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SENATE

REPORT
102-294

AUDIO HOME RECORDING ACT OF 1991

JUNE 9, (legislative day, MARCH 26), 1992.—Ordered to be printed

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

REPORT

[To accompany S. 1623]

The Committee on the Judiciary, to which was referred the bill S. 1623, which would amend title 17, United States Code, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Audio Home Recording Act of 1991".

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

"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.
"1014. Entitlement to royalty payments.
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"1016. Negotiated collection and distribution arrangements.

"SUBCHAPTER C—THE SERIAL COPY MANAGEMENT SYSTEM

"1021. Incorporation of the serial copy management system.
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"SUBCHAPTER D—REMEDIES

"1031. Civil remedies.
"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) An 'audiogram' is a material object (i) in which are fixed, by any method now known or later developed, only sounds (and not, for example, a motion picture or other audiovisual work even though it may be accompanied by 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.

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

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

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

"(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.

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

"(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 audio-

visual works or for the purpose of making copies of nonmusical library works, including, without limitation, computer programs or data bases.

"(6) '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.

"(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 an audiogram 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 an audiogram a musical work that has been embodied in an audiogram 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.

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

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

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

"(11)(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.

"(12) The 'Register' is the Register of Copyrights.

"(13) 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).

"(14) The 'technical reference document' is the document entitled 'Technical Reference Document for Audio Home Recording Act of 1991' in section 5 of this Act.

"(15)(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.

"(16) 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.

"(17) The 'Tribunal' is the Copyright Royalty Tribunal.

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

"(19) 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 audiograms. However, this subsection does not apply with respect to any claim against a person for infringement by virtue of the making of one or more audiograms, or other material objects in which works are fixed, for direct or indirect commercial advantage.

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

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

"§ 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; provided, however, that no notice shall be required with respect to any distribution occurring prior to the effective date of this chapter.

"(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) 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.

"(3) STATEMENTS OF ACCOUNT FOR THE FIRST THREE QUARTERS.—For the first three quarters of any calendar or fiscal year, such statement shall—

"(A) be filed no later than 45 days after the close of the period covered by the statement; *provided, however,* that any quarterly statement that would be due within three months and 45 days of the effective date of this chapter shall not be filed until the next quarterly statement is due, at which time a statement shall be filed covering the entire period since the effective date of this chapter;

"(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.

"(4) STATEMENT OF ACCOUNT FOR THE FOURTH QUARTER.—The quarterly statement for the final quarter of any calendar or fiscal year shall be incorporated into the annual statement required under subsection (d) of this section, which shall be accompanied by the royalty payment due for such quarter.

"(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 subsections (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; provided, however, that the amount of any such increase as a percentage of the royalty maximum shall in no event exceed the percentage increase in the Consumer Price Index during the period under review.

"(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—

within two years following the date royalties are paid on such devices or media.

"(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 may, in the Register's discretion, four years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the next succeeding calendar year. The Register shall submit to the Copyright Royalty Tribunal, on a monthly basis, a financial statement reporting the amount of royalties available for distribution.

"§ 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 audiograms lawfully made under this title that have been distributed to the public, and

"(B) distributed to the public in the form of audiograms 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 2%* 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 1⅔ 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(7)(A) 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) DISTRIBUTION 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 Recording Fund, each sound recording was distributed to the public in the form of audiograms; and

"(2) for the Musical Works Fund, each musical work was distributed to the public in the form of audiograms 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 allocation 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, 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) 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) Interested copyright parties and interested manufacturing parties may at any time negotiate among or between themselves a single 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 under sections 1011 through 1015 of this title, including the time periods for payment and distribution of royalties, but shall not alter the requirements of section 1011(a), (b), or (h)(4), section 1012 (a) or (b), or section 1014 (a) or (b) of this title.

"(3) Such a negotiated arrangement may also provide that specified types of disputes that cannot be resolved among the parties to the arrangement shall be resolved by binding arbitration or other agreed upon means of dispute resolution.

"(4) Notwithstanding any provision of the antitrust laws, for purposes of this section interested manufacturing parties and interested copyright parties may negotiate in good faith and voluntarily agree among themselves as to the collection, 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) No negotiated arrangement shall go into effect under this section until the Tribunal has approved the arrangement, after full opportunity for comment, as meeting the following requirements.

"(A) The participants in the negotiated arrangement shall include—

"(i) at least two-thirds of all individual interested copyright parties that are entitled to receive royalty payments from the Sound Recording 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 audiograms 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 audiograms in which musical works or sound recordings of musical works are embodied.

"(C) The implementation of the arrangement shall include all necessary safeguards, as determined by the Tribunal, which ensure that all interested copyright parties who are not participants in the arrangement receive the royalty payments to which they would be entitled in the absence of such an arrangement under sections 1013 and either 1014(c) or 1015(b), whichever is applicable. Such safeguards may include accounting procedures, reports and any other information determined to be necessary to ensure the proper collection and distribution of royalty payments.

"(2) Notwithstanding the existence of a negotiated arrangement that has gone into effect under this section, any interested manufacturing party that is not a party to such negotiated arrangement shall remain subject to the requirements of sections 1011 and 1012 and may fully satisfy its obligations under this subchapter by complying with the procedures set forth therein.

"(c) MAINTENANCE OF JURISDICTION BY TRIBUNAL.—Where a negotiated arrangement has gone into effect under this section, the Tribunal shall maintain jurisdiction and shall (1) hear and address any objections to the arrangement that may arise while it is in effect, (2) ensure the availability of alternative procedures for any interested manufacturing party or interested copyright party that is not a participant in the negotiated arrangement, (3) ensure that all interested copyright parties who are not participants in the arrangement receive the royalty payments to which they would be entitled in the absence of such an arrangement under sections 1013 and either 1014(c) or 1015(b), whichever is applicable, (4) ensure that it has adequate funds at its disposal, received either through the Copyright Office or through the entity administering the negotiated arrangement, to distribute to interested copyright parties not participating in the arrangement the royalty payments to which they are entitled under section 1014(c) or 1015(b), including applicable interest, and (5) ensure that the requirements of section 1016(b)(1)(C) are met.

"(d) JUDICIAL ENFORCEMENT.—The Tribunal may seek injunctive relief in an appropriate United States district court to secure compliance with the requirements of subsection (c).

"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 AUDIOGRAMS.—

"(1) No person shall encode an audiogram 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 audiograms to encode any such audiogram 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 AND CERTIFICATION.—Within 10 days after the date of enactment of this chapter, the Secretary of Commerce shall cause to be published in the Federal Register the technical reference document along with the certification from the National Institute of Standards and Technology, as such certification appears in the report of the Committee on the Judiciary to the Senate on the Audio Home Recording Act of 1991, that the technical reference document sets forth standards and specifications that adequately incorporate the intended functional characteristics to regulate serial copying and are not incompatible with existing international digital audio interface standards and existing digital audio technology.

"(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) LIMITATIONS 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 paragraph (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) AUDIOGRAM.—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 audiogram 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 interface devices 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 interface devices 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 Register 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, audiogram, 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(4) 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, audiogram, 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 an audiogram.

"§ 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 proceedings 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 30 days after receipt of such notice. The arbitral panel shall permit any other interested copyright party or interested manu-

facturing 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 proceedings.

"(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 it 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.".

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 1014, to determine, in cases where controversy exists, 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, 1015, or 1016".

(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 or January 1, 1992, whichever date is later.

SEC. 5. TECHNICAL REFERENCE DOCUMENT FOR AUDIO HOME RECORDING ACT OF 1991.

SEC. 6. REPEAL OF SECTION 5.

Effective upon publication of the Technical Reference Document in the Federal Register pursuant to section 1022(a) of this title—

(a) section 5 of this Act shall be repealed, and

(b) section 1001(14) of this title shall be amended by striking "in section 5 of this Act" and inserting "as such document was published in the Federal Register pursuant to section 1022(a) of this title".

TECHNICAL REFERENCE DOCUMENT FOR THE AUDIO HOME RECORDING ACT OF 1991

INTRODUCTION

This Technical Reference Document is provided to facilitate the implementation of legislation relating to digital audio recording ("DAR") devices, known as the "Audio Home Recording Act of 1991" ("the Act").

This Technical Reference Document establishes the standards and specifications that are necessary to implement the Serial Copy Management System ("SCMS") under the Act. It draws in part from specifications proposed to the International Electrotechnical Commission ("IEC") in "IEC 958: Digital Audio Interface" (First edition 1989-03) and "Amendment Number 1 to IEC 958 (1989): Digital Audio Interface, Serial Copy Management System" (Reference 84(CO)126 submitted on June 21, 1991) (collectively, "IEC 958"), and "IEC 60A(CO)136 Part 6: Serial copy management system for consumer audio use DAT recorders". The standards and specifications set forth herein relate only to the implementation of SCMS via digital audio interface signals, DAR devices and digital audio interface devices. The standards and specifications set forth herein, as they may be amended pursuant to an order of the Secretary of Commerce under section 1022(b) of subchapter C of the Act, shall be considered determinative under the Act, regardless of any future action by the IEC or by a manufacturer or by an owner of a proprietary technology.

SCMS is intended to prohibit DAR devices from recording "second-generation" digital copies from "first-generation" digital copies containing audio material over which copyright has been asserted via SCMS. It does not generally restrict the ability of such devices to make "first-generation" digital copies from "original" digital sources such as prerecorded commercially available compact discs, digital transmissions or digital tapes.

Currently, the predominant type of DAR device offered for sale in the United States is the DAT recorder, which records and sends digital signals in accordance with the IEC 958 nonprofessional digital audio interface format. Additional types of DAR devices and interface formats are being or may be developed. The standards and specifications in this Technical Reference Document are not intended to hinder the development of such new technologies but require, in accordance with section 1021(a)(1)(A)–(C) of subchapter C of the Act, that they incorporate the functional characteristics of SCMS protection. In order for a DAR device to be "compatible with the prevailing method of implementing SCMS," to the extent DAR devices are capable of recording signals sent in a particular digital audio interface signal format, the SCMS information must be accurately received and acted upon by the DAR devices so as to correctly implement the same level of SCMS protection provided by that format. "Compatibility" does not require direct bit-for-bit correspondence across every interface signal format; indeed, particular interface signal formats may be recordable by some, but not all, DAR devices. To the extent that any digital audio interface device translates and sends signals in a form that can be recorded by a particular DAR device, however, "compatibility" requires that the SCMS information also be accurately translated and sent by the interface device, and accurately read and acted upon by the DAR device.

This document is in three parts. Part I section A sets forth standards and specifications constituting the functional characteristics for implementing SCMS in digital audio interface signals. Sections B and C then apply these standards and specifications in a specific reference for implementing SCMS in the IEC 958 nonprofessional digital audio interface format. Part II section A similarly first sets forth standards and specifications constituting the functional characteristics for implementing SCMS in DAR devices. Sections B and C then apply these standards and specifications in a specific reference for implementing SCMS with respect to the recording and play-back functions of nonprofessional model DAT recorders. Part III contains a series of charts that apply and correlate those codes that are mandated for implementation in DAT recorders by parts I–C and II–C of this document.

The terms "digital audio interface device," "digital audio recording device," "digital audio recording medium," "distribute," "professional model," and 'transmission" as used in this document have the same meanings as in the Act. "Generation status" means whether the signal emanates from a source that has been produced or published by or with the authority of the owner of the material, such as commercially released pre-recorded compact discs or digital tapes or a digital transmission (referred to herein as "original"); or whether the signal emanates from a recording made from such "original" material.

PART I. IMPLEMENTATION OF SCMS IN DIGITAL AUDIO INTERFACE FORMATS

Various consumer devices are capable of producing digital audio signals. Currently, for example, compact disc players, DAT recorders and analog-to-digital converters can send digital audio signals; future devices may include digital microphones or recordable compact disk devices. To enable communication between these different types of devices and a DAR device, it is necessary and desirable to establish common protocols or "interfaces" that mandate specific information in the digital audio output signal of each device. Digital signal interfaces may enable communication of different types of data. A "digital audio interface signal" communicates audio and related interface data as distinguished from, for example, computer or video data. Digital audio interface signal formats may be established for particular types of devices or uses. For example, interface protocols may exist for broadcast use, or for users of professional model products ("professional interface") or for nonprofessional model products ("nonprofessional interface") or for nonprofessional model products ("nonprofessional interface"). One such set of protocols already has been established in the document IEC 958. Sections B and C of part I summarize and mandate the implementation of SCMS in the IEC 958 nonprofessional interface.

Section A sets forth the standards and specifications for implementing SCMS in digital audio interface signals and devices.

(A) DIGITAL AUDIO INTERFACE STANDARD.—To implement the functional characteristics of SCMS in nonprofessional digital audio interface signal formats, whether presently known or developed in the future, the following conditions must be observed:

(1) The digital audio interface format shall provide a means to indicate—

(a) whether or not copyright protection is being asserted via SCMS over the material being sent via the interface; and

(b) whether or not the generation status of the material being sent via the interface is original.

(2) If the digital audio interface format has discrete professional and nonprofessional modes, the interface format and digital audio interface devices shall indicate accurately the professional or nonprofessional status of the interface signal. Such indication is referred to generically as a "channel status block flag".

(3) If the interface format has a discrete mode for sending data other than audio material, the interface format shall indicate accurately whether or not the interface signal contains audio material.

(4) If a digital audio interface device is capable of combining more than one digital audio input signal into a single digital audio output signal, and if copy right is asserted via SCMS over the material being sent in at least one of the input signals, then the device shall indicate in the output signal that copyright is asserted over the entire output signal. If copyright protection is asserted via SCMS over any of the input signals, and the generation status of that copyright-asserted signal is not original, then the entire output signal shall indicate that copyright is asserted and that the generation status is not original.

(5) Devices that are capable of reading original recordings and/or DAR media, and that are capable of sending digital audio signals that can be recorded by a DAR device, shall accurately read the copyright and generation status information from the media and accurately send that information.

(6) Devices having a nonprofessional digital audio interface shall receive and accurately send the copyright and generation status information.

(7) Professional devices that are capable of sending audio information in a nonprofessional digital audio interface format shall send SCMS information as implemented for that format. However, nothing shall prevent professional devices and/or recording professionals engaged in a lawful business from setting SCMS information according to the needs of recording professionals.

(8) If the audio signal is capable of being recorded by a DAR device and the interface format requires an indication of the type of device sending the signal

via the interface, then the device shall send the most accurate and specific designation applicable to that device; for example, "Category Codes" as set forth in part I with reference to the IEC 958 nonprofessional interface.

(9) Devices that receive digital audio transmissions sent without copyright and generation status information shall indicate that copyright is asserted over the transmitted audio material and that the generation status is original. If the transmitting entity wishes to transmit copyright status information it shall do so accurately, and the information shall accurately be received and sent unaltered by the receiving device. In the case of Electronic Audio Software Delivery signal transmissions, the receiver shall accurately receive generation status information as sent by the transmitting entity so as to permit or restrict recording of the transmitted signals. "Electronic Audio Software Delivery" refers to a type of transmission whereby the consumer interactively determines what specific work(s) and/or events(s) are received. This includes, for example, "audio on demand" (electronic selection and delivery of sound recordings for copying) or "pay-per-listen" reception, as distinguished from regular broadcast or comparable cable radio programming services.

(10)(a) If the digital audio portion of an interface signal format is recordable by a "preexisting" type of DAR device, that is, one that was distributed prior to the distribution of the interface signal format, then the signal format shall implement the rules of SCMS so that the preexisting DAR device will act upon the rules of SCMS applicable to that DAR device.

(b) If a type of DAR device is capable of recording the digital audio portion of signals sent by a preexisting digital audio interface device, then the DAR device shall implement the rules of SCMS so that the DAR device will act upon the rules of SCMS applicable to that preexisting digital audio interface device's format.

(c) If a digital audio interface device is capable of translating a signal from one interface format to another, then the device also shall accurately translate and send the SCMS information.

(B) SUMMARY OF SCMS IMPLEMENTATION IN THE IEC 958 DIGITAL AUDIO INTERFACE.—Under IEC 958, SCMS is implemented via inaudible information, known as "channel status data", that accompanies a digital audio signal being sent to or by a DAR device via a nonprofessional digital audio interface. Like all digital data, channel status data consist of numerical information encoded as a series of zeros and ones. Each zero or one constitutes a "bit" of data in which both zero and one may impart information concerning the composition of the audio signal being sent to or by a DAR device. Bits represented in this Technical Reference Document as "X", rather than as zero or one, indicate that those bits may be either zero or one without affecting the specifications set forth herein.

Channel status data bits are organized into units of information, known as "blocks," relating to both the left and right stereo audio channels. Each block contains 192 bits of information, numbered consecutively from 0 to 191. Those channel status bits that are significant to the implementation of SCMS via the IEC 958 interface are included within channel status bits 0 through 15. Certain of these 16 bits identify professional or nonprofessional interfaces; some specify copyright assertion; and some identify the generation number of a recording. The remaining bits are "Category Codes" that describe the type of device sending the digital audio signal. More complete descriptions of these channel status bits are set forth in the remaining sections of this part I.

IEC 958 defines professional and nonprofessional interface formats for digital audio signals. An IEC 958 professional interface contains particular types of channel status data for such digital audio recording devices as would be used in professional model products. An IEC 958 nonprofessional interface contains different types of channel status data. The channel status data sent in a nonprofessional interface are incompatible with the channel status data in a professional interface; a DAR device cannot correctly read the channel status data sent in a professional interface.

The specifications summarized herein and mandated in section C apply only to devices that send or read an IEC 958 nonprofessional interface signal. To the extent that a professional device also may have a IEC 958 nonprofessional interface, such a professional device must be capable to sending channel status data via its nonprofessional interface in accordance with the standards set forth herein. However, nothing in this Technical Reference Document shall be interpreted to prevent a professional device having an IEC 958 nonprofessional interface and/or recording professionals engaged in a lawful business from permitting such channel status data bits to be set in accordance with the needs of recording professionals.

All devices having a digital audio output capable of supplying a digital audio signal to a DAR device through an IEC 958 nonprofessional interface must implement five types of codes located between Channel Status Bits 0 and 15. For the IEC 958 interface format, Channel Status Bits 0 through 15 are supplied in a digital audio output signal to a DAR device as follows:

(1) BIT 0.—Bit 0 (the "Channel Status Block Flag"), one of the "Control" bits, shall identify whether the channel status bits are for a professional or nonprofessional interface. Where Bit 0 is set as "1", the signal contains the channel status data required for a professional interface. Where Bit 0 is set as "0", the channel status data is suitable for a nonprofessional interface. The remaining bit assignments are mandated only with respect to a nonprofessional interface, that is, where Bit 0 is set as "0".

(2) BIT 1.—Bit 1, another of the "Control" bits, shall identify whether the signal being sent to or by the DAR device is a digital audio or a digital data signal. Where Bit 1 is set as "0", the signal is a digital audio signal. Where Bit 1 is set as "1", the signal is a digital data signal.

(3) BIT 2.—Bit 2 (the "C" Bit), another of the "Control" bits, shall identify whether copyright protection is asserted for the audio material being sent via the digital audio signal. Where the C Bit is set as "0", copyright protection has been asserted over the material being sent to the digital audio input of the DAR device. Where the C Bit is set as "1", either that material is not protected by copyright or no copyright protection has been asserted by the owner of that material. There are specific applications of the C Bit for three types of devices, as follows:

Compact disc players compatible with the standards set forth in IEC 908 (compact disc standard, Category Code 10000000) in effect as of the date of enactment of the Act indicate in the C Bit both the copyright and generation status of the signal. (See description of "Bit 15", infra.) Where the signal is original and copyright protection has been asserted, the C Bit ="0". Where no copyright protection has been asserted, the C Bit ="1". Where the signal is first-generation and copyright protection has been asserted, the C Bit will fluctuate between "0" and "1" at a rate of between 4–10 Hz.

Digital Receivers (Category Codes 001XXXXL and 0111XXXL) shall set the C Bit as "0", except that these devices shall send the C Bit as "1" only where the cable operator, broadcaster or other entity specifically transmits information indicating that no copyright protection has been asserted over the material.

Devices that combine digital audio input signals into one digital audio output signal for example, digital signal mixing devices) shall reflect whether copyright protection has been asserted in the C Bit for at least one of the input signals by setting the C bit as "0" in the resulting digital audio output signal.

Devices in the Category Codes for General ("00000000") and Present A/D Converters ("01100XXX") are not capable of sending copyright status information in the C Bit. The C Bit in the channel status data sent by these devices has no meaning.

There is no existing legal requirement that a copyright owner must assert protection over its material (and, therefore, set the C Bit as "0"). However, except as provided herein with respect to implementation in Digital Receivers (category codes 001XXXXL and 0111XXXL), a copyright owner may not set the C Bit as "0" for material that is not copyrighted or is in the public domain.

(4) BITS 3–7.—These bits are sent to and read by a DAR device, but specific bit settings for Bits 3–7 are not necessary for the implementation of SCMS. (Bits 6–7 are Music Production Program Block ("MPPB") flag bits.)

(5) BITS 8–14.—Bits 8–14 shall specify a "Category Code" that identifies the type of device that produces the digital audio signal sent to or by a DAR device. Using various combinations of zeros and ones, Bits 8–14 can define Category Codes for as many as 128 different devices that can provide digital audio signals to a DAR device. According to IEC 958, the first three to five Category Code bits (numbered Bits 8–10 through 8–12) describe general product groups, and the remaining Category Code bits specify particular devices within each product group. IEC 958 has assigned particular Category Codes to existing and anticipated product groups and devices, and has reserved additional Category Codes for future devices.

The Category Code issued by each particular device must reflect the most specific code applicable to that device, with the following exceptions:

Digital signal processing and mixing products receive digital audio signals from one or more sources and either process or combine them with other incoming digital audio signals. If all input signals come from analog-to-digital converters having a Category Code "01100XXX", these devices should issue the Category Code of an analog-to-digital converter rather than of the digital signal processing or mixing device.

Sampling rate converters and digital sound samplers come under the Category Codes for digital-to-digital converters. If an input signal to a sampling rate converter or digital sound sampler comes from an analog-to-digital converter having a Category Code "01100XXX", the sampling rate converter or digital sound sampler should issue the Category Code of the analog-to-digital converter.

These exception cases will permit two generations of digital copies from analog recordings, which currently is permitted under SCMS.

The relevance of these Category Codes to SCMS as implemented for devices having the IEC 958 nonprofessional interface is described in Section C and, specifically as to DAT recorders, in Part II Sections B and C.

(6) BIT 15.—Bit 15 (the "L" Bit) shall indicate the "generation status" of the digital audio signals being sent to or by a DAR device. "Generation status" means whether the signal emanates from a source that has been produced or published by or with the authority of the owner of the material, such as commercially released pre-recorded compact discs or digital tapes or a digital transmission (referred to herein as "original"); or where the signal emanates from a recording made from such "original" material. In the latter case, a recording made directly from an "original" source is known as a "first-generation" copy; a recording made from a first-generation copy is a "second-generation" copy; and so forth. Because there is no restriction on the number of copies that can be made from material over which no copyright protection has been asserted, generation status is relevant only where copyright protection has been asserted over the signal. For most products, if the L Bit is set as "0", the source is a recording that is first-generation or higher. If the L Bit is set as "1", the source is "original." There are four specific categories of products which indicate generation status differently, as follows:

Compact disc players compatible with the specifications in IEC 908 (Category Code 10000000) are incapable of controlling the L Bit. These products signal generation status solely by means of the C Bit (Bit 2).

Digital audio output signals from all other laser-optical products (Category Code 100XXXXL) shall send the L Bit as "0" for "original" material and the L Bit as "1" for first-generation or higher recordings.

Digital Receivers (Category Codes 001XXXXL and 0111XXXL) shall set the L Bit as "0"; except in the case of receivers for Electronic Audio Software Delivery, which receivers shall send the L Bit as "1" only where the entity specifically transmits information indicating that the material should be treated as if it were first generation or higher.

Devices that combine more than one digital audio input signal into one digital audio output signal, such as digital signal processors or mixers, shall reflect in the L Bit of the output signal the highest generation status of any input containing material over which copyright protection has been asserted. Thus, where one or more of the constituent input signals contains material that is not original (that is, a first-generation copy) and over which copyright protection is asserted, then the device must reflect in the L Bit of the digital audio output signal a nonoriginal generation status. In all other cases, the device shall reflect in the L Bit that the output signal is original.

(C) MANDATORY SPECIFICATIONS FOR IMPLEMENTING SCMS IN THE IEC 958 DIGITAL AUDIO INTERFACE.—The following bit assignments for channel status data, as referenced in the provisions of IEC 958 paragraph 4.2.2 "Channel status data format for digital equipment for consumer use", shall be mandatory for devices implementing the IEC 958 interface:

(1) BITS 0–2 OF THE "CONTROL" BITS.—

(a) BIT 0 (THE "CHANNEL STATUS BLOCK FLAG"):

Bit 0="0"	Nonprofessional interface.
Bit 0="1"	Professional interface.

(b) BIT 1:

Bit 1="0"	Digital audio signals.
Bit 1="1"	Nonaudio (data) signals.

(c) BIT 2 (THE "C" BIT)—

(i) CASE 1:

Bit 2="0"	Copyright protection asserted.
Bit 2="1"	No copyright protection asserted or not under copyright.

(ii) CASE 2—COMPACT DISC PLAYERS.—For compact disc players compatible with IEC 908 (Category Code 10000000), the C Bit shall indicate:

Bit 2="0"	Copyright protection asserted and generation status is "original".
Bit 2="1"	No copyright protection asserted.

Where the Bit 2 fluctuates between '0" and "1" at a rate between 4-10 Hz, copyright protection has been asserted and the signal is first generation or higher.

(iii) CASE 3—DIGITAL RECEIVERS.—For Digital Receivers (Category Codes 001XXXXL and 0111XXXL), the C Bit shall indicate, where copyright information is transmitted to the digital receiver:

Bit 2="0"	Copyright protection asserted.
Bit 2="1"	No copyright protection asserted.

Where no copyright information is transmitted to the receiver, the digital receiver shall set the C Bit as "0".

(iv) CASE 4—DIGITAL SIGNAL MIXERS.—Where a single digital audio output signal results from the combination of more than one digital audio input signal:

Bit 2="0"	Copyright protection asserted over at least one of the constituent digital audio input signals.
Bit 2="1"	For all of the constituent digital audio input signals, no copyright protection asserted or not under copyright.

(v) EXCEPTION CASE.—The C Bit has no meaning for A/D converters for analog signals that do not include status information concerning the C Bit and the L Bit (that is, A/D converters in Category Code 01100XXX).

(2) BITS 3-7.—Specific bit settings for Bits 3-7 are not necessary for the implementation of SCMS.

(3) CATEGORY CODE BITS 8-15:

(a) BITS 8-15.—The Category Codes that follow are established for particular product groups. Where Bit 15 is represented by "L" rather than a zero or one, Bit 15 (the "L" Bit) can be either a zero or one without affecting the Category Code. Where Bit 15 is represented by "X" rather than a zero or one, the device is not capable of issuing status information concerning the L Bit:

00000000	General. This category applies to products that are capable of sending channel status data but are not programmed to send such data in accordance with the specifications set forth in this Technical Reference Document because the products were manufactured before the effective date of the Act. This General Category Code shall not be used for products manufactured after the effective date of the Act.
0000001L	Experimental products not for commercial sale.
100XXXXL	Laser-optical products, such as compact disc players (including recordable and erasable compact disk players) and videodisc players with digital audio outputs.
010XXXXL	Digital-to-digital ("D/D") converters and signal processing products.
110XXXXL	Magnetic tape or disk based products, such as DAT players and recorders.
001XXXXL and 0111XXXL	Receivers of digitally encoded audio transmissions with or without video signals.
101XXXXL	Musical instruments, microphones and other sources that create original digital audio signals.
01100XXX	Analog-to-digital ("A/D") converters for analog signals without status information concerning the C Bit and the L Bit ("Present A/D converters").
01101XXL	A/D converters for analog signals which include status information concerning the C Bit and the L Bit ("Future A/D converters").
0001XXXL	Solid state memory based media products.

Particular devices within each product group defined above shall be assigned specific Category Codes in accordance with IEC 958. Manufacturers

of any device that is capable of supplying a digital audio input to a DAR device must use the most specific Category Code applicable to that particular device. However, digital signal processing or digital signal mixing products in Category Code product group "010XXXXL" shall issue the Category Code for Present A/D converters where all the input signals have the Category Code for a Present A/D converter. Similarly, sampling rate converters in Category Code "0101100L" and digital sound samplers in Category Code "0100010L" shall issue the Category Code for Present A/D converters where the input signal comes from a Present A/D converter.

(b) BIT 15 (THE "L" BIT).—The L Bit shall be used to identify the generation status of the digital audio input signal as emanating from an "original" source or from a nonoriginal (*that is,* first-generation or higher) recording.

(1) CASE 1—GENERAL CASE.—For all Category Codes (except as explicitly set forth below), the L Bit shall indicate:

Bit 15="0"	First-generation or higher recording.
Bit 15="1"	"Original" source, such as a commercially released prerecorded digital audiogram.

(2) CASE 2.—LASER OPTICAL PRODUCTS.—The reverse situation is valid for laser optical products (Category Code 100XXXXL), other than compact disc players compatible with IEC 908 (Category Code 10000000). For laser optical products in Category Code 100XXXXL, the L Bit shall indicate:

Bit 15 = "1"	First-generation or higher recording.
Bit 15 = "0"	"Original" recording, such as a commercially released prerecorded compact disc.

(3) CASE 3.—DIGITAL RECEIVERS.—For Digital Receivers (Category Codes 001XXXXL and 0111XXXL), Bit 15 always shall be set as "0"; except for receivers for Electronic Audio Software Delivery, for which the L Bit shall indicate:

Bit 15 = "0"	Generation status information transmitted as "original" material.
Bit 15 = "1"	Generation status information transmitted as for nonoriginal material, or no generation status information transmitted.

(4) CASE 4.—DIGITAL SIGNAL MIXERS.—Where a single digital audio output signal results from the combination of more than one digital audio input signal:

Bit 15 = "0"	One or more of those constituent digital audio input signals over which copyright protection has been asserted is first-generation or higher.
Bit 15 = "1"	All other cases.

(5) EXCEPTION CASE.—The L Bit has no meaning for A/D converters for analog signals that do not include status information concerning the C Bit and the L Bit (*that is,* A/D converters in Category Code 01100XXX) and compact disc players in Category Code 10000000.

PART II. SERIAL COPY MANAGEMENT SYSTEM FOR DAR DEVICES AND NONPROFESSIONAL MODEL DAT RECORDERS

The intention of SCMS is generally to prevent DAR devices from making second-generation or higher "serial" digital recordings of "original" digital audio material over which copyright protection has been asserted through SCMS. SCMS does not prevent the making of a first-generation recording of such "original" digital audio material. As future technologies permit, SCMS may limit the digital recording by a DAR device of analog audio material over which copyright protection has been asserted to the making of only first-generation digital copies. However, because present technology does not identify whether analog audio material is protected by copyright, SCMS will not prevent the making of first- and second-generation digital copies of such material. SCMS will not restrict digital recording of material carrying an indication through SCMS that copyright protection has not been asserted. SCMS does not apply to professional model products as defined under the Act.

(A) GENERAL PRINCIPLES FOR SCMS IMPLEMENTATION IN DAR DEVICES.—To implement the functional characteristics of SCMS in DAR devices, whether presently known or developed in the future, the following conditions must be observed:

(1) A digital audio recording medium shall be capable of storing an indication of—

(a) whether or not copyright protection is being asserted over the audio material being sent via the interface and stored on the DAR medium; and

(b) whether or not the generation status of the audio material being sent via the interface and stored on the DAR medium is original.

(2) If the digital audio interface format being sent to and read by a DAR device has discrete modes for professional as well as nonprofessional purposes, the DAR device shall distinguish accurately the professional or nonprofessional status of the interface signal.

(3) If the interface format has a discrete mode for sending data other than audio material, the DAR device shall distinguish accurately whether or not the interface signal contains audio material.

(4) A DAR device capable of receiving and recording digital audio signals shall observe the following rules:

(a) Audio material over which copyright is asserted via SCMS and whose generation status is original is permitted to be recorded. An indication that copyright is asserted over the audio material contained in the signal and that the generation status of the recording is first generation shall be recorded on the media.

(b) Audio material over which copyright is not asserted via SCMS may be recorded, without regard to generation status. An indication that copyright is not asserted shall be recorded on the media.

(c) Audio material over which copyright is asserted via SCMS and whose generation status is not original shall not be recorded.

(5) DAR media shall store the copyright and generation status information as described herein during recording in a manner that the information can be accurately read.

(6) Devices that are capable of reading original recordings and/or DAR media, and that are capable of sending digital audio signals that can be recorded by a DAR device, shall accurately read the copyright and generation status information from the media and accurately send the information.

(7) DAR devices shall not be capable of recording digital audio signals transmitted in a professional digital audio interface format.

(8) DAR devices having a nonprofessional digital audio interface shall receive and accurately send the copyright and generation status information.

(9) Professional devices that are capable of sending audio information in a nonprofessional digital audio interface format shall send SCMS information as implemented for that format. However, nothing shall prevent professional devices and/or recording professionals engaged in a lawful business from setting SCMS information according to the needs of recording professionals.

(10) Digital audio signals that are capable of being recorded by a DAR device but that have no information concerning copyright and/or generation status shall be recorded by the DAR device so that the digital copy is copyright asserted and original generation status.

(11) If the signal is capable of being recorded by a DAR device and the interface format requires an indication of the type of device sending the signal via the interface, then the device shall send the most accurate and specific designation applicable to that device; for example, "Category Codes" as set forth in part I with reference to the IEC 958 nonprofessional interface.

(12) Except as may be provided pursuant to section 1022(b)(4) of subchapter C of the Act, a DAR device that is capable of converting analog input signals to be recorded in digital format shall indicate that the digital copy is copyright asserted and original generation status.

(13)(a) If the digital audio portion of an interface signal format is recordable by a "preexisting" type of DAR device, that is, one that was distributed prior to the distribution of the interface signal format, then the signal format shall implement the rules of SCMS so that the preexisting DAR device will act upon the rules of SCMS applicable to that DAR device.

(b) If a type of DAR device is capable of recording the digital audio portion of signals sent by a preexisting digital audio interface device, then the DAR device shall implement the rules of SCMS so that the DAR device will act upon the rules of SCMS applicable to the format of that preexisting digital audio interface device.

(c) If a digital audio interface device is capable of translating a signal from one interface format to another, then the device also shall accurately translate and send the SCMS information.

(B) SUMMARY OF MANDATORY SCMS SPECIFICATIONS FOR DAT RECORDERS.—SCMS, to be implemented for DAT machines, requires that a DAT machine must play-back

and/or record specific inaudible data in a particular location on a DAT tape. According to IEC documents "IEC 60A(CO)130 part 1: Digital Audio Tape Cassette System (DAT) Dimensions and Characteristics" and "IEC 60A(CO)136 part 6: Serial copy management system for consumer audio use DAT recorders", that particular location on the digital audio tape consists of two bits known as "subcode ID6 in the main ID in the main data area" ("ID6").

(1) SCMS OPERATION WHEN PLAYING A DAT TAPE.—With respect to the play-back function, a DAT machine that is connected to a DAT recorder can provide digital audio output signals via a nonprofessional interface. In that circumstance, the DAT play-back machine functions as a digital audio interface device that must provide channel status data conforming to the general principles and specifications set forth in part I. SCMS as implemented for the IEC 958 nonprofessional interface format requires that when a DAT tape is played back, the DAT play-back machine reads the information from ID6 on the tape and then sends the corresponding channel status data (concerning Bit 2 "the C Bit" and Bit 15 "the L Bit"), along with the Category Code for a DAT machine, in its digital audio output signal. The channel status data to be sent in response to the various settings of ID6 are as follows:

(a) Where ID6 is set as "00", copyright protection has not been asserted over the material under SCMS. In response to ID6, the digital audio signal output of the DAT will provide the C Bit set as "1" and the L Bit set as "0".

(b) Where ID6 is set as "10", copyright protection has been asserted over the material under SCMS and the recording is not "original". In response to ID6, the digital audio output signal of the DAT will provide the C Bit set as "0" and the L Bit set as "0".

(c) Where ID6 is set as "11", copyright protection has been asserted over the material under SCMS and the recording is "original". In response to ID6, the digital audio output signal of the DAT will provide the C Bit set as "0" and the L Bit set as "1".

(2) SCMS OPERATION WHEN RECORDING ON DAT TAPE.—With respect to the recording function, SCMS governs the circumstances and manner in which a DAT recorder may record a digital audio input signal. A DAT recorder implementing SCMS information being sent in the IEC 958 nonprofessional interface format must be capable of acknowledging the presence or absence of specific channel status information being sent to the DAT recorder via its digital audio input. The DAT recorder then responds to that channel status information by either preventing or permitting the recording of that digital audio input signal. If recording is permitted, the DAT machine records specific codes in ID6 on the tape, so that when the tape is played back, the DAT machine will issue the correct channel status data in its digital audio output signal. The settings of ID6 to be recorded in response to particular IEC 958 channel status bit information are as follows:

(a) Where the C bit of the digital audio input signal is set as "0" (copyright protection asserted), the DAT recorder shall not record the input, except in three circumstances: (a) where the input is original material and the digital audio input signal comes from one of the products on the "Category Code White List" (section D below); (b) where the digital audio input signal contains an undefined Category Code (in which case only one generation of recording is permitted); or, (c) where the digital audio input signal comes from a product with a defined Category Code but the product currently is not capable of transmitting information regarding copyright protection (in which case, two generations of copying are possible). In circumstances (a) and (b) above, the DAT recorder will record "10" in ID6 to prevent further copying. In circumstance (c) above, the DAT recorder will record "11" in ID6 for the first-generation copy.

(b) Where the C Bit of the digital audio input signal is set as "1" (no copyright protection asserted or not copyrighted), the DAT recorder will record "00" in ID6, and unlimited generations of copying will be permitted.

(c) Where the C Bit of the digital audio input signal fluctuates between "0" and "1" at a rate of between 4–10 Hz, the signal is coming from a compact disc player compatible with IEC 908 (Category Code 10000000) which plays back a compact disc that is not an "original" and that contains material over which copyright protection has been asserted. The DAT recorder shall not record in this circumstance.

(d) The condition "01" in ID6 has been assigned no meaning within SCMS. Therefore, to prevent circumvention of SCMS, the DAT recorder shall not record "01" in ID6 on the tape.

(C) MANDATORY SPECIFICATIONS FOR IMPLEMENTING SCMS IN DAT RECORDERS IN THE IEC 958 FORMAT.—

(1) MANDATORY STANDARDS FOR DIGITAL AUDIO OUTPUT SIGNALS.—

(a) CATEGORY CODE BIT 15 (THE "L" BIT).—All nonprofessional model DAT recorders having a IEC 958 interface shall provide the Category Code "1100000L" in the channel status bits of the IEC 958 digital audio output signal. The status of the L Bit of the Category Code shall be provided in the digital audio output signal of the DAT recorder as follows, in accordance with the status of ID6:

When ID6 is "00", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is either a first-generation or higher DAT tape recorded from an "original" source, or an "original" commercially released prerecorded DAT tape of material over which copyright protection is not being asserted under SCMS. In either of these cases, the L Bit shall be set as "0", and the complete Category Code would be "11000000".

When ID6 is "10", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is a first-generation or higher DAT tape recorded from an "original" source (that is, L Bit="0"). The complete Category Code in this case would be "11000000".

When ID6 is "11", the digital audio output signal shall indicate in the L Bit of the Category Code that the output source is an "original" source, such as a commercially released prerecorded DAT tape (that is, L Bit="1"). The complete Category Code in this case would be "11000001".

(b) BIT 2 (THE "C" BIT).—All nonprofessional model DAT recorders having an IEC 958 nonprofessional interface shall provide an output code in the C Bit in the channel status bits of the IEC 958 digital audio output signal. The C Bit shall be applied in the digital audio output signal as follows, in accordance with the status of ID6:

When ID6 is "00", the C Bit shall be set as "1".

When ID6 is "10" or "11", the C Bit shall be set as "0".

(2) MANDATORY SPECIFICATIONS FOR RECORDING FUNCTIONS.—SCMS with respect to recording functions performed by a nonprofessional model DAT recorder receiving digital audio input signals in the IEC 958 nonprofessional interface format shall be implemented as follows:

(a) Digital audio input signals in which the C Bit is set as "0" shall not be recorded, except for the cases specified below in paragraphs b, d, and e.

(b) A DAT recorder may record a digital audio input signal in which the C Bit is set as "0", where the Category Code of the signal is listed in the "Category Code White List." The DAT recorder shall record "10" in ID6 on the tape in this case.

(c) For digital audio input signals in which the C Bit is set as "1", the DAT recorder shall record "00" in ID6 on the tape except for those cases specified below in paragraphs d and e.

(d) For digital audio input signals that contain Category Code information that is not defined in this document, the DAT recorder shall record "10" in ID6, regardless of the status of the C Bit or the L Bit.

(e) For digital audio input signals originating from a source identified as an A/D converter with the Category Code "01100XXL", or from other sources such as from A/D converters with the Category Code for "General" ("00000000"), the DAT recorder shall record "11" in ID6, regardless of the status of the C Bit or the L Bit. This requirement shall be applied to digital input signals that do not contain source information of the original signal before digitization, for example, and A/D converter that does not deliver source information.

(f) For digital input signals originating from an A/D converter with the Category Code "01101XXL", which can deliver original source information concerning the C Bit and L Bit even if the source is in analog format, the requirement stated above in paragraph e shall not be applied. The "Category Code White List" includes this Category Code.

(g) A DAT tape of "original" generation status over which copyright protection has been asserted shall contain "11" in ID6. A DAT tape of "origi-

nal" generation status over which no copyright protection has been asserted shall contain "00" in ID6.

(h) A DAT recorder shall not record digital audio input signals where the C Bit alternates between "0" and "1" at a frequency of between 4 and 10 Hz and the Category Code is for a Compact disc digital audio signal ("10000000"), as in the case of digital audio input signals from recordable or erasable compact discs that are not "original" and that contain material over which copyright protection has been asserted.

(i) A nonprofessional model DAT recorder shall not record digital audio input signals sent from a professional interface, that is, where channel status Bit 0 is set as "1".

(j) The condition "01" in ID6 is not to be used.

(k) Category codes and the C Bit included in the channel status information of digital audio input signals being sent to or by a DAT recorder shall not be deleted or modified and shall be monitored continuously and acted upon accordingly.

(D) "CATEGORY CODE WHITE LIST".—

100XXXX0	Laser optical product.
010XXXX1	Digital-to-digital converter and signal processing devices.
110XXXX1	Magnetic tape and disk based product.
001XXXX0 and 0111XXX0	Receivers of digitally encoded audio transmissions with or without video signals.
101XXXX1	Musical instruments.
01101XX1	Future A/D converter (with status information concerning the C Bit and L Bit).
0001XXX1	Solid state memory based media products.
00000011	Experimental products not for commercial sale.

PART III. APPLICATION OF SCMS IN DAT RECORDERS IMPLEMENTING THE IEC 958 INTERFACE

The following charts apply and correlate those codes that are mandated under the Act to implement SCMS in nonprofessional model DAT recorders having an IEC 958 nonprofessional interface, in those situations contemplated by these standards. The columns in each of these charts identify the following information:

The "Signal Source" column describes the type of product sending the digital audio signal to a DAT recorder.

The three columns under the heading "Digital Audio Input Signal," that is, the signal sent to the DAT recorder, identify the correct channel status information in the C Bit, Category Code Bits 8–14 and the L Bit, respectively, which correspond to each product. (In each case, Bit 0 will be "0" to indicate that the signal is being sent in the IEC 958 nonprofessional interface format, and Bit 1 will be "0" to indicate that the signal consists of audio data.)

The next three columns under the heading "DAT Recorder Response" identify the response of the DAT recorder to the corresponding digital audio input signal. The column "ID6" specifies the code that the DAT recorder will record on the tape in ID6 in response to the digital audio input signal. The last two columns set forth the correct channel status information in the C Bit and L Bit that are sent in the digital audio output signal of a DAT recorder in response to the setting of ID6.

Each of the appropriate codes is set forth in the cases described below:

Case 1: Where copyright protection has been asserted over the digital audio input, and the source of the input is "original" material (Only first-generation recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser Optical	0	100XXXX	0	10	0	0
D/D converter	0	010XXXX	1	10	0	0
Magnetic prod	0	110XXXX	1	10	0	0
Musical Instrum	0	101XXXX	1	10	0	0
Future A/D conv	0	01101XX	1	10	0	0
Digital Receiver	0	001XXXX	0	10	0	0

Case 1: Where copyright protection has been asserted over the digital audio input, and the source of the input is "original" material (Only first-generation recording permitted):—Continued

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Digital Receiver	0	0111XXX	0	10	0	0
Experimental	0	0000001	1	10	0	0
Solid state dev	0	0001XXX	1	10	0	0

Case 2: Where copyright protection has not been asserted over the digital audio input, and the source of the input is "original" material (First-generation and above recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser Optical	1	100XXXX	0	00	1	0
D/D converter	1	010XXXX	1	00	1	0
Magnetic prod	1	110XXXX	1	00	1	0
Musical Instrum	1	101XXXX	1	00	1	0
Future A/D conv	1	01101XX	1	00	1	0
Digital Receiver	1	001XXXX	0	00	1	0
Digital Receiver	1	0111XXX	0	00	1	0
Experimental	1	0000001	1	00	1	0
Solid state dev	1	0001XXX	1	00	1	0

Case 3: Where copyright protection has been asserted over the digital audio input, and the source of the input to the DAT recorder is not "original" material (No recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser Optical	0	100XXXX	1	.....	.....	.....
D/D converter	0	010XXXX	0	.....	.....	.....
Magnetic prod	0	110XXXX	0	.....	.....	.....
Musical Instrum	0	101XXXX	0	.....	.....	.....
Future A/D conv	0	01101XX	0	.....	.....	.....
Experimental	0	0000001	0	.....	.....	.....
Solid state dev	0	0001XXX	0	.....	.....	.....

Case 4: Where copyright protection has not been asserted over the digital audio input, and the source of the input to the DAT recorder is not "original" material (Second-generation and above recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Laser Optical	1	100XXXX	1	00	1	0
D/D converter	1	010XXXX	0	00	1	0
Magnetic prod	1	110XXXX	0	00	1	0
Musical Instrum	1	101XXXX	0	00	1	0
Future A/D conv	1	01101XX	0	00	1	0
Experimental	1	0000001	0	00	1	0
Solid state dev	1	0001XXX	0	00	1	0

Case 5: Where the digital audio input signal includes Category Code information, but cannot provide information concerning copyright protection of the source (First- and second-generation recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
General	X	0000000	0	11	0	1
Present A/D Con	X	01100XX	X	11	0	1

Case 6: Where the digital input signal does not include a defined Category Code (First-generation recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Undefined	X		X	10	0	0

Case 7: Where copyright protection has been asserted over the digital audio input from a compact disc that is not an "original" by fluctuating the C Bit at a rate between 4–10 Hz (No recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
CD Player	0/1	1000000	X			

Case 8: Where the digital signal transmitted to a Digital Receiver does not include information concerning copyright protection (Only first-generation recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Digital Receiver	0	001XXXX	0	10	0	0
Digital Receiver	0	0111XXX	0	10	0	0

Case 9: Where the digital signal transmitted to a receiver for Electronic Audio Software Delivery provides generation status information as if the status were first-generation or higher (No recording permitted):

Signal Source	Digital Audio Input Signal			DAT Recorder Response		
	C Bit (Bit 2)	Category code (Bits 8–14)	L bit (Bit 15)	ID6	C Bit (Bit 2)	L bit (Bit 15)
Digital Receiver	0	001XXXX	1	.....	.....	.....
Digital Receiver	0	0111XXX	1	.....	.....	.....

I. Purpose of the Legislation

The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use. Moreover, S. 1623 contains a royalty payment system that provides modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music. In addition, the bill contains a serial copy management system that would prohibit the digital serial copying of copyrighted music.

II. Legislative History

The advances made in the area of audio recording technology in recent years have made the private copying of prerecorded music a greater concern to the music industry than ever before. With the advent of digital audio recording technologies, the possibility of copies retaining the sound quality of the original has become a reality.[1]

Although musical works have long been copyrightable, sound recordings became copyrightable for the first time in February 1972 under the 1971 Sound Recording Act.[2] However, there has been a longstanding controversy surrounding the home taping of prerecorded music.

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[1] Unlike its predecessor, analog tape, digital audio recording media retain the sound quality of the master recording regardless of the number of copies which are produced.

[2] Pub. Law 92–140 (85 Stat. 391).

THE BETAMAX DECISION

In 1981, the Ninth Circuit Court of Appeals issued its decision in the case of *Universal City Studios, Inc.* v *Sony Corp.*,[3] also known as the *Betamax* decision, finding that the noncommercial private video taping of broadcast television shows constituted copyright infringement. Senator DeConcini introduced legislation to overturn the decision to ensure that consumers had the right to tape copyrighted material for their own use. In 1983, Senator Mathias introduced legislation to create a royalty system for home taping.

In 1984, the Supreme Court reviewed the *Betamax* decision and decided that private home taping of television broadcasts for the purpose of time shifting constituted a fair use of the copyrighted programming.[4] The precedential impact of the *Betamax* decision has been as hotly debated as the case itself. Although the *Betamax* case revolved around video taping, the case has been utilized by all parties to the audio home recording dispute.

The electronics industry has maintained that the *Betamax* decision applied to virtually all home taping while songwriters, music publishers, performers, and recording companies have insisted that the decision applies to a very limited set of facts, i.e. home video taping for time-shifting purposes. Consequently the controversy has continued and in fact, has been exacerbated by the increasing refinement of audio recording technology.

SEEKING A LEGISLATIVE SOLUTION

Since the Court issued the *Betamax* decision Congress has considered several legislative solutions. The recording industry has attempted to persuade the electronics industry to voluntarily install within their products, devices which would prevent unauthorized copying. The recording industry has also asked Congress to require the installation of such devices.

By 1987, a number of hypothetical technological copy prevention systems had been discussed but none had been developed.[5] On February 5, 1987, Senator Gore introduced S. 506. Shortly thereafter, on March 3, Representative Waxman introduced H.R. 1384. Both bills required digital audio recording equipment to contain a copy-guard system prior to distribution in this country.

On April 2, 1987, Congress held joint hearings on digital audio taping.[6] CBS Records developed a system which was designed to prevent all digital audio copying. This system, commonly known as "Copycode," would indicate that a prerecorded work was protected by copyright by removing a narrow band of frequencies from the audio signal.[7] A chip installed in each recording device would

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[3] 659 F.2d 963 (9th Cir. 1981), rev'd. 464 U.S. 417 (1984).

[4] 464 U.S. 417 (1984) The decision was based largely upon two points. First, the Court held 107 of the Copyright Act to allow home video taping for timeshifting, or delayed viewing, purposes. Second, some owners of the copyrighted programming did not object to the home taping of their programs.

[5] See, "Statement of the Register of Copyrights, Ralph Oman on S. 2358 Before the Subcommittee on Commerce, Science and Transportation," 101st Cong., 2d sess. at 36 (1990).

[6] See, "Joint Hearings before the Senate Subcommittee on Patents, Copyrights and Trademarks and the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice on Digital Audio Taping," S. 1623, Hrg. 100-216, 100th Cong., 1st sess. (1987).

[7] Supra, note 5, at 37.

"read" this signal and prevent the copying of that copyrighted recording. The sound quality of the "Copycode" system and its effectiveness were challenged at the hearing.[8] In an effort to resolve the growing uncertainty about the adequacy of the "Copycode" system, the two subcommittees requested the National Bureau of Standards [hereinafter, NBS] to test the "Copycode" system.[9] NBS found that the copy prevention system did not adequately resolve the problem.[10] One of the problems NBS found with the system was that the encoding process produced "false positives", and thus failed to permit the recording of unencoded material. NBS also found that the system altered the audio signal, which some listeners claimed resulted in a degradation of the sound quality.[11]

Following the rejection of the "Copycode" system, the Serial Copy Management System (hereinafter, SCMS] was developed. The SCMS permits a digital audio recorder to make unlimited first generation copies from prerecorded material, but prohibits the copying of those first generation copies of copyrighted material. While the SCMS was based largely upon the same principles as "Copycode", it was more flexible in terms of application and had no effect on sound quality.[12]

In April 1990, Senator DeConcini introduced S. 2358,[13] a bill to require the installation of the SCMS in all digital audio tape recorders imported into or manufactured in the United States. The legislation reflected a consensus between the recording industry and the consumer electronics industry. It was however, staunchly opposed by the songwriters and music publishers, because it failed to establish a system to compensate copyright owners and creators for sales displaced by home taping of copyrighted music.

Hearings were held on S. 2358 in June 1990,[14] shortly after the announcement of the development of the Digital Compact Cassette recorder [hereinafter DCC], a new type of digital audio recorder. There was disagreement among the proponents of the bill as to whether the bill encompassed the new DCC technology in addition to existing Digital Audio Tape recorders [hereinafter DAT]. After the hearings Senator DeConcini and members of the Senate Commerce Committee urged the parties to work out a compromise to this longstanding dispute. No further action was taken on S. 2358.[15]

The prospect of any compromise seemed unlikely on July 9, 1990, when songwriters and music publishers filed a lawsuit against Sony Corporation claiming that unauthorized home taping on DAT recorders would displace record sales, costing the plaintiffs the royalties to which they were entitled under United States copyright law. The plaintiffs sought a ban on the import of Sony DAT recorders and blank cassettes on the grounds of contributory copyright infringement.

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[8] Supra, note 6, at 69, see, "Statement of Leonard Feldman."
[9] Supra, note 5, at 37.
[10] Id., at 38.
[11] Id.
[12] Id. at 39–42. see also Discussion section below for more in-depth analysis of SCMS.
[13] The House companion measure was H.R. 4096.
[14] See, S. Hrg. 101–890.
[15] Action was not taken on the House counterpart.

However, in June 1991, a historic compromise was reached by all of the parties to the audio home taping dispute. [16] The suit against Sony was subsequently dropped. The compromise was incorporated into a legislative proposal and introduced in the Senate and the House.

THE AUDIO HOME RECORDING ACT OF 1991

On August 1, 1991, S. 1623, the Audio Home Recording Act was introduced by Senator DeConcini. S. 1623 embodies the compromise reached between the audio hardware industry and the various segments of the music industry. A similar bill [17] was introduced in the House of Representatives. [18] S. 1623 is a direct response to the needs of the music industry, the consumer electronics industry, and consumers. The bill incorporates the SCMS system, and a royalty provision on digital audio recorders and media, thus ensuring the consumers' right to record both analog and digital audio material for their private use.

S. 1623 was referred to the Judiciary Subcommittee on Patents, Copyrights and Trademarks and hearings were held on October 29, 1991.[19] While the bill was in the subcommittee, Senator DeConcini substituted the term (and definition of) "audiogram" for the term (and definition of) "phonorecord" and amended some administrative procedures, which are discussed further in the section-by-section analysis. An amendment in the nature of a substitute to the bill was polled out of subcommittee on November 20, 1991.

The committee passed the substitute by unanimous consent, including the following provisions offered by Senator Metzenbaum.

—Any future increase in the royalty maximum shall be capped by the Consumer Price Index for the period under review.

—Section 1016 was modified to insure that the CRT maintained the requisite authority to protect the interests of those parties which are eligible for royalties, but choose not to enter a negotiated agreement.

—Antitrust exemptions under sections 1015 and 1016 are limited in scope to the collection, distribution and verification functions contemplated by this legislation.

—The Technical Reference Document will also be incorporated into the bill until such time as the document is printed in the Federal Register.

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[16] The recording industry, recording artists, songwriters, music publishers, the consumer electronics industry, and consumer groups were all represented.

[17] The sole difference was that the Technical Reference Document was to be contained in the respective House and Senate committee reports.

[18] H.R. 3204.

[19] Testifying at the hearings were, Ralph Oman, Register of Copyrights; Debbie Gibson, ASCAP songwriter and recording artists; John V. Roach, chairman of Tandy Corporation; Jay Berman, President of the Recording Industry Association of America; Linda Golodner, executive director of the National Consumers League; Gary Shapiro, group vice-president, Consumer Electronics Group, Electronic Industries Association; Edward P. Murphy, president and CEO of National Music Publishers' Association and the Harry Fox Agency; Philip Greenspun, research assistant, Massachusetts Institute of Technology; and Frank Beacham, print journalist.

III. Discussion

BACKGROUND

Bolstered by the fears that recently developed digital audio recording technology would lead to unprecedented home audio copying of sound recordings, the conflict between the music and consumer electronics industries has intensified. This longstanding dispute has impeded the introduction of digital audio recording technology into the American marketplace. However, the competing interests have, through negotiation and compromise, reached an agreement which all parties involved feel is equitable. S. 1623 reflects this agreement.

THE EFFECT OF HOME TAPING

The music industry has long been fearful of the negative effect home taping of its products would have on the growth of the industry. It has been estimated that only 15 percent of all recordings released recoup their costs. In essence these "hits" subsidize any new artist development that a company may seek to undertake.[20] Recording industry estimates of the damage caused by home taping puts annual losses at nearly $1 billion.[21]

Numerous reports have been completed which seek to quantify the exact effect home taping has upon the music industry. One study, entitled "Copyright and Home Copying: Technology Challenges the Law," [22] was the result of efforts by the Office of Technology Assessment [hereinafter, OTA Report]. Among other conclusions, the OTA found that 4 out of 10 persons aged 10 and older taped recorded music in 1988, which compared to prior studies represents a significant increase.[23] Also, people who tape music exhibited a greater interest in music, and purchased more prerecorded music than nontapers.[24] Overall, the effect of taping on sales and the exact extent of sales displacement were not clear.

The second report, which was commissioned by the (c) Copyright Coalition, a coalition of music publisher and songwriter interests, and completed by the Roper Organization, Inc., was entitled, "Report on Home Audio Taping and Projected DAT Use [25] [hereinafter, the Roper Report]. This report was submitted to the Senate Subcommittee on Communications of the Committee on Commerce, Science and Transportation during hearings the Digital Audio Tape Recorder Act of 1990.[26] This telephone survey of respondents 14 years of age and older, found that 37 percent of those surveyed did in fact tape prerecorded music.[27] Furthermore, nearly 50 percent of those surveyed between the ages of 14 and 49 taped music at home.[28] Those persons surveyed felt that they would copy more

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[20] See, "Statement of Jason S. Berman Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on S. 1623," 102d Cong., 1st sess. (Oct. 29, 1991).
[21] Id.
[22] OTA-CIT-422 (Washington, DC: U.S. Government Printing Office, Oct. 1989).
[23] Id., at page 145.
[24] Id.
[25] See, "Report on Home Audio Taping and Projected DAT Use," The Roper Organization Inc., June 1990.
[26] Supra, this report at pages 5 and 6 for history and disposition of this bill.
[27] Supra, note 25, at 1.
[28] Id., at 2.

prerecorded music if the equipment they owned had DAT capability.[29]

The Roper Report focused its analysis on the projected loss of sales. Of those surveyed, 34 percent said that if they could not tape they would not purchase the recordings they would have taped.[30] The Roper Report found that the remaining tapers would have purchased recordings, which would have worked out, on average, to seven additional recordings per taper annually. In estimated lost sales, this equals approximately 322,500,000 recordings.[31] Half of those who expressed a desire to own DAT technology said they would make tapes with that equipment. Forty-one percent stated they would make more tapes than they currently do. The Roper Report concludes that this "indicates that DAT technology will encourage a portion of the people who are currently *non*-tapers of prerecorded music to become prerecorded music tapers." [32]

Senator DeConcini, on July 25, 1990, requested that the Copyright Office conduct a study on the copyright implications of digitial audio broadcasts. The Copyright Office's Report [33] contained an analysis of the home taping issue. The report concluded that "* * * copying of prerecorded works does and will displace sales of authorized copies, both in analog and digital formats, although the magnitude and economic impact of the displacement is difficult to assess at this time." [34] The report of the Copyright Office endorsed S. 1623.

THE ADVENT OF "AUDIOGRAM"

It is the intention of the committee that this legislation is technologically neutral. In attempting to achieve this neutrality, the term "audiogram" was created.

The term "phonorecord" was used in S. 1623 because the term is used elsewhere in the Copyright Act. However, Senator DeConcini expressed concern that in attempting to craft legislation that is technologically neutral, the bill as introduced may inadvertently encompass some form of technology that was not intended. After consultation with the computer and telecommunications industries it became apparent that the term "phonorecord" and its attendant definitions might be overly broad. For example, many computer programs currently generate sound during their operation. This will become more prevalent as technology continues to advance. According to the Computer and Business Equipment Manufacturers Association [hereinafter CBEMA]:

> The difficulty with S. 1623 as introduced is that not only was there no explicit statement in the statutory language clarifying that computer programs may not be copied, but the definition of "phonorecord" * * * was drafted so broadly as to encompass all, "material objects in which

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[29] Id., at 1.
[30] Supra, note 25 at 8.
[31] Id.
[32] Id., at 14.
[33] See, "Report on Copyright Implications of Digital Audio Transmission Services," a report of the register of copyrights, Oct. 1991.
[34] Id., at 43.

sound, other than those accompanying a motion picture or other audio-visual work, are fixed * * * ".[35]

S. 1623 sets forth a new term for a material object embodying works in an effort to distinguish clearly between the devices and media which the bill affects, and those it does not. Specifically, the committee replaced the word "phonorecord" with the new term "audiogram". As defined in S. 1623, "audiogram" is a material object in which are fixed only sounds, and material, statements or instructions incidental to those sounds, and from which the sounds and material can be perceived, reproduced, or communicated, either directly, or with the aid of a machine or device. "Audiogram" is intended to cover those objects commonly understood to embody sound recordings and their underlying works.[36] Excluded from the definition are video, multimedia and other non-audio products.[37]

The use of the new term "audiogram" avoids the possible ambiguities associated with "phonorecord" while preserving the intended function of the bill as being broad enough to cover many different types of digital audio recording equipment and media, as is the committee's intent. The use of "audiogram" will benefit those affected by the bill as well as eliminate unnecessary litigation to determine the intended scope of this legislation. The use of this new term will also preclude Congress from having to revisit this issue almost annually in order to keep pace with the rapidly changing technological world.

THE SERIAL COPY MANAGEMENT SYSTEM

Two substantial obstacles have hampered the enactment of digital audio recording legislation. One was the development of an equitable royalty system,[38] and the other was the development of a proper technological remedy for the problem of unlimited taping. S. 1623 addresses the second obstacle by requiring use of the Serial Copy Management System [SCMS], which is a far superior method of protecting copyrighted material than previous copy-restriction technology.

SCMS is required only in digital audio recorders and interface devices. SCMS will allow copying but only in a limited circumstance. The system places limitations on "serial" copying, or making copies of copies. One can make an unlimited number of copies from the original, but one cannot copy the copy.[39] The SCMS coding is placed in the digital subcode. the SCMS limits copying to one copy,[40] or no copies,[41] or permits unlimited copies.[42] A simple numbers code is utilized to trigger the system.

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[35] Letter to Senator Joseph Biden from John L. Pickitt, president, CBEMA, dated Nov. 20, 1991, page 2. citations omitted.

[36] That is recorded compact discs, digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.

[37] For a more in-depth review of the definition of "audiogram," see Section-by-Section analysis below.

[38] For an in-depth discussion of the royalty system implemented by S. 1623 see below.

[39] SCMS affects only copying done on digital recording equipment. SCMS does not control copying done on an analog recorder.

[40] If the source is an original copyright protected source.

[41] If the source is a previously made digital copy.

[42] If the source is coded as not copyright protected.

The input signal is categorized and materials which are identified as copyright protected are "flagged." The recording device then responds accordingly depending upon the code found in the recording.[43] SCMS also limits the number of generations of digital copies that can be made from analog source material. Current technology will not allow copyright identification in the analog domain. Two generations of digital copies can be made of material recorded through the analog inputs to a digital audio recorder. The second generation copy, however, can not be copied further on a digital audio recorder.[44]

In summary, there are four important facets of the SCMS system: (1) SCMS controls copying done on digital recorders and has no effect on analog recorder operation; (2) SCMS limits second generation copying of copyrighted source material and not first generation copying of the original source; (3) SCMS will allow only one copy of a copy (two generations) made from an analog source to be recorded; (4) the code which triggers the SCMS device is not stored in the same location as the sound signals. Thus, unlike "Copycode," [45] the code does not affect the overall sound quality.[46]

The functional specifications for SCMS are contained in a technical reference document which according to S. 1623, as introduced, was to be published in the Senate Committee Report and incorporated by reference into S. 1623. Section 1022(b) allows for the Secretary of Commerce to approve additional technical standards which meet the functional requirements set forth in the technical reference document in order to make the legislation more flexible.

At the markup the committee incorporated the technical reference document within the text of the bill. An additional provision was also included to require the National Institute of Standards and Technology [hereinafter, NIST] to review the technical reference document and certify that the document sets forth standards and specifications that adequately incorporate the intended functional characteristics to regulate serial copying, and are not incompatible with existing international digital audio interface standards or existing digital audio technology. This certification is contained below in a letter from the Director of NIST, and provides the necessary assurance that the specifications are not unduly restrictive so as to prohibit competition.

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[43] Supra, note 22, at 29, "For example, if the source material's category code indicated a digital source (e.g. CD) and if it were marked for copyright protection, a code of "1,0" would be written onto the DAT copy as it was being made. Then, if a DAT recorder detected the "1,0" code on digital material, the record function would not operate. By contrast, if source material were being copied from a digital microphone and were not protected, the DAT recorder would write a code of "0,0" on the copied tape, and future serial copying would not be limited."

[44] Id.

[45] Infra, see text accompanying footnote 11.

[46] Supra, note 5, at 41.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY,
Gaithersburg, MD, March 17, 1992.

Hon. DENNIS DECONCINI,
U.S. Senate,
Washington, DC.

DEAR SENATOR DECONCINI: This letter responds to your request of February 3, 1992, pursuant to the terms of S. 1623, the Audio Home Recording Act of 1991, for a technical review and certification by the National Institute of Standards and Technology of the technical reference document incorporated into S. 1623. Members of our technical staff have reviewed the technical reference document in light of present digital audio technology and standards. We find:

1. The technical reference document incorporates the intended functional characteristic to regulate serial copying of audio materials in a digital format.

2. We are not aware of any existing international standards which are incompatible with the standards and specifications set forth in the technical reference document.

3. We are not aware of any existing digital audio technology which is incompatible with the standards and specifications set forth in the technical reference document.

This letter addresses only our technical review of the technical reference document. The Administration is planning to submit its views on the substance of the bill at a later date.

Sincerely,

JOHN W. LYONS,
Director.

Although the development of a workable copy limitation system was essential to the success of this legislation, it only resolved half of the problem. The design of an equitable royalty system which compensated the creators and copyright owners while also protecting the consumer and the consumer electronics industry was required before a compromise could be reached.

EQUITABLE ROYALTIES, DISTRIBUTION AND NEGOTIATED AGREEMENTS

A. The need for a royalty system

In testimony before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, John V. Roach, chairman of the Board of Tandy Corporation,[47] summarized the effect the dispute over the home taping issue, and in turn the delayed introduction of digital audio recording technology, had on his industry during the eighties:

> * * * there is nothing more important to the vitality and robustness of the consumer electronics industry than new technology * * * since the introduction of the compact disc in the early 1980's, we have not had any exciting new technology on our shelves to capture the imagination of con-

[47] The largest U.S. headquartered consumer electronics company in the market, employing 27,000 workers.

> sumers. Put another way, the last decade has been recessionary not only for the economy but for new technology as well. Unfortunately the United States has been losing its edge in producing consumer electronics products. More and more manufacturers—and with them, more and more jobs—have gone overseas * * * [48]

The lack of an agreement among the parties affected by this legislation was detrimental to all concerned. The music industry received no royalties, the threat of legal action precluded the electronics industry from introducing new products, and the consumer was therefore deprived of the latest technology. At the behest of Senator DeConcini and the Senate Commerce Committee, all interested parties were encouraged to reach an agreement. Subchapter B of S. 1623 establishes an equitable royalty system that has been agreed to and supported by all parties involved.

B. An equitable royalty system

Importers and manufacturers will bear the cost of royalty fees. The royalty rate is 2 percent of the "transfer price" for digital audio recording devices and will be borne only by " * * * the first person to manufacture and distribute or import and distribute such [recording] device * * * " The same guidelines apply to the 3 percent of transfer price royalty for "digital audio recording media." [49] Under Sec. 1012(c) a credit system is established for returned devices. At the request of the Register of Copyrights, the subcommittee limited the time period for these credits to 2 years.

Single deck recording devices will be statutorily subjected to a per unit ceiling of $8 and a floor of $1. Dual port recorders [50] have a ceiling placed at $12 per unit. Also included is a provision allowing for the adjustment of the royalty ceiling. If more than 20 percent of the royalty payments are at the relevant royalty maximum, the Copyright Royalty Tribunal [CRT] may increase the royalty ceiling in an effort to have no more than 10 percent of such payments at the new royalty maximum. However, the committee inserted language which will prevent excessive increases in the royalty maximum. An increase in the royalty maximum may not exceed the rate of inflation. The bill provides that the percentage increase of any adjustment in the royalty maximum may never exceed the percentage increase in the Consumer Price Index during the period since the last adjustment of the cap.[51]

Administration of the royalty system is the dual responsibility of the Copyright Office and the CRT. The Copyright Office collects the money generated by the royalty payments and deposits it with the Treasury of the United States, and also reports to the CRT on a quarterly basis. During the subcommittee markup, at the behest of the Register of Copyrights, the reporting schedule was altered so that the fourth quarterly report was incorporated into the annual

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[48] See, "Statement of John V. Roach Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on S. 1623," 102d Cong., 1st sess. (Oct. 29, 1991).

[49] Blank tapes, etc.

[50] Defined in S. 1623, sec. 1012(a)(1)(3) as " * * * a physically integrated unit containing more than one digital audio recording device * * * "

[51] In the case of the first adjustment of the royalty maximum, the increase may not exceed the percentage increase in the CPI during the period since the effective date of this legislation.

statement of account, rather than having four quarterly reports and then an annual report.

The CRT adjusts the royalty caps and distributes the money pursuant to pre-set allocations among the music creators and copyright owners.[52]

This system has received the endorsement of each of the groups which it affects. Speaking on behalf of the National Consumers League, Linda F. Golodner, executive director, felt that S. 1623 was sound:

> * * * as it is based on a time-tested and constitutionally mandated copyright scheme which rewards innovation in order to foster creativity. That system serves not only the copyright holder, but the American public at large—the consumer—because it ensures a steady supply of new creative products such as music.[53]

Representing the recording industry, Jason S. Berman, president of the Recording Industry Association of America, testified that,

> [A]s the world's leading producer of prerecorded music, it is fitting that the U.S. join the ranks of those countries affording such protection to prerecorded music.[54] [See below for an analysis of S. 1623 in the context of international copyright protection.]

On behalf of music publishers and songwriter interests, Edward P. Murphy, president of the National Music Publishers' Association and Chairman of the (c) Copyright Coalition, testified that:

> The Coalition's enthusiastic support for the Audio Home Recording Act of 1991 stems from its comprehensive approach to audio home taping issues. The proposed legislation incorporates the critical royalty component, and it extends to all digital audio recording technologies, not just to DAT.[55]

Finally, the consumer electronics industry hails the bill as the resolution to a difficult problem which has slowed the advent of technological advances on the American electronics market. John V. Roach of the Tandy Corporation stated,

> The Audio Home Recording Act is an equitable solution that promises everyone a share in the benefits of the digital audio revolution * * * Of special importance to Tandy is the protection the bill would afford manufacturers and retailers from copyright infringement actions * * * This would create a more stable environment for the introduction of new products and formats, allowing us to focus

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[52] See, "Statement of Register of Copyrights, Ralph Oman Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on S. 1623," 102d Cong., 1st sess. (Oct. 29, 1991).

[53] See, "Statement of Linda L. Golodner, Executive Director, National Consumers League Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on S. 1623," 102d Cong., 1st sess. (Oct. 29, 1991).

[54] Supra, note 20.

[55] See, "Statement of Edward P. Murphy, President of the National Music Publishers' Association and Chairman of the Copyright Coalition Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on S. 1623," 102d Cong., 1st sess. (Oct. 29, 1991).

more on marketing strategies and less on litigation strategies.[56]

Thus, support of the royalty system embodied within S. 1623 is widespread. More importantly, the system will allow *all* interested parties to benefit from its implementation.

C. Distribution of royalties

Subchapter B of S. 1623 includes two provisions which establish a statutory method of royalty distribution and guidelines for interested parties to negotiate separate collection and distribution arrangements.

Section 1014 enumerates those interested copyright parties which are entitled to royalty proceeds. The committee intends the beneficiaries to consist of individual record companies, writers, music publishers and performers. Under this section, royalty receipts will initially be divided into two funds from which royalty allocations will be made. The two funds are the Sound Recordings Fund and the Musical Works Fund. 66.6 percent of royalty receipts will go to the Sound Recordings Fund and will then be distributed pursuant to the guidelines of subsection (b). The remaining 33.3 percent will go to the Musical Works Fund for distribution. The total royalties collected will be allocated as follows: record companies 38.41 percent; featured artists 25.6 percent; songwriters and music publishers 16.66 percent each; the American Federation of Musicians for the benefit of nonfeatured musicians who have performed on sound recordings—1.75 percent; and the American Federation of Television and Radio Artists, for the benefit of nonfeatured vocalists who have performed on sound recordings—.92 percent. Additionally, subsection (c) establishes the method by which the CRT will resolve disputes as to distribution within a group of claimants.

Section 1015 calls for interested copyright parties to file a claim for payments for royalties received in the preceding year. The Register of Copyrights suggested, and the subcommittee accepted, an amendment allowing the CRT 60 days to distribute funds as to which there is no controversy. Section 1015 may be superseded by the establishment of a negotiated arrangement pursuant to sec. 1016.

D. Negotiated arrangements

Section 1016 allows interested copyright parties, if two-thirds of the members of each group agree, to negotiate and establish, among themselves or with interested manufacturing parties, a private system for distribution, verification and/or collection of royalties.

The two-thirds threshold is to be calculated by reference to the proportion of the market accounted for by the individual record companies, music publishers, and writers—measured by annual retail sales of audiograms—rather than by counting the number of individual record companies, music publishers, and writers that wish to participate in the private arrangement. For these purposes, an organization representing one of the three categories of interest-

[56] Supra, note. 48

ed copyright parties identified above (e.g., an association of music publishers) is presumed to represent the requisite two-thirds of that category if the membership of, or other participation in, that organization accounts for at least two-thirds of annual retail sales of audiograms.

The fact that a particular organization meets this two-thirds requirement does not, however, give the organization any power or authority to force its members into a negotiated arrangement. Rather, the committee envisions that organizations that may wish to carry out a representative role with respect to the establishment or implementation of a negotiated arrangement will seek advance authorization from their members for this purpose. If such authorization is not given, or is withdrawn at anytime (either before or after the negotiated arrangement goes into effect), by an individual record company, music publisher, or writer, that person or entity has recourse to the full set of protections available under sec. 1016 to parties that choose not to participate in a negotiated arrangement.

The committee recognized that, absent appropriate safeguards, a negotiated arrangement that is not entered into unanimously could work to the detriment of parties that do not wish to participate. Accordingly, the committee strengthened language in the bill that is designed to protect the interests of those parties who choose not to enter into a negotiated arrangement. The legislation provides that no negotiated arrangement can go into effect without the approval of the CRT. The CRT must determine that the conditions set forth in sec. 1016(b) are met before a negotiated arrangement can be approved.

Language contained in subsections (b) and (c) ensures that both interested manufacturing parties and interested copyright parties who choose not to participate in a negotiated arrangement will not be adversely affected by the arrangement. A manufacturer or importer may fully satisfy its obligations by depositing appropriate royalty payments with the Copyright Office and otherwise complying with the provisions of secs. 1011 and 1012. In order to protect the rights of nonparticipating interested copyright parties, the CRT, prior to approval of a negotiated arrangement, must ensure that the arrangement includes any necessary safeguards to ensure their receipt of proper royalty payments.

In particular, the CRT must ensure that any negotiated arrangement does not reduce the amount of money that nonparticipating interested copyright parties would receive in the absence of such an arrangement. In order to achieve this end, the Tribunal may require such safeguards as accounting procedures, reports, and any other information required to ensure and verify that royalty payments have been properly collected and distributed.

The legislation establishes antitrust immunity for good-faith negotiation and voluntary implementation of a negotiated arrangement. The "good faith" and "voluntary" language was included to address competing objectives in connection with the negotiation and implementation of these private arrangements. The first objective was to ensure that the participants would be free to negotiate vigorously and ultimately to implement a negotiated arrangement absent the fear of frivolous antitrust claims by potentially disgrun-

tled participants or nonparticipants. The second objective was to ensure that, in an industry such as this where there are some relatively powerful participants, there would be some protection against their imposing their will on less powerful participants by the use of coercive acts in the negotiation or implementation of a negotiated arrangement.

For example, despite the fact that there are over 2,600 record companies in the United States, 6 record distribution companies distribute sound recordings from their own labels, as well as from numerous independent labels, which combined account for over two-thirds of all annual retail record sales. The committee believed that appropriate safeguards should be included in the legislation to ensure that any negotiated arrangements agreed to by larger entities do not prejudice the rights of smaller record companies, or for that matter, songwriters, composers, and music publishers that choose not to participate. The language of the legislation strikes a balance between these concerns by providing antitrust immunity for the good faith negotiation and implementation of these private arrangements, but not for group boycotts, concerted refusals to deal, illegal tying or similar coercive actions (including threats to take such acts) in the negotiation or implementation of a negotiated arrangement (for example, a group boycott designed to force parties to participate in the arrangement).

The committee intends that, where a private arrangement has been authorized that provides for direct collection of royalty payments from one or more participating interested manufacturing parties, the administering entity for the private arrangement shall set aside a portion of the payments it has collected sufficient to settle likely claims against such payments by those interested copyright parties that have chosen not to participate in the private arrangement. Depending on the procedures that the CRT approves, the funds that are set aside may either be retained in a separate account pending the Tribunal's annual claims resolution process or they may be paid over periodically to the Copyright Office. If the funds are retained until completion of the annual claims resolution process, a set-off procedure could be implemented to settle the claims that nonparticipants may have against those funds on the one hand, and the claims participants may have against the government-collected royalty pool on the other hand. However, any funds that are set aside for nonparticipants but retained by the private administering entity pending the CRT's annual claims resolution process must accumulate interest, for the benefit of such nonparticipants, as provided under sec. 1013.

After a private arrangement goes into effect, the CRT is directed to hear and address any objections to the arrangement and to ensure that alternative collection and distribution procedures remain available to, and are working properly for, interested manufacturing parties and interested copyright parties that are not participating in the arrangement. The CRT's responsibility includes ensuring that interested copyright parties who are not participants in the negotiated arrangement continue to receive the royalty payments to which they would be entitled in the absence of the arrangement. The CRT's responsibility also includes responding to objections from participants that the arrangement is no longer

operating as a fair and effective alternative to the collection, distribution and/or verification procedures otherwise provided under chapter 10. In order to ensure the necessary powers to carry out these responsibilities, the CRT is empowered to seek injunctive relief in an appropriate U.S. district court.

The committee anticipates that the CRT will make use of these powers as necessary to protect the interests of those who have chosen not to participate in the negotiated arrangement, and to ensure that the arrangement continues to function as a fair and effective alternative to the procedures provided under chapter 10. The committee also anticipates, however, that the parties to the arrangement are likely to agree upon binding arbitration or other means to resolve disputes that may arise within the arrangement. Except to the extent necessary to protect nonparticipants and to ensure compliance with the provisions of sec. 1016, the committee does not intend for the CRT's oversight authority to be used to intervene in matters which are subject to arbitration, or to dictate the internal functioning of the private arrangement.

In short, the royalty system of S. 1623 is an equitable resolution of a long-standing problem which benefits all parties. The oversight provisions are established to ensure that all interests, and not just the interests of the majority, are protected. Together, the royalty system and oversight regulations will allow the United States to join the growing number of countries which afford their creators and copyright owners royalties for home taping of musical works and sound recordings.

Development of an international copyright protection plan

Currently, 17 countries provide home taping royalties to creators and copyright holders for private home copying by statute.[57] Australia was the first English-speaking nation to provide for a blank tape royalty. The royalty, or levy, is between 20 and 50 Australian cents per 60-minute cassette.

The exact method of attaching the royalty to products differs from nation to nation. Nations such as France and Sweden place the royalty on blank tapes.[58] Others, such as Germany, Italy, Norway, and Spain, place the royalty on both blank tapes and equipment.[59] The method and amount of royalties distributed also vary from country to country.

In addition to the United States, other nations are considering legislation. The Japanese are contemplating adopting a royalty plan for digital hardware by 1992.[60] Review of international movement in the area is important in terms of S. 1623 for two reasons. First, because the problems created by home copying are being addressed on a national level in other countries, it is appropriate that the problem be addressed domestically in the United States as well.

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[57] Supra, note 52, these countries are Argentina, Australia, Austria, the Congo, Germany, Finland, France, Gabon, Hungary, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and Zaire.

[58] Id., at 37 in France the royalty is roughly 25 cents per hour of playing time. Sweden's royalty equates to roughly 23 cents per audiotape.

[59] Id.

[60] Id., at 37, among the countries other than Japan which are considering similar legislation are Belgium, Denmark, Canada, Poland, Bulgaria, and the Russian Republic.

Second, and perhaps more importantly, there is a movement on the international stage to develop a system which provides creators and copyright owners with royalties for foreign taping.

While many nations have established private copying levies for domestic rightsholders, very few have expanded those protections beyond their own borders. A major drawback which currently plagues the international royalty payment systems is the requirement of reciprocity. Under such a reciprocity requirement a country will only permit U.S. copyright holders to receive compensation from home taping royalty pools if the United States has a home taping royalty system that allows payments to that country's rightsholders. Such a reciprocity requirement already exists in Australia, Finland, and Iceland, and poses a growing threat.[61] While American music is enjoyed around the world, no American creators or copyright owners can receive royalties for home taping in these countries because the United States has not adopted a domestic method of providing royalties for home taping. Given that U.S. songwriters, composers, musicians, and record companies produce approximately half of the recordings listened to and copied around the world, it is critical that we address this problem and ensure that U.S. creators share in the revenue produced through the use of their works.

Until such time as America adopts a workable home taping royalty scheme, artists, record companies, composers, music publishers, consumers, and the electronics industry of this nation will remain at least one step behind. The adoption of S. 1623 will not only benefit the aforementioned groups, it will allow the United States to take an active role in developing a feasible international system. A leadership role in developing an international scheme would serve to insure that the tremendously popular music of this country attains the best possible protection abroad.

IV. Vote of the Committee

On November 21, 1991, with a quorum present, by unanimous consent, the Committee on the Judiciary ordered the bill as an amendment in the nature of a substitute favorably reported.

V. Section-By-Section Analysis

Section 1—Short Title.—This section sets forth the title of the Act, the "Audio Home Recording Act of 1991."

Section 2—Importation, Manufacture, and Distribution of Digital Audio Recording Devices and Media.—This section adds a new chapter to the Copyright Act, as described below.

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

Section 1001. Definitions

This section contains definitions of certain terms used in chapter 10. The definitions are carefully tailored so as to limit the effect of the new chapter to audio recording. For convenience, the defini-

[61] Supra, note 5, at 34, 35.

tions are set forth in alphabetical order in section 1001. For clarity of discussion in this report, however, the definitions are grouped below by subject matter.

Several of the definitions identify the digital audio recording technology and products to which the chapter applies:

Section 1001 establishes a new type of material object embodying works—an "audiogram"—in order to delineate clearly the types of devices and media subject to chapter 10, and to ensure that devices dedicated to the recording of motion pictures, television programs or multimedia works are not covered by the chapter. An "audiogram" is defined as a material object in which are fixed only sounds, and material, statements or instructions incidental to those sounds, and from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The intention is for the term "audiogram" to cover objects commonly understood to embody sound recordings and their underlying works, such as recorded compact discs (CD's), digital audio tapes (DAT's), audio cassettes and long-playing albums (LP's), and in the near future, digital compact cassettes (DCC's) and mini-discs (MD's); conversely, the term is intended to exclude objects such as recorded videocassettes and multimedia products (i.e., unitary products which integrate several prominent components such as text, video clips, computer graphics, speech and music).

As noted above, the definition of audiogram focuses on objects in which only sounds are fixed, but the sounds may be accompanied by incidental "material, statements or instructions." The term "material" is intended to include such items as the textual and graphic materials commonly embodied on (or inserted inside) album covers, CD boxes and audio cassette packages, such as title and artist information, biographies and still photos of the performers, and lyrics of the musical works. The phrase "statements or instructions" is intended to refer to such items as the data or executable code that may accompany the fixed sounds for purposes of providing functional information or instructions for the operation of the machine on which the "audiogram" is played. Thus, for example, commercially released compact discs generally contain, in addition to the data representing the fixed sounds, data providing track and timing information so that the CD player can locate a particular track of a sound recording. Compact discs also contain subcode information such as that used in the Serial Copy Management System. Such material, statements or instructions are "incidental to" the fixed sounds because they are related to and relatively minor as compared with the sounds. On the other hand, if the material object contains computer programs or data bases that are not incidental to the fixed sounds, then the material object would not qualify as an "audiogram."

The committee decided to create the new term "audiogram" rather than to use the term "phonorecord," which is defined in section 101 of title 17, to avoid any possible ambiguities concerning the scope of the definition of "phonorecord." In creating the new term "audiogram" for purposes of this chapter, the committee intends to preserve the existing balance of rights under title 17 between rightsholders in musical works and record companies with

respect to works (including any "incidental" material) that may be incorporated in "audiograms."

A "digital audio copied recording" is defined as a reproduction in a digital format of an audiogram, regardless of whether that reproduction is made directly from the audiogram or indirectly from a transmission (*e.g.*, a radio broadcast of a commercially released audio cassette), and regardless of whether the material is reproduced from a digital or analog source. Thus, a digital audio recording made from a commercially released compact disc or audio cassette, or from a radio broadcast of a commercially released compact disc or audio cassette, would be a "digital audio copied recording." Because a live performance, such as a concert, is not an "audiogram," a reproduction made of such a live performance would not be a "digital audio copied recording."

A "digital audio recording device" is defined as "any machine or device, now known or later developed, of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use." The definition specifically excludes "professional model products," as well as "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 non-musical sounds." Machines that are predominantly for the recording of speech, including voice mail, are thus excluded. The indicia that should be used to determine whether a machine is "designed and marketed primarily for the creation of sound recordings resulting from the fixation of non-musical sounds"—as contrasted with musical sounds—include such factors as the machine's technical features and capabilities, advertising and distribution channels. The definition makes clear that the focus of chapter 10 is on machines or devices "of a type commonly distributed to individuals for use by individuals," where the primary purpose of the recording function is recording audio works "for private use." Thus for example, machines or devices designed for use in a telephone company facility as part of its integrated service network would not qualify as digital audio recording devices even though they make digital recordings of audio information. Similarly, machines or devices for the authorized manufacture of audiograms for distribution and sale by legitimate record companies would be excluded from the definition of "digital audio recording devices."

The definition also makes clear that a "digital audio recording device" must be a machine or device that has a recording function that is designed or marketed for the primary purpose of making a digital audio copied recording for private use. In determining whether a machine with both recording and playback functions qualifies as a "digital audio recording device," the primary purpose test is applied only to the "recording function" of the machine, and not to all of the features of the machine taken together. In using the phrase "primary purpose," the committee contemplates a purpose that exceeds 50 percent of all purposes. If the "primary purpose" of the recording function is to make objects other than digi-

tal audio copied recordings, then the machine or device is not a "digital audio recording device," even if the machine or device is technically capable of making such recordings.

Thus, a digital videocassette recorder—though capable of making digital audio copied recordings—would not qualify as a "digital audio recording device" because the primary purpose of the recording function of the device is not to make "digital audio copied recordings," but rather to make digital video recordings. Similarly, neither a personal computer whose recording function is designed and marketed primarily for the recording of data and computer programs, nor a machine whose recording function is designed and marketed for the primary purpose of copying multimedia products, would qualify as a "digital audio recording device."

Although the typical personal computer would not fall within the definition of "digital audio recording device," a separate peripheral device with an independent recording function would be a "digital audio recording device" if the recording function was designed or marketed for the primary purpose of making digital audio capied recordings for private use. In that case, only the peripheral device would be subject to the royalty payment requirements of subchapter B.

A "professional model product" is defined essentially as an audio recording device that has professionally oriented characteristics such that it should be considered to be designed or marketed primarily for professional use.

Standards and protocols in the consumer electronics industry commonly identify certain codes to be included in electronic signals communicated between machines that identify the nature or type of device sending the signals. To qualify as a "professional model product," an audio recording device that utilizes an interface format with discrete professional and non-professional modes must be capable of sending such a digital audio interface signal in which the channel status block flag is set at "professional." In addition, a "professional model product" must be clearly, prominently, and permanently marked with the letter "P" or the word "professional" on the outside of its packaging and in all published advertising, promotional, and descriptive literature. In this regard, it is the committee's intention that the inadvertent omission of the letter "P" or the word "professional" from a de minimis portion of a product's literature shall not automatically disqualify a device from being a "professional model product."

To qualify as a "professional model product," an audio recording device must also be designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business. In this regard, the definition of "professional model product" lists eight factors that bear on the distinction between a "professional model product" and a "digital audio recording device." The committee does not intend that the presence or absence of any single factor should create a presumption as to whether or not a device is a professional model product. The factors include such criteria as the nature of the advertising and distribution channels used to market the device; the occupations of the ultimate purchasers of the device; and the uses to which it is put.

A "digital audio interface device" is defined as any machine or device that supplies a digital audio signal through a "nonprofessional interface," regardless of whether the machine or device is now known or later developed and regardless of whether it is incorporated as part of another machine or device.

The term "digital audio recording medium" refers to a material object, now known or later developed, that may be used as a storage medium for sound recordings. For media products to come within the definition of "digital audio recording medium," they must be "in a form commonly distributed for ultimate sale to individuals for use by individuals" and they must be "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." The phrase "primarily marketed" means more than 50 percent of the marketing; the phrase "most commonly used" refers to the use which is greatest (i.e, the use which is largest among all uses, regardless of whether it constitutes more or less than 50 percent of all uses).

Media products that are distributed in intermediate configuration would not come within the definition of "digital audio recording medium." For example, digital audio tape that is distributed to record manufacturers in "pancake" form—*i.e.,* as a large reel of tape that has not yet been packed into individual cassettes—is neither "in a form commonly distributed * * * for use by individuals" nor "primarily marketed or most commonly used by consumers" for the requisite purpose. The conversion of such a "pancake" into individual blank cassettes would constitute "manufacture" within the meaning of section 1001(9), and, assuming the elements of the definition are met, then such media products would be "digital audio recording media."

Examples of types of current or anticipated "digital audio recording media" are magnetic digital audio tape cassettes, optical discs, and magneto-optical discs. Other types of media may be developed in the future that will come within the definition. Excluded from the definition, however, is any material object that embodies a sound recording at the time it is first distributed by the manufacturer or importer of the object, unless the sound recording was added in order to evade the royalty payment obligations imposed by chapter 10. Also expressly excluded from the definition are media primarily marketed and most commonly used by consumers for copying motion pictures, other audiovisual works, or non-musical literary works such as computer programs and data bases.

Likewise, media products that are primarily marketed for and most commonly used by professionals in recording studios would not be a "digital audio recording medium" and therefore would not be subject to the royalty obligation. In connection with any disputes concerning whether media products are primarily marketed for and most commonly used by professionals in recording studios or come within the definition of "digital audio recording medium," reference should be made to the factors that govern whether a device constitutes a "professional model product" to the extent such factors are applicable to media products. Other factors to be considered include whether the media products are permanently marked to indicate that they are not intended for retail sale, the

absence of retail bar codes on the packaging, and the use of separate model numbers for the products. In the particular case of a media product that meets the definition of "digital audio recording medium" in other respects, it shall be incumbent on the manufacturer or importer to demonstrate that the royalty obligation does not apply because the media product is primarily marketed for and most commonly used by professional in recording studios.

Persons to which important rights and obligations apply are identified in the definitions of "interested manufacturing party" and "interested copyright party." The definition of "interested copyright party" is intended to include record companies, music publishers, songwriters, and their respective industry associations, including organizations that present writers and/or publishers in licensing rights in musical works.

Key obligations under chapter 10 are tied to the distribution of digital audio recording devices, media, and interface devices. To "distribute" means to sell, resell, lease, or assign a product to consumers in the United States or for ultimate transfer to consumers in the United States. The definition is intended to encompass all means by which products may be transferred through the distribution chain for ultimate transfer to consumers in the United States, whether through third parties or intermediaries or within a vertically integrated manufacturing and distribution operation.

The definition of "distribute" is intended to include transfers between related entities or within a single entity. However, before a "distribution" can take place, activities that normally constitute part of the manufacture or importation of a product should first have been concluded. For example, the packaging of a product is customarily considered part of the manufacturing operation. Therefore, transfer of a product from a manufacturer's assembly line to its packaging department would not be considered a "distribution." In addition, a "distribution" should not be considered to occur within a single entity at a point earlier than the point at which the entity has established a bona fide internal transfer price for purposes other than this legislation.

When viewed in combination with sections 1012 (a) and (b), it is clear that there are to be no double royalty payments for the same digital audio recording device or medium, even where there is more than one distribution (*i.e.*, consecutive distributions). Rather, it is intended that a royalty payment will be made by the first distributor of each digital audio recording device or medium.

The royalty payment required by subchapter B is calculated based on the "transfer price" of a digital audio recording device or medium. While the formulae for calculating the royalty are set forth in section 1012, the "transfer price" is defined in section 1001 as (1) in the case of an imported product, the actual entered value of the product at U.S. Customs (exclusive of any freight, insurance, and applicable duty), and (2) 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).

Where the transferor and transferee are related entities (such as a parent and subsidiary) or are within a single entity (such as units within the same corporation), the transfer price must be used in

connection either with a manufacturer's bona fide "distribution" (as explained above) or with importation, and is not to be less than a reasonable arms-length price as determined in accordance with the principles of the regulations adopted pursuant to the Internal Revenue Code, title 26 U.S.C. § 482, or any successor provision to section 482.

Sections 1002 and 1003. Prohibition on certain infringement actions and effect on other rights and remedies

The copyright law implications of private audio recording for noncommercial use have been the subject of longstanding debate. Since 1981, there have been successive legislative attempts to resolve the issue. In the absence of legislative resolution, the distribution of consumer digital audio recording technologies has been subject to challenge in the courts based on claims of contributory copyright infringement. See, e.g., *Cahn* v. *Sony Corp.* (S.D.N.Y., filed July 9, 1990, dismissed without prejudice, July 10, 1991).

A central purpose of the Audio Home Recording Act of 1991 is conclusively to resolve this debate, both in the analog and digital areas, thereby creating an atmosphere of certainty to pave the way for the development and availability to consumers of new digital recording technologies and new musical recordings. To address the uncertainty that has plagued this issue, section 1002 prohibits certain copyright infringement actions.

Subsection (a) provides that no action may be brought under title 17 of the United States Code or under section 337 of title 19, chapter 4, the Tariff Act of 1930, alleging infringement of copyright based on the manufacture, importation, or distribution of (i) a digital audio recording device or medium or (ii) an analog audio recording device or medium. The subsection also extends protection to users of such audio recording devices and media by prohibiting copyright infringement actions based on the use of such devices or media for making audiograms; however, the protection against copyright infringement actions does not extend to infringement claims by virtue of the making of one or more audiograms, or other material objects in which works are fixed, for direct or indirect commercial advantage.

As stated earlier, a key purpose of S. 1623 is to insure the right of consumers to make analog or digital audio recordings of copyrighted music for private, noncommercial use. Section 1002(a)(2) states that the copying of an audiogram by a consumer for private, noncommercial use is not for direct or indirect commercial advantage and is therefore not actionable. Thus, for purposes of illustration, the making of an audiogram by a consumer for use in his or her home, car, or portable tape player, or for a family member, is protected by the prohibition against copyright infringement actions contained in this legislation.

In determining whether the making of audiograms is for "direct or indirect commercial advantage," the relevant inquiry is whether a person makes audiograms for the purpose of commercial advantage, rather than whether the person making them acquires devices, media, or music from a commercial enterprise or in a commercial transaction. For example, a person who makes multiple copies of a particular audiogram and sells those copies to others

would not be protected by the prohibition against copyright infringement actions contained in this legislation. Such a person would have, however, the full range of defenses to such an infringement action available under current law.

The foregoing examples, of course, are merely illustrative of the meaning of "direct or indirect commercial advantage" in the context of section 1002 only. As is clearly indicated by section 1003, the new chapter 10 created by S. 1623 is intended to address audio recording, and only audio recording, and is not intended to establish principles of copyright law applicable to other types of works or interpretations applicable to other provisions of title 17.

The reference to actions "alleging infringement of copyright" includes actions under section 1337 of title 19 for unfair methods of competition and unfair acts in the importation of articles based on copyright infringement.

The prohibition on actions under section 1002 is not dependent upon compliance with other requirements under this chapter. Thus, for example, the protection granted by section 1002 applies to all digital audio recording devices and media regardless of whether applicable royalty payments have been made for a device or medium or whether a device includes SCMS. The Committee believes that the remedies provided by subchapter D are sufficient to ensure compliance with the royalty and SCMS provisions of this chapter, and it would be unfair to subject a consumer to potential infringement litigation merely because provisions of chapter 10 were violated somewhere in the distribution chain.

Subsection (b) makes clear that the prohibition on certain infringement actions in subsection (a) is not intended, by negative implication or otherwise, to create any new cause of action for copyright infringement, to expand any existing cause of action for copyright infringement, or to limit any defense that may be available to a copyright infringement action under title 17 of the United States Code or section 337 of the Tariff Act.

In crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording. There is no intention to establish generally applicable principles of copyright law. The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication. This intent is manifest in several provisions of the bill. For example, section 1002 provides only that certain copyright infringement actions are precluded. The section does not purport to resolve, nor does it resolve, whether the underlying conduct is or is not infringement. The committee intends the immunity from lawsuits to provide full protection against the specified types of copyright infringement actions, but it has not addressed the underlying copyright infringement issue in order to minimize the chances that a resolution of that issue might be interpreted to have applicability with respect to other conduct or other technologies.

Similarly, section 1003 specifically provides that, except as expressly provided in chapter 10 with respect to audio recording devices and media, nothing in chapter 10, or the fact of its enactment, is intended to have any effect on any person's rights or remedies under chapters 1 through 9 of title 17. For example, nothing

in chapter 10 should be construed to authorize unlawful access to a transmission from which a reproduction may be made.

Finally, the committee wishes to express its view that neither the restriction on copyright infringement actions in section 1002 nor the provision for royalty payments under subchapter B obviates the need for, or the importance of, the phonorecord rental restrictions contained in section 109(b) of title 17 (the so-called "Record Rental Amendment"). Twice before—in 1983, when this committee approved the Record Rental Amendment, and again in 1988, when the Record Rental Amendment was extended until 1977—this committee has considered the question of commercial phonorecord rental, and has determined that the Record Rental Amendment is necessary and appropriate.

Neither the enactment of chapter 10 nor the language used in any of its provisions is intended to undercut in any way the committee's prior findings or conclusions with respect to the issue of commercial phonorecord rental and problems posed by this practice. The use of the new term "audiogram" in chapter 10 is not intended to diminish, enlarge, or otherwise affect the scope of the term "phonorecord" as it is used in section 109 of title 17, or elsewhere in title 17.

SUBCHAPTER B—ROYALTY PAYMENTS

Section 1011. Obligation to make royalty payments

Subsection (a) sets forth the basic obligations to file notices, statements of account, and royalty payments in order to import into and distribute in the United States, or to manufacture and distribute in the United States, any digital audio recording device or medium. The three basic filings—the initial notice filing, the quarterly statements of account, and the annual statement of account—are described in detail in subsections (b) through (d). Subsections (e) through (h) address verification procedures and the confidentiality of information. Since each of the filing requirements (including the royalty payment obligation) is tied to "distribution" of a digital audio recording device or medium, manufacture or importation by itself would not trigger these obligations under section 1011. The importation of a digital audio recording device or medium as part of the personal baggage of any person arriving from outside the United States, for use and not for sale, would not trigger any obligations under section 1011.

Subsection (b) requires an importer or manufacturer to file a notice with the Register within 45 days following first distribution within the United States of a digital audio recording device or medium that falls within a product category or utilizes a technology for which no notice has previously been filed by that importer or manufacturer. However, no notice shall be required with respect to any distribution occurring prior to the effective date of this chapter. The committee intends "product category" to refer to products with substantially the same use in substantially the same environment. For example, product categories would include categories such as: hand held portable integrated combination units (e.g., "boomboxes"); portable personal recorders; stand-alone home recorders (e.g., "tape decks"); home combination systems (e.g.,

"rack systems"); automobile recorders; configurations of tape media such as standard cassettes or microcassettes; and configurations of disc media such as 2½", 3", 5" discs. The committee intends "technology" to include such technology-based distinctions as: DAT, DCC, MD, and other recording technologies.

The notice must set forth the product category and technology of the device or medium, the manufacturer's or importer's identity and address, and the trademarks, trade names or other indicia of origin that will be associated with the product. Products need not be identified by model number, and notices need not be submitted for different models within a single product category or product technology. Provided that the requisite information is provided by product category and technology, the committee intends that multiple product categories and technologies may be included on a single notice (e.g., home tape decks and "boomboxes" using DCC and DAT technology).

Subsection (c) requires that each importer and manufacturer of digital audio recording devices or media file with the Register a quarterly statement of account for each quarter in which that importer or manufacturer distributed such a device or medium. Thus, there is no obligation to file for any quarter in which no digital audio recording device or medium was distributed. The quarterly statement must specify, by product category, technology and model, the quantity and transfer price of all such devices and media distributed in the applicable quarter. Except with respect to the fourth quarter of each calendar or fiscal year, the statement must be filed with the Register no later than 45 days after the close of the quarter. The quarterly statement for the final quarter of any calendar or fiscal year is to be incorporated into the annual statement of account required under subsection (d). In order to ease the transition following the effective date of this chapter, no quarterly statement is required for the calendar or fiscal quarter within which the effective date of this chapter falls. However, the first quarterly statement of account shall cover the entire period since the effective date of this chapter.

Each quarterly statement of account must be certified as accurate by an authorized officer (in the case of a corporation) or principal (in the case of a proprietorship or partnership) of the importer or manufacturer. The statement must be accompanied by the total royalty payment due, as calculated under section 1012. Each manufacturer or importer has the option to file the required quarterly statements on either a calendar or fiscal year basis. However, once a filing choice has been made, the Committee does not envision that it will be changed except on the basis of important fiscal or accounting considerations (such as a change in the filing entity's fiscal year).

Subsection (d) requires that each importer or manufacturer of digital audio recording devices or media file an annual statement of account for each calendar or fiscal year (as elected) in which that importer or manufacturer distributed such a device or medium. Thus, there is no obligation to file for any year in the absence of a distribution of a digital audio recording device or medium. The annual statement is to be filed with the Register no later than 60 days after the close of the calendar or fiscal year. The

statement must be certified as accurate by an authorized officer or principal of the importer or manufacturer, and must be reviewed and certified by an independent certified public accountant pursuant to generally accepted auditing standards.

The annual statement of account must also be accompanied by any royalty payment due under section 1012 that was not previously paid under subsection (c) of this section, including the royalty payment due for the fourth quarter and any shortfalls in the royalty payments made for the first three quarters that may be discovered during the preparation and certification of the statement. On the other hand, if the preparation and certification of the annual statement reveals that the manufacturer or importer has overpaid for the first three quarters, such overpayment may be deducted from the royalty payment for the fourth quarter. To the extent such deduction is not sufficient to recover such overpayment, the committee intends that the unrecovered amount may be carried forward and credited against future royalty payment obligations, or, at the election of the manufacturer or importer, shall be refunded to said manufacturer or importer upon written request to the Register, in such form as the Register shall prescribe by regulation.

Subsections (b), (c), and (d) authorize the Register to prescribe by regulation the form of the required notices and statements of account. As indicated above, the content of the notices and statements of account is set forth in those subsections.

Subsection (e) provides for the promulgation of regulations pursuant to which interested copyright parties may, through independent certified public accountants who meet certain criteria, audit the statements of account filed by importers and manufacturers to verify the accuracy of the information contained therein. The Register is directed, after consulting with interested copyright parties and interested manufacturing parties, to issue regulations defining the scope of such verification audits and establishing a procedure for coordination of the audits to ensure that no importer or manufacturer is audited more than one per year. The regulations shall also ensure that verification audits will be conducted only at reasonable times, with reasonable advance notice, and will be no broader in scope than is reasonably necessary to carry out the verification audit function.

The results of each verification audit are to be certified by the independent certified public accountant pursuant to generally accepted auditing standards. The certification and the results of the audit are to be filed with the Register. In the event that a verification audit leads to a dispute concerning the amount of royalty payment due from a manufacturer or importer, the approved representatives of interested copyright parties and the audited party (and its authorized representatives) shall have access to all documents upon which the review and audit results under subsections (d) and (e), respectively, were based. This access shall be limited, in the case of representatives of interested copyright parties, to only such representatives who have been approved by the Register under subsection (h)(2) to have access to confidential information, and who have complied with the procedural requirements of subsection (h)(2).

Subsection (f) specifies that the party initiating a verification audit under subsection (e) must, in the first instance and unless otherwise agreed among interested copyright parties, bear the cost of the audit. However, in the event the verification audit leads ultimately to the recovery of an amount greater than or equal to five percent of the audited party's actual royalty payments for the year subject to audit, the audited party shall provide reimbursement for the reasonable costs of the audit. Any recovery of royalty underpayments resulting from the audit shall be used first to provide reimbursement for the reasonable costs of the audit, to the extent those costs have not otherwise been reimbursed by the audited party. The remainder of any such recovery shall be deposited with either the Register or, where the audited party has been making deposits under a negotiated arrangement pursuant to section 1016, with the administering entity for that arrangement, for distribution to interested copyright parties as though such funds were royalty payments made by the audited party under section 1011 for the year subject to audit. For any dispute between an audited party and one or more interested copyright parties concerning reimbursement for the reasonable costs of a verification audit, the committee encourages use of the dispute resolution procedures under subchapter D.

Subsection (g) is intended to ensure the fairness and independence of the accountants used to conduct the annual reviews required by subsection (d) and the verification audits permitted under subsection (e). Each accountant used by interested manufacturing parties or interested copyright parties must be in good professional standing and must not be financially dependent on interested manufacturing parties (in the aggregate) or interested copyright parties (in the aggregate), respectively.

In light of the commercially sensitive nature of information contained in the quarterly and annual statements of account and in the reports concerning verification audits, subsection (h) sharply restricts the disclosure of, and public access to, that information, which is expressly presumed to contain confidential trade secrets. Access to the information is limited to (i) Copyright Office and Tribunal personnel who require access as part of their official duties under chapter 10, and (ii) representatives of interested copyright parties and interested manufacturing parties who have been approved pursuant to procedures to be established by the Register, for the sole purpose of conducting verification functions and resolving resulting disputes. In establishing these procedures, the Copyright Office should take account of such factors as the sensitivity of the information, competition between interested manufacturing parties, and possible relationships between interested copyright parties and interested manufacturing parties. In addition, the regulations should make clear that parties to whom confidential information is disclosed will in good faith cooperate in obtaining appropriate protective orders to preserve confidentiality in the course of enforcement actions.

Subsection (h) also provides, however, that any manufacturer or importer is always entitled to access to all documents filed with the Register as the result of a verification audit of that manufacturer or importer. Moreover, nothing in subsection (h) authorizes the

withholding of information from Congress. In addition, the importer and manufacturer notices filed under section 1011(b) will be available for public inspection, and the Register and Tribunal may disclose aggregate information based on account statements and audit results so long as no company-specific information is revealed either directly or indirectly.

Section 1012. Royalty payments

Section 1012 sets forth the basis for determining the royalty payments due under chapter 10 for digital audio recording devices and media. Royalty payments are calculated as a percentage of the "transfer price" defined in section 1001(15). Pursuant to subsection (a), the royalty payment for each digital audio recording device is 2 percent of the transfer price of the device, subject to a cap, a floor and special rules for digital audio recording devices first distributed in combination with one or more other devices. Pursuant to subsection (b), the royalty payment for each digital audio recording medium is 3 percent of the transfer price of the medium. Only one royalty payment is due for each device or medium, and it is due only from the first person to manufacture and distribute or to import and distribute the device or medium.

Paragraph 1012(a)(2) sets forth the method of calculating the royalty for digital audio recording devices first distributed in combination with one or more other devices, whether physically integrated (e.g., a "boombox") or distributed together with other physically separate components (e.g., a "rack system").

If the digital audio recording device is first distributed as part of a physically integrated unit, the royalty payment for the device shall be two percent of the transfer price of the physically integrated unit (but shall be reduced by the amount of any royalty previously paid on any other digital audio recording device included in the unit that was not first distributed in the unit). If all digital audio recording devices included in the unit were first distributed prior to inclusion in the unit, no further royalty would be due, because no digital audio recording device would be "first distributed" as part of the unit.

On the other hand, if a digital audio recording device is first distributed in combination with one or more other devices (e.g., stereo components) with which it is not physically integrated, calculation of the royalty payment depends on whether substantially similar digital audio recording devices have been distributed separately (i.e., not as part of a combination) during the preceding year. If so, the royalty payment shall be 2 percednt of the average transfer price of the similar devices during the prior year. If not, the royalty payment will be 2 percent of a constructed price that reflects the proportional value of the digital audio recording device to the combination as a whole.

The amount of the royalty payment on each digital audio recording device or physically integrated unit containing such a device is subject to a statutory floor of $1.00 and a statutory cap of $8.00. However, where a physically integrated unit contains two or more digital audio recording devices, the cap for the unit is $12.00 rather than $8.00. The statutory floor is fixed, but the caps are subject to upward adjustment, upon petition of any interested copyright party

to the Tribunal, during the sixth year after the effective date, and not more than once per year thereafter. If the Tribunal finds that more than 20 percent of the royalty payments are hitting the relevant cap (*i.e.*, $12.00 in the case of physically integrated units containing two or more digital audio recording devices, and $8.00 in other cases), then the Tribunal is directed to increase prospectively the relevant cap with the goal of having no more than 10 percent of such payments hit the new cap. The committee intends that the Tribunal shall attempt to set the new cap as close to the 10 percent goal as possible without exceeding 10 percent. However, the percentage increase in the relevant cap may not exceed the percentage increase in the CPI during the period since the last adjustment of that cap by the Tribunal or, in the case of the first such adjustment, the period since the effective date of chapter 10. Unless the Tribunal finds that more than 20 percent of the royalty payments are hitting the relevant cap, it shall not increase the cap.

Subsection (c) provides for importers and manufacturers to take a credit for royalty payments already made on devices or media that, within two years after the date on which the applicable royalties were paid, (i) are returned to the manufacturer or importer as unsold or defective merchandise, or (ii) despite having been distributed in the United States, are subsequently exported by the manufacturer, importer or a related entity. Any such credit is to be deducted from the royalty payments covering the period in which the device or medium was returned or exported, except that any credit that is not fully used during a given quarter may be carried forward. If the manufacturer or importer subsequently distributes any returned or exported merchandise for which a credit has been taken, a new royalty payment will be made based on the transfer price and cap applicable to the new distribution.

Section 1013. Deposit of royalty payments and deduction of expenses

In a manner similar to other sections of the Copyright Act that involve the pooling of royalty payments, chapter 10 establishes a basic system of depositing royalty payments with the Register for ultimate distribution by the Tribunal. Section 1013 provides that royalty payments are to be initially deposited with the Register, who is to deduct the reasonable expenses of the Copyright Office in connection with its duties under chapter 10, and then deposit the remaining sums in the U.S. Treasury in such manner as the Secretary of the Treasury directs. The Secretary of the Treasury is to invest such funds in interest-bearing U.S. Government securities for later distribution with interest pursuant to other sections of chapter 10. The Register is directed to provide the Tribunal with monthly financial statements reporting the amount of royalties available for distribution.

Although the committee acknowledges the basic fairness of distributing late royalty payments (e.g., those resulting from litigation) as if they had been deposited during or shortly after the year to which they relate, the committee also recognizes the potential administrative difficulties associated with keeping royalty payment accounts for each calendar year open indefinitely. As a consequence, section 1013 authorizes the Register to close out the royalty payments account for any calendar year after 4 years have passed,

and to treat any funds remaining in that account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the next succeeding calendar year. The Tribunal would then distribute such funds accordingly.

Section 1014. Entitlement to royalty payments

Section 1014 identifies the parties who are entitled to receive royalty payments and sets forth the basic allocations of royalty payments among such parties. Subsection (a) provides that a portion of the royalty payments for a given period are to be distributed to any "interested copyright party" (as defined in section 1001(7)) who has filed a timely claim, provided that the interested copyright party's musical work or sound recording has been (i) embodied in lawfully made audiograms that have been distributed to the public, and (ii) either distributed to the public in the form of audiograms or disseminated to the public in transmissions during the period to which such payments pertain. The committee intends the pool of claimants to consist of individual record companies, writers, and music publishers, although representative associations or other organizations may act on behalf of such claimants to the extent they have been so authorized.

Subsection (b) designates two separate funds into which the royalty payments will initially be divided, and then provides for the secondary allocation of the funds among various groups and organizations. The first fund, the Sound Recordings Fund, will receive 66⅔ percent of the total royalty payments. The Tribunal will distribute the sums allocated to the Sound Recordings Fund as follows:

—2⅝ percent of these funds will be distributed to the American Federation of Musicians (or any successor entity), for the benefit of nonfeatured musicians who have performed on sound recordings distributed in the United States;

—1⅜ percent of these funds will be distributed to the American Federation of Television and Radio Artists (or any successor entity), for the benefit of nonfeatured vocalists who have performed on sound recordings distributed in the United States; and

—the remaining funds will be distributed to those interested copyright parties who come within section 1001(7)(A), each of whom shall, on a per sound recording basis, allocate 40 percent of these remaining funds to the featured artists or artists (or the person(s) conveying rights in the performance of the featured artist(s) in the sound recording).

The second fund, the Musical Works Fund, will receive 33⅓ percent of the total royalty payments. The Tribunal will evenly divide the funds in the Musical Works Fund into two separate royalty payment pools, one of which shall be dedicated exclusively to writer claimants and the other of which shall be dedicated exclusively to music publisher claimants. Individual writers and music publishers that receive distributions from these two royalty payment pools are entitled to the full sum of money received, notwithstanding any contractual obligations to the contrary.

The interested copyright parties that are entitled to receive payments from each fund or pool shall attempt in good faith to negoti-

ate a voluntary division of the funds within each group specified in subsection (b): namely, (i) within the group of owners of copyright in sound recordings specified in section 1001(7)(A) (such as record companies), (ii) within the group of music publishers and (iii) within the group of writers. Subsection (c) provides that, in the absence of a voluntary agreement covering all interested copyright parties within such a group, the Tribunal will resolve the dispute within that group pursuant to the procedures specified in section 1015(c).

Subsection (c) also specifies that, where such disputes occur, the Tribunal will allocate royalty payments as follows: (1) where the dispute is among owners of copyright in sound recordings, the Tribunal will look to the extent to which each sound recording was distributed to the public in the form of audiograms (e.g., retail record sales); and (2) where the dispute is among music publishers or among writers, the Tribunal will look to the extent to which each musical work was (i) distributed to the public in the form of audiograms or (ii) disseminated to the public in transmissions (e.g., airplay time). For disputes among music publishers and among writers, the Tribunal has discretion to decide what respective weight to assign each of the two factors listed (i.e., audiogram sales and transmissions).

Section 1015. Procedures for distributing royalty payments

Section 1015 specifies the mechanism by which royalty payments are distributed to interested copyright parties, except to the extent elements of such mechanism are superseded by a negotiated arrangement that has entered into effect pursuant to section 1016. Subsection (a) requires that all interested copyright parties who wish to receive a share of the royalty payments file a claim with the Tribunal before March 1 of each year with respect to the payments collected for the preceding calendar year. In order to keep administrative costs and delays to a minimum, interested copyright parties within each group specified in section 1014(b) are encouraged to reach agreement among themselves as to the division of royalty payments within the group, and to combine their claims either in a joint filing or by designating a common agent to receive payment on their behalf (e.g., an organization acting on behalf of record companies, music publishers, or writers).

As is the case for similar activities under other provisions of the Copyright Act that address the need to divide royalty pools, activities related to the distribution of royalty payments are exempted from the antitrust laws. However, no agreement among claimants may vary the basic allocation of royalties set forth in section 1014(b) (e.g., the basic 50-50 split between music publishers and writers).

Under subsection (b), the Tribunal must determine by March 30 of each year whether or not there exists a controversy concerning the division of royalty payments among claimants within any of the groups of interested copyright parties. If not, the Tribunal is directed to authorize the distribution of all royalty payments (along with accumulated interest) in the manner agreed to by the claimants under subsection (a), after deducting its reasonable administrative expenses. Subsection (c) provides that, if the Tribunal deter-

mines that a controversy exists within one or more of the groups of interested copyright parties, it must conduct a proceeding to resolve the dispute. Notwithstanding the pendency of a proceeding, the Tribunal is directed, to the extent feasible, to distribute any amounts that are not in controversy (including, at a minimum, the amounts due to those groups of interested copyright parties within which no dispute exists).

Section 1016. Negotiated collection and distribution arrangements

Section 1016 authorizes interested copyright parties to negotiate among themselves or with interested manufacturing parties in order to establish a private system for the distribution, verification, and/or collection of royalty payments. The establishment of such a private system is subject to approval by the Copyright Royalty Tribunal, and only one private system can be in place at a time. A private system can be narrow in scope (e.g., covering only verification activities), or can broadly cover collection, distribution, and verification functions under chapter 10. Thus, subject to the safeguards provided under section 1016, a broad version of such a system could assume many of the collection functions of the Copyright Office and distribution functions of the Tribunal.

Subsection (a) provides, however, that a negotiated private arrangement may not alter certain key elements of collection and distribution under chapter 10: namely, the requirements related to (i) the obligation of manufacturers and importers to file royalty payments and statements of account (section 1011(a)); (ii) the obligation of manufacturers and importers to file notices with the Copyright Office (section 1011(b)); (iii) Congressional access to information (section 1011(h)(4)); (iv) royalty payment amounts for digital audio recording devices and media (sections 1012(a)–(b)); (v) entitlement to royalty payments (section 1014(a)); and (vi) allocation of royalty payments among groups (section 1014(b)).

Other requirements of subchapter B, including the frequency of filing royalty payments and statements of account, the frequency of distributions, and the verification procedures, may be altered for those parties who choose to participate in the negotiated private arrangement. Such an arrangement also may provide that specified types of disputes among the parties to the arrangement (e.g., regarding distribution of royalty payments) are to be resolved by binding arbitration or other agreed upon means of dispute resolution.

Section 1016 allows interested copyright parties, if two-thirds of the members of each group agree, to negotiate and establish, among themselves or with interested manufacturing parties, a private system for distribution, verification and/or collection of royalties.

The two-thirds threshold is to be calculated by reference to the proportion of the market accounted for by the individual record companies, music publishers, and writers—measured by annual retail sales of audiograms—rather than by counting the number of individual record companies, music publishers, and writers that wish to participate in the private arrangement. For these purposes, an organization representing one of the three categories of interested copyright parties identified above (e.g., an association of music

publishers) is presumed to represent the requisite two-thirds of that category if the membership of, or other participation in, that organization accounts for at least two-thirds of annual retail sales of audiograms.

The fact that a particular organization meets this two-thirds requirement does not, however, give the organization any power or authority to force its members into a negotiated arrangement. Rather, the committee envisions that organizations that may wish to carry out a representative role with respect to the establishment or implementation of a negotiated arrangement will seek advance authorization from their members for this purpose. If such authorization is not given, or is withdrawn at any time (either before or after the negotiated arrangement goes into effect), by an individual record company, music publisher, or writer, that person or entity has recourse to the full set of protections available under section 1016 to parties that choose not to participate in a negotiated arrangement.

The committee recognized that, absent appropriate safeguards, a negotiated arrangement that is not entered into unanimously could work to the detriment of parties that do not wish to participate. Accordingly, the committee strengthened language in the bill that is designed to protect the interests of those parties who choose not to enter into a negotiated arrangement. The legislation provides that no negotiated arrangement can go into effect without the approval of the CRT. The CRT must determine that the conditions set forth in section 1016(b) are met before a negotiated arrangement can be approved.

Language contained in subsections (b) and (c) ensures that both interested manufacturing parties and interested copyright parties who choose not to participate in a negotiated arrangement will not be adversely affected by the arrangement. A manufacturer or importer may fully satisfy its obligations by depositing appropriate royalty payments with the Copyright Office and otherwise complying with the provisions of sections 1011 and 1012. In order to protect the rights of nonparticipating interested copyright parties, the CRT, prior to approval of a negotiated arrangement, must ensure that the arrangement includes any necessary safeguards to ensure their receipt of proper royalty payments.

In particular, the CRT must ensure that any negotiated arrangement does not reduce the amount of money that non-participating interested copyright parties would receive in the absence of such an arrangement. In order to achieve this end, the Tribunal may require such safeguards as accounting procedures, reports, and any other information required to ensure and verify that royalty payments have been properly collected and distributed.

The legislation establishes antitrust immunity for good-faith negotiation and voluntary implementation of a negotiated arrangement. The "good faith" and "voluntary" language was included to address competing objectives in connection with the negotiation and implementation of these private arrangements. The first objective was to ensure that the participants would be free to negotiate vigorously and ultimately to implement a negotiated arrangement absent the fear of frivolous antitrust claims by potentially disgruntled participants or nonparticipants. The second objective was to

ensure that, in an industry such as this where there are some relatively powerful participants, there would be some protection against their imposing their will on less powerful participants by the use of coercive acts in the negotiation or implementation of a negotiated arrangement.

For example, despite the fact that there are over 2600 record companies in the United States, six record distribution companies distribute sound recordings from their own labels, as well as from numerous independent labels, which combined account for over two-thirds of all annual retail record sales. The committee believed that appropriate safeguards should be included in the legislation to assure that any negotiated arrangements agreed to by larger entities do not prejudice the rights of smaller record companies, or for that matter, songwriters, composers and music publishers that choose not to participate. The language of the legislation strikes a balance between these concerns by providing antitrust immunity for the good-faith negotiation and implementation of these private arrangements, but not for group boycotts, concerted refusals to deal, illegal tying or similar coercive acts (including threats to take such acts) in the negotiation or implementation of a negotiated arrangement (for example, a group boycott designed to force parties to participate in the arrangement).

The committee intends that, where a private arrangement has been authorized that provides for direct collection of royalty payments from one or more participating interested manufacturing parties, the administering entity for the private arrangement shall set asisde a portion of the payments it has collected sufficient to settle likely claims against such payments by those interested copyright parties that have chosen not to participate in the private arrangement. Depending on the procedures that the CRT approves, the funds that are set aside may either be retained in a separate account pending the Tribunal's annual claims resolution process or they may be paid over periodically to the Copyright Office. If the funds are retained until completion of the annual claims resolution process, a setoff procedure could be implemented to settle the claims that nonparticipants may have against those funds on the one hand, and the claims participants may have against the government-collected royalty pool on the other hand. However, any funds that are set aside for nonparticipants but retained by the prviate administering entity pending the CRT's annual claims resolution proces must accumlate interest, for the benefit of such nonparticipants, as provided under section 1013.

After a private arrangement goes into effect, the CRT is directed to hear and address any objections to the arrangement and to ensure that alternative collection and distribution procedures remain available to, and are working properly for, interested manufacturing parties and interested copyright parties that are not participating in the arrangement. The CRT's responsibility includes ensuring that interested copyright parties who are not participants in the negotiated arrangement continue to receive the royalty payments to which they would be entitled in the absence of the arrangement. The CRT's responsibility also includes responding to objections from participants that the arrangement is no longer operating as a fair and effective alternative to the collection, distri-

bution and/or verification procedures otherwise provided under chapter 10. In order to ensure the necessary powers to carry out these responsibilities, the CRT is enpowered to seek injunctive relief in an appropriate U.S. district court.

The committee anticipates that the CRT will make use of these powers as necessary to protect the interests of those who have chosen not to participate in the negotiated arrangement, and to ensure that the arrangement continues to function as a fair and effective alternative to the procedures provided under chapter 10. The committee also anticipates, however, that the parties to the arrangement are likely to agree upon binding arbitration or other means to resolve disputes that may arise within the arrangement. Except to the extent necessary to protect nonparticipants and to ensure compliance with the provisions of section 1016, the committee does not intend for the CRT's oversight authority to be used to intervene in matters which are subject to arbitration, or to dictate the internal functioning of the private arrangement.

In short, the royalty system of S. 1623 is an equitable resolution of a longstanding problem which benefits all parties. The oversight provisions are established to insure that all interests, and not just the interests of the majority, are protected. Together, the royalty system and the oversight regulations will allow the United States to join the growing number of countries which afford their creators and copyright owners royalties for home taping of musical works and sound recordings.

SUBCHAPTER C—THE SERIAL COPY MANAGEMENT SYSTEM

Section 1021. Incorporation of the Serial Copy Management System

Section 1021 prohibits any person from importing, manufacturing or distributing any digital audio recording device or digital audio interface device that does not conform to the standards and specifications to implement the Serial Copy Management System ("SCMS").

The fundamental elements of SCMS are simple. SCMS will not restrict the copying of digital source material that has been encoded so as not to assert copyright protection over the sound recording and the underlying musical work. Where the digital source material has been encoded to assert such copyright protection, SCMS will not prevent the making of one or more first generation digital audio copied recordings. However, SCMS will prevent the making of second generation digital copies from such first generation digital copies. Thus, digital copies can be made directly from a commercially released compact disc or digital tape containing copyrighted material, but a second generation of digital copies cannot be made from the first generation copies.

The standards and specifications for implementing SCMS under the act are set forth in the technical reference document published in this report, which will also be published in the Federal Register by the Secretary of Commerce pursuant to section 1022(a). In a letter reprinted in this report, which is also to be published in the Federal Register, the National Institute of Standards and Technology ("NIST") has certified that the technical reference document sets forth standards and specifications (i) that adequately incorpo-

rate the intended functional characteristics to regulate serial copying, and (ii) that are not incompatible with existing international digital audio interface standards and existing digital audio technology.

Section 1021(a)(1) provides that digital audio recording devices and digital audio interface devices must conform to the SCMS standards and specifications by one of three methods. First, under subsection (a)(1)(A), such devices may conform to the standards and specifications set forth in the technical reference document. Second, under subsection (a)(1)(B), such devices may conform to standards and specifications set forth in an order of the Secretary of Commerce issued pursuant to standards set forth in section 1022(b), in cases where a particular device does not conform to the standards and specifications set forth in the technical reference document and does not meet the requirements of subsection (a)(1)(C). Third, under subsection (a)(1)(C), digital audio recording devices other than those defined in part II of the technical reference document can comply with SCMS standards and specifications established by a manufacturer or an owner of a proprietary technology so long as those standards and specifications achieve the same functional characteristics with respect to the regulation of serial copying and are compatible with the prevailing method for implementing SCMS. Such functional characteristics are set forth in parts I–A and II–A of the technical reference document. In order for the SCMS system in a digital audio recording device to be compatible with the prevailing method for implementing SCMS, the device must accurately receive and act upon the SCMS information contained in a digital audio signal so as to correctly implement the level of SCMS protection indicated in the signal. Thus, a "compatible" SCMS system need not be implemented in exactly the same way, "bit-for-bit," in every digital audio interface device and digital audio recording device, so long as the proper functional characteristics are achieved.

Subsection (b) prohibits the importation, manufacture, or distribution of any device, or the offering or performing of any service, whose primary purpose or effect is the deactivation or other circumvention of an SCMS program or circuit in a digital audio recording device or digital audio interface device.

Subsection (c) prohibits any person from encoding an audiogram with inaccurate information relating to the category code, copyright status, or generation status of the source material so as to affect improperly the operation of SCMS. For example, a manufacturer of audiograms cannot encode noncopyrighted musical works and sound recordings as copyrighted. Subsection (c) also makes clear, however, that nothing in subchapter C obligates those who make audiograms to encode them so as to assert copyright protection.

Subsection (d) provides that a person who transmits or otherwise communicates to the public a sound recording in a digital format is not required also to transmit or otherwise communicate the SCMS information indicating whether copyright is being asserted over the sound recording or underlying musical work. This provision is designed to minimize any adverse impact on digital transmission services. Subsection (d) makes clear, however, that any person who

elects to transmit or otherwise communicate such copyright status information must do so accurately. As set forth in the technical reference document, digital receivers will be programmed to treat digital audio transmissions without such SCMS information as the equivalent of copyrighted, commercially released CD's or other digital originals; as a result, digital broadcast and cable transmissions generally will be recordable by consumers, but second generation digital copies will not be able to be made from those first generation copies.

Section 1022. Implementing the Serial Copy Management System

Subsection (a) requires the Secretary of Commerce, within 10 days of enactment of chapter 10, to publish in the Federal Register the technical reference document along with the certification from NIST referred to above, both of which are set forth in this report. Parts I-A and II-A of the technical reference document provide standards and specifications for implementing SCMS in digital audio interface devices and digital audio recording devices, respectively. These parts of the technical reference document are intended to lay out broad rules for SCMS so that SCMS can be implemented in different ways and the development and introduction of new digital audio technologies will not be hindered.

Part I B-C of the technical reference document describes and mandates the implementation of SCMS in a particular interface format, known as the IEC-958 nonprofessional digital audio interface, which has been in use for several years in various digital audio devices. Part II B-D of the technical reference document describes and mandates the implementation of SCMS in a particular digital audio recording device, the DAT recorder, which also has been available commercially for several years. These parts draw from voluntary standards developed for the International Electrotechnical Commission ("IEC"), an international engineering standards organization, and make mandatory under U.S. law only those elements necessary to the implementation of SCMS. Any future changes to the IEC standard will have no force under U.S. law, but may be considered by the Secretary of Commerce in issuing orders under subsection (b)(2).

Subsection (b) authorizes the Secretary of Commerce, at the request of an interested manufacturing party or an interested copyright party, and after consultation with the Register, to issue orders permitting the importation, manufacture and distribution of digital audio recording and interface devices that do not conform to standards and specifications set forth in the technical reference document. Such orders enable the Secretary, subject to specified restrictions, to address the need for (i) allowing exceptions for digital audio recording or interface devices for which application of all relevant standards and specifications in the technical reference document is unnecessary to achieve the goals of SCMS; (ii) authorizing the distribution of digital audio recording or interface devices that conform to new or revised general standards and specifications; and (iii) ensuring that any standards and specifications established by a manufacturer or proprietor under section 1021(a)(1)(C) meet the requirements of that provision. For each type of order, the Secretary is required to ensure that all digital audio recording and

interface devices continue to possess the same functional characteristics with respect to the regulation of serial copying as devices that meet the standards and specifications set forth in the technical reference document.

The Secretary also may issue an order under subsection (b) regarding proposed methods to regulate the ability of digital audio recording devices to make serial digital copies of analog audio source material. Existing analog recordings and transmissions do not identify, in the audio signal itself, whether the sound recordings or musical works are protected by copyright. Because of this limitation, the technical reference document currently permits the making of two generations of digital audio copied recordings from analog audio source material. If, in the future, a technical method becomes available to effectuate, in digital audio recording devices, the functional characteristics of SCMS for analog source material, the Secretary may issue an order directing the implementation of such method. Differences in technology among types of digital audio recording devices, of course, may require more than one order to approve implementation of different technical methods for implementing in such devices SCMS for analog audio source material.

Subsection (b)(4)(A) requires that the new analog-to-digital method must regulate serial copying "in a manner equivalent to source material input in the digital format." Pursuant to subsection (b)(4)(B), implementation of such method (combined with the implementation of digital-to-digital SCMS) in a type of device may not impose on manufacturers a cost in excess of 125 percent of the cost of implementing digital-to-digital SCMS alone in that type of device.

Pursuant to subsection (b)(4) (A) and (C), the Secretary shall publish a notice in the Federal Register requesting public comment on a particular method of implementing SCMS for analog audio source material, and shall consider other reasoned objections to the proposed method from interested copyright parties and interested manufacturing parties for example, claims that the proposed system is unreliable or has an adverse impact on sonic quality). Finally, any order issued by the Secretary under subsection (b)(4) shall affect the recording of analog or digital source material on analog recording equipment, and shall not affect devices other than digital audio interface devices and digital audio recording devices.

SUBCHAPTER D—REMEDIES

Section 1031. Civil remedies

Section 1031 establishes civil remedies for violations of sections 1011 and 1021. Subsection (a) provides that any interested copyright party or any interested manufacturing party that has been or would be injured by a violation of section 1011 or 1021 may bring a civil action against any person for such violation in an appropriate U.S. district court. Subsection (a) also provides that the Attorney General may bring a civil action against any person based on a violation of section 1011 or 1021. Subsection (b) identifies the types of relief that a district court may award in an action under subsection (a) (including damages and injunctive relief). Subsection (c) provides

that, in addition to awarding damages under subsection (d), the court shall direct the payment of unpaid royalties plus interest in cases where the court finds a violation of section 1011 involving underpayment or nonpayment of royalties.

Subsection (d) sets forth the types of damages to be awarded for violations of sections 1011 and 1021. Actual and statutory damages can be awarded for violations of section 1021; only statutory damages, and not actual damages, can be awarded for violations of section 1011. The specified damage awards are as follows:

For a violation of section 1011(a) through (d) involving a digital audio recording device, the award of statutory damages shall be an amount between a nominal level and $100 per device, as the court considers just. However, in the case of a violation committed willfully and for purposes of direct or indirect commercial advantage, the award shall be between $100 and $500 per device.

For a violation of section 1011(a) through (d) involving a digital audio recording medium, the award of statutory damages shall be an amount between a nominal level and $4 per medium, as the court considers just. However, in the case of a violation committed willfully and for purposes of direct or indirect commercial advantage, the award shall be between $4 and $15 per medium.

For a violation of section 1021, each complaining party (i.e., each plaintiff interested copyright party or interested manufacturing party, or the Attorney General) is entitle to choose either an award of actual damages or an award of statutory damages (calculated as decribed below). No complaining party may receive both types of damages, and each such party must choose the type it wishes to receive before final judgment is rendered in the proceeding. The total award of damages for violations of section 1021 (both actual and statutory)

May not exceed $1 million in a single proceeding, except that

Any award of actual damages to an interested manufacturing party shall not be counted toward this $1 million limitation, and

Where the violation was committed willfully and for purposes of direct or indirect commercial advantage, the court may increase the award of damages by up to $5 million;

Conversely, where the violator was not aware and had no reason to believe that its acts constituted a violation of section 1021, the court may reduce the total award of damages against the violator to a sum of not less than $250;

Moreover, where the violator believed in good faith that a digital audio recording device complied with section 1021(a)(1)(C), the court may reduce the total award of statutory damages against the violator to a sum of not less than $250.

For a violation of section 1021, each complaining party that has elected to receive an award of actual damages shall be entitled to recover (i) its actual damages suffered as a result of the violation, and (ii) its appropriate portion of the profits of

the violator that are attributable to the violation, provided that such profits were not taken into account in computing the actual damages. In calculating profits, once the complaining party has established the violator's gross revenue, it is up to the violator to establish its deductible expenses and the elements of profit attributable to factors other than the violation. As provided under subsection (e), even if more than one complaining party elects to recover actual damages, only one award of the violator's profits shall be made.

For a violation of section 1021 where at least one complaining party has elected statutory damages, the award of such damages shall be as follows (subject to the adjustments for willful and innocent violations described above):

For a violation of section 1021 (a) or (b), between $1,000 and $10,000 per device involved in the violation or per device on which a service prohibited by section 1021(b) has been performed;

For a violation of section 1021(c), between $10 and $100 per audiogram involved in such violation; and

For a violation of section 1021(d), between $10,000 and $100,000 per transmission or communication involved in such violation.

Subsection (e) prohibits certain multiple actions and multiple damage awards. Only one action may be brought against any party and only one award of statutory damages may be made under subsection (d) (regardless of the number of complaining parties electing statutory damages)

For any violations of section 1011 involving the same digital audio recording device or medium, and

For any violations of section 1021 involving digital audio recording or interface devices of the same model, except that another action may be brought and another award of statutory damages may be made whenever the violator continues to manufacture, import, or distribute the same type of device found to be in violation of section 1021 subsequent to the entry of a final judgment to that effect.

The committee has used the phrase "digital audio recording devices and digital audio interface devices of the same model" in order to restrict multiple lawsuits against the same manufacturer or importer raising the same SCMS issues; this language is not intended to change the basic method of assessing statutory damages under section 1021—namely, on a per device basis.

Because of these tight restrictions on multiple actions, subsection (e) requires any party that brings a civil action under section 1031 to serve a copy of the complaint upon the Register of Copyrights within 10 days after the complaining party's service of a summons upon the defendant. The Register is in turn directed, within 10 days after receipt of the complaint, to publish notice of the action in the Federal Register. Any other interested copyright party or interested manufacturing party that would be entitled to bring the action may then intervene in the pending lawsuit by filing a motion with the court within 30 days of the publication of the notice.

Under subsection (e), a court may generally award actual damages for a violation of section 1021 to each complaining party that elects to recover actual damages, subject to the $1 million limitation and any adjustment for innocent or willful violations referred to above. However, only one award of the violator's profits may be made, which the court shall divide as it considers just. In addition, if one or more complaining interested copyright parties elects to recover statutory damages for violations of section 1021 while one or more other complaining interested copyright parties elects to recover actual damages for the same violations, the award of actual damages is to be deducted from the statutory damages awarded to interested copyright parties for such violations.

Subsection (f) addresses the distribution of damage awards. The court may divide an award of damages under subsection (d) between or among complaining parties as it deems just. Any award of damages to an interested copyright party under subsection (d) and any award of overdue royalties plus interest under subsection (c) shall be deposited with the Register pursuant to section 1013, or as may otherwise be provided pursuant to a negotiated arrangement authorized under section 1016, for distribution to interested copyright parties as though such funds were royalty payments paid pursuant to section 1011. Thus, all sums awarded to interested copyright parties under section 1031 (including actual damages) are to become part of the royalty pool rather than to be distributed to those interested copyright parties that happen to be parties to the court action.

Subsection (g) provides that, at any time while an action under section 1031 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, audiogram, or SCMS-circumventing device where (i) the article is in the custody or control of the alleged violator and (ii) the court has reasonable cause to believe that the article does not comply with, or was involved in a violation of, section 1021.

Subsection (h) provides that a court may not issue a temporary or preliminary injunction barring the distribution of a type of digital audio recording device which the relevant manufacturer or importer believes to be either (i) a professional model product or (ii) a type of audio recording equipment designed and marketed primarily for the creation of sound recordings resulting from the fixation of non-musical sounds (such as a dictation machine), unless the court finds that the manufacturer's or importer's belief is without a reasonable basis or not in good faith.

Subsection (i) provides that the court, as part of a final judgment finding a violation of section 1021, shall order the remedial modification or, if modification is not possible, the destruction, of any digital audio recording device, digital audio interface device, audiogram, or SCMS-circumventing device where (i) the article does not comply with, or was involved in a violation of, section 1021, and (ii) the article is either in the custody or control of the violator or has been impounded under subsection (g).

Subsection (j) provides guidance concerning the meaning of the terms "complaining party" and "device" for purposes of section 1031.

Section 1032. Binding arbitration

Section 1032 reflects the intention of the committee to encourage the arbitration of disputes concerning the rights and obligations of interested copyright parties and interested manufacturing parties. Except as provided in subsection (a)(2) or (b)(1), however, the decision whether to request or agree to binding arbitration rests solely with the parties to the dispute. Thus, where a dispute is ultimately brought before a court under section 1031, a prior refusal by an interested manufacturing party or by interested copyright parties, where such refusal is discretionary under section 1032(a), to resolve a dispute by means of arbitration should not be a factor in determining the amount of damages to be awarded for violations of section 1011 or 1021.

Subsection (a) provides that any dispute between an interested copyright party and an interested manufacturing party shall be resolved through binding arbitration if (i) the parties mutually agree or (ii) before the date of first distribution of a product in the United States, an interested manufacturing party or an interested copyright party requests arbitration concerning (a) whether or not such product is a digital audio recording device, a digital audio recording medium, or a digital audio interface device, or (b) the basis on which royalty payments are to be made with respect to such product. Thus, an interested manufacturing party or interested copyright party can ensure the resolution of such a dispute through binding arbitration (rather than through court action) so long as the party requests arbitration before a product is first distributed in the United States. Subsection (b) sets forth the basic procedures governing binding arbitration under section 1032. Given the large number of interested copyright parties that is likely to have an interest in the outcome of any arbitration proceeding, the Register is directed, after consultation with such parties, to issue regulations governing the coordination of each decision to engage in arbitration of a dispute and the representation interested copyright parties in the proceeding. No interested copyright party may initiate or, except as an intervening party under subsection (c), participate in binding arbitration under section 1032 unless that party has been authorized to do so pursuant to those regulations. In providing the Register with this authority, the committee contemplates that it will be used solely to ensure the smooth functioning of the arbitral mechanism. In particular, the committee does not intend that such authority be used to assess the merits of the dispute, or to restrict the availability of arbitration to a party entitled to arbitration under subsection (a).

Subsection (b) also provides that, except as otherwise agreed by the parties to the dispute, the arbitration panel shall be composed of three people, with one arbitrator selected by each of the two sides and the third arbitrator selected by agreement of the first two arbitrators. The final decision of the arbitral panel must be a written opinion with supporting rationale, and the decision must be issued and sent to the Register within 120 days of the selection of the final arbitrator. The Register is to publish the final opinion in the Federal Register within 10 days of receipt thereof.

Finally, subsection (b) addresses the applicability of the Arbitration Act (title 9 of the United States Code) to the arbitration proceedings conducted under section 1032. Except as otherwise provided in section 1032, these arbitration proceedings are to 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.

Subsection (b) also requires, however, that each arbitral panel take into account any prior arbitral decisions under section 1032 that address identical or similar issues. The failure of a panel to take account of such prior arbitral decisions may be considered "imperfect execution of arbitral powers" under 9 U.S.C. 10(a)(4), and may thereby form the basis for a judicial decision to overturn the panel's decision. The committee's intention here is to encourage the creation of a consistent, rather than ad hoc, body of jurisprudence on the matters covered by section 1032; the arbitral panel is not bound to adhere to prior arbitral decisions, however, where it can provide a reasoned explanation for not doing so.

Subsection (c) outlines procedures similar to those governing civil actions under 1031(e), including public notice of an arbitral proceeding and opportunity for interested parties to intervene.

Subsection (d) sets forth the authority of an arbitral panel to order specified types of relief. Because of the harm that might be associated with the release of proprietary information used in the arbitral proceeding, the panel is directed to issue appropriate protective orders to safeguard a party's proprietary technology and other proprietary information, including provision for injunctive relief. In addition, the panel shall terminate a proceeding if the panel finds that the issues raised are not ripe for decision or that the proceeding was commenced in bad faith by a competitor in order to gain access to proprietary information. Further, the panel shall direct a party whose devices or media are found to be subject to a royalty payment obligation to make such royalty payments, plus interest, as are due through the date of the arbitral decision. Except as provided in subsection (d), the arbitral panel has no power to award monetary or injunctive relief.

Subsection (e) limits the ability of any party to bring a civil action under section 1031 to resolve the same dispute that has already been addressed by, or is pending before, an arbitral panel under section 1032. Specifically, subsection (e) provides that no civil action may be brought or relief granted under section 1031 against any party to an ongoing or completed arbitration proceeding under section 1032 where the action or relief involves devices or media that are or were the subject of the arbitration proceeding.

However, given the harm that could be associated with the distribution of merchandise or provision of services that violate the SCMS requirements of section 1021, subsection (e) does not bar a party from bringing a civil action for injunctive relief at any time based on a violation of that section. In addition, subsection (e) does not bar an action or any relief with respect to those devices or media distributed by the manufacturer or importer after the conclusion of the arbitral proceeding or, if so stipulated by the parties to the proceeding, prior to the commencement of such proceeding.

In the latter regard, there may be situations in which a manufacturer or importer wishes to take advantage of the arbitration procedures under section 1032 after having begun distribution of a type of device or medium, and in whichn the manufacturer or importer is prepared to accept the possibility of a court later imposing statutory or actual damages with respect to those devices or media already distributed in order to obtain agreement from interested copyright parties to resolve the dispute under those arbitration procedures. On the other hand, interested copyright parties may elect to pursue arbitration rather than litigation in the absence of such agreement from the interested manufacturing party, in which case the full bar of subsection (e) would apply.

Subsection (f) addresses the allocation of costs for the arbitral proceeding.

Section 3—Technical amendments.—This section makes certain technical amendments to other chapters of title 17, including amendments to chapter 8 to reflect the new duties assigned to the Copyright Royalty Tribunal under chapter 10.

Section 4—Effective date.—This section provides that the effective date of the act is the date of enactment or January 1, 1992, whichever date is later.

Section 5—Technical reference document for Audio Home Recording Act of 1991.—This section sets forth the technical reference document.

Section 6—Repeal of section 5.—This section provides for the repeal of section 5 upon publication of the technical reference document in the Federal Register, which is required within 10 days after the date of enactment of the act.

VI. Cost Estimate

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 9, 1992.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 1623, the Audio Home Recording Act of 1991, as reported by the Senate Committee on the Judiciary on November 27, 1991, and reflecting floor amendments proposed by the Committee.

Because this bill would affect spending and revenues, it would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

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: S. 1623.

2. Bill title: The Audio Home Recording Act of 1991.

3. Bill status: As reported by the Senate Committee on the Judiciary on November 27, 1991, and reflecting floor amendments proposed by the Committee.

4. Bill purpose: S. 1623 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 Recording 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.

S. 1623 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, S. 1623 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 appropriations 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 1993–97 period.
[2] Less than $500,000.

The costs of this bill fall within budget function 370.

Basis of estimate: Estimates of royalty payments are based on information provided by the Copyright Office and on an assumed enactment date late in fiscal year 1992. 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 quarter 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, implementing S.1623 would cost the federal government approximately $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. The CRT, as specified in appropriations bills, recovers only costs associated with fund distribution, which in 1992 is 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 S. 1623 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 receipts	NA	NA	NA	NA
Change in outlays	0	−50	−2	−2

NA—Not applicable.

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: None.

10. Estimate prepared by: John Webb.

11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

VII. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, it is hereby stated that the committee anticipates that the bill will have no additional direct regulatory impact.

VIII. Changes in Existing Law

The committee has determined that it is necessary, in order to expedite the business of the Senate, to dispense with the requirements of rule XXVI, paragraph 12, of the Standing Rules of the Senate, with respect to this legislation.

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