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Part 2

AUDIO HOME RECORDING ACT

SEPTEMBER 21, 1992.—Ordered to be printed

Mr. ROSTENKOWSKI, from the Committee on Ways and Means, 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 Ways and Means, 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 (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 57, between lines 11 and 12 insert the following:

> (d) CONFORMING AMENDMENT TO SECTION 337 OF THE TARIFF ACT OF 1930.—The second sentence of section 337(b)(3) of the Tariff Act of 1930 (19 U.S.C. 1337(b)(3)) is amended to read as follows: "If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 303, 671, or 673, or (B) relates to an alleged copyright infringement with respect to which action under this section is prohibited by section 1002 of title 17, United States Code, the Commission shall terminate, or not institute, any investigation into the matter.".

BACKGROUND, PURPOSE, AND JUSTIFICATION

H.R. 3204, the "Audio Home Recording Act of 1991," was introduced by Mr. Brooks on August 2, 1991. It was jointly referred to the Committees on Energy and Commerce, the Judiciary, and Ways and Means. On June 2, 1992, the Committee on Energy and Commerce ordered reported H.R. 4567, the 1991 Senate-passed version of H.R. 3204. The Judiciary Committee ordered reported H.R. 3204 on August 12, 1992, with an amendment in the nature of a substitute.

The purpose of H.R. 3204 is to create the necessary legal environment for digital audio tape (DAT) technology to be introduced into the commercial marketplace in the United States. Heretofore, as will be explained below, legal uncertainties surrounding the use of this technology have impeded its commercialization in this country.

DAT technology was first introduced to the consumer-electronics world in 1986. With this new technology, consumers would be able to make home copies of prerecorded music that is as good as the quality of commercial originals. Moreover, the technology would allow consumers to make such copies not only from the commercial originals but from copies of copies. From a single prerecorded work, hundreds of copies and copies of copies might be made that would be virtually indistinguishable from the original.

The music recording industry became concerned that the DAT recorder's "perfect" copying capabilities could significantly decrease consumer demand for commercially prerecorded music products because there would be significantly more illegal "perfect" copies in circulation. In order to safeguard its copyrighted material, the industry threatened legal action against any company that attempted to market DAT recorders in the United States. This threat was taken seriously by hardware manufacturers, importers, and distributors and they have refrained from selling DAT recorders to date.

At the same time, the music recording industry has sought legislation since 1987 that would control this potential for massive copyright infringement by requiring that all DAT recorders incorporate technology that identifies and precludes the copying of copyrighted works. On the other hand, the electronics industries and consumer rights organizations have argued that restricting the copy capability of DAT recorders would violate the consumer's "right" to reproduce copyrighted material for personal use under the fair use exceptions of the copyright law. Finally, the music composers, authors, and publishers have argued that they should receive some form of compensation if DAT technology is to be permitted.

After legislative efforts in the 100th and 101st Congresses failed to bridge the differences between the various interested parties, the electronics manufacturers, the recording companies, and the songwriting and music publishing interests finally agreed that their various interests could generally be accommodated in the approach set forth in H.R. 3204.

H.R. 3204 basically sets forth an intellectual-property-based approach on digital audio technology that falls primarily within the jurisdiction of the Committee on the Judiciary. This report concentrates on the trade-related aspects of the bill within the jurisdiction

of the Committee on Ways and Means. The report of the Committee on the Judiciary contains a more complete description and analysis of the entire bill.

SUMMARY OF H.R. 3204, AS AMENDED

H.R. 3204, as amended, would add a new chapter 10 on digital audio recording devices and media to Title 17 of the U.S. Code. In brief, this new chapter would provide for: (1) a serial copy prevention system under which consumers are permitted to make an infinite number of copies directly from a lawfully purchased prerecorded tape but, due to digital code that is inserted into any initial copy of the purchased tape, are prevented from making further copies from any initial copy; (2) a 2-percent royalty levy on the transfer price of digital recorders and a 3-percent royalty levy on the transfer price of blank recording media; (3) the deposit of these royalties into the Copyright Office for distribution by the Copyright Royalty Tribunal under a sound recording fund and a musical works fund; and (4) various civil remedies and the arbitration of certain disputes.

COMMITTEE ACTION

H.R. 3204 was introduced by Mr. Brooks on August 2, 1991, and referred to the Committees on Energy and Commerce, the Judiciary, and Ways and Means. The bill was further referred by the Committee on Ways and Means to the Subcommittee on Trade. The Subcommittee on Trade reviewed the record on the bill compiled by the Committee on the Judiciary. On September 10, 1992, the Subcommittee ordered H.R. 3204 favorably reported to the full Committee on Ways and Means, by voice vote, with an amendment. The amendment would amend section 337 of the Tariff Act of 1930 to cross-reference new section 1002 of Title 17 of the U.S. Code.

On September 16, 1992, the Committee on Ways and Means ordered favorably reported H.R. 3204, as amended, by voice vote.

SECTION-BY-SECTION ANALYSIS OF THE TRADE-RELATED PROVISIONS OF H.R. 3204, AS AMENDED, WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS

Section 2—Importation, manufacture, and distribution of digital audio recording devices and media

Section 2 of H.R. 3204 would add a new chapter 10 on digital audio recording devices and media to Title 17 of the U.S. Code. The trade-related sections referred to below would be part of this new Title 10.

Section 1001—Definitions

Section 1001(14)(A)(i) defines the transfer price of a digital audio recording device or a digital audio recording medium as, in the case of an imported product, the actual entered value at United States Customs (exclusive of any freight, insurance, and applicable duty).

Section 1002—Prohibition on certain infringement actions

Section 1002 provides that no action may be brought under Title 17, 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 the use of such a device or medium for making phonorecords. However, this does not apply with respect to any claim against a person for infringement by virtue of the making of one or more copies or phonorecords for direct or indirect commercial advantage.

Section 1011—Obligation to make royalty payments

Section 1011 prohibits any person from importing and distributing, or manufacturing and distributing, any digital audio recording device or digital audio recording medium unless they file certain notices and statements of account with the Register of Copyrights and pay certain royalties.

Section 1012—Royalty payments

Section 1012 sets the level of royalty payments that must be paid under section 1011. These royalties shall be 2 percent of the transfer price for each digital audio recorder imported or manufactured and 3 percent of the transfer price for each digital audio recording medium imported or manufactured, subject to specified maximum levels.

Section 1021—Incorporation of the serial copy management system

Section 1021 provides that no person shall import, manufacture, or distribute any digital audio recording device that does not contain the serial copy management system, which prohibits the serial copying or copyrighted works embodied in digital musical recordings.

Section 3(d)—Conforming Amendment to Section 337 of the Tariff Act of 1930

Section 3(d) was added by the Committee to amend the second sentence of section 337(b)(3) of the Tariff Act of 1930 to provide that, if the International Trade Commission has reason to believe that the matter before it relates to an alleged copyright infringement with respect to which action under this section is prohibited by section 1002 of title 17, United States Code, the Commission shall terminate, or not institute, any investigation into the matter. The purpose of the amendment is to ensure that section 337 remains a self-contained statute with respect to the subject matter that may be litigated thereunder.

Matters Required To Be Discussed Under the Rules of the House

VOTE OF THE COMMITTEE IN REPORTING THE BILL

In compliance with clause 2(l)(2)(B) of rule XI of the Rules of the House of Representatives, the following statement is made relative

to the vote of the Committee in reporting the bill: H.R. 3204 was ordered favorably reported by the Committee, by voice vote, with one amendment.

OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives relating to oversight findings, the Committee, based on the Committee's ongoing oversight of the U.S. Trade Agreements Program, particularly section 337 of the Tariff Act of 1930, and a review of the record compiled on this bill by the Committee on the Judiciary, finds that this bill is justified.

With respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings or recommendations have been submitted to the Committee by the Committee on Government Operations with respect to the subject matter contained in the bill.

BUDGETARY AUTHORITY AND COST ESTIMATES, INCLUDING ESTIMATES OF THE CONGRESSIONAL BUDGET OFFICE

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee states that there are no tax expenditures or new budgetary authority providing financial assistance to State and local governments in the bill.

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee agrees with cost estimates furnished by the Congressional Budget Office on H.R. 3204, as amended, and required to be included herein:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 18, 1992.

Hon. DAN ROSTENKOWSKI,
Chairman, Committee on Ways and Means,
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 Ways and Means on September 16, 1992.

Because this bill would affect direct spending and receipts, 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 Ways and Means on September 16, 1992.

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 governmental 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
Direct spending:						
Estimated budget authority	0	23	103	113	124	134
Estimated outlays	0	23	103	113	124	134
Spending subject to appropriation action: [1]						
Estimated authorization level	0	([2])	([2])	([2])	([2])	([2])
Estimated outlays	0	([2])	([2])	([2])	([2])	([2])
Estimated revenues: [3]	0	54	79	86	94	101
Net increase or decrease (−) in the deficit	0	−32	24	27	30	33

[1] Approximately $115,000 over the 1993–1997 period.
[2] Less than $500,000.
[3] Net of income and payroll tax offsets.

Note.—Details may not add to totals because of rounding.

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 governmental receipts, and would accrue interest until disbursed. Gross 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. Net of income and payroll tax offsets, however, total receipts would only increase $54 million in 1993, $79 million in 1994, $86 million in 1995, $94 million in 1996, and $101 million in 1997. 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 quarter of fiscal year 1993; therefore, we expect the Treasury to begin receiving royalty pay-

ments 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 $32 million. In later years, receipts and disbursements would both include amounts for an entire year, but a reduction in collections from other tax sources would cause receipts to be smaller than direct spending.

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:

H.R. 3204 as ordered reported.—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 receipts, and the bill would therefore be subject to pay-as-you-go procedures. Royalty payments paid into the funds would be counted as governmental receipts. 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 administering the funds. The following table summarizes the estimated pay-as-you-go impact of this bill as ordered reported by the Ways and Means Committee.

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995
Change in outlays	0	23	103	113
Change in receipts	0	54	79	86

The bill as ordered reported by the Ways and Means Committee would decrease the deficit in fiscal year 1993 by $32 million but would increase the deficit in all subsequent fiscal years.

H.R. 3204 with Judiciary Committee amendment.—The House Committee on the Judiciary has prepared a floor amendment that would alter the pay-as-you-go effects of the bill. At the request of the Ways and Means Committee staff, CBO has estimated the budgetary impact of this bill assuming adoption of the Judiciary Committee's amendment.

Under the amendment, royalty payments paid into the funds would be counted as offsetting receipts, which are shown as negative outlays. CBO estimates that the pay-as-you-go impact of the bill ordered reported by the Ways and Means Committee, if amended this way, would be a net decrease in the deficit of $50 million in 1993 and smaller amounts in subsequent years. The table below summarizes the pay-as-you-go effects of the bill assuming the amendment offered by the Committee on the Judiciary were incorporated into the bill as ordered reported by the Ways and Means Committee.

[By fiscal year, in million of dollars]

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

1 Not applicable.

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. On September 17, 1992, the Congressional Budget Office prepared a cost estimate for H.R. 3204, as ordered reported by the House Committee on the Judiciary on August 11, 1992, and reflecting floor amendments proposed by that committee. The budget impact of H.R. 3204 as ordered reported by the Committee on Ways and Means differs from that of those two previous versions of the bill because its fee collections would be treated as revenues (governmental receipts) rather than offsetting receipts.

10. Estimate prepared by: John Webb and John Stell.

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	23	103	113
Change in receipts	0	54	79	86

[1] An estimate of H.R. 3204 as ordered reported by the House Committee on Ways and Means on September 16, 1992. This estimate was transmitted by the Congressional Budget Office on September 18, 1992.

INFLATIONARY IMPACT

With respect to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee states that H.R. 3204, as amended, would not have an inflationary impact on prices and costs in the operation of the general 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:

(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 fee[.]*; and*

(4) to distribute royalty payments deposited with the Register of Copyrights under section 1014, to determine, in cases where

controversy exists, 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, 1015, or 1016*, 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.

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CHAPTER 9—PROTECTION OF SEMICONDUCTOR CHIP PRODUCTS

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§ 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.

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CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

SUBCHAPTER A—DEFINITIONS, PROHIBITION OF CERTAIN INFRINGEMENT ACTIONS, AND RULES OF CONSTRUCTION

Sec.
1001. Definitions.
1002. Prohibition on certain infringement actions.
1003. Effect on other rights and remedies with respect to private home copying or otherwise.

SUBCHAPTER B—ROYALTY PAYMENTS

1011. Obligation to make royalty payments.
1012. Royalty payments.
1013. Deposit of royalty payments and deduction of expenses.
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SUBCHAPTER C—THE SERIAL COPY MANAGEMENT SYSTEM

1021. Incorporation of the serial copy management system.
1022. Implementing the serial copy management system.

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1032. Binding arbitration.

SUBCHAPTER A—DEFINITIONS, PROHIBITION OF CERTAIN INFRINGEMENT ACTIONS, AND RULES OF CONSTRUCTION

§ 1001. DEFINITIONS

As used in this chapter, the following terms and their variant forms mean the following:

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

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

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

(A) professional model products, and

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

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

(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, unless the sound recording has been so embodied in order to evade the obligations of section 1011 of this title; 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, without limitation, computer programs or data bases.

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

(6) 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 phonorecord lawfully made under this title that has been distributed to the public;

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

(C) any association or other organization—

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

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

(7) An "interested manufacturing party" is any person that imports or manufactures any digital audio recording device or digital audio recording medium in the United States, or any association of such persons.

(8) "Manufacture" includes the production or assembly of a product in the United States.

(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) A "professional model product" is an audio recording device—

(i) that is capable of sending a digital audio interface signal in which the channel status block flag is set as a "professional" interface, in accordance with the standards and specifications set forth in the technical reference document or established under an order issued by the Secretary of Commerce under section 1022(b);

(ii) that is clearly, prominently, and permanently marked with the letter "P" or the word "professional" on the outside of its packaging, and in all advertising, promotional, and descriptive literature, with respect to the device, that is available or provided to persons other than the manufacturer or importer, its employees, or its agents; and

(iii) that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business.

(B) In determining whether an audio recording device meets the requirements of subparagraph (A)(iii), factors to be considered shall include—

(i) whether it has features used by recording professionals in the course of a lawful business, including features such as—

(I) a data collection and reporting system of error codes during recording and playback;

(II) a record and reproduce format providing "read after write" and "read after read";

(III) a time code reader and generator conforming to the standards set by the Society of Motion Picture and

Television Engineers for such readers and generators; and

(IV) a professional input/output interface, both digital and analog, conforming to standards set by audio engineering organizations for connectors, signaling formats, levels, and impedances;

(ii) the nature of the promotional materials used to market the audio recording device;

(iii) the media used for the dissemination of the promotional materials, including the intended audience;

(iv) the distribution channels and retail outlets through which the device is disseminated;

(v) the manufacturer's or importer's price for the device as compared to the manufacturer's or importer's price for digital audio recording devices implementing the Serial Copy Management System;

(vi) the relative quantity of the device manufactured or imported as compared to the size of the manufacturer's or importer's market for professional model products;

(vii) the occupations of the purchasers of the device; and

(viii) the uses to which the device is put.

(11) The "Register" is the Register of Copyrights.

(12) The "Serial Copy Management System" means the system for regulating serial copying by digital audio recording devices that is set forth in the technical reference document or in an order of the Secretary of Commerce under section 1022(b), or that conforms to the requirements of section 1021(a)(1)(C).

(13) The "technical reference document" is the document entitled "Technical Reference Document for Audio Home Recording Act of 1991," as such document appears in the report of the Committee on the Judiciary to the House of Representatives reporting favorably the bill which upon enactment made the amendment adding this chapter.

(14)(A) The "transfer price" of a digital audio recording device or a digital audio recording medium is—

(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).

(B) Where the transferor and transferee are related entities or within a single entity, the transfer price shall 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 482.

(15) A "transmission" is any audio or audiovisual transmission, now known or later developed, whether by a broadcast station, cable system, multipoint distribution service, subscription service, direct broadcast satellite, or other form of analog or digital communication.

(16) The "Tribunal" is the Copyright Royalty Tribunal.

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

(18) The terms "analog format", "copyright status", "category code", "generation status", and "source material", mean those terms as they are used in the technical reference document.

§ 1002. Prohibition on certain infringement actions

(a) CERTAIN ACTIONS PROHIBITED.—

(1) GENERALLY.—No action may be brought under this title, or under section 337 of the Tariff Act of 1930, alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device or a digital audio recording medium, or an analog audio recording device or analog audio recording medium, or the use of such a device or medium for making phonorecords. However, this subsection does not apply with respect to any claim against a person for infringement by virtue of the making of one or more copies or phonorecords for direct or indirect commercial advantage.

(2) EXAMPLE.—For purposes of this section, the copying of a phonorecord by a consumer for private, noncommercial use is not for direct or indirect commercial advantage, and is therefore not actionable.

(b) EFFECT OF THIS SECTION.—Nothing in this section shall be construed to create or expand a cause of action for copyright infringement except to the extent such a cause of action otherwise exists under other chapters of this title or under section 337 of the Tariff Act of 1930, or to limit any defenses that may be available to such causes of action.

§ 1003. Effect on other rights and remedies with respect to private home copying or otherwise

Except as expressly provided in this chapter with respect to audio recording devices and media, neither the enactment of this chapter nor anything contained in this chapter shall be construed to expand, limit, or otherwise affect the rights of any person with respect to private home copying of copyrighted works, or to expand, limit, create, or otherwise affect any other right or remedy that may be held by or available to any person under chapters 1 through 9 of this title.

SUBCHAPTER B—ROYALTY PAYMENTS

§ 1011. Obligation to make royalty payments

(a) PROHIBITION ON IMPORTATION AND MANUFACTURE.—No person shall import into and distribute in the United States, or manufacture and distribute in the United States, any digital audio recording device or digital audio recording medium unless such person—

(1) records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified by this section and section 1012 of this title, or

(2) complies with the applicable notice, statement of account, and payment obligations under a negotiated arrangement authorized pursuant to section 1016 of this title.

(b) FILING OF NOTICE.—

(1) GENERALLY.—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 a notice with the Register, no later than 45 days after the commencement of the first distribution in the United States of such device or medium, in such form as the Register shall prescribe by regulation.

(2) CONTENTS.—Such notice shall—

(A) set forth the manufacturer's or importer's identity and address,

(B) identify such product category and technology, and

(C) identify any trade or business names, trademarks, or like indicia of origin that the importer or manufacturer uses or intends to use in connection with the importation, manufacture, or distribution of such device or medium in the United States.

(c) FILING OF QUARTERLY STATEMENTS OF ACCOUNT.—

(1) GENERALLY.—Any importer or manufacturer that distributed during a given quarter any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register, in such form as the Register shall prescribe by regulation, a quarterly statement of account specifying, by product category, technology, and model, the number and transfer price of all digital audio recording devices and digital audio recording media that it distributed during such quarter.

(2) TIMING, CERTIFICATION, AND ROYALTY PAYMENTS.—Such statement shall—

(A) be filed no later than 45 days after the close of the period covered by the statement;

(B) be certified as accurate by an authorized officer or principal of the importer or manufacturer;

(C) be accompanied by the total royalty payment due for such period pursuant to section 1012 of this title.

(3) PERIOD COVERED.—The quarterly statements of account may be filed on either a calendar or fiscal year basis, at the election of the manufacturer or importer.

(d) FILING OF ANNUAL STATEMENTS OF ACCOUNT.—

(1) GENERALLY.—Any importer or manufacturer that distributed during a given calendar or fiscal year (as applicable) any digital audio recording device or digital audio recording medium that it manufactured or imported shall also file with the Register a cumulative annual statement of account, in such form as the Register shall prescribe by regulation.

(2) TIMING AND CERTIFICATION.—Such statement shall be filed no later than 60 days after the close of such calendar or fiscal year, and shall be certified as accurate by an authorized officer or principal of the importer or manufacturer.

(3) INDEPENDENT REVIEW AND CERTIFICATION.—The annual statement of account shall be reviewed and, pursuant to generally accepted auditing standards, certified by an independent

certified public accountant selected by the manufacturer or importer as fairly presenting the information contained therein, on a consistent basis and in accordance with the requirements of this chapter.

(4) RECONCILIATION OF ROYALTY PAYMENT.—The cumulative annual statement of account shall be accompanied by any royalty payment due under section 1012 of this title that was not previously paid under subsection (c) of this section.

(e) VERIFICATION.—

(1) GENERALLY.—

(A) The Register shall, after consulting with interested copyright parties and interested manufacturing parties, prescribe regulations specifying procedures for the verification of statements of account filed pursuant to this section.

(B) Such regulations shall permit interested copyright parties to select independent certified public accountants to conduct audits in order to verify the accuracy of the information contained in the statements of account filed by manufacturers and importers.

(C) Such regulations shall also—

(i) specify the scope of such independent audits; and

(ii) establish a procedure by which interested copyright parties will coordinate the engagement of such independent certified public accountants, in order to ensure that no manufacturer or importer is audited more than once per year.

(D) All such independent audits shall be conducted at reasonable times, with reasonable advance notice, and shall be no broader in scope than is reasonably necessary to carry out the purposes of this subsection in accordance with generally accepted auditing standards.

(2) INDEPENDENT CERTIFICATION.—The results of all such independent audits shall be certified as fairly presenting the information contained therein, on a consistent basis and in accordance with the requirements of this chapter and generally accepted auditing standards, by the certified public accountant responsible for the audit. The certification and results shall be filed with the Register.

(3) ACCESS TO DOCUMENTS IN EVENT OF DISPUTE.—In the event of a dispute concerning the amount of the royalty payment due from a manufacturer or importer resulting from a verification audit conducted under this section—

(A) any interested manufacturing party audited pursuant to this subsection, and its authorized representatives, shall be entitled to have access to all documents upon which the audit results under this subsection were based; and

(B) any representative of an interested copyright party that has been approved by the Register under subsection (h)(2) of this section shall be entitled to have access to all documents upon which the audit results under subsection (d) of this section were based, subject to the limitations of subsection (h)(2) of this section.

(f) COSTS OF VERIFICATION.—

(1) The costs of all verification audits that are conducted pursuant to subsection (e) of this section shall be borne by interested copyright parties, except that, in the case of a verification audit of a manufacturer or importer that leads ultimately to recovery of an annual royalty underpayment of 5 percent or more of the annual payment made, the importer or manufacturer shall provide reimbursement for the reasonable costs of such audit.

(2) Except as may otherwise be agreed by interested copyright parties, the costs of a verification audit conducted pursuant to subsection (e) of this section shall be borne by the party engaging the certified public accountant. Any recovery of royalty underpayments as a result of the audit shall be used first to provide reimbursement for the reasonable costs of such audit to the extent such costs have not otherwise been reimbursed by the manufacturer or importer pursuant to this subsection. Any remaining recovery shall be deposited with the Register pursuant to section 1013 of this title, or as may otherwise be provided by a negotiated arrangement authorized under section 1016 of this title, for distribution to interested copyright parties as though such funds were royalty payments made pursuant to this section.

(g) INDEPENDENCE OF ACCOUNTANTS.—Each certified public accountant used by interested copyright parties or interested manufacturing parties pursuant to this section shall be in good standing and shall not be financially dependent upon interested copyright parties or interested manufacturing parties, respectively. The Register may, upon petition by any interested copyright party or interested manufacturing party, prevent the use of a particular certified public accountant on the ground that such accountant does not meet the requirements of this subsection.

(h) CONFIDENTIALITY.—

(1) GENERALLY.—The quarterly and annual statements of account filed pursuant to subsections (c) and (d) of this section, and information disclosed or generated during verification audits conducted pursuant to subsection (e) of this section, shall be presumed to contain confidential trade secret information within the meaning of section 1905 of title 18 of the United States Code. Except as provided in paragraphs (2), (3), and (4) of this subsection, neither the Register nor any member, officer, or employee of the Copyright Office or the Tribunal, may—

(A) publicly disclose audit information furnished under this section or information contained in quarterly or annual statements of account, except that aggregate information that does not disclose, directly or indirectly, company-specific information may be made available to the public;

(B) use such information for any purpose other than to carry out responsibilities under this chapter; or

(C) permit anyone (other than members, officers, and employees of the Copyright Office and the Tribunal who require such information in the performance of duties under this chapter) to examine such information.

(2) PROCEDURES FOR ACCESS TO BE PRESCRIBED BY REGISTER.—(A) The Register, after consulting with interested manufacturing parties and interested copyright parties, shall prescribe procedures for disclosing, in confidence, to representatives of interested copyright parties and representatives of interested manufacturing parties information contained in quarterly and annual statements of account and information generated as a result of verification audits.

(B) Such procedures shall provide that only those representatives of interested copyright parties and interested manufacturing parties who have been approved by the Register shall have access to such information, and that all such representatives shall be required to sign a certification limiting the use of the information to—

(i) verification functions under this section, and

(ii) any enforcement actions that may result from such verification procedures.

(3) ACCESS BY AUDITED MANUFACTURER.—Any interested manufacturing party that is audited pursuant to subsection (e) of this section, and its authorized representatives, shall be entitled to have access to all documents filed with the Register as a result of such audit.

(4) ACCESS BY CONGRESS.—Nothing in this section shall authorize the withholding of information from the Congress.

§ 1012. Royalty payments

(a) DIGITAL AUDIO RECORDING DEVICES.—

(1) The royalty payment due under section 1011 of this title 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. However, 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) 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 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 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) Notwithstanding paragraph (1) or (2) of this subsection, the amount of the royalty payment for each digital audio recording device or physically integrated unit containing a 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 for a physically integrated unit containing more than one 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 no more than once each year thereafter, any interested copyright party may petition the 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 1011 of this title 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. However, 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.

(c) RETURNED OR EXPORTED MERCHANDISE.—

(1) In calculating the amount of royalty payments due under subsections (a) and (b) of this section, manufacturers and importers may deduct the amount of any royalty payments already made on digital audio recording devices or media that are—

(A) returned to the manufacturer or importer as unsold or defective merchandise; or

(B) exported by the manufacturer or importer or a related person.

(2) Any such credit shall be taken during the period when such devices or media are returned or exported, and the basis for any such credit shall be set forth in the statement of account for such period filed under section 1011(c) of this title.

(3) Any such credit that is not fully used during such period may be carried forward to subsequent periods. If any returned or exported merchandise for which a credit has been taken is subsequently distributed, a royalty payment shall be made as specified under subsection (a) or (b) of this section, based on the transfer price applicable to such distribution.

§ 1013. Deposit of royalty payments and deduction of expenses

The Register 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 1014, 1015, or 1016 of this title. The Register shall submit to the Copyright Royalty Tribu-

nal, on a quarterly basis, such information as the Tribunal shall require to perform its functions under this chapter.

§ 1014. Entitlement to royalty payments

(a) INTERESTED COPYRIGHT PARTIES.—The royalty payments deposited pursuant to section 1013 of this title shall, in accordance with the procedures specified in section 1015 or 1016 of this title, 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 to the public, and

(B) distributed to the public 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 1015 or 1016 of this title.

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

(1) THE SOUND RECORDINGS FUND.—66⅔ percent of the royalty payments shall be allocated to the Sound Recordings Fund. The American Federation of Musicians (or any successor entity) shall receive 2⅝ percent of the royalty payments allocated to the Sound Recordings Fund for the benefit of nonfeatured musicians who have performed on sound recordings distributed in the United States. The American Federation of Television and Radio Artists (or any successor entity) shall receive 1⅜ percent of the royalty payments allocated to the Sound Recordings Fund for the benefit of nonfeatured vocalists who have performed on sound recordings distributed in the United States. The remaining royalty payments in the Sound Recordings Fund shall be distributed to claimants under subsection (a) of this section who are interested copyright parties under section 1001(a)(6)(i) of this title. Such claimants shall allocate such royalty payments, on a per sound recording basis, in the following manner: 40 percent to the recording artist or artists featured on such sound recordings (or the persons conveying rights in the artists' performances in the sound recordings), and 60 percent to the interested copyright parties.

(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 whose entitlement is based on legal or beneficial ownership or control of a copyright in a musical work.

(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) of this section do not agree on a voluntary proposal for the distribution of the royalty payments within such group, the Tribunal shall, pursuant to the procedures specified in section 1015(c) of this title, allocate such royalty payments based on the extent to which, during the relevant period—

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

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

§ 1015. Procedures for distributing royalty payments

(a) FILING OF CLAIMS AND NEGOTIATIONS.—

(1) During the first 2 months of each calendar year after the calendar year in which this chapter takes effect, every interested copyright party that is entitled to royalty payments under section 1014 of this title shall file with the Tribunal a claim for payments collected during the preceding year in such form and manner as the Tribunal shall prescribe by regulation.

(2) All interested copyright parties within each group specified in section 1014(b) of this title shall negotiate in good faith among themselves in an effort to agree to a voluntary proposal for the distribution of royalty payments. Notwithstanding any provision of the antitrust laws, for purposes of this section such interested copyright parties 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 vary the division of royalties specified in section 1014(b) of this title.

(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) of this section, in each year after the year in which this section takes effect, the Tribunal shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1014(c) of this title. If the Tribunal determines that no such controversy exists, it shall 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) of this section, 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.

§ 1016. Negotiated collection and distribution arrangements

(a) SCOPE OF PERMISSIBLE NEGOTIATED ARRANGEMENTS.—

(1) Notwithstanding sections 1011 through 1015 of this title, interested copyright parties and interested manufacturing par-

ties may at any time negotiate among or between themselves an alternative system for the collection, distribution, or verification of royalty payments provided for in this chapter.

(2) Such a negotiated arrangement may vary the collection, distribution, and verification procedures and requirements that would otherwise apply, including the time periods for payment and distribution of royalties, but shall not alter the royalty rates specified in section 1012(a)(1) or (b) of this title, the division of royalty payments specified in section 1014(b) of this title, or the notice requirement of section 1011(b) of this title.

(3) Such a negotiated arrangement may also provide that specified types of disputes that cannot be resolved among the parties shall be resolved by binding arbitration or other agreed upon means of dispute resolution. Notwithstanding any provision of the antitrust laws, for purposes of this section interested manufacturing parties and interested copyright parties may agree among themselves as to the collection, allocation, distribution, and verification of royalty payments, and may designate common agents to negotiate and carry out such activities on their behalf.

(b) IMPLEMENTATION OF A NEGOTIATED ARRANGEMENT.—(1)(A) No negotiated arrangement shall go into effect under this section until the Tribunal has determined, after full opportunity for comment, that the participants in the negotiated arrangement include—

(i) at least two-thirds of all individual interested copyright parties that are entitled to receive royalty payments from the Sound Recordings Fund,

(ii) at least two-thirds of all individual interested copyright parties that are entitled to receive royalty payments from the Musical Works Fund as music publishers, and

(iii) at least two-thirds of all individual interested copyright parties that are entitled to receive royalty payments from the Musical Works Fund as writers.

(B) For purposes of subparagraph (A) of this paragraph, the determination as to two-thirds participation shall be based on annual retail sales of phonorecords in which musical works or sound recordings of musical works are embodied. One or more organizations representing any of the types of individual interested copyright parties specified in the first sentence of this subsection shall be presumed to represent two-thirds of that type of interested copyright party if the membership of, or other participation in, such organization or organizations includes two-thirds of that type of interested copyright party based on annual retail sales of phonorecords in which musical works or sound recordings of musical works are embodied.

(2) Notwithstanding the existence of a negotiated arrangement that has gone into effect under this subsection—

(A) any interested manufacturing party that is not a party to such negotiated arrangement may fully satisfy its obligations under this subchapter by complying with the procedures set forth in section 1011 of this title; and

(B) the Tribunal shall ensure that alternative distribution procedures are available for any interested copyright party that is not a party to such negotiated arrangement.

(c) MAINTENANCE OF JURISDICTION BY TRIBUNAL.—Where a negotiated arrangement has gone into effect under this section, the Tribunal shall maintain jurisdiction to hear and address any objections to the arrangement that may arise while it is in effect, and to ensure the availability of alternative procedures for any interested manufacturing party or interested copyright party that is not a participant in the negotiated arrangement.

SUBCHAPTER C—THE SERIAL COPY MANAGEMENT SYSTEM

§ 1021. Incorporation of the serial copy management system

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

(1) No person shall import, manufacture, or distribute any digital audio recording device or any digital audio interface device that does not conform to the standards and specifications to implement the Serial Copy Management System that are—

(A) set forth in the technical reference document;

(B) set forth in an order by the Secretary of Commerce under section 1022 (b)(1), (2), or (3) of this title; or

(C) in the case of a digital audio recording device other than a device defined in part II of the technical reference document or in an order issued by the Secretary pursuant to section 1022(b) of this title, established by the manufacturer (or, in the case of a proprietary technology, the proprietor of such technology) so as to achieve the same functional characteristics with respect to regulation of serial copying as, and to be compatible with the prevailing method for implementation of, the Serial Copy Management System set forth in the technical reference document or in any order of the Secretary issued under section 1022 of this title.

(2) If the Secretary of Commerce approves standards and specifications under section 1022(b)(4) of this title, then no person shall import, manufacture, or distribute any digital audio recording device or any digital audio interface device that does not conform to such standards and specifications.

(b) PROHIBITION ON CIRCUMVENTION OF THE SERIAL COPY MANAGEMENT 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, the Serial Copy Management System in a digital audio recording device or a digital audio interface device.

(c) ENCODING OF INFORMATION ON PHONORECORDS.—(1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material so as improperly to affect the operation of the Serial Copy Management System.

(2) Nothing in this subchapter requires any person engaged in the importation, manufacture, or assembly of phonorecords to encode any such phonorecord with respect to its copyright status.

(d) 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 subchapter to transmit or otherwise communicate the information relating to the copyright status of the sound recording. However, any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

§ 1022. Implementing the serial copy management system

(a) PUBLICATION OF TECHNICAL REFERENCE DOCUMENT.—Within 10 days after the date of the enactment of this chapter, the Secretary of Commerce shall cause the technical reference document to be published in the Federal Register.

(b) ORDERS OF SECRETARY OF COMMERCE.—The Secretary of Commerce, upon petition by an interested manufacturing party or an interested copyright party, and after consultation with the Register, may, if the Secretary determines that to do so is in accordance with the purposes of this chapter, issue an order to implement the Serial Copy Management System set forth in the technical reference document as follows:

(1) FUNCTIONALLY EQUIVALENT ALTERNATIVES.—The Secretary may issue an order for the purpose of permitting in commerce devices that do not conform to all of the standards and specifications set forth in the technical reference document, if the Secretary determines that such devices possess the same functional characteristics with respect to regulation of serial copying as, and are compatible with the prevailing method for implementation of, the Serial Copy Management System set forth in the technical reference document.

(2) REVISED GENERAL STANDARDS.—The Secretary may issue an order for the purpose of permitting in commerce devices that do not conform to all of the standards and specifications set forth in the technical reference document, if the Secretary determines that—

(A) the standards and specifications relating generally to digital audio recording devices and digital audio interface devices have been or are being revised or otherwise amended or modified such that the standards and specifications set forth in the technical reference document are not or would no longer be applicable or appropriate; and

(B) such devices conform to such new standards and specifications and possess the same functional characteristics with respect to regulation of serial copying as the Serial Copy Management System set forth in the technical reference document.

(3) STANDARDS FOR NEW DEVICES.—The Secretary may issue an order for the purpose of—

(A) establishing whether the standards and specifications established by a manufacturer or proprietor for digital audio recording devices other than devices defined in part II of the technical reference document or a prior order of the Secretary under paragraph (1) or (2) of this subsection

comply with the requirements of subparagraph (C) of section 1021(a)(1) of this title; or

(B) establishing alternative standards or specifications in order to ensure compliance with such requirements.

(4) MATERIAL INPUT TO DIGITAL DEVICE THROUGH ANALOG CONVERTER.—

(A) GENERALLY.—Except as provided in subparagraphs (B) through (D), the Secretary, after publication of notice in the Federal Register and reasonable opportunity for public comment, may issue an order for the purpose of approving standards and specifications for a technical method implementing in a digital audio recording device the same functional characteristics as the Serial Copy Management System so as to regulate the serial copying of source material input through an analog converter in a manner equivalent to source material input in the digital format.

(B) COST LIMITATION.—The order may not impose a total cost burden on manufacturers of digital audio recording devices, for implementing the Serial Copy Management System and the technical method prescribed in such order, in excess of 125 percent of the cost of implementing the Serial Copy Management System before the issuance of such order.

(C) CONSIDERATION OF OTHER OBJECTIONS.—The Secretary shall consider other reasoned objections from any interested manufacturing party or interested copyright party.

(D) LIMITATION TO DIGITAL AUDIO DEVICES.—The order shall not affect the recording of any source material on analog recording equipment and the order shall not impose any restrictions or requirements that must be implemented in any device other than a digital audio recording device or digital audio interface device.

SUBCHAPTER D—REMEDIES

§ 1031. Civil remedies

(a) CIVIL ACTIONS.—Any interested copyright party or interested manufacturing party that is or would be injured by a violation of section 1011 or 1021 of this title, or the Attorney General of the United States, may bring a civil action in an appropriate United States district court against any person for such violation.

(b) POWERS OF THE COURT.—In an action brought under subsection (a) of this section, the court—

(1) except as provided in subsection (h) of this section, 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 1011 (a) through (d) or 1021 of this title, shall award damages under subsection (d) of this section;

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

(4) in its discretion may award a reasonable attorney's fee to the prevailing party as part of the costs awarded under para-

graph (3) if the court finds that the nonprevailing party has not proceeded in good faith; and

(5) may grant such other equitable relief as it deems reasonable.

(c) RECOVERY OF OVERDUE ROYALTY PAYMENTS.—In any case in which the court finds that a violation of section 1011 of this title involving nonpayment or underpayment of royalty payments has occurred, the violator shall be directed to pay, in addition to damages awarded under subsection (d) of this section, any such royalties due, plus interest calculated as provided under section 1961 of title 28, United States Code.

(d) AWARD OF DAMAGES.—

(1) SECTION 1011.—

(A) DEVICE.—In the case of a violation of section 1011 (a) through (d) of this title involving a digital audio recording device, the court shall award statutory damages in an amount between a nominal level and $100 per device, as the court considers just.

(B) MEDIUM.—In the case of a violation of section 1011 (a) through (d) of this title involving a digital audio recording medium, the court shall award statutory damages in an amount between a nominal level and $4 per medium, as the court considers just.

(2) SECTION 1021.—In any case in which the court finds that a violation of section 1021 of this title has occurred, the court shall award damages calculated, at the election of the complaining party at any time before final judgment is rendered, pursuant to subparagraph (A) or (B) of this paragraph, but in no event shall the judgment (excluding any award of actual damages to an interested manufacturing party) exceed a total of $1,000,000:

(A) ACTUAL DAMAGES.—A complaining party may recover its actual damages suffered as a result of the violation and any profits of the violator that are attributable to the violation that are not taken into account in computing the actual damages. In determining the violator's profits, the complaining party is required to prove only the violator's gross revenue, and the violator is required to prove its deductible expenses and the elements of profit attributable to factors other than the violation.

(B) STATUTORY DAMAGES.—

(i) DEVICE.—A complaining party may recover an award of statutory damages for each violation of section 1021 (a) or (b) of this title in the sum of not less than $1,000 nor more than $10,000 per device involved in such violation or per device on which a service prohibited by section 1021(b) of this title has been performed, as the court considers just.

(ii) PHONORECORD.—A complaining party may recover an award of statutory damages for each violation of section 1021(c) of this title in the sum of not less than $10 nor more than $100 per phonorecord 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 1021(d) of this title in the sum of not less than $10,000 nor more than $100,000, as the court considers just.

(3) WILLFUL VIOLATIONS.—

(A) In any case in which the court finds that a violation of section 1011 (a) through (d) of this title was committed willfully and for purposes of direct or indirect commercial advantage, the court shall increase statutory damages—

(i) for a violation involving a digital audio recording device, to a sum of not less than $100 nor more than $500 per device; and

(ii) for a violation involving a digital audio recording medium, to a sum of not less than $4 nor more than $15 per medium, as the court considers just.

(B) In any case in which the court finds that a violation of section 1021 of this title was committed willfully and for purposes of direct or indirect commercial advantage, the court in its discretion may increase the award of damages by an additional amount of not more than $5,000,000, as the court considers just.

(4) INNOCENT VIOLATIONS OF SECTION 1021.—The court in its discretion may reduce the total award of damages against a person violating section 1021 of this title to a sum of not less than $250 in any case in which the court finds that—

(A) the violator was not aware and had no reason to believe that its acts constituted a violation of section 1021 of this title, or

(B) in the case of a violation of section 1021(a) of this title involving a digital audio recording device, the violator believed in good faith that the device complied with section 1021(a)(1)(C) of this title, except that this subparagraph shall not apply to any damages awarded under subsection (d)(2)(A) of this section.

(e) MULTIPLE ACTIONS.—

(1) GENERALLY.—No more than one action shall be brought against any party and no more than one award of statutory damages under subsection (d) of this section shall be permitted—

(A) for any violations of section 1011 of this title involving the same digital audio recording device or digital audio recording medium; or

(B) for any violations of section 1021 of this title involving digital audio recording devices or digital audio recording media of the same model, except that this subparagraph shall not bar an action or an award of damages with respect to digital audio recording devices or digital audio recording media that are imported, manufactured, or distributed subsequent to a final judgment in a prior action.

(2) NOTICE AND INTERVENTION.—Any complaining party who brings an action under this section shall serve a copy of the complaint upon the Register within 10 days after the complaining party's service of a summons upon a defendant. The Regis-

ter shall cause a notice of such action to be published in the Federal Register within 10 days after receipt of such complaint. The court shall permit any other interested copyright party or interested manufacturing party entitled to bring the action under section 1031(a) of this title who moves to intervene within 30 days after the publication of such notice to intervene in the action.

(3) AWARD.—

(A) GENERALLY.—Except as provided in subparagraph (B), the court may award recovery of actual damages for a violation of section 1021 of this title pursuant to subsection (d)(2)(A) of this section to each complaining party in an action who elects to recover actual damages.

(B) LIMITATIONS.—

(i) If more than one complaining party elects to recover actual damages pursuant to subsection (d)(2)(A) of this section, only a single award of the violator's profits shall be made, which shall be allocated as the court considers just.

(ii) If any complaining interested copyright party or parties elect to recover statutory damages pursuant to subsection (d)(2) of this section in an action in which one or more other complaining interested copyright parties have elected to recover actual damages, the single award of statutory damages permitted pursuant to paragraph (1) of this subsection shall be reduced by the total amount of actual damages awarded to interested copyright parties pursuant to subsection (d)(2)(A) of this section.

(f) PAYMENT OF OVERDUE ROYALTIES AND DAMAGES.—The court may allocate any award of damages under subsection (d) of this section between or among complaining parties as it considers just. Any award of damages that is allocated to an interested copyright party and any award of overdue royalties and interest under subsection (c) of this section shall be deposited with the Register pursuant to section 1013 of this title, or as may otherwise be provided pursuant to a negotiated arrangement authorized under section 1016 of this title, for distribution to interested copyright parties as though such funds were royalty payments made pursuant to section 1011 of this title.

(g) IMPOUNDING OF ARTICLES.—At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of any digital audio recording device, digital audio interface device, phonorecord, or device specified in section 1021(b) of this title 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 1021 of this title.

(h) LIMITATIONS REGARDING PROFESSIONAL MODELS AND OTHER EXEMPT DEVICES.—Unless a court finds that the determination by a manufacturer or importer that a device fits within the exemption of subparagraph (A) or (B) of section 1001(3) of this title was without a reasonable basis or not in good faith, the court shall not grant a

temporary or preliminary injunction against the distribution of such device by the manufacturer or importer.

(i) REMEDIAL MODIFICATION AND DESTRUCTION OF ARTICLES.—As part of a final judgment or decree finding a violation of section 1021 of this title, the court shall order the remedial modification, if possible, or the destruction of any digital audio recording device, digital audio interface device, phonorecord, or device specified in section 1021(b) of this title that—

(1) does not comply with, or was involved in a violation of, section 1021 of this title, and

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

(j) DEFINITIONS.—For purposes of this section—

(1) the term "complaining party" means an interested copyright party, interested manufacturing party, or the Attorney General of the United States when one of these parties has initiated or intervened as a plaintiff in an action brought under this section; and

(2) the term "device" does not include a phonorecord.

§ 1032. Binding arbitration

(a) DISPUTES TO BE ARBITRATED.—Any dispute between an interested manufacturing party and an interested copyright party shall be resolved through binding arbitration, in accordance with the provisions of this section, if—

(1) the parties mutually agree; or

(2) before the date of first distribution in the United States of the product which is the subject of the dispute, an interested manufacturing party or an interested copyright party requests arbitration concerning whether such product is or is not a digital audio recording device, a digital audio recording medium, or a digital audio interface device, or concerning the basis on which royalty payments are to be made with respect to such product.

(b) ARBITRAL PROCEDURES.—

(1) REGULATIONS FOR COORDINATION OF ARBITRATION.—The Register shall, after consulting with interested copyright parties, prescribe regulations establishing a procedure by which interested copyright parties will coordinate decisions and representation concerning the arbitration of disputes. No interested copyright party shall have the authority to request, agree to, or (except as an intervenor pursuant to subsection (c) of this section) enter into, binding arbitration unless that party shall have been authorized to do so pursuant to the regulations prescribed by the Register.

(2) PANEL.—Except as otherwise agreed by the parties to a dispute that is to be submitted to binding arbitration under subsection (a) of this section, the dispute shall be heard by a panel of three arbitrators, with one arbitrator selected by each of the two sides to the dispute and the third arbitrator selected by mutual agreement of the first two arbitrators chosen.

(3) DECISION.—The arbitral panel shall render its final decision concerning the dispute, in a written opinion explaining its reasoning, within 120 days after the date on which the selection

of arbitrators has been concluded. The Register shall cause to be published in the Federal Register the written opinion of the arbitral panel within 10 days after receipt thereof.

(4) TITLE 9 PROVISIONS TO GOVERN.—Except to the extent inconsistent with this section, any arbitration proceeding under this section shall be conducted in the same manner, subject to the same limitations, carried out with the same powers (including the power to summon witnesses), and enforced in the courts of the United States as an arbitration proceeding under title 9, United States Code.

(5) PRECEDENTS.—In rendering a final decision, the arbitral panel shall take into account any final decisions rendered in prior proceedings under this section that address identical or similar issues; and failure of the arbitral panel to take account of such prior decisions may be considered imperfect execution of arbitral powers under section 10(a)(4) of title 9, United States Code.

(c) NOTICE AND RIGHT TO INTERVENE.—Any interested copyright party or interested manufacturing party that requests an arbitral proceeding under this section shall provide the Register with notice concerning the parties to the dispute and the nature of the dispute within 10 days after formally requesting arbitration under subsection (a) of this section. The Register shall cause a summary of such notice to be published in the Federal Register within 10 days after receipt of such notice. The arbitral panel shall permit any other interested copyright party or interested manufacturing party who moves to intervene within 20 days after such publication to intervene in the action.

(d) AUTHORITY OF ARBITRAL PANEL TO ORDER RELIEF.—

(1) TO PROTECT PROPRIETARY INFORMATION.—The arbitral panel shall issue such orders as are appropriate to protect the proprietary technology and information of parties to the proceeding, including provision for injunctive relief in the event of a violation of such order.

(2) TO TERMINATE PROCEEDING.—The arbitral panel shall terminate any proceeding that it has good cause to believe has been commenced in bad faith by a competitor in order to gain access to proprietary information. The panel shall also terminate any proceeding that it believes has been commenced before the technology or product at issue has been sufficiently developed or defined to permit an informed decision concerning the applicability of this chapter to such technology or product.

(3) TO ORDER RELIEF.—In any case in which the arbitral panel finds, with respect to devices or media that were the subject of the dispute, that royalty payments have been or will be due under section 1011 of this title through the date of the arbitral decision, the panel shall order the deposit of such royalty payments pursuant to section 1013 of this title, plus interest calculated as provided under section 1961 of title 28, United States Code. The arbitral panel shall not award monetary or injunctive relief, as provided in section 1031 of this title or otherwise, except as is expressly provided in this subsection.

(e) EFFECT OF ARBITRATION PROCEEDING ON CIVIL ACTIONS AND REMEDIES.—Notwithstanding any provision of section 1031 of this

title, no civil action may be brought or relief granted under section 1031 of this title against any party to an ongoing or completed arbitration proceeding under this section, with respect to devices or media that are the subject of such an arbitration proceeding. However, this subsection does not bar—

(1) an action for injunctive relief at any time based on a violation of section 1021 of this title; or

(2) an action or any relief with respect to those devices or media distributed by their importer or manufacturer following the conclusion of such arbitration proceeding, or, if so stipulated by the parties, prior to the commencement of such proceeding.

(f) ARBITRAL COSTS.—Except as otherwise agreed by the parties to a dispute, the costs of an arbitral proceeding under this section shall be divided among the parties in such fashion as is considered just by the arbitral panel at the conclusion of the proceeding. Each party to the dispute shall bear its own attorney fees unless the arbitral panel determines that a nonprevailing party has not proceeded in good faith and that, as a matter of discretion, it is appropriate to award reasonable attorney's fees to the prevailing party.

SECTION 337 OF THE TARIFF ACT OF 1930

SEC. 337. UNFAIR PRACTICES IN IMPORT TRADE.

(a) * * *

(b) INVESTIGATIONS OF VIOLATIONS BY COMMISSION; TIME LIMITS.—(1) * * *

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(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of section 303 or of subtitle B of title VII of the Tariff Act of 1930, it shall promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such section and such Act. [If the Commission has reason to believe the matter before it is based solely on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, it shall terminate, or not institute, any investigation into the matter.] *If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 303, 671, or 673, or (B) relates to an alleged copyright infringement with respect to which action under this section is prohibited by section 1002 of title 17, United States Code, the Commission shall terminate, or not institute, any investigation into the matter.* If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 771(1) of this Act) with respect to a matter under this para-

graph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. For purposes of computing the 1-year or 18-month periods prescribed by this subsection, there shall be excluded such period of suspension. Any final decision of the Secretary under section 303 of this Act or by the administering authority under section 701 or 731 of this Act with respect to the matter within such section 303, 701, or 731 of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

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