

2000

Red Apples and Green Persimmons: A Comparative Analysis of Audio Home-Recording Royalty Laws in the United States and Abroad

Don E. Tomlinson

Timothy Nielander

Follow this and additional works at: <https://dc.law.mc.edu/lawreview>



Part of the [Law Commons](#)

Custom Citation

20 Miss. C. L. Rev. 5 (1999-2000)

This Article is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

RED APPLES AND GREEN PERSIMMONS:
A COMPARATIVE ANALYSIS OF AUDIO HOME-RECORDING
ROYALTY LAWS IN THE UNITED STATES AND ABROAD

*Don E. Tomlinson**

*Timothy Nielander***

I. INTRODUCTION

The economic viability of the recorded entertainment industry, certainly to include the sound recording industry, depends on the protectability of its intellectual property;¹ copyrights, after all, are the very lifeblood of the industry.² The commercial “piracy”³ of sound recordings has been a significant problem at least since the dawn of rock ‘n’ roll.⁴ Non-commercial piracy—or private copying⁵—has grown to epidemic proportion with the coming of digital recording,⁶ including digital audiotape⁷ (“DAT”) and the digital audio compact disk (“CD”).⁸ The overall piracy of sound recordings is a multi-billion dollar, worldwide problem,⁹ and is getting worse.¹⁰

* LL.M. (Intellectual Property), University of Houston Law Center, 1996; J.D., University of Arkansas at Little Rock School of Law, 1977; M.J., University of North Texas, 1976; B.S., Arkansas State University, 1970. Member, Arkansas Bar. Professor of Journalism and Mass Communication, Texas A&M University. Adjunct Professor of Law, University of Houston Law Center. Mr. Tomlinson has published extensively on technology-related aspects of intellectual property.

** LL.M. (Intellectual Property), University of Houston Law Center, 1997; J.D., Mississippi College, 1994; B.A., Ambassador College, 1987. Member, Washington Bar. Associate, Information Technology and Intellectual Property Group, Preston Gates & Ellis LLP, Seattle, Washington. Mr. Nielander has published extensively on technology-related aspects of intellectual property.

1. See Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 846 (1997).

2. *Id.* at 846.

3. See David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefit of Improving Technology*, 47 FED. COMM. L.J. 611, 622 (1995).

4. *Id.* at 621.

5. Private copying is the non-commercial copying of sound recordings . . . for personal, domestic use

.....

... It has resulted from the ready availability to the consumer from 1964 onwards of magnetic [-]tape reproduction equipment, coupled with blank cassette tapes for use with such equipment. . . . The inducement to engage in private copying provided by such equipment far outweighs the individual consumers’ awareness of and concern for the rights of copyright owners.

GILLIAN DAVIES & MICHELE E. HUNG, *MUSIC AND VIDEO PRIVATE COPYING: AN INTERNATIONAL SURVEY OF THE PROBLEM AND THE LAW* 1 (1993).

6. *Id.* at 2.

7. *Id.*

8. *Id.* “The combination of a pre-recorded digital sound carrier such as a CD and a blank DAT provides home copiers with a perfect master and a copying medium which permits infinite duplication of perfect copies which equal the original.”

9. See Don E. Tomlinson, *Intellectual Property in the Digital Age: The Piracy/Counterfeiting Problem and Antipiracy and Anticounterfeiting Measures*, 8 CURRENTS: INT’L TRADE L.J. 3 (1999).

10. See ICC *Spawns Formation of Multinational Anti-Counterfeiting Body*, 10 NO. 2 J. PROPRIETARY RIGHTS 27 (1998). “Audio recording equipment is now a standard feature in households in all the industrialised [sic] countries and multiple ownership of cassette recorders is very common.” DAVIES & HUNG, *supra* note 5, at 28.

Of the copyright “bundle of rights,” it is the right of “reproduction”¹¹ that is implicated. Digital technology calls into question the very efficacy of copyright protection,¹² as eerily predicted by an Italian scholar writing in 1927: “[I]n the hypothetical event that future events make reproductions a current and everyday practice, [it] could be the death of copyright.”¹³

In an effort to more fairly¹⁴ compensate¹⁵ the royalty beneficiaries¹⁶ of sound recording copyrights,¹⁷ some countries¹⁸ have begun charging a subsidy on the sale of blank audio recording media¹⁹ and/or on the sale of home audio recording equipment.²⁰ The monies collected are pooled for distribution through what, under any circumstances, is an imperfect system of determining how to “split the pie.”²¹ Any such pie-splitting inequities, however, pale in comparison to the

11. 17 U.S.C. § 106(1) (1994).

12. See Don E. Tomlinson, *Journalism and Entertainment as Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain*, 6 STAN. L. & POL'Y REV. 61 (1994).

13. E. Piola-Casselli, *Trattato del diritto di autore e del contratto di edizione*, U.T.E.T. TURIN, 424 (1927), quoted in DAVIES & HUNG, *supra* note 5, at 2.

14. The question of the nature of the material recorded for private use has aroused a great deal of controversy. On the one hand, the representatives of copyright owners . . . claim that what is being copied is more or less exclusively their music, performances and productions and that they should receive . . . remuneration for such . . . use. On the other hand, consumer organisations [sic] and representatives of blank tape and hardware manufacturers claim that people use blank tapes to make a number of legitimate recordings such as business letters, recordings of family events and performances . . . by family members and that indiscriminately to impose a royalty on blank tapes and/or on hardware would be unfair to those who make such recordings.

DAVIES & HUNG, *supra* note 5, at 38.

[Another criticism] put forward against a royalty on blank tapes has been that many people record their own CDs . . . on cassettes to use in their car and that they would be penalised [sic] by such a royalty, since they had already paid copyright royalties when purchasing the original recording and [thus] would be required to pay a second time with the blank tape royalty.

. . . However, there is no doubt that the additional copy made in this way, for reasons of convenience, represents an extended use and a new copy of the original music bought and it is [therefore] reasonable to suggest that a royalty . . . on blank tapes (and/or on hardware) should be paid to the copyright owners for this additional facility and gain for the copier.

Id. at 52.

15. New technology should not alter [the copyright goal of providing economic incentives for the creation of new expression]. Rather, because [new technology] generally enables easier and faster copying and distribution of creative intellectual and artistic works, it likewise intensifies the need to extend the protection afforded by copyright to embrace these new uses of works of authorship.

D. Ladd, *Private Use, Private Property and Public Policy: Home Recording and Reproduction of Protected Works*, YEARBOOK OF THE INTERNATIONAL COPYRIGHT SOCIETY, 75 (1983), quoted in DAVIES & HUNG, *supra* note 5, at 2.

16. The United States law, for example, benefits record companies, featured recording artists, music publishers, songwriters, non-featured musicians and non-featured vocalists. 17 U.S.C. § 1006 (1994 & Supp. IV 1998).

17. In the context of this Article, terms such as “sound recording” and “sound recording copyrights” also refer to the separate copyright in the underlying musical composition.

18. “An increasing number of countries have adopted the solution of a royalty . . . payable to right[s] owners and calculated as a percentage of the selling price of blank tapes and/or recording equipment or as a flat fee.” DAVIES & HUNG, *supra* note 5, at 16.

19. William I. Hochberg, *Battle Royal-ty: The Multi-Billion Dollar Audio Home Taping Feud Between Continental Europe and the U.S.-U.K. Axis*, 27 BEV. HILLS BAR ASS'N J. 157 (1993).

20. *Id.*

21. Since, in any given country, it would be literally impossible to know *exactly* how many units of a particular sound recording were sold over a given period and *exactly* how many times a particular sound recording was publicly performed over that same period, royalty distribution is generally based on the next best thing: the best sales data available and scientifically-conducted random sampling of public performances. The public performance notion has been made somewhat problematic by the proliferation of music in cyberspace. See Don E. Tomlinson & Timothy Nielander, *Unchained Melody: Music Licensing in the Digital Age*, 6 TEX. INTELL. PROP. L.J. 277, 290-92 (1998).

greater fundamental problem concerning the basis upon which the United States, in contrast to various other countries, generates the money pool. While the United States collects money only for the sale of *digital* blank audio recording media and *digital* home audio recording equipment,²² many other countries with such laws collect money from the sale of *digital and analog* blank audio recording media as well as home audio recording equipment.²³

Internationally, this creates an inherent inequity for two reasons. First, the pool of money collected in the United States for distribution internally *and abroad* is considerably less than that in the other countries because the United States law was enacted in 1992 and for some time into the future most blank audio recording media and home audio recording equipment sold in the United States is and will be analog, not digital,²⁴ whereas the pool of money collected in the other countries for distribution internally *and abroad* will cover both (effectively meaning "all") types of blank audio recording media and home audio recording equipment.²⁵ Second, inequities arise because American sound recordings sold and publicly performed²⁶ in the other countries will account for a greater proportion of the distribution than will foreign recordings sold and publicly performed in the United States.²⁷

As a result, there is considerable disagreement over whether United States sound-recording copyright owners should benefit from this unequal situation.²⁸ There are two logical bases for deciding how any country might include foreign claimants in the disbursement of the royalty pool: national treatment²⁹ or reciprocal treatment.³⁰ In virtually all the countries with such laws, the national treatment principle is used—likely because various international copyright treaties to which these countries are signatories require the use of the national treatment plan.³¹ The effect of this situation is that the United States is benefiting immensely—in the sense that it pays far fewer royalties to the other countries (because it collects for digital processes only) while receiving the benefit of royalties collected in the other countries derived both from digital and analog processes. The United States does apply the national treatment principle to the money it collects,³² but the money collected is a paltry sum compared to what it

22. William I. Hochberg, *Tracking International Tape Royalties; U.S. Seeks to Get in Synch*, LEADER PUBLICATIONS, Apr. 1993, at 3, available in LEXIS, Academic Universe, Document File.

23. See *id.*; Hochberg, *supra* note 19, at 157.

24. Hochberg, *supra* note 19, at 157.

25. *Id.*

26. *Id.*

27. *Id.* There is a rather obvious domestic inequity as well. Since United States consumers pay the levy only on digital recording media and home recording equipment, the pool of money collected for domestic distribution is much less than it would be if analog recording media and home recording equipment were also taxed. This particular problem, however, is beyond the scope of this Article.

28. *Id.* at 158.

29. Benefits under a particular law in a particular country which apply to the citizens of that country are extended to the citizens of other countries, regardless of reciprocity. See DAVIES & HUNG, *supra* note 5, at 215.

30. Benefits under a particular law in a particular country which apply to the citizens of that country are *not* extended to the citizens of any other country unless the other country has a similar law that extends benefits to the citizens of the first country, *i.e.*, benefits under the law of the first country are reciprocal in nature. *Id.* at 217.

31. *Id.* at 215.

32. *Id.* at 217.

would be if analog tape and recording equipment were a part of the royalty equation.

Part II of this Article discusses the problem of consumer sound-recording piracy, particularly in light of recent technological developments. Part III surveys private copying laws worldwide and specifically examines the audio home-recording laws of Germany and the United States. Part IV discusses the relevant economic, trade and cultural considerations as between the United States and the other countries with such laws. Finally, Part V recommends that the United States Audio Home Recording Act be amended to bring it in line with prevailing international views on the subject. Such amendment would end the royalty-distribution problem between the other countries and the United States because all countries would then be proceeding from the same starting point.

II. PIRACY MEETS TECHNOLOGY

A. Worldwide Consumer Piracy of Sound Recordings

It has been said that there are three types of sound recording pirates³³—professional pirates, consumer pirates and Internet pirates.³⁴ Professional pirates are those having no regard for the law or morality of the situation, and who have large economic ideas.³⁵ Consumer pirates seem to view themselves as moral, law-abiding citizens, but, at the same time, they seem to believe that pirating sound recordings is neither illegal nor immoral.³⁶ Clearly, they have small economic ideas. Internet pirates, perhaps the newest category of pirate on the intellectual property landscape, seem to be placing copyrighted materials on the Internet—to be downloaded, used, and/or enjoyed by other “surfers”—for the

33. There are other forms of intellectual property pirates in the journalism and entertainment industries. This Article, however, concerns only sound recordings.

34. See Tomlinson, *supra* note 12, at 66-67.

35. The annual loss of intellectual property revenue to professional pirates in the United States is measured in the billions of dollars, and the revenue loss internationally is estimated to be in the tens of billions of dollars. Statutory protection of authorship by the United States has little real value if professional pirates remain undeterred from reproducing copyrighted matter at will. The copyrights of the journalism and entertainment industries are among the most pirated. And the same innovative technologies used to enhance the quality and disseminability of these copyrighted works facilitate their theft. Given the nature of copyrighted matter, these new technologies have made uncovering piracy difficult and, even when uncovered, quite difficult to punish through the civil courts.

Id. at 66 (citing Erich Fleishman, *The Impact of Digital Technology on Copyright Law*, 23 NEW ENG. L. REV. 45 (1988)).

36. Consumer pirates usually do not believe they are doing anything wrong. Without doubt, the greatest obstacle that copyright owners must overcome is the consumer pirate's attitude that copyright infringement carries no moral implications. The ease of replication introduced with digital technology will exacerbate the problem to the extreme. Americans are accustomed to infringing copyrights by simple copying, and polls show that the public believes copying of protected works is morally acceptable. If copyright owners wish to preserve and enhance their copyrights in the digital age, they will have to change the public attitude toward piracy.

Id.

sheer joy of doing it.³⁷ They too seem to believe that such infringement is neither illegal nor immoral; preferring instead to view the Internet as an “anything goes” kind of place—something like the Old West in American history.³⁸ In general, they seem to have no economic ideas at all. Of these forms of piracy, it is consumer piracy, more specifically the “home taping” problem, with which this Article deals.³⁹

In the context of the sound-recording industry, although neither the United States Supreme Court⁴⁰ nor Congress has ever so stated, most observers historically would draw some distinction between consumer pirates and “home recorders.” A “home recorder” may be thought of as someone who buys a CD, takes it home, and makes one copy to use for her own enjoyment when the original unit is lost or has become defective.⁴¹ The home recorder, however, may become a consumer pirate if she buys a CD, takes it home, makes copies and gives or sells them to her friends.⁴² (Congress does not consider non-commercial home recording to be an infringement⁴³—without indicating whether it was infringing in the past, or infringing but negated by the “fair use” defense.) Worldwide, the sound recording industry loses billions of dollars per year to pirates.⁴⁴

B. The Analog and Digital Technologies

Analog technology has been in use since the inception of audio⁴⁵ and involves an electronic signal made up of waveforms.⁴⁶ When these waveforms are recorded originally onto audiotape and then transferred to another piece of audiotape, the waveforms lose some of their original strength.⁴⁷ With each generational loss, the resulting quality is diminished, eventually to the point of unuseability.⁴⁸

Digital technology has fundamentally changed electronic sound recordings with regard to generational signal degradation.⁴⁹ In digital audiotape copying

37. One of the main distinctions between professional copyright pirates and consumer copyright pirates is that professional infringers have large economic goals and consumer infringers have small ones. Neither economic extreme, however, seems to describe the form of infringement now taking place in cyberspace. On the Internet and on the networks that comprise the Internet, users routinely deposit copyrighted materials, not for economic gain, but because they enjoy the process and because they simply do not believe that placing copyrighted music, pictures and computer software on the Internet constitutes piracy.

Id. at 67.

38. See Michael Meyer, *Stop! Cyberthief!*, NEWSWEEK, Feb. 6, 1995, at 36.

39. “The reasons put forward by consumers for private copying have not changed significantly over the . . . years. The two main reasons given [in surveys] for copying music are [the ability to make] personal selections of particular works and price considerations . . . taping is much cheaper than buying pre-recorded music.” DAVIES & HUNG, *supra* note 5, at 55.

40. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

41. See Tomlinson, *supra* note 12, at 66.

42. *Id.*

43. 17 U.S.C. § 1008 (1994).

44. See Tomlinson, *supra* note 9, at 3.

45. See John Rousell, *Digital Audio*, in COMMUNICATION TECHNOLOGY UPDATE 191 (August E. Grant & Jennifer Harman Meadows, eds., 1998).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 191-92.

there is no loss of quality from generation to generation because the source signal is not being *copied* to the resulting audiotape as is the case with analog technology.⁵⁰ The resulting audiotape, through the digital process, is being fed binary computer information; it is a *mathematical re-creation*, not a transference.⁵¹ At some point, magnetic audiotape will be superseded by solid-state storage systems.⁵² "It is the capacity for making identical duplicates and for serial copying that makes digital recording equipment substantially different from analogue [sic] recording methods."⁵³ Ironically, one of the digital technology's breakthroughs—the lack of generational signal degradation—has exacerbated the problem of sound recording piracy.

III. AUDIO HOME-RECORDING LAWS

A. Worldwide

During the past decade, many European⁵⁴ and other countries have adopted legislation⁵⁵ to benefit sound recording copyright owners⁵⁶ by taxing blank audio recording media and/or consumer audio recording equipment.⁵⁷ Germany, in 1965, was the first European country to do so.⁵⁸ Countries which tax blank audio recording media and/or consumer audio recording equipment include: Australia, Austria, Bulgaria, Cameroon, Congo, the Czech Republic, Denmark, Finland, France, Gabon, Germany, Hungary, Iceland, Italy, Kenya, The Netherlands, Norway, Portugal, Slovak, Spain, Sweden and Switzerland.⁵⁹ Apparently,

50. *Id.*

51. *Id.*

52. See Don E. Tomlinson, *Computer Manipulation and Creation of Images and Sounds: Assessing the Impact*, THE ANNENBERG WASHINGTON PROGRAM 10 (1993).

One must be sensitive to the warnings of the German [g]overnment that recording technology may change so that recording machines with permanent integral recording storage may replace the present type of machine that requires tape or other such material as a recording medium. If such a development is likely, it would seem wise to adopt a machine levy from the beginning rather than be forced to convert to one in the future as technology changes.

D. Maagnusson & V. Nabhan, *Exemptions under the Canadian Copyright Act*, CONSUMER AND CORPORATE AFFAIRS (1983), quoted in DAVIES & HUNG, *supra* note 5, at 225.

53. DAVIES & HUNG, *supra* note 5, at 75.

54. While there has been talk (and even a draft) of a European Commission Directive on the subject of private copying, it has not happened.

If . . . right[s] owners are granted a right to remuneration in return for freedom for members of the public to make single copies of sound . . . recordings for their personal use, then this amounts to a compulsory license and must be recognised [sic] as a specific exception to the reproduction right which is fundamental to copyright protection. The control of both piracy and private copying depends on the exercise of the reproduction right of . . . right[s] owners . . .

Id. at 271.

55. There are two schools of thought on how to distribute the compensation that would go to rights owners. One is based on "lost sales," the other on "use." *Id.* at 57.

56. "The majority of consumers have been found, in many [European] surveys, to support . . . private copying royalties as a solution to the home-taping problem. [This suggests] that consumers, contrary to popular belief, accept the justice of a royalty system." *Id.* at 64.

57. See Joel L. McKuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 330-31 (1994). "The amount of royalties levied under these countries' laws varies widely, as does the breakdown of royalty distribution among the various claimants. Additionally, the basis for the blank tape royalties (i.e., recording time, flat rate per tape, etc.) varies." *Id.*

58. See DAVIES & HUNG, *supra* note 5, at 116.

59. *Id.* at 116-214.

Canada⁶⁰ and Japan⁶¹ have also enacted such laws. Others, such as Argentina, Belgium, Brazil, Greece, Hong Kong, Ireland and the United Kingdom may have done so.⁶²

Most of these countries pay royalties to foreign claimants on a national treatment basis, but at least two—Finland and Denmark—pay foreign claimants on a reciprocal basis.⁶³ Since the United States law applies only to blank digital audio recording media and to digital home audio recording equipment, while all the other laws apply to digital *and analog*, United States sound recording copyright owners would lose perhaps hundreds of millions of dollars in revenue now being collected from the other countries if these other states have a collective change of heart on the subject of foreign royalty—that is, distribution by reciprocity rather than by national treatment. For whatever reason, no nation has as yet chosen to retaliate “in-kind” against the United States by switching to reciprocally-based treatment.

A good question, of course, is why the United States law is so different from the other laws. The answer may be that until the digital technology with its “perfect copy” capability came along, Congress had never been persuaded that “poor quality” analog copying was a significant loss to the sound recording industry.⁶⁴ “[T]he Europeans [, however,] disagree, arguing that many consumers do not really appreciate the difference between analog and digital recordings, or at least don’t care enough to refrain from home taping with analog equipment to the tune of billions of dollars in lost . . . revenues annually.”⁶⁵

B. The United States Audio Home Recording Act of 1992

The Audio Home Recording Act of 1992 (“AHRA”),⁶⁶ rather than being a bold pronouncement by Congress on a subject of great importance, is more in the nature of a settlement agreement⁶⁷ between the sound recording industry and the manufacturers of blank digital audio recording media and digital home audio recording equipment.⁶⁸ The first major component of AHRA concerns electronic safeguards against digital copies being made from first and later-generation digital copies. This component is called the Serial Copy Management System (“SCMS”).⁶⁹ All home digital recording equipment imported or sold in the United States must contain the SCMS computer chip.⁷⁰ While SCMS is not a

60. See John Geddes, *Record Industry Seeks Higher Blank-Tape Royalty*, THE FINANCIAL POST, Dec. 31, 1994, at 1.

61. See *New Copyright Law To Allow Surcharge*, THE DAILY YOMIURI, Oct. 30, 1992, at 2.

62. See DAVIES & HUNG, *supra* note 5, at 116-214.

63. *Id.* at 132, 185.

64. *Id.*

65. Hochberg, *supra* note 19, at 158.

66. 17 U.S.C. §§ 1001-1010 (1994 & Supp. IV 1998).

67. See *Cahn v. Sony Corp.*, 90 Civ. 4537 (S.D.N.Y. 1990). Because the stakes were so high on both sides, the two industry segments chose “the bargaining table to hammer out the blueprint for the [AHRA]” rather than risking an adverse court decision. *Id.* See also, Hochberg, *supra* note 19, at 157.

68. See McQuin, *supra* note 57, at 325. See also, Christine C. Carlisle, *The Audio Home Recording Act of 1992*, 1 J. INTELL. PROP. L. 335 (1994).

69. 17 U.S.C. § 1002 (1994).

70. *Id.* § 1002.

panacea (because, for example, one could theoretically make an infinite number of DAT copies from one CD), it does seem to solve the problem of exponential generational piracy—"perfect" digital copies being made from digital copies that are one or more generations removed from the original CD.

The second major component of AHRA mandates that royalties be collected on blank digital audio recording media and on digital home audio recording equipment,⁷¹ that such royalties be deposited into the United States Treasury,⁷² and that the copyright royalty panel, convened from time to time by the Librarian of Congress, act as the disbursing agent.⁷³ The royalty on blank digital audio recording media is three percent of the import value or of the domestic manufacturer's FOB price to wholesalers.⁷⁴ The royalty on digital home audio recording equipment is two percent of the import value or of the domestic manufacturer's FOB price to wholesalers, including a minimum royalty of \$1.00 and a maximum royalty of \$8.00 per machine.⁷⁵ For digital home audio recording devices that contain, for example, dual recording decks, the maximum royalty is \$12.00.⁷⁶ Once the money is collected into the royalty pool, it is distributed to approved claimants⁷⁷ as follows: record companies 38.83%; featured recording artists 25.59%; music publishers 16.66%; songwriters 16.66%; non-featured musicians 1.75%; and non-featured vocalists 0.92%.⁷⁸

The third major component of AHRA counterbalances the royalty system by prohibiting sound-recording copyright infringement actions of a non-commercial nature.⁷⁹ In other words, home recorders are free to home record. In this regard, AHRA draws no distinction between digital audio home recording and analog audio home recording.⁸⁰ Finally, AHRA, without specifically so stating, uses the "national treatment" method by including foreign claimants in the disbursement of the royalty pool.⁸¹

Regulations promulgated by the Copyright Office include: 1) a provision requiring distributors of digital audio recording devices⁸² and media to obtain a statutory license from the Copyright Office;⁸³ 2) a provision requiring annual "Statements of Account" to be filed and royalty fees submitted to the Copyright

71. *Id.* § 1004.

72. *Id.* § 1005.

73. *Id.* § 1006 (1994 & Supp. IV 1998).

74. *Id.* § 1004(b).

75. *Id.* § 1004(a).

76. *Id.* § 1004(a)(3).

77. *Id.* § 1007(a)(2).

78. *Id.* § 1006(b); Distribution of the 1992, 1993, and 1994 Musical Works Fund, 62 Fed. Reg. 6558-01 (1997).

79. 17 U.S.C. § 1008 (1994).

80. *Id.* § 1008.

81. *Id.* §§ 1006-1007.

82. One lawsuit has resulted from differences of opinion over what constitutes a digital audio recording device. See *Recording Indus. Ass'n of America v. Diamond Multimedia*, 180 F.3d 1072 (9th Cir. 1999) (holding that Diamond Multimedia's Rio MP3 music player is not a digital audio recording device and therefore not subject to the AHRA). "The Rio is a consumer electronics device with headphones that allows a user to download [record] MP3 audio files from a computer and listen to them elsewhere." Mike Blevins, et al., *Home Recording Rights Coalition* <www.hrrc.org/CEMARIO-PR> (visited Aug. 24, 1999).

83. 37 C.F.R. § 201.27(a) (1998).

Office by distributors;⁸⁴ 3) a provision granting access to royalty pool information by "interested copyright parties;"⁸⁵ and 4) a provision prescribing the procedures whereby interested copyright parties entitled to royalty payments can claim them.⁸⁶

The first pool of United States money became available for claims by artists and record companies in late 1994.⁸⁷ These two groups have formed a not-for-profit organization called the Alliance of Artists & Recording Companies ("AARC").⁸⁸ The AARC's first claim resulted in a pool of \$350,000 to divide among its members.⁸⁹ Songwriters and music publishers are paid from a separate pool.⁹⁰ Conceding that the \$350,000 amount was relatively small, Linda Bocchi, the Executive Director of the AARC, said: "As with any emerging technology, we expect the pool to start small and grow over time."⁹¹ No evidence was found on the subject of whether any foreign entities made claims against any United States revenue pool.

C. The German Private Copying Law

The German private copying law is codified as a section of the general copyright law.⁹² Article 54(1) of this law states: "Where the nature of a work makes it probable that it will be reproduced by the . . . transfer from one . . . audio recording medium to another in accordance with Article 53(1) or (2), the [rights' holder] of the work shall be entitled to payment of equitable remuneration."⁹³ Article 54(1) also specifies that the remuneration shall be compensated through the collection of royalties from the sale of blank audio recording media and audio home recording equipment.⁹⁴ Originally, only recording equipment was taxed; recording media was added by amendment in 1985.⁹⁵ Importantly, and in contrast to United States law, the German audio home recording law collects royalties on *analog* as well as digital audio tape and recording equipment.⁹⁶

It is the manufacturers and importers of blank audio recording media and audio home recording equipment who are liable for payment of the royalty.⁹⁷ The beneficiaries are the various rights holders under German copyright law, including the authors, performers and producers of the sound recording.⁹⁸

84. *Id.* § 201.28(a) (1998).

85. *Id.* § 201.29(a) (1998).

86. *Id.* § 259.1 (1998).

87. See Dennis Wharton, *Artists, Diskeries Get First Blank-Tape Royalties*, DAILY VARIETY, Oct. 18, 1994, at 6.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. See DAVIES & HUNG, *supra* note 5, at 128-37 (discussing German copyright law).

93. *Id.* at 130. Article 53(1) permits the making of single copies of a work for personal use and Article 53(2) permits the making of single copies for such as scientific use. *Id.* at 129.

94. *Id.* at 130.

95. *Id.* at 131.

96. As far as could be determined, the German law is silent on the subject of the analog versus the digital technology. Since the German law originally was enacted in 1965 when digital recordation was not yet in existence or even foreseen (at the consumer level), the digital technology apparently was non-controversially subsumed into the operation of the law once digitalization became a reality.

97. See DAVIES & HUNG, *supra* note 5, at 130.

98. *Id.*

The amount payable per audio home recording device is DM 2.50,⁹⁹ and the amount payable per hour of blank audio recording media is DM 0.12.¹⁰⁰ The amount payable per audio home recording device that records without benefit of a separate tape is DM 5.00.¹⁰¹ Claims for compensation under the law may be made only through a "collecting society" and not directly by rights holders.¹⁰² The society created in Germany for the collection and disbursement of these funds is "Zentralstelle für Private Überspielungs Rechte" or "ZPU."¹⁰³ It is run by representatives from each group of rights holders.¹⁰⁴ The sharing formula in Germany, which is achieved by rights-holder group negotiations rather than specified by law, is 27% to performers, 15% to producers, 42% to musical authors, and 16% to literary authors (lyricists).¹⁰⁵ As with all copyright-type collecting societies, the distribution scheme is immensely complicated but generally based on statistics relating to sales and public performances of recorded music.¹⁰⁶ There are no criminal penalties for non-payment by manufacturers and importers, but the civil remedies include damages and injunctive relief.¹⁰⁷

IV. ECONOMIC, TRADE RELATIONS AND CULTURAL CONSIDERATIONS

Economically, the sound recording (and video) industries constitute an increasingly larger share of the United States Gross National Product¹⁰⁸ and should not, therefore, be taken lightly. There are various factors in the "trade relations" realm that bear on this problem. For instance, there is the "cultural debasement" problem. Perhaps partially underlying any European change of heart in this situation is a matter that has less to do with revenue than with a strong desire for cultural preservation.

"The Europeans are operating under a number of emotional and practical considerations," says Don Biederman, senior vice president of legal and business affairs at Warner/Chappel Music, Inc. "Many of them perceive a cultural invasion from us and fear the debasement of their indigenous cultures." There is no question that American entertainment—music, film and television—dominates world culture much as Roman and Greek culture permeated the outlying realms during the height of those civilizations.¹⁰⁹

Also, there is the problem that America's musical acts have long since dominated Europe *vis-a-vis* units sold and sound-recording public performances, whereas European groups or solo artists far less often make it near or to the top

99. *Id.* at 131.

100. *Id.*

101. *Id.*

102. *Id.* at 132.

103. *Id.* at 132-33.

104. *Id.* at 133.

105. *Id.* at 131.

106. *Id.* at 133-34.

107. *Id.* at 135.

108. "[These industries] contributed more [in 1989] to the [Gross National Product] than either the construction industry or the agriculture, mining and energy extraction industries combined." *Id.* at 27.

109. Hochberg, *supra* note 19, at 158.

of the United States music charts.¹¹⁰ "Add to this state of affairs the fact that barriers exist with respect to foreign entertainment permitted into the highly lucrative American markets, and one begins to understand the scope of the situation."¹¹¹

Another policy consideration that aggravates AHRA's lack of comparability with its European counterparts is that "it is not an immutable law of nature that English-language pop music will dominate forever. The taste of the general public changes over the years."¹¹²

V. CONCLUSIONS

Very little argues in favor of leaving the AHRA as it presently exists. It is understandable that the manufacturers of blank digital (and analog) audio recording media and digital (and analog) home audio recording equipment would be opposed to any kind of additional overhead burden, but the simple fact is that it is consumers who ultimately should and would pay this freight. Since any levy applies equally to all manufacturers, what is it that the manufacturers so fear? There seems to be no evidence that any such levy would affect consumer buying practices in any way.

A law that includes digital and excludes analog has two problems in relation to foreign sound-recording copyright owners. First, there seemingly is little to claim from United States coffers. Second, United States claimants have much to claim abroad. The downside to United States claimants is that the United States practice could result in the exclusion of United States copyright owners from hundreds of millions of dollars in foreign earnings over the coming years if reciprocity becomes the standard imposed on the United States by other countries (not to mention that domestically the United States law leaves the huge analog market unaccounted for). Further, other countries might choose economic retaliation against United States intellectual property interests in other ways. Whether these inequities will result in any type of retaliation against the United States is, of course, uncertain. For its part, United States thinking could be that there is no international inequity in this situation because of the gross piracy of United States intellectual property abroad (even if the countries with audio home recording laws generally are not the problem "pirate" nations). At any rate, all such problems easily could be remedied by amending current law to cover analog sound recordings as well as digital sound recordings. Some public policy problems defy solution; this one does not.

110. *Id.* at 157.

111. *Id.* at 158.

112. *Id.*

