted works input in a digital format. The Committee believes that this issue raises policy questions that are appropriately addressed in the future by the Congress. The deletion reserves this issue to the Congress.

The bill as reported by the Committee deletes a provision in section 1031(a) of the bill as introduced that would have granted an "interested manufacturing party" and the Attorney General standing to sue. The Committee believes it unnecessary to grant the At-

torney General standing while interested manufacturing parties are no longer eligible to receive actual or statutory damages under current section 1009(d).

Section 1031(e) of the bill as introduced contained a provision barring the bringing of more than one action, and more than one award of statutory damages, for failure to pay royalty payments. The bill as reported by the Committee deletes this provision as unnecessary.

As introduced, section 1032 of H.R. 3204 had a provision for mandatory, binding arbitration of any disputes between interested manufacturing parties and interested copyright parties. This provision, found in current section 1010, has been revised to be consensual, and limited to arbitration before first distribution in the United States of digital audio recording devices or digital audio interface devices for the purpose of determining whether such devices are subject to the serial copy prevention requirements of section 1002. The Committee in making these revisions was concerned that mandatory, binding arbitration might be unfair, such as to small music publishers, record companies, and performers. The arbitration provisions in current section 1010 are patterned after those in section 119 of title 17.

INCORPORATION OF COPYING CONTROLS

This provision is found in section 1002 of the current bill and was in section 1021 of the bill as introduced. As introduced, the bill mandated use of the Serial Copy Management System (SCMS) or a system that achieved the same functional characteristics as and was compatible with the prevailing method for implementing SCMS. By contrast, the approach now taken in the bill is result-oriented: SCMS and systems that have the same functional characteristics as and are compatible with SCMS automatically qualify under the bill. Any other system certified by the Secretary of Commerce as prohibiting serial copying of copyrighted works embodied in digital musical recordings meets the requirements of the Act. Because of this alternative to SCMS, all references to the Technical Reference Document have been deleted for the bill.

ENTITLEMENT TO ROYALTY PAYMENTS

In contrast to section 1014 of the bill as introduced, section 1006 of the bill as reported permits featured performers to receive directly the 40 percent of the Sound Recording Fund allocated to them. Record companies wanted to collect these royalties and disburse them to featured performers solely according to the terms of their general contracts. Under those contracts, record companies typically advance monies to performers and then recoup the advance from record sales and other revenue generating sources. So-called "cross-collateralization" contracts extend this arrangement for multiple album deals. The Committee is strongly of the view that the statutory allocation formula should result in distribution according to that formula. Accordingly, through the above-discussed change in the definition of "interested copyright party" featured performers may receive their royalties directly.

A final change in this section reflects an amendment made to the 4 percent of the Sound Recordings Fund received by nonfeatured musicians and vocalists. 2⅝ percent of this 4 percent is to be placed into an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) for the benefit of nonfeatured musicians (whether or not they are members of the AFM) who have performed on sound recordings distributed in the United States. The remaining 1⅜ percent of the 4 percent is to be placed in an escrow account to be managed by an independent administrator jointly appointed by the record companies and the American Federation of Television and Radio Artists (or any successor entity) for the benefit of nonfeatured vocalists (whether or not they are members of AFTRA) who have performed on sound recordings distributed in the United States.

NEGOTIATED COLLECTION AND DISTRIBUTION ARRANGEMENTS

Section 1016 of H.R. 3204 as introduced permitted interested copyright parties and interested manufacturing parties to negotiate among themselves for alternative methods to the statutory scheme for collection, distribution, or verification of royalty payments.

The Committee believes that former section 1016 vested too much authority in private parties to alter a legislative scheme, and with possibly adverse effects on independent record companies and small music publishers. Accordingly, the section was deleted from the bill as reported.

CIVIL REMEDIES

H.R. 3204 limits liability to civil penalties. As introduced, the bill contained high mandatory minimum statutory damages coupled with substantial maximum statutory damages. Additionally, defined "interested manufacturing parties" were permitted to sue and to receive statutory damages for other manufacturers' violations of the serial copy prevention requirements. As reported, H.R. 3204 scales back the amount of statutory damages, eliminates statutory damages for violations of the royalty obligation provisions, and eliminates the eligibility of manufacturing parties to receive actual or statutory damages for violations of sections 1002 and 1003. In order to provide a deterrence for those who would refuse to pay royalties until sued, the bill gives courts the discretion to award up to 50 percent additional damages for first time violations, and to double the damages for repeat violations committed by the same person within three years of final judgment for a previous violation.

SECTION-BY-SECTION ANALYSIS OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

SECTION 1001: DEFINITIONS

Section 1001 contains definitions of a number of key terms in the bill. These include:

"Digital Audio Interface Device" (§ 1001(2))

As introduced, the bill defined "digital audio interface device" by reference to the Technical Reference Document. As reported by the Committee, the bill no longer refers in any way to the Technical Reference Document. Accordingly, the definition of "digital audio interface device" was amended to describe the function of such a device, namely, to communicate digital audio information regarding the copyright and generation status of the work to a digital audio recording device.

"Digital Musical Recording" (§ 1001(5))

The principal purpose of the new term "digital musical recording" is to avoid using the term "phonorecord" as currently defined in section 101 of title 17 to define the material objects covered by H.R. 3204. The Committee concluded that use of "phonorecord" in this context is undesirable for two reasons. First, recorded literary works such as "talking books" are fixed in "phonorecords" rather than in "copies." Since talking books are excluded from the bill, use of "phonorecord" would have required an amendment to that definition to avoid sweeping in recorded literary works. The Committee believes that the better approach is to adopt a new term that addresses the copying of digitally-formatted music, and thus "digital musical recording" was selected.[16] Second, using this new term in lieu of "phonorecord" avoids any impact on other unamended provisions of the current Copyright Act, such as section 115, which grants a compulsory license for the making and distributing of phonorecords of nondramatic musical works.

In drafting a definition of "digital musical recording," the Committee faced certain difficulties. Digitally-formatted music is played back or reproduced in part through a series of statements or instructions to digital music equipment that resembles, if not, comprises, a computer program as defined in 17 USC § 101 (1980). As with "talking books," the bill specifically excludes computer programs (which generally are classified under the Copyright Act as literary works). In addition to containing an express exclusion of computer programs in the definition of "digital musical recording," the Committee expressly includes the technical embodiment of statements of instructions incidential to the playback or reproduction of music by referencing such statements or instructions in both sections 1001(5) (A)(i) and (B)(ii).

"Distributed" (§ 1001(6))

"Distributed" is defined as the sale, lease, or assignment of a product to consumers in the United States, or for ultimate transfer to consumers in the United States.

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[16] See section 1001(5)(B)(i) of the bill, which excludes from the definition of "digital musical recording" a material object "in which the fixed sounds consist entirely of spoken word recordings," and section 1005(C)(i) (defining "spoken word recording"). Another issue with respect to spoken word recordings concerns "incidental musical or other sounds" that may accompany a spoken word recording. Some talking books contain short bridge passages denoting page breaks or the end of chapters. Where such music is incidential (defined in section 1005(C)(ii) as "related to and relatively minor by comparison") it is not covered by the provisions of the bill.

"Interested Copyright Party" (§ 1001(7))

This definition has significance for a number of provisions of the bill, including distribution of royalties from the Copyright Royalty Tribunal, ability to enter into negotiated agreements regarding distribution, and standing to sue.

Section 1008(b)(1) provides that of the 66⅔ percent of the royalty payments deposited pursuant to section 1005, 60 percent of such amount is to be distributed to owners of exclusive rights under section 106(1) of title 17 to reproduce a sound recording of a musical work (typically a record company), and 40 percent is to be distributed to featured recording artists who perform on distributed sound recordings, after first deducting 4 percent for the benefit of nonfeatured musicians and nonfeatured vocalists. Since featured recording artists are defined as "interested copyright parties," they may receive directly their royalties, enter into negotiated arrangements for royalty distribution under section 1007(a)(2), and sue for violations of the Act.

The term "featured recording artist" is not defined since it is a term of art in the industry. Generally, however, the term includes instrumentalists, vocalists, conductors, narrators, or other persons who play in, sing, or otherwise perform a musical work or sound recording.

Other provisions of the definition of "interested copyright party" bear explanation. Section 1001(7)(D) refers to any association or other organization representing (1) owners of exclusive rights to reproduce sound recordings of musical works; (2) legal or beneficial owners of, or persons who control the right to reproduce musical works in digital or analog musical recordings; (3) featured recording artists performing on sound recordings; and, (4) any association or organization that is "engaged in licensing rights in musical works to music users on behalf of writers and publishers," i.e., performing rights societies such as ASCAP and BMI. These various associations and organizations are not themselves directly entitled to receive royalties: only those individuals or organizations specified in section 1006(a) receive royalties directly. Nevertheless, these associations and organizations may be designated as common agents to negotiate and receive payment for royalties on behalf of others pursuant to section 1007(a)(2).

"Music Publisher" (§ 1001(9))

Section 1001(9) defines a "music publisher" as "a person authorized to license the reproduction of a particular musical work in a sound recording."

"Serial Copying" (§ 1001(11))

A definition of "serial copying" has been added which reflects the approach taken in section 1002. That section permits systems other than the Serial Copy Management System (SCMS) to be implemented as long as they can prevent unauthorized serial copying of digital musical recordings. The genesis of the legislation was concern by copyright owners that the fidelity of digital reproductions of recorded music would lead to massive unauthorized copying, significantly displacing sales. SCMS was designed to provide a

technological method of prohibiting such copying without impairing the sound quality. Under SCMS (or any alternative future serial copying regulation system), consumers will be able to make an unlimited number of copies from a digital musical recording. However, due to encoding that takes place on a digitally-formatted copy made from a digital musical recording, no further copies may be made from that copy. To paraphrase a Supreme Court opinion in a different context, consumers "are free to copy from the original, but they may not copy from the copy." [17] "Serial copying" is copying from the copy.

Even though the focus of the legislation is on digitally-formatted music, the Committee recognizes both that a significant amount of such music was (or may continue to be) recorded by analog rather than digital means, and, that recorded music issued in an analog format may also be copied onto a digital format. The term "serial copying" encompasses musical works and sound recordings whether originally recorded in a digital or an analog format and then copied into digital form.

"Transfer Price" (§ 1001(12))

The "transfer price" of a digital audio recording device or a digital audio recording medium is defined in this section, with provisions for both imported and domestic products, and products where the transferor and transferee are related entities or within a single entity.

"Writer" (§ 1001(13))

Section 1001(13) defines "writer" as "the composer or lyricist of a particular musical work."

SECTION 1002: INCORPORATION OF COPYING CONTROLS

Section 1002(a) contains a key component of the legislation: the requirement that digital audio recording devices and digital audio interface devices contain a system of regulating serial copying of copyrighted musical works embodied in digital musical recordings.

The Committee recognizes that SCMS has been subjected to extensive review by the affected industries and relevant international scientific standards bodies and that substantial investments have been made in products utilizing SCMS. For these reasons, SCMS automatically qualifies under the bill as satisfying the requirements of section 1002(a). At the same time, the Committee does not wish to discourage the future development of alternative methods of regulating serial copying which achieve the desired result of prohibiting unauthorized serial copying of copyrighted works embodied in digital musical recordings.

Under section 1002(a) any other system besides SCMS that prohibits unauthorized serial copying of such works may also be utilized. Section 1002(b) directs the Secretary of Commerce to prescribe, by regulation, its requirements.

Section 1002(c) prohibits the importation, manufacture, or distribution of devices, or the offer to perform or performance of any

[17] *Bleistein* v. *Donaldson Lithographing Company*, 188 U.S. 239 (1903).

service, the primary purpose of which is to avoid, bypass, remove, deactivate, or otherwise circumvent serial copy regulation systems.

Sections 1002 (d) and (e) concern encoding of inaccurate information. Although section 1002(d)(2) states that no person engaged in the importation or manufacture of digital musical recordings is required to encode the copyright status of a musical composition or sound recording on such a digital musical recording, under section 1002(d)(1), no person may encode inaccurate information relating to the category code, copyright status, or generation status of the source material for a sound recording. However, if such information is encoded, the bill requires that it be encoded accurately. A parallel provision with respect to copyright status of sound recordings broadcast to the public is provided in section 1002(e).

SECTION 1003: OBLIGATION TO MAKE ROYALTY PAYMENTS

This provision requires persons who import and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium, to file quarterly and annually with the Copyright Office the notices and statements of account prescribed by sections 1003 (b) and (c), and to deposit with the Copyright Office the appropriate royalty payments specified in section 1004.

Section 1003(c)(2) requires that each statement of account be certified as accurate by an authorized officer or principal of the importer or manufacturer. Due to the nature of the material contained in the statements of account, this section also directs the Register of Copyrights to issue regulations providing for the verification and audit of these statements, and protecting the confidentiality of the information contained therein. These regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

SECTION 1004: ROYALTY PAYMENTS

Section 1004 sets forth the royalty payments due under section 1003 for each digital audio recording device and digital audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States. As the provisions of § 1004 (a)(1) and (b) make clear, only the first person to import and distribute or manufacture and distribute the device or medium is required to make the royalty payment. Thus, only one royalty payment is to be made per device or medium.

Royalties for digital audio recording devices

The royalty for digital audio recording devices is set, in section 1004(a)(1), at 2 percent of the transfer price of the device.[18] Special considerations apply, however, for digital audio recording devices first distributed in combination with one or more similar devices or other components, such as tuners and receivers, whether as a physically integrated unit, or as separate components:

[18] The term "transfer price" of a digital audio recording device or digital audio recording medium is defined in § 1001(12).

Where the device is part of a physically integrated unit, the royalty is based on the transfer price of the unit, reduced by any royalty previously paid for any digital audio recording device previously distributed separately from the physically integrated unit but now a part thereof.

Where the device is not part of a physically integrated unit, but is sold in combination with other devices, and substantially similar devices have been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment is based on the average transfer price of such substantially similar devices during those 4 quarters.

Where the device is not part of a physically integrated unit, but is sold in combination with other devices, and substantially similar devices have not been separately distributed at any time during the preceding 4 calendar quarters, the royalty is based on a constructed price reflecting the proportional value of the device to the combination of devices as a whole.

The first example above concerns so-called "boom boxes." The last two examples concern digital audio recording devices sold as part of a retail package along with other stereo components.

A minimum of $1 and a maximum of $8 for each digital audio recording device is provided, except in the case of a physically integrated unit containing more than one such device, where the maximum payment is $12 (§ 1004(a)(3)).

Royalties for digital audio recording

The royalty for digital audio recording media is set at 3 percent of the transfer price (§ 1004(b)).

SECTION 1005: DEPOSIT OF ROYALTY PAYMENTS

This section requires the Register of Copyrights to receive all royalties under this Chapter and, after deducting reasonable costs incurred in carrying out the responsibilities under this Chapter, to deposit such royalties in the United States Treasury. These royalties are to be treated as off-setting receipts.

The Copyright Office is also required to submit to the Copyright Royalty Tribunal, on a quarterly basis, such information as that Tribunal requires to perform its functions under this Chapter.

SECTION 1006: ENTITLEMENT TO ROYALTY PAYMENTS

Section 1006 sets forth which interested copyright parties are entitled to royalties under the bill: those whose musical work or sound recording has been embodied in lawfully made, distibuted [19] phonorecords, or in transmissions to the public.

Royalty funds

Royalties received by the Copyright Office and and deposited into the United States Treasury are to be divided into two funds: the Sound Recording Fund and the Musical Works Fund.

[19] The term "distributed" is defined in § 1001(6).

Sound recording fund (§ 1006(b)(1))

The Sound Recording Fund is to receive 66⅔ percent of all royalties, and is to be divided as follows among the various groups.

Nonfeatured musicians and nonfeatured vocalists

Of the 66⅔ percent of all royalties, 4 percent is first to be placed into two escrow accounts for the benefit of nonfeatured musicians and nonfeatured vocalists. Of this 4 percent, 2⅝ percent is to be placed into an escrow account managed by an independent administrator appointed jointly by record companies and the American Federation of Musicians (or any successor entity), and distributed to nonfeatured musicians (regardless of whether they are members of the AFM or any successor entity) who have performed on sound recordings distributed in the United States.[20] The remaining 1⅜ percent of the 4 percent is to be placed into an escrow account managed by an independent administrator appointed jointly by record companies and the American Federation of Television and Radio Artists (or any successor entity), and distributed to nonfeatured vocalists (regardless of whether they are members of AFTRA or any successor entity) who have performed on sound recordings distributed in the United States.[21]

Record companies and featured performers

The remaining amount of the Sound Recording Fund (96 percent of the 66⅔ percent of the total royalties) is to be divided 60 percent to record companies and 40 percent to featured performers.

The 60 percent portion goes to "the interested copyright parties described in section 1001(7)(A)." Section 1001(7)(A) describes such an interested copyright party as "the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a musical recording lawfully made under this title that has been distributed." Typically this will be a record company; however, it is possible that an individual could own the right.

The 40 percent portion goes to "the interested copyright parties described in section 1001(7)(C)." Section 1001(7)(C) describes such an interested copyright party as "a featured recording artist who performs on a sound recording that has been distributed." The reference in this report to "featured performer" is merely a shorthand for the more precise definition in section 1001(7)(C).

Musical works fund (§ 1006(b)(2))

33⅓ percent of the total royalties are allocated to the Musical Works Fund. This 33⅓ percent is to be divided 50 percent to music publishers and 50 percent to writers.

Concern has been expressed about the prefatory language in section 1006(b)(2)(B) that this 50–50 division is to be accomplished "Notwithstanding any contractual obligation to the contrary," es-

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[20] The performance need not have been recorded in the United States, since the bill is not limited to United States authors or performers.

[21] As with the fund for nonfeatured musicians, the performance by nonfeatured vocalists need not have been recorded in the United States, since the bill is not limited to United States authors or performers.

pecially in light of the absence of similar language in the divisions for the Sound Recording Fund. The Committee intends the statutory allocations to fix the percentage of royalties that the various groups of interested copyright parties are to receive from the two funds. Contractual provisions, whether existing or future, that would alter these allocations are preempted by this bill. On the other hand, once the distribution of the royalty payment has been made according to the statutory allocation, the bill does not seek to place restrictions on how the recipients may spend their royalties. The presence of the prefatory language in the Musical Works Fund, and its absence in the Sound Recording Fund, is not intended to indicate a different result at either the distribution or post-distribution steps.

Agreements on division of royalties within groups (§§ 1006(c), 1007(a)(2))

Section 1007(a)(2) permits all interested copyright parties within a group entitled to royalties under section 1006(b), free of antitrust liability, to agree among themselves as to the proportionate division of royalty payments, to lump their claims together and to file them jointly or as a single claim, and to designate a common agent to receive payment and negotiate on their behalf, but not to modify the allocation of royalties specified in section 1006(b). For example, with respect to the 50 percent of the Musical Works Fund allocated to writers, writers eligible to file a claim can negotiate among themselves regarding who should receive how much of the 50 percent, or could appoint common agents, for example, one of the other interested copyright parties defined in section 1001(7)(D), to negotiate and file claims on their behalf.

Section 1006(c) states that if these negotiations are not successful, the Copyright Royalty Tribunal shall allocate the royalties. For the Sound Recording Fund, this allocation shall be based on the extent to which during the relevant period "each sound recording was distributed in the form of phonorecords." (§ 1006(c)(1)). For the Musical Works Fund, this allocation shall be based on the extent to which "each musical work was distributed in the form of phonorecords or disseminated to the public in transmissions." "Phonorecords" includes analog recordings.

SECTION 1007: PROCEDURES FOR DISTRIBUTING ROYALTY PAYMENTS

Section 1007 concerns the procedures for distributing royalties. Within the first two months of each calendar year after the calendar year in which this chapter takes effect, every interested copyright party seeking to receive royalty payments is required to file a claim with the Copyright Royalty Tribunal (CRT) for royalties collected during the preceding year (§ 1007(a)(1)). Section 1007(b) states that within 30 days after the period for filing claims, the CRT shall determine whether there is a controversy concerning the distribution of royalties within the various groups entitled to receive royalties, e.g., whether within the 50 percent of the Musical Works Fund allocated to writers, all writers who have filed claims agree or disagree concerning which writers are to receive how much of that 50 percent. If no such controversy exists, the CRT is directed to au-

thorize the distribution of royalties as set forth in the parties' agreement, after the CRT deducts its reasonable administrative costs.

If the CRT finds a controversy does exist, under section 1007(c) it must conduct a proceeding to determine the distribution of royalty payments. Where an agreement has been reached for distribution of some of the funds, the Tribunal is directed to authorize the distribution of royalty payments covered by the agreement, and to withhold an amount sufficient to satisfy all claims with respect to which a controversy exists after deducting reasonable administrative costs.

SECTION 1008: PROHIBITION ON CERTAIN INFRINGEMENT ACTIONS

Section 1008 covers one of the critical components of the legislation: exemptions from liability for suit under title 17 for home taping of copyrighted musical works and sound recordings, and, for contributory infringement actions under title 17 against manufacturers, importers, and distributors of digital and analog audio recording devices and recording media. In the case of home taping, the exemption protects all noncommercial copying by consumers of digital and analog musical recordings. Manufacturers, importers, and distributors of digital and analog recording devices and media have a complete exemption from copyright infringement claims based on the manufacture, importation, or distribution of such devices and media.

SECTION 1009: CIVIL REMEDIES

Section 1009 sets forth the provisions on standing to sue and the relief available for violations of the Act.

Section 1009(a) permits any interested copyright party who is injured by a violation of the requirement to include a serial copy regulation system or to pay the appropriate royalties to bring a civil action in the United States District Courts against any person for such violation.

Section 1009(b) is catchall provision; it permits any person who can demonstrate injury from a violation of the Act to sue for actual damages incurred as a result of that injury.

Section 1009(c) permits, but does not mandate, the courts to issue temporary and permanent injunctions (§ 1009(c)(1)); to allow the recovery of costs by or against any party other than the United States (§ 1009(c)(3)); and, to award a reasonable attorney's fee to the prevailing party (§ 1009(c)(4)). Section 1009(c)(2) states that in the case of a violation of the serial copying regulation requirements of section 1002, or, in the case of a failure to pay the proper royalties under section 1003, the court shall award damages under section 1009(d). Section 1009(f) permits the court to order the impounding of any digital audio recording device, digital recording medium, or device for circumventing serial copying prevention as specified in section 1002(c) during the pendency of an action brought under section 1009(a) if in the custody or control of the alleged violator and if the court has reasonable cause to believe that it does not comply with, or was involved with, a violation of the serial copying prevention requirements of section 1002. Section 1009(g) permits the

court, as part of a final judgment or decree finding a violation of section 1002, to order the remedial modification or destruction of any digital audio recording device, digital audio recording, or bypass device specified in section 1002(c), if such device or recording does not comply with, or was involved in a violation of section 1002 and is in the custody or control of the violator, or was impounded under section 1009(f).

Section 1009(d) sets forth the two types of damages that the court may award, actual and statutory.

Actual damages: (§ 1009(d)(1)(A))

Section 1009(d)(1)(A) covers awards of actual damages for violations of sections 1002 and 1003. Clause (A)(i) has the effect of permitting the complaining party to elect between actual or statutory damages at any time before final judgment is entered. Clause (A)(ii) states that in the case of violations of the royalty provisions of section 1003, actual damages are the royalty payments which should have been paid under section 1004 and deposited with the Copyright Office. This clause also gives the court the discretion to increase the award by an amount not to exceed 50 percent of the actual damages, in order to provide a deterrence to those who fail to pay royalties or who fail to pay the proper royalties.

Statutory damages: (§ 1009(d)(1)(B))

Statutory damages, provided for in section 1009(d)(1)(B), are limited to violations of the section 1002 requirements on serial copying regulation. For importation, manufacture, or distribution or digital audio recording devices that do not conform to an approved method of serial copying regulation, the court may award statutory damages for each violation in an amount of not more than $2,500 per device (§ 1009(d)(1)(B)(i)). For importation, manufacture, or distribution of any device, or the offer or performance of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate or otherwise circumvent the implementation of an approved serial copy regulation system, the court may award statutory damages for each device involved in the violation in an amount of not more than $2,500 per device (§ 1009(d)(1)(B)(i)). For encoding of inaccurate information on a digital musical recording in violation of section 1002(d), the court may award statutory damages in an amount of not more than $25 per digital musical recording involved in such violation (§ 1009(d)(1)(B)(ii)). For each transmission or communication of a sound recording in a digital format that contains inaccurate information regarding the copyright status of the sound recording in violation of section 1002(e), the court may award statutory damages for each such transmission or communication in an amount not to exceed $10,000 (§ 1009(d)(1)(B)(iii)).

General principles of res judicata or collateral estoppel will apply to all suits brought under section 1009. Since awards of royalty payments go into a pool, rather than to individual litigants, the first award of statutory damages should be for the entire amount due the pool, thereby eliminating any incentive for repetitive suits. These same principles apply to litigation over alleged failure to comply with the serial copying regulation requirements: once it has been determined by a court that a digital device does or does not

comply with the statutory requirements, the Committee believes it unlikely that further actions would be brought against that particular device. Of course, further actions could be brought for future violations.

Repeat violations: (§ 1009(d)(2))

This section is also concerned with deterrence. It permits the courts to increase the amount of damages to not more than double the amounts that would otherwise be awarded under paragraph (d)(1) in the case of persons who have violated the serial copy prevention requirements of section 1002 or the royalty provisions of section 1003 within three years after a final judgment against that person for another violation was entered.

Innocent violations of section 1002: (§ 1009(d)(3))

Where the court finds that a person who violated the serial copy regulation requirements of section 1002 was unaware and had no reason to believe that his or her acts violated that section, the court may reduce the award of damages to not less than $250.

Damages to be deposited into royalty pool: (§ 1009(e))

All awards of damages under section 1009(d) are to be deposited with the Register of Copyrights pursuant to section 1005 for distribution to interested copyright parties and treated exactly like royalty payments made pursuant to section 1003. Thus, suits brought under section 1009(a) are to vindicate the rights of all interested copyright parties entitled to receive royalties, and not be benefit solely those interested copyright parties who actually bring the suit.

SECTION 1010: ARBITRATION OF CERTAIN DISPUTES

Section 1010 permits consensual, arbitration for disputes before distribution in the United States of digital audio recording devices or digital audio interface devices regarding whether such devices are subject to the serial copy prevention requirements of section 1002. The arbitration provisions are patterned after those in section 119 of title 17.

EFFECTIVE DATE

The Act and the amendments made by the Act shall take effect on the date of enactment.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 3204, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
September 17, 1992.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 3204, the Audio Home Recording Act of 1992, as ordered reported by the House Committee on the Judiciary on August 11, 1992, and reflecting floor amendments proposed by the committee.

Because this bill would affect direct spending, it would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. As a result, the estimate required under clause 8 of House Rule XXI is attached.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 3204.
2. Bill title: The Audio Home Recording Act of 1992.
3. Bill status: As ordered reported by the House Committee on the Judiciary on August 11, 1992, and reflecting floor amendments proposed by the Committee.
4. Bill purpose: H.R. 3204 would protect manufacturers, importers, and distributors of digital audio recorders and blank media from lawsuits claiming copyright infringement. The bill would require importers and manufacturers to pay royalties, which would be collected by the Copyright Office and deposited as offsetting receipts into two funds in the Treasury, a Sound Recordings Fund and a Musical Works Fund. The amounts in these funds would then be allocated among persons and groups whose audio works had been distributed to the public.

H.R. 3204 would designate those entitled to a share of the funds. The bill would establish a formula for dividing the royalty payments between the funds and for distributing the amounts in the funds. It also would establish a schedule of damages to be paid by those who violate requirements of the act. Finally, H.R. 3204 would direct the Copyright Office to oversee payments into the funds and the Copyright Royalty Tribunal (CRT) to administer their distribution.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995	1996	1997
Net direct spending:						
Estimated budget authority	0	−50	−2	−2	−1	−1
Estimated outlays	0	−50	−2	−2	−1	−1
Spending subject to appropriation action: [1]						
Estimated authorization level	0	[2]	[2]	[2]	[2]	[2]
Estimated outlays	0	[2]	[2]	[2]	[2]	[2]
Net increase or decrease (−) in the deficit	0	−50	−2	−2	−1	−1

[1] Approximately $115,000 over the 1993–1997 period.
[2] Less than $500,000.

The budgetary impact of this bill falls within function 370.

Basis of estimate

Estimates of royalty payments are based on information provided by the Copyright Office and on an assumed enactment date early in fiscal year 1993. Payments for each quarter would be deposited into the funds within 45 days of the end of the quarter, would be recorded as offsetting receipts (that is, negative budget authority and outlays), and would accrue interest until disbursed. (Under the reported bill, royalty, collections by the government would be categorized as federal revenues; the committee's floor amendments would specify that they be deposited as offsetting receipts to the Treasury.) Royalty payments into the funds are estimated to be $73 million in fiscal year 1993, $105 million in 1994, and larger amounts in subsequent years. Disbursements to interested parties would be mandatory and would count as direct spending, as would amounts paid to the Copyright Office and the CRT to cover costs associated with administration of the funds.

We assume that distributors would begin marketing digital audio recording devices and tapes in the first quarters of fiscal year 1993; therefore, we expect the Treasury to begin receiving royalty payments in February 1993. Disbursements to interested parties would be based on royalties accrued over the previous calendar year. Thus, while receipts would accrue over the entire 1993 fiscal year, disbursements in that year would include only the $23 million in copyright payments accrued in calendar year 1992 (i.e., the first quarter of fiscal year 1993). As a result, receipts in fiscal year 1993 would exceed disbursements by about $50 million. In later years, receipts and disbursements would both include amounts for an entire year.

Based on information from the CRT and the Copyright Office, CBO estimates that implementing H.R. 3204 would cost the federal government $1.15 million over the next five years. Of this amount, $115,000 would not be recovered from payments to the funds. While the bill would provide that the Copyright Office and the CRT can recover costs associated with administering the funds, the Copyright Office would incur some unrecoverable costs in establishing the funds. As specified in appropriation bills, the CRT recovers only costs associated with fund distribution, which in 1992 are approximately 85 percent of total costs.

CBO assumes that the Congress will appropriate the full amounts authorized. We estimate accrued interest consistent with CBO baseline assumptions. Outlay estimates are based on historical spending patterns for similar activities.

6. Pay-as-you-go considerations: The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. Enacting H.R. 3204 would affect direct spending, and the bill would therefore be subject to pay-as-you-go procedures. The following table summarizes the estimated pay-as-you-go impact of this bill.

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995
Change in outlays	0	−50	−2	−2
Change in receipts	(1)	(1)	(1)	(1)

[1] Not applicable.

As specified in the committee amendments, royalty payments paid into the funds would be counted as offsetting receipts, which are shown as negative outlays. Payments to interested parties would be mandatory and would count as direct spending, as would amounts paid to the Copyright Office and the CRT to cover costs associated with administration of the funds. CBO estimates that the impact of this bill for pay-as-you-go purposes would be a net decrease in the deficit of $50 million in 1993 and smaller amounts in subsequent years.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: On June 9, 1992, the Congressional Budget Office prepared a cost estimate for S. 1623, a similar bill reported by the Senate Committee on the Judiciary on November 27, 1991, and reflecting floor amendments proposed by that committee. The estimated budgetary impact of H.R. 3204 is the same as that for S. 1623.

10. Estimate prepared by: John Webb.

11. Estimate approved by: Paul Van de Water for C.G. Nuckols, Assistant Director for Budget Analysis.

CONGRESSIONAL BUDGET OFFICE ESTIMATE [1]

The applicable cost estimate of this act for all purposes of sections 252 and 253 of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be as follows:

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995
Change in outlays	0	−50	−2	−2
Change in receipts	(1)	(1)	(1)	(1)

[1] Not applicable.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3204 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

§ 101. Definitions

[As used] *Except as otherwise provided in this title, as used* in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

* * * * * * *

CHAPTER 8—COPYRIGHT ROYALTY TRIBUNAL

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) * * *

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) * * *

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

[1] An estimate of H.R. 3204 as ordered reported by the House Committee on the Judiciary on August 11, 1992 and reflecting floor amendments proposed by the committee. This estimate was transmitted by the Congressional Budget Office on September 17, 1992.

(A) * * *

* * * * * * *

(D) The gross receipts limitations established by section 111(d)(1) (C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; [and]

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111, 116, and 119(b), and to determine, in cases where controversy exists, the distribution of such fees[.]; *and*

(4) to distribute royalty payments deposited with the Register of Copyrights under section 1003, to determine the distribution of such payments, and to carry out its other responsibilities under chapter 10.

* * * * * * *

§ 804. Institution and conclusion of proceedings

(a) * * *

* * * * * *

(d) With respect to proceedings under section 801(b)(3) or (4), concerning the distribution of royalty fees in certain circumstances under section 111, 116, [or 119] *119, or 1007,* the Chairman of the Tribunal shall, upon determination by the Tribunal that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

* * * * * * *

CHAPTER 9—PROTECTION OF SEMICONDUCTOR CHIP PRODUCTS

* * * * * * *

§ 912. Relation to other laws

(a) Nothing in this chapter shall affect any right or remedy held by any person under chapters 1 through 8 or 10 of this title, or under title 35.

(b) Except as provided in section 908(b) of this title, references to "this title" or "title 17" in chapters 1 through 8 or 10 of this title shall be deemed not to apply to this chapter.

* * * * * * *

CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

Sec.
1001. Definitions.
1002. Incorporation of copying controls.

1003. Obligation to make royalty payments.
1004. Royalty payments.
1005. Deposit of royalty payments and deduction of expenses.
1006. Entitlement to royalty payments.
1007. Procedures for distributing royalty payments.
1008. Prohibition on certain infringement actions.
1009. Civil remedies.
1010. Arbitration of certain disputes.

§ 1001. Definitions

As used in this chapter, the following terms have the following meanings:

(1) A "digital audio copied recording" is a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

(2) A "digital audio interface device" is any machine or device that reads or sends copyright and generation status information from a digital musical recording.

(3) A "digital audio recording device" is any machine or device, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—

(A) professional model products, and

(B) dictation machines, answering machines, and other audio recording equipment that is designed or marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

(4)(A) A "digital audio recording medium" is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

(B) Such term does not include any material object—

(i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or

(ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

(5)(A) A "digital musical recording" is a material object—

(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(B) A "digital musical recording" does not include a material object—

(i) in which the fixed sounds consist entirely of spoken word recordings, or

(ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

(C) For purposes of this paragraph—

(i) a "spoken word recording" is a sound recording in which are fixed only a series of spoken words, except that the spoken words may be accompanied by incidental musical or other sounds, and

(ii) the term "incidental" means related to and relatively minor by comparison.

(6) "Distribute" means to sell, lease, or assign a product to consumers in the United States, or to sell, lease, or assign a product in the United States for ultimate transfer to consumers in the United States.

(7) An "interested copyright party" is—

(A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a musical recording lawfully made under this title that has been distributed;

(B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a musical recording a musical work that has been embodied in a musical recording lawfully made under this title that has been distributed;

(C) a featured recording artist who performs on a sound recording that has been distributed; or

(D) any association or other organization—

(i) representing persons specified in subparagraph (A), (B), or (C), or

(ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers.

(8) To "manufacture" means to produce or assemble a product in the United States. A "manufacturer" is a person who manufactures.

(9) A "music publisher" is a person that is authorized to license the reproduction of a particular musical work in a sound recording.

(10) A "professional model product" is an audio recording device that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business, in accordance with such requirements as the Secretary of Commerce shall establish by regulation.

(11) The term "serial copying" means the duplication of a copyrighted musical work from a copy of a copyrighted digital musical recording. The term "copy of a digital musical recording" does not include a digital musical recording that is distributed, by authority of the copyright owner, for ultimate sale to consumers.

(12) The "transfer price" of a digital audio recording device or a digital audio recording medium—

(A) is, subject to subparagraph (B)—

(i) in the case of an imported product, the actual entered value at United States Customs (exclusive of any freight, insurance, and applicable duty), and

(ii) in the case of a domestic product, the manufacturer's transfer price (FOB the manufacturer, and exclusive of any direct sales taxes or excise taxes incurred in connection with the sale); and

(B) shall, in a case in which the transferor and transferee are related entities or within a single entity, not be less than a reasonable arms-length price under the principles of the regulations adopted pursuant to section 482 of the Internal Revenue Code of 1986, or any successor provision to such section.

(13) A "writer" is the composer or lyricist of a particular musical work.

§ 1002. Incorporation of copying controls

(a) PROHIBITION ON IMPORTATION, MANUFACTURE, AND DISTRIBUTION.—

(1) SYSTEM PROHIBITING COPYING.—No person shall import, manufacture, or distribute any digital audio recording device that does not contain the Serial Copy Management System or other system that prohibits serial copying of copyrighted works embodied in digital musical recordings.

(2) DIGITAL AUDIO INTERFACE DEVICE.—No person shall import, manufacture, or distribute any machine or device that is designed or marketed for the primary purpose of, and that is capable of, playing back digital musical recordings, unless such machine or device contains a digital audio interface device.

(b) DEVELOPMENT OF SYSTEM.—The Secretary of Commerce shall, not later than 45 days after the date of the enactment of this chapter, by regulation prescribe the requirements of the Serial Copy Management System or other system described in subsection (a)(1).

(c) PROHIBITION ON CIRCUMVENTION OF THE SYSTEM.—No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a)(1).

(d) ENCODING OF INFORMATION ON DIGITAL MUSICAL RECORDINGS.—

(1) PROHIBITION ON ENCODING INACCURATE INFORMATION.—No person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording.

(2) ENCODING OF COPYRIGHT STATUS NOT REQUIRED.—Nothing in this chapter requires any person engaged in the importation or manufacture of digital musical recordings to encode any such digital musical recording with respect to its copyright status.

(e) INFORMATION ACCOMPANYING TRANSMISSIONS IN DIGITAL FORMAT.—Any person who transmits or otherwise communicates to

the public any sound recording in digital format is not required under this chapter to transmit or otherwise communicate the information relating to the copyright status of the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

§ 1003. Obligation to make royalty payments

(a) PROHIBITION ON IMPORTATION AND MANUFACTURE.—No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

(b) FILING OF NOTICE.—The importer or manufacturer of any digital audio recording device or digital audio recording medium, within a product category or utilizing a technology with respect to which such manufacturer or importer has not previously filed a notice under this subsection, shall file with the Register of Copyrights a notice with respect to such device or medium, in such form and content as the Register shall prescribe by regulation.

(c) FILING OF QUARTERLY AND ANNUAL STATEMENTS OF ACCOUNT.—

(1) GENERALLY.—Any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register of Copyrights, in such form and content as the Register shall prescribe by regulation, such quarterly and annual statements of account with respect to such distribution as the Register shall prescribe by regulation.

(2) CERTIFICATION, VERIFICATION, AND CONFIDENTIALITY.—Each such statement shall be certified as accurate by an authorized officer or principal of the importer or manufacturer. The Register shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

(3) ROYALTY PAYMENTS.—Each such statement shall be accompanied by the royalty payments specified in section 1004.

§ 1004. Royalty payments

(a) DIGITAL AUDIO RECORDING DEVICES.—

(1) AMOUNT OF PAYMENT.—The royalty payment due under section 1003 for each digital audio recording device imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device.

(2) CALCULATION FOR DEVICES DISTRIBUTED WITH OTHER DEVICES.—With respect to a digital audio recording device first distributed in combination with one or more devices, either as a

physically integrated unit or as separate components, the royalty payment shall be calculated as follows:

(A) If the digital audio recording device and such other devices are part of a physically integrated unit, the royalty payment shall be based on the transfer price of the unit, but shall be reduced by any royalty payment made on any digital audio recording device included within the unit that was not first distributed in combination with the unit.

(B) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on the average transfer price of such devices during those 4 quarters.

(C) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have not been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on a constructed price reflecting the proportional value of such device to the combination as a whole.

(3) LIMITS ON ROYALTIES.—Notwithstanding paragraph (1) or (2), the amount of the royalty payment for each digital audio recording device shall not be less than $1 nor more than the royalty maximum. The royalty maximum shall be $8 per device, except that in the case of a physically integrated unit containing more than 1 digital audio recording device, the royalty maximum for such unit shall be $12. During the 6th year after the effective date of this chapter, and not more than once each year thereafter, any interested copyright party may petition the Copyright Royalty Tribunal to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Tribunal shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum.

(b) DIGITAL AUDIO RECORDING MEDIA.—The royalty payment due under section 1003 for each digital audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 3 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such medium shall be required to pay the royalty with respect to such medium.

§ 1005. Deposit of royalty payments and deduction of expenses

The Register of Copyrights shall receive all royalty payments deposited under this chapter and, after deducting the reasonable costs incurred by the Copyright Office under this chapter, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest under section 1007. The Register shall submit to the Copyright Royalty Tribunal, on a quarterly basis, such information as the Tribunal shall require to perform its functions under this chapter.

§ 1006. Entitlement to royalty payments

(a) INTERESTED COPYRIGHT PARTIES.—The royalty payments deposited pursuant to section 1005 shall, in accordance with the procedures specified in section 1007, be distributed to any interested copyright party—

(1) whose musical work or sound recording has been—

(A) embodied in phonorecords lawfully made under this title that have been distributed, and

(B) distributed in the form of phonorecords or disseminated to the public in transmissions, during the period to which such payments pertain; and

(2) who has filed a claim under section 1007.

(b) ALLOCATION OF ROYALTY PAYMENTS TO GROUPS.—The royalty payments shall be divided into 2 funds as follows:

(1) THE SOUND RECORDINGS FUND.—66⅔ percent of the royalty payments shall be allocated to the Sound Recordings Fund. 2⅝ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians or any successor entity) who have performed on sound recordings distributed in the United States. 1⅜ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States. 40 percent of the remaining royalty payments in the Sound Recordings Fund shall be distributed to the interested copyright parties described in section 1001(7)(C), and 60 percent of such remaining royalty payments shall be distributed to the interested copyright parties described in section 1001(7)(A).

(2) THE MUSICAL WORKS FUND.—

(A) 33⅓ percent of the royalty payments shall be allocated to the Musical Works Fund for distribution to interested copyright parties described in section 1001(7)(B).

(B) Notwithstanding any contractual obligation to the contrary—

(i) music publishers shall be entitled to 50 percent of the royalty payments allocated to the Musical Works Fund, and

(ii) writers shall be entitled to the other 50 percent of the royalty payments allocated to the Musical Works Fund.

(c) ALLOCATION OF ROYALTY PAYMENTS WITHIN GROUPS.—If all interested copyright parties within a group specified in subsection

(b) do not agree on a voluntary proposal for the distribution of the royalty payments within each group, the Copyright Royalty Tribunal shall, pursuant to the procedures specified under section 1007(c), allocate royalty payments under this section based on the extent to which, during the relevant period—

(1) for the Sound Recordings Fund, each sound recording was distributed in the form of phonorecords; and

(2) for the Musical Works Fund, each musical work was distributed in the form of phonorecords or disseminated to the public in transmissions.

§ 1007. Procedures for distributing royalty payments

(a) FILING OF CLAIMS AND NEGOTIATIONS.—

(1) FILING OF CLAIMS.—During the first 2 months of each calendar year after the calendar year in which this chapter takes effect, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Tribunal a claim for payments collected during the preceding year in such form and manner as the Tribunal shall prescribe by regulation.

(2) NEGOTIATIONS.—Notwithstanding any provision of the antitrust laws, for purposes of this section interested copyright parties within each group specified in section 1006(b) may agree among themselves to the proportionate division of royalty payments, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf; except that no agreement under this subsection may modify the allocation of royalties specified in section 1006(b).

(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—Within 30 days after the period established for the filing of claims under subsection (a), in each year after the year in which this section takes effect, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Tribunal determines that no such controversy exists, the Tribunal shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

(c) RESOLUTION OF DISPUTES.—If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Tribunal shall, before authorizing the distribution of such royalty payments, deduct its reasonable administrative costs under this section.

§ 1008. Prohibition on certain infringement actions

No action may be brought under this title, or under section 337 of the Tariff Act of 1930, alleging infringement of copyright based on

the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analogue recording device, or an analogue recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analogue musical recordings.

§ 1009. Civil remedies

(a) CIVIL ACTIONS.—Any interested copyright party injured by a violation of section 1002 or 1003 may bring a civil action in an appropriate United States district court against any person for such violation.

(b) OTHER CIVIL ACTIONS.—Any person injured by a violation of this chapter may bring a civil action in an appropriate United States district court for actual damages incurred as a result of such violation.

(c) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation;

(2) in the case of a violation of section 1002, or in the case of an injury resulting from a failure to make royalty payments required by section 1003, shall award damages under subsection (d);

(3) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof; and

(4) in its discretion may award a reasonable attorney's fee to the prevailing party.

(d) AWARD OF DAMAGES.—

(1) DAMAGES FOR SECTION 1002 OR 1003 VIOLATIONS.—

(A) ACTUAL DAMAGES.—(i) In an action brought under subsection (a), if the court finds that a violation of section 1002 or 1003 has occurred, the court shall award to the complaining party its actual damages if the complaining party elects such damages at any time before final judgment is entered.

(ii) In the case of section 1003, actual damages shall constitute the royalty payments that should have been paid under section 1004 and deposited under section 1005. In such a case, the court, in its discretion, may award an additional amount of not to exceed 50 percent of the actual damages.

(B) STATUTORY DAMAGES FOR SECTION 1002 VIOLATIONS.—

(i) DEVICE.—A complaining party may recover an award of statutory damages for each violation of section 1002 (a) or (c) in the sum of not more than $2,500 per device involved in such violation or per device on which a service prohibited by section 1002(c) has been performed, as the court considers just.

(ii) DIGITAL MUSICAL RECORDING.—A complaining party may recover an award of statutory damages for each violation of section 1002(d) in the sum of not more

than $25 per digital musical recording involved in such violation, as the court considers just.

(iii) TRANSMISSION.—A complaining party may recover an award of damages for each transmission or communication that violates section 1002(e) in the sum of not more than $10,000, as the court considers just.

(2) REPEATED VIOLATIONS.—In any case in which the court finds that a person has violated section 1002 or 1003 within 3 years after a final judgment against that person for another such violation was entered, the court may increase the award of damages to not more than double the amounts that would otherwise be awarded under paragraph (1), as the court considers just.

(3) INNOCENT VIOLATIONS OF SECTION 1002.—The court in its discretion may reduce the total award of damages against a person violating section 1002 to a sum of not less than $250 in any case in which the court finds that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1002.

(e) PAYMENT OF DAMAGES.—Any award of damages under subsection (d) shall be deposited with the Register pursuant to section 1005 for distribution to interested copyright parties as though such funds were royalty payments made pursuant to section 1003.

(f) IMPOUNDING OF ARTICLES.—At any time while an action under subsection (a) is pending, the court may order the impounding, on such terms as it deems reasonable, of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that is in the custody or control of the alleged violator and that the court has reasonable cause to believe does not comply with, or was involved in a violation of, section 1002.

(g) REMEDIAL MODIFICATION AND DESTRUCTION OF ARTICLES.—In an action brought under subsection (a), the court may, as part of a final judgment or decree finding a violation of section 1002, order the remedial modification or the destruction of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that—

(1) does not comply with, or was involved in a violation of, section 1002, and

(2) is in the custody or control of the violator or has been impounded under subsection (f).

§ 1010. Arbitration of certain disputes

(a) SCOPE OF ARBITRATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to binding arbitration for the purpose of determining whether such device is subject to section 1002.

(b) INITIATION OF ARBITRATION PROCEEDINGS.—Parties agreeing to such arbitration shall file a petition with the Copyright Royalty Tribunal requesting the commencement of an arbitration proceeding. The petition may include the names and qualifications of potential arbitrators. Within 2 weeks after receiving such a petition, the Tribunal shall cause notice to be published in the Federal Reg-

ister of the initiation of an arbitration proceeding. Such notice shall include the names and qualifications of 3 arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select, and from potential arbitrators listed in the parties' petition. The arbitrators selected under this subsection shall constitute an Arbitration Panel.

(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to arbitration under this section shall, on application of one of the parties to the arbitration, be stayed until completion of the arbitration proceeding.

(d) ARBITRATION PROCEEDING.—The Arbitration Panel shall conduct an arbitration proceeding with respect to the matter concerned, in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record. Any party to the arbitration may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

(e) REPORT TO COPYRIGHT ROYALTY TRIBUNAL.—Not later than 60 days after publication of the notice under subsection (b) of the initiation of an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning whether the device concerned is subject to section 1002. Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

(f) ACTION BY THE COPYRIGHT ROYALTY TRIBUNAL.—Within 60 days after receiving the report of the Arbitration Panel under subsection (e), the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel. The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly erroneous. If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting forth its decision and the reasons therefor. The Tribunal shall cause to be published in the Federal Register the determination of the Panel and the decision of the Tribunal under this subsection with respect to the determination (including any order issued under the preceding sentence).

(g) JUDICIAL REVIEW.—Any decision of the Copyright Royalty Tribunal under subsection (f) with respect to a determination of the Arbitration Panel may be appealed, by a party to the arbitration, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this subsection shall not stay the Tribunal's decision. The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal, that the Arbitration Panel or the Tribunal acted in an arbitrary manner. If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings as provided in this section.

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