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Protection of Sound Recordings Under the Proposed Copyright Revision Bill

I. INTRODUCTION

In recent years the phonograph record has achieved a prominent role in exposing the American public to music and in fashioning its musical tastes.\(^1\) It has been estimated that ninety-five percent of all new music is first brought to public attention through phonograph records.\(^2\) An estimated sixty million Americans are exposed daily to wired-music services.\(^3\) Many radio stations devote up to eighty percent of their broadcast time to phonograph records.\(^4\) The phonograph record has also revolutionized the music industry and profession. It is presently, directly or indirectly, the most substantial source of income to composers and music publishers.\(^5\)

The recording industry is fiercely competitive.\(^6\) Although retail sales of records have increased, record producers complain of decreasing profit margins.\(^7\) Smaller companies face great difficulties in entering the market.\(^8\) Success often depends upon the ability to anticipate the wild fluctuations in the tastes of the consumers,\(^9\) who are primarily teenagers and preteenagers.\(^10\)

Record counterfeiters and "pirates"\(^11\) make this risky busi-

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5. Staff of Subcomm. on Patents, Trademarks, and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 1st Sess., The Compulsory License Provisions of the U.S. Copyright Law 44 (Comm. Print 1960) (Study No. 5, by Prof. Henn); id., The Economic Aspects of the Compulsory License 105 (Comm. Print 1960) (Study No. 6, by W. Blaisdell) [hereinafter cited as Study No. 6].
7. See 1965 Hearings 947; Hamill, supra note 6.
ness even more hazardous. Record counterfeiters siphoned off an estimated twenty million dollars from industry gross sales in 1960.\(^{12}\) The rights and economic interests of composers, music publishers, recording artists, legitimate record manufacturers, and, ultimately, the public are all affected by these activities. Primarily in response to this problem, sound recordings\(^ {13}\) are included as a category of copyrightable works in the proposed Copyright Revision Bill.\(^ {14}\)

II. PRESENT LAW

A. STATUTORY

Although disagreement has been voiced,\(^ {16}\) it is generally accepted that the copyright clause of the Constitution\(^ {16}\) is broad enough to permit copyright protection for sound recordings.\(^ {17}\) No copyright statute has limited its scope to "writings" in a

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13. "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work; regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.
14. Extensive hearings were held during 1965 on the Bill; see 1965 Hearings. H.R. 4347, as revised, was reported out of committee and recommended for passage on Oct. 13, 1966. H.R. REP. No. 2237, 89th Cong., 2d Sess. (1966) [hereinafter cited as House Report]. H.R. 2512, the 1967 version of the bill, was reported on favorably by the House Committee on the Judiciary on March 2, 1967. Wall Street Journal, March 3, 1967, p. 11, col. 2. Senate hearings were scheduled to begin March 15. Id., p. 1, col. 3.
15. The principal objections raised, chiefly by authors and record users, are that performers are not "authors" and records are not "writings." It is argued that the contribution of the manufacturer, in particular, is not creative enough to be copyrighted. See, e.g., Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (both majority and dissent); 1965 Hearings 1721.
literal sense. Since the protection of the present Copyright Act is extended to "all the writings of an author," it may seem that all matter constitutionally capable of being copyrighted, including records and recorded performances, already has adequate protection. However, the statutory list of classes of works for registration, which has come to define the scope of copyrightability under the act, does not include phonorecords. Although there is some dispute, it seems generally agreed that records are not covered by the present copyright statute, and that neither the artist whose performance is fixed in the phonograph record nor the record manufacturer who fixes it has any protection under the act.

No state statute recognizes rights in sound recordings or recorded performances. In fact, three states have enacted statutes which purport to deny all common law protection to any record placed on sale. While the purpose of these laws is to prevent the collection of royalties from commercial users of records, they may foreclose any common law right to prevent dubbing in those states.

Los Angeles has the only municipal prohibition against unauthorized dubbing. This ordinance has been invoked in recent

18. STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 71 (Comm. Print 1960) (Study No. 3, by Prof. Walter J. Derenberg) [hereinafter cited as STUDY No. 3].
22. The rights of the recording artist and the record manufacturer must be distinguished from those of the owner of copyright covering the musical composition recorded. The owner possesses the exclusive right to record the composition and to perform it publicly for profit. 17 U.S.C. § 1(e) (1952).
cases, but the counterfeiters are often released with only minor fines.27 Further, even if effectively enforced, a restriction in only one locality is not likely to have a significant effect upon the activities of record counterfeiters.

In 1962 Congress enacted legislation making it a federal offense to knowingly transport, receive, sell, or offer for sale in interstate or foreign commerce any phonograph record bearing a forged or counterfeit label.28 This legislation has not provided a satisfactory solution.29 The act can probably be avoided if the record pirate merely puts a new label on his records. The fact that no prosecution has been brought under the statute is an indication of the difficult problems of proof involved.30

B. COMMON LAW

Protection against duplication of phonograph records may be available under one or more common law theories: right to privacy,31 interference with contractual relations,32 moral right,33 and quantum meruit.34 However, theories other than common law copyright and unfair competition are rarely used and thus have been put outside the scope of this discussion.

1. Common Law Copyright

To be eligible for common law copyright protection, neither novelty or addition to the prior state of the art nor artistic quality is required.35 A work need be only an independently

27. See 1962 Hearings 46-50.
29. It has, however, apparently discouraged large chain stores from marketing counterfeit records. See 1962 Hearings 32-33.
33. Granz v. Harris, 198 F.2d 585, 589 (2d Cir. 1952) (concurring opinion).
35. See, e.g., Mazer v. Stein, 347 U.S. 201 (1954); Bleistein v. Don-
produced intellectual creation. Although common law copyright has been held to exist in recordings, this protection is probably limited to the performer's contribution to the sound recording. Arguments based upon the creativity of the contribution of the manufacturer to the recording have generally been rejected by the courts.

Common law copyright is perpetual in duration and is lost only by publication. Public sale of phonograph records may be a publication of an uncopyrighted composition, but probably limited to the performer's contribution to the sound recording. Arguments based upon the creativity of the contribution of the manufacturer to the recording have generally been rejected by the courts.


37. NIMMER § 10. See generally STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., PROTECTION OF UNPUBLISHED WORKS 3-5 (Comm. Print 1961) (Study No. 29, by William S. Strauss) [hereinafter cited as STUDY No. 29]; Note, CATV: Liability for the Uncompensated Transmission of Television Programs, 50 MINN. L. REV. 349, 356-59 (1966) [hereinafter cited as CATV].


41. The court in RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787 (S.D. N.Y. 1939), did not consider the manufacturer's contribution creative. Id. at 782. On appeal, Judge Hand reasoned from the "doubtful" assumption that the manufacturer's skill might be protected by common law copyright. 114 F.2d 86, 88 (2d Cir. 1940). See also Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) (assumption that manufacturer acquired all rights from performers).


43. Warner Bros. v. Columbia Broadcasting Sys., Inc., 102 F. Supp. 141 (S.D. Cal. 1951); NIMMER § 112.1. Publication occurs when visually perceptible copies of the work are made available to the public. STUDY No. 28, 14; STUDY No. 29, 8.

44. McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (S.D. Cal. 1958) (dictum); Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F.
ably does not constitute publication of the recorded performance itself. Recorded performances are seemingly protected by a perpetual common law copyright which is not lost by sale of the phonograph record.

2. Unfair Competition

The traditional cause of action for unfair competition required proof of three essential elements: competition between plaintiff and defendant; appropriation by defendant of a business asset acquired by plaintiff through the exercise of skill, money, time and effort; and public confusion resulting from the palming off of the defendant's product as the plaintiff's. In the ordinary dubbing situation it is very difficult to establish these elements. While the counterfeiter usually competes with the record manufacturer, the performer probably cannot show direct competition. Further, because the pirate rarely misrepresents the source of the recording, palming off is extremely difficult to show.

In response to these difficulties, the general trend toward expansion of the scope of unfair competition has been particularly marked in the area of sound recordings. In International News Serv. v. Associated Press, the Supreme Court discarded the palming off requirement, and established a test based upon


45. See Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (2d Cir. 1956); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955). Earlier cases had indicated that sale and distribution of phonorecords was a publication divestitive of common law copyright. RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937) (dictum).


49. 248 U.S. 215 (1918).

50. Id. at 241-42.
unjust enrichment.\textsuperscript{51} Although read very narrowly in most areas,\textsuperscript{52} the misappropriation doctrine of \textit{INS} has been widely applied in the entertainment field.\textsuperscript{53} In \textit{Metropolitan Opera Ass’n v. Wagner-Nichols Recorder Corp.},\textsuperscript{54} the court stated that neither palming off\textsuperscript{55} nor direct competition\textsuperscript{56} was essential to state a cause of action in unfair competition. However, since both elements were present on the facts of the case, its authority on the point is weak.\textsuperscript{57} Relying on \textit{Metropolitan Opera}, the court in \textit{Gieseking v. Urania Records, Inc.},\textsuperscript{58} found unfair competition in a dubbing situation in which there was neither direct competition nor palming off.

3. Recent Developments

The availability of common law protection for phonograph records and recorded performances has been cast in doubt by two recent Supreme Court decisions. In \textit{Sears, Roebuck & Co. v. Stiffel Co.},\textsuperscript{59} and \textit{Compco Corp. v. Day-Brite Lighting, Inc.},\textsuperscript{60} the Court held that the paramount federal interest in national uniformity of patent protection precluded the states, under any common law theory, from recognizing any right which conflicts with the policies and objectives of the federal patent laws. Although the common law copyright in “unpublished writings” was not intended to be affected,\textsuperscript{61} the Court held that “a State may not, when an article is unpatented and uncopryrighted, prohibit

\textsuperscript{51} \textit{Id.} at 239.
\textsuperscript{55} \textit{Id.} at 793, 101 N.Y.S.2d at 489.
\textsuperscript{56} \textit{Id.} at 795, 101 N.Y.S.2d at 491-92.
\textsuperscript{57} \textit{S rum} No. 26, 19.
\textsuperscript{58} 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956).
\textsuperscript{59} \textit{376 U.S.} 225 (1964).
\textsuperscript{60} \textit{376 U.S.} 234 (1964).
\textsuperscript{61} \textit{376 U.S.} at 231 n.7. Note that § 2 of the act refers to unpublished works, not \textit{writings}. Columbia Broadcasting Sys., Inc. \textit{v.} Documentaries Unlimited, Inc., 42 Misc. 2d 723, 725, 248 N.Y.S.2d 809, 811 (Sup. Ct. 1964), found a common law copyright in a nonwriting. See \textit{CATV} at 355 n.54.
the copying of the article itself or award damages for such copying.\(^{62}\)

Neither the courts\(^{63}\) nor the commentators\(^{64}\) are agreed upon the effect of the Sears and Compco decisions. They could be read to adopt the view, set forth by Judge Learned Hand in his dissent in Capitol Records, Inc. v. Mercury Records Corp.,\(^{65}\) that all rights pertaining to any work capable of protection under the federal constitution must be defined as a matter of federal law.\(^{66}\) In RCA Mfg. Co. v. Whiteman,\(^{67}\) Judge Hand held the sale of phonograph records to be a divestive publication terminating any common law copyright in the recorded performance. The contrary conclusion of the majority in Capitol Records, Inc. v. Mercury Records Corp., rendered before Sears and Compco, resulted from the application of state law declared in Metropolitan Opera.\(^{68}\) Thus federal courts may conclude that Sears and Compco have reinstated the Whiteman holding.\(^{69}\)

Since a finding that dubbing constitutes unfair competition would accord a right equivalent to copyright protection, the law of unfair competition may also be removed as a means of protecting the record producer and recording artist. Thus, although the point is not yet settled, Sears and Compco appear to have deprived any recording made available to the public of all common law protection. At the very least, the uncertainty stemming from the decisions has made common law protection against dubbing less effective.

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62. 376 U.S. at 232-33. Mr. Justice Black relied on G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952), for this statement.


65. 221 F.2d 657 (2d Cir. 1955).


67. 114 F.2d 86 (2d Cir. 1940).


III. PAST LEGISLATIVE PROPOSALS

Between 1906 and 1951, thirty-one bills which would have provided some protection for sound recordings were introduced in Congress.\textsuperscript{70} Twenty-nine were additions to the copyright law; two were proposed as amendments to the Communications Act.\textsuperscript{71}

Though many of these bills aroused considerable interest,\textsuperscript{72} none were passed. Their defeat is attributable to the conflicting economic interests of two opposing groups: the first consisting of the authors and users, and the second of the performers and manufacturers.\textsuperscript{73} The alignment of the two groups and their arguments—dictated chiefly by economic self-interest—remain virtually unchanged. However, there has not been, in the course of controversy over these many proposals, any substantial opposition to limited protection against dubbing.\textsuperscript{74}

IV. THE COPYRIGHT REVISION BILL

A. SOUND RECORDINGS AS THE SUBJECT MATTER OF COPYRIGHT

The Bill defines the subject matter of copyright as “original works of authorship fixed in any tangible medium of expression.”\textsuperscript{75} Seven categories are set forth as examples of original works of authorship, the last of which is sound recordings.\textsuperscript{76}

\textsuperscript{70.} See generally Study No. 26, 21-37.
\textsuperscript{72.} See, e.g., 2 LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY \textsuperscript{770-73} (1938); Diamond & Adler, Proposed Copyright Revision and Phonograph Records, 11 AIR L. REV. 29 (1940); Traicoff, Rights of the Performing Artist in His Interpretation and Performance, 11 AIR L. REV. 225 (1940); Note,\textsuperscript{78} Revision of the Copyright Law, 51 HARV. L. REV. 906, 915-16 (1938).
\textsuperscript{73.} S. 3043, 76th Cong., 3d Sess. (1940), omitted any provision for copyright in sound recordings, in part because “no way could be found at the present time for reconciling the serious conflicts of interest in this field.” Letter-memorandum from the executive secretary of the Shotwell Committee, reprinted in 86 CONG. REC. 77, 78 (1940), and quoted in Study No. 26, 34.
\textsuperscript{74.} Study No. 26, 37.
\textsuperscript{75.} Bill § 102. The phrase “works of authorship” was chosen in preference to “writings” to make it clear that the Bill is not intended to exhaust the constitutional power of Congress and to avoid the possibility that “writings” be given different meanings in the constitutional and statutory contexts. House Report 42-43; Part 6, 3. Use of the word “original” suggests that the standard developed under the present act, requiring originality but not aesthetic or intellectual value, novelty, or ingenuity, will apply under the Bill. Ibid. See generally House Report 93-95; Part 6, 5, 49-53; Diamond, Phonorecords and Sound Recordings, 13 BULL. COPYRIGHT SOC’y 20 (1965).
\textsuperscript{76.} Bill § 102.
"Sound recordings" are works consisting of a collocation of sounds, from any source, fixed in a tangible medium from which they may be reproduced. It is the captured performance, preserved in a tangible object, which is protected. Thus, an audible but unrecorded performance is not copyrightable because it lacks the physical embodiment and permanence necessary for copyright protection.

The source of the sounds making up the sound recording does not affect copyrightability. For example, a recording of natural sounds, such as bird calls, would be capable of protection. This is of great significance to the composer of electronic music. Electronic music, consisting of natural and artificial sounds manipulated electronically, has been denied protection under the present act because it cannot be reduced to a visually perceptible form.

The sound recording must be distinguished from the tangible object in which it is reproduced—the phonorecord. Protection is accorded to the collection of sounds stored on the phonorecord, not to the material object itself. Thus, transfer of a particular phonorecord transfers none of the rights of the owner of copyright, just as transfer of a copy of a book transfers none of the author's rights. A phonorecord may be transferred without the authorization of the copyright owner.

It is also important to distinguish between the sound recording as an embodiment of literary, dramatic, or musical work, and the sound recording as a work in itself. Thus, when a song which has not previously been reduced to written notation is recorded, two works are protected. Since a work is copyrightable if fixed in any tangible medium from which it can be reproduced, the recording will secure copyright protection for the

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77. See Bill § 101. Sounds accompanying a motion picture or other audio-visual work are, however, excepted from this definition.

78. House Report 46. Protection is being extended "to the product of recording, not the act of recording." Part 3, 61 (statement by Mr. Goldman of the Copyright Office).

79. Bill § 101: "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds . . . ." (Emphasis added.)


82. House Report 46; Part 6, 5.

83. A phonorecord is any material object in which sounds are fixed and from which the sounds can be reproduced. Bill § 101.

84. Bill § 109(a).

85. Bill § 102.
song. But the sound recording itself is also a copyrightable work, separate and distinct from the song. When a composition in the public domain is recorded, the recording contains only one copyrighted work: the sound recording. It is the sound recording as a separate work which is the subject matter of this Note.

B. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

The Bill would grant the owner of copyright in a sound recording only the right to reproduce and distribute phonorecords embodying the actual sounds of the recording.\(^{86}\)

Section 114 denies the owner of copyright in sound recordings the exclusive right to prepare derivative works.\(^{87}\) Thus there is no right to prevent imitation or simulation of the sounds of a recording, even if the imitation is virtually indistinguishable from the original sound recording.\(^{88}\) Such an imitation would constitute a second, independent performance and would be capable of copyright protection. Both recordings would have equal status under the Bill. Section 114 is not, however, intended to permit reproduction of a sound recording, with minor deletions, additions or alterations, to escape liability as a derivative work.\(^{89}\) The intent is that any substantial reproduction of the sounds contained in a copyrighted sound recording shall infringe the copyright in the sound recording.\(^{90}\)

Section 114 also withholds from the owner of copyright in a sound recording the exclusive right to perform the work publicly. Thus a radio station could broadcast a phonorecord without obtaining permission from the owner of copyright in the sound recording.\(^{91}\)

The Bill purports to preempt all state created rights in the nature of copyright protection as they pertain to any work within the subject matter of copyright.\(^{92}\) Moreover, it is intended that

\(^{86}\) Bill §§ 106(1) (3), 114(a).

\(^{87}\) A derivative work is one “based upon one or more preexisting works . . . .” Bill § 101. Translations, musical arrangements and art reproductions are derivative works. A sound recording is also a derivative work since it is based on the musical composition or other work performed. The exclusive right to prepare derive works is recognized in most other classes of works. See Bill § 106.

\(^{88}\) Bill § 114(b). See House Report 94-95; Part 6, 52.

\(^{89}\) House Report 94-95; Part 6, 52.

\(^{90}\) Ibid.

\(^{91}\) However, such a broadcast would infringe upon the rights of the owner of copyright in the musical composition performed on the sound recording. Bill §§ 106(4), 114(c); House Report 95; Part 6, 52-53.

\(^{92}\) Bill § 301(a).
any theory of misappropriation which would create rights equivalent to copyright be precluded. Thus, a state could not grant a performance right in sound recordings, since such a right is equivalent to copyright.

Preemption does not extend, however, to violations of rights which are not in the nature of copyright protection. Since state causes of action for palming off or false representation are specified to be within this exception, a state could probably punish a record counterfeiter but not a record dumper.

C. INFRINGEMENT

Only unauthorized reproduction in the form of phonorecords of the actual sounds contained in a copyrighted sound recording would be an infringement under the Bill. Although a literal reading of section 114(b) would indicate that any reproduction is forbidden, the drafters intended that only substantial takings would be an infringement. It is not clear, however, what constitutes a substantial taking. Suppose, for example, that four bars of a copyrighted sound recording are re-recorded as background for a radio or television commercial. If the sole purpose of according copyright protection to sound recordings is to provide effective protection against the activities of record counterfeiters and duffers, it could be argued that infringement should be found only when such an amount has been taken that the product of the alleged infringer could compete as a substitute for the copyrighted sound recording. However, such an argument runs against the usual notions of the nature of copyright protection. Copyright is not ordinarily intended merely as a protection against direct competition. The present and prior copyright laws have given the copyright owner a right in the nature of a property right which allows him to prevent any exploitation of his work, even exploitations which he himself could not or would not pursue. There is no indication that the right given under the Bill to the owner of copyright in a sound recording to prevent reproduction of his work should not be read as broadly. In the case posed above, the maker of the commercial has taken a sufficiently substantial portion of the protected sound recording so that it may reasonably be presumed that he will profit economically from its use. Since the sound recording has been exploited

94. Bill § 301(b) (3).
95. Bill § 114(b).
96. Part 6, 82.
without authorization of the owner of copyright, this should be an infringement. A taking should be allowed only when it is so insubstantial as to constitute an insignificant part of the value of the product of the taker.

The manner of reproduction is immaterial, but infringement would exist only if the product of the reproducer is a phonorecord. The latter limitation produces an exemption probably not intended by the draftsmen. Since the definition of phonorecords in section 101 specifically excludes motion picture sound tracks, reproduction of a sound recording in such a manner would not violate any right granted to the owner of copyright in the sound recording. This exception appears contrary to the scheme of protection for sound recordings, and should be corrected before final enactment of the Bill.

Problems may arise involving unauthorized recordings of radio or television broadcasts of live performances. If no authorized recording is made of the performance, it is accorded no protection by the Bill since the performance has not been fixed in a "tangible medium of expression." However, because the performance is not within the subject matter of copyright, state remedies protecting the broadcaster and performers would not be preempted by the Bill.

If, however, both an authorized and an unauthorized recording are simultaneously made of the broadcast performance, the result is less clear. In such a case the alleged infringer has captured the same sounds as are fixed in the authorized sound recording, but he has not copied the authorized recording.

It could be argued that the alleged infringer has not infringed but has independently created his own copyrightable work by taping particular sounds that the Bill has preempted from state protection. Section 114(b) describes the sound re-

97. House Report 94; Part 6, 52.
98. Bill § 114(b).
101. However, if the authorized recording is made in a studio, and the unauthorized version is taken off the air, it may be argued that the two recordings are not identical due to the distortion inherent in broadcasting. Since the broadcast sound has no permanence or tangibility, it is not covered by the Bill and hence state law is not preempted. Under Wagner-Nichols, the broadcaster would have an action against the unauthorized recorder under either unfair competition or common law copyright.
ording right as "the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording." This language can be read to mean that infringement exists only when there is a taking of sound from the authorized sound recording.

However, the Bill also bears a construction favoring the copyright owner. Section 114(b) goes on to state that, "this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds . . . ." The word "other" implies that any use of the same sounds would be an infringement. Since the economic effect of allowing a taking of the broadcast in this situation is the same as permitting duplication of the authorized sound recording, the latter construction probably should prevail.

Yet, this interpretation brings additional problems. It directly follows from such a position that when a performance is recorded and the sound recording obtains protection under the Bill, the owner of copyright enjoys the exclusive right to exploit the particular sounds fixed in the sound recording. However, if two persons were to record the same bird calls, probably neither should have a right of action against the other, even if one of them conceived the idea, found the location, and determined the proper microphone placement. Similarly, if a performer authorizes recording of a single performance by two persons, there can be no infringement. Thus the proprietary interest in the sounds contained in a sound recording must be limited to those cases in which the owner of copyright either produces the sounds or holds as assignee of the producer of the sounds.

D. Duration of Copyright

Copyright exists in a sound recording from the moment the sounds are fixed in any tangible medium from which they can be reproduced. 103 Where a work is prepared over a period of time, the portion completely fixed at any given time constitutes the work as of that time and is protected by copyright. 104 It is a common practice in the recording industry to record several renditions of a single tune during a recording session. Sections of various tapes are often combined to produce the final pro-

103. Section 101 provides that "a work is 'created' when it is fixed in a copy or phonorecord for the first time . . . ." Copyright subsists in a work from the time of its creation. Bill § 302(a).
104. Bill § 101 (Definition of "created").
duct. Apparently the tape of each rendition would be separately protected from the moment of recording. Thus an unauthorized reproduction of a discarded preliminary tape would infringe copyright in that tape, not in the final sound recording. The final composite tape would also be a separate version, and copyright would subsist in it from the time it is recorded in its final combined form.

As with all other copyrightable works, copyright in a sound recording endures for the life of the author and fifty years after his death. In the case of a work made for hire, the period of protection is seventy-five years. In both cases the period of protection extends to the end of the calendar year of termination.

E. Notice

Notice must appear on the surface of the phonorecord, or on the label or container, positioned in such a way as to give "reasonable notice" of the claim of copyright. Proper notice consists of three elements: (1) the letter P in a circle; (2) the year of first publication of the sound recording; (3) the name of the owner of copyright, or an abbreviation by which the name may be recognized.

The P in a circle was selected to avoid confusion between copyright in the sound recording and that in the printed matter accompanying the phonorecord, and to avoid confusion between the claim to copyright in the sound recording and the claim to copyright in the underlying musical or literary work. Generally the phonorecord need not bear a notice of copyright in the underlying work. However, in the case in which the sound recording is used to obtain copyright of an underlying work, the phonorecord probably should bear two notices.

106. Section 101 (definition of "created") provides that "where the work has been prepared in different versions, each version constitutes a separate work."
107. Bill § 302(a).
108. Bill § 302(c).
109. Bill § 305.
110. Bill § 402(c). See also Bill § 402(b)(3); House Report 141; Part 6, 102-03.
111. Bill § 402(b); House Report 141; Part 6, 105-09.
112. Part 6, 103.
113. House Report 141; Part 6, 100.
Notice is only required on sound recordings published with the authority of the copyright owner.\textsuperscript{114} Omission of notice from an unauthorized publication, or one in which the author has conditioned his authorization on use of the notice, does not affect the author's rights.\textsuperscript{115} Since notice is required only on phonorecords distributed to the public,\textsuperscript{116} the preliminary tapes made during a recording session do not have to carry a notice to be protected.

F. Ownership of Copyright in Sound Recordings

The Bill does not specify the owner of copyright in a sound recording. The draftsmen felt that resolution of this problem was best left to the employment relationship and to bargaining among the parties concerned.\textsuperscript{117} As the Bill is drafted, granting no performance right in sound recordings, this result is probably satisfactory. The manufacturer or producer, who would usually hold the copyright as employer of the performers and technicians contributing to the recording, is directly interested in the prevention of dubbing and is in the best position to enforce the rights granted by the Bill. If the copyright were, by designation of law, to be the property of those persons whose skills and services produced the sound recording, or if the benefits of the copyright were required to be shared among such persons and the manufacturer or producer, many problems would be created. The diversity of claimants would be great. Several individual performers usually participate in a single recording. Sound technicians would certainly assert a claim that the creativity of their efforts constitutes a part of that which is protected. Such diversity would render enforcement of the right ineffective and make an organized system of licensing difficult.

However, if the scope of the Bill were expanded to include a performance right, contractual relationships might provide a less desirable solution to the ownership problem. Since non-recording musicians must compete for work with commercial uses of recorded music, the American Federation of Musicians, which represents both recording and non-recording musicians, might insist upon retention of the performance right by the performers. The manufacturers would probably prefer that the performance right be waived, believing that wide use of the recording by radio

\textsuperscript{114} Bill § 402(a); Part 6, 100-01.
\textsuperscript{115} Part 6, 100.
\textsuperscript{116} Bill § 101.
\textsuperscript{117} House Report 47; Part 6, 5.
broadcasters would increase record sales, and thus would be reluctant to accede to this demand. Because of the power of the American Federation of Musicians, which represents nearly all performing musicians active in the recording industry, such a conflict might not be easily resolved.

It may be argued that because such strife did not develop from the grant of a performance right to motion pictures under the present Copyright Act, the problem is insubstantial. The analogy between sound recordings and motion pictures is quite close. In both cases the producer combines the artistic and technical skills of a number of different individuals into an integrated artistic work. The individuals involved are normally employees or contractors working under centralized control. Both producers must edit the initial fixations and combine them to produce the final product.

However, the right of performance in motion pictures was established in the early days of the industry. Organization of the contending groups grew up with the performing right. In the recording industry the contending factions are already well organized and relatively equal in bargaining power. The American Federation of Musicians has registered its opposition to the present bill, insisting that the performance right should be recognized and that the benefit of that right should inure directly to the performers. Thus each contending faction is certain to assert vigorously its claim to any benefit bestowed by the Bill.

For these reasons, if the performance right is recognized, the Bill should specifically designate the ownership of copyright in sound recordings.

Administration of the right would operate most efficiently if the record producer were the owner. The right would then rest in a single entity, instead of in a shifting, highly mobile group of

118. Edison v. Lubin, 122 Fed. 240 (3d Cir. 1903), extended copyright to motion pictures. Patterson v. Century Prods., Inc., 93 F.2d 489 (2d Cir. 1937), indicated that this included a right of public performance.

It should be noted that numerous foreign countries (including England) have extended a performance right to sound recordings. In each case, the necessary economic give-and-take occurred, and no catastrophic consequences ensued. Cf. Part 3, 358.

119. The earliest American motion picture case, Edison v. Lubin, 122 Fed. 240 (3d Cir. 1903), held that a motion picture of a ship launching was properly the subject of copyright as a photograph. See also Annot., 23 A.L.R.2d 244, 266-77, 349-51 (1952).

120. 1965 Hearings 1384 (statement of Mr. Stanley Ballard, representing the AFM).
performers. Information about, and permission to use, a copyrighted sound recording would be readily accessible. The term of protection would be readily determinable. Further, the producer is in a good position to protect the copyright.

It is true that the producer's interests may be antithetical to those of the performers. Still, given the strength of the American Federation of Musicians, it seems reasonable to assume that the performers' interests will be protected. The English experience, where a strong musicians' union has been able to induce manufacturers to restrict the grant of licenses to use recorded music, is an indication of the validity of this assumption.

Finally, it is the producer who bears all the risks of the venture. The performers are recompensed by salary at the time of recording and by payments to a special fund for mechanical royalties. Without someone to incur the risks of recording, a performance remains an evanescent thing, incapable of copyright, and capable of only limited commercial exploitation.

In summary, the Bill should spell out that ownership of the copyright in a sound recording is presumptively lodged, in the first instance, in the producer of the sound recording.

V. RECOMMENDATIONS

The owners of copyright in sound recordings should be given the exclusive right to perform the copyrighted works publicly. Of all works publicly performable, the Bill denies this right only to sound recordings. Because of the pronounced impact recognition of such a right would have upon the entertainment industry, the drafters of the Bill concluded that protection against dubbing was the greatest gain presently feasible, and intentionally omitted a performance right.

121. Regarding the producer as an employer for hire, the term would be seventy-five years from the year of first publication, or one hundred years from creation, whichever occurred first. Bill § 302(c).
123. See Bill §§ 101 (definition of "publicly"), 106(4).
124. See Bill §§ 106, 114(a). The owner of copyright may, however, prevent unauthorized performances of the copyrighted work by any user who reproduces the recording on another phonorecord. For example, radio stations and background music services who use pre-programmed tapes could not operate without authorization from the owners of copyright in every sound recording used.
125. House Report 93-94; Part 6, 50, 51. There is genuine fear that controversy over this feature could wreck the entire revision effort. Ibid.
The conflict of interest among the several groups which would be affected by the performing right is a substantial stumbling block now as it has been in the past. However, all interested groups recognize the urgent need for revision of the existing law, and it is unlikely that any group would destroy the Bill over the issue of performing rights. Moreover, amendments to copyright laws have historically been infrequent and slow to respond to changing needs. Thus the performing right in sound recordings should be recognized now.

Evaluation of the effects and desirability of a performing right in sound recordings requires an examination of the conflicting economic interests involved in the recording industry. The authors and composers, performers, and record producers are the direct contributors to sound recordings. Since the effects of a performing right would not be limited to the contributors to sound recordings, the interests of users of recordings must also be considered.

A. AUTHORS AND COMPOSERS

The role of the authors and composers is most important to the recording industry in the field of popular music. While many pop recordings are made of previously recorded compositions, the industry requires a steady input of new material to

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126. Letter-memorandum from the executive secretary of the Shotwell Committee, reprinted in 86 Cong. Rec. 77, 78 (1940), and quoted in Study No. 26 at 34.

127. See notes 70-74 supra and accompanying text.

128. Only two good studies are available, and both are extensively relied upon here. These are Corry and Glover, Hawkins, & Cambridge Research Institution, Economic Analysis of the Proposal to Increase Copyright License Fee for Phonograph Records (1965) (reprinted in 1965 Hearings at 771-888 [hereinafter cited as Glover]. It should be noted that Glover has not gone uncontradicted. See 1965 Hearings 286-93 (statement of Mr. Julian Abeles of the Music Publishers Protective Ass'n).

129. Publishers, as assignees of composers and authors, occupy a position in the recording industry substantially identical to that of the composers and authors. Thus, most comments contained in this section are equally applicable to publishers.

130. The term “composer” is used here to refer to both the composer of the music and the lyricist. Many compositions are written by “teams” consisting of one or more musical composers and one or more lyricists. Time, April 22, 1966, p. 44. In such cases the team divides the composer’s share of royalties. Corry 31; 1965 Hearings 947.

131. See, e.g., 1965 Hearings 850-55, listing 207 separate recordings of the song “I Believe” in the period Nov. 30, 1953-Jan. 7, 1965. See also 1965 Hearings 920, showing the annual return to one publisher from his catalog, and noting the number of “standards” (such as “Star-
capture public interest.

The income of the pop composer is primarily derived, directly or indirectly, from commercial exploitation of three rights guaranteed by both the present Copyright Act and the proposed Bill. First is the sale of copies of his work in the form of sheet music or other printed matter. Once the major source of income, proceeds from the sale of sheet music are now relatively insignificant.

Of greater importance presently is the right to license a copyrighted composition for recording. The Bill provides that once the owner of copyright in a nondramatic musical work has permitted phonorecords of his work to be distributed to the public, he is required to license the composition, on terms and conditions specified in the Bill, to any other person for the purpose of making and distributing phonorecords. Mechanical royalties collected pursuant to a similar compulsory license provision of the present act have been substantial.

The third source of income is the right to perform the copyrighted composition publicly. Because commercial use of a phonorecord constitutes a public performance of the recorded composition, the performance right has increased in importance to the composer with every expansion of the recording industry.

Individually, the composer is in a weak position to exploit each of these rights. He does not have a strong bargaining position with the publishing companies. It is difficult, if not impossible, for a single composer to enforce his rights under the copyrighted music ("catalog") in that catalog which have generated income over a long period of time.

132. Most of the sources of income to the composer of serious or classical music do not depend upon the existence of copyright protection. For example, commissions, teaching, and conducting are the only substantial sources of income to a great percentage of this class of composers. 1965 Hearings 216-17, 260-61. For this reason most considerations discussed here are of importance only to the composer of tunes intended to gain wide public popularity.

133. Prior to 1950, it was not unusual for a composition to sell a million copies of sheet music; now, 100,000 copies are considered a large sale. 1965 Hearings 278. See also Finkelstein, The Composer and the Public Interest—Regulation of Performing Right Societies, 19 Law & Contemp. Prob. 275, 278-79 (1954).

134. Bill § 115.

135. Estimates of the total mechanical royalties collected in 1961 range from $9.75 million to $34.9 million. CoRy 31-32; 1965 Hearings 877.

pulsory license and performing right provisions. For example, the composer of a recorded song could not separately negotiate with every radio station which plays the recording over the air.

However, the rise of several professional organizations has made the economic position of the composer secure. The American Guild of Authors and Composers, as the representative of over 2,000 songwriters, has strengthened the bargaining position of the composer before his publisher. Composers and publishers have banded together in two societies, the American Society of Composers, Authors and Publishers, and Broadcast Music Industries, which effectively enforce the compulsory license provision and the right of public performance.

The composers have advanced several arguments in opposition to the right of public performance in sound recordings. Some have asserted that because the compulsory license provision fixes the mechanical royalty allowable to the composer, it is unfair to grant an additional right to the performers and record producers, who may freely exploit their products and services in the open market. However, the benefits flowing to the composers from recordings are not limited to mechanical rights. The composer collects performance royalties from commercial users of recordings of his works. Neither the present act nor the proposed Bill fixes a maximum performance royalty.

Unfairness also arises, it is asserted, from the fact that recordings can be produced under a compulsory license without the composer's permission. If a performing right were recognized in a sound recording, the producer could limit use of the recording, thereby unwarrantedly limiting the right of the composer. It is apparently felt that because the composer must license his works for recording, the record producers should be required to reciprocate by allowing free and unrestricted use of recordings. While this is probably a legitimate concern, it should not be seized upon as a reason for denying the performance right to sound recordings. The problem can be adequately met by creating another compulsory license providing that, once any commercial use of a recording has been authorized, all commercial users must be permitted to use it on the payment of a specified fee.

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137. CoRRy 25; 1965 Hearings 230. A similar organization, the American Composers Alliance, performs a similar function for about 130 composers of serious music. 1965 Hearings 225.
138. See, e.g., Part 4, 456; Study No. 26, 49.
It is also argued that the grant of a performance right would cause licensing problems and a multiplicity of claims against innocent infringers.\textsuperscript{140} The licensing problem could be solved, as it has been in the case of the performance right in musical compositions, by the formation of performing rights societies. Since the Bill protects innocent infringers,\textsuperscript{141} only wilful violators of copyright will be burdened by multiple claims.

The central objection of the composers to the performance right in sound recordings seems to be based upon a fear that the commercial users of recordings will pay no more to all persons having rights in sound recordings than is presently paid as performance royalties to the composers. Therefore the grant of a performance right in sound recordings would decrease performance royalties passing to the composers.\textsuperscript{142} However, the experience in countries which have recognized performance rights in sound recordings does not support this argument.\textsuperscript{143} It is far more likely that commercial users would pay the additional cost, either absorbing it or passing it on to the consuming public.

Thus, if properly drafted, a provision recognizing a performance right in sound recordings would not operate to the detriment of composers.

B. PERFORMING ARTISTS

The performers are probably the most important factor in the success of a sound recording, particularly in the popular music field.\textsuperscript{144} Musical compositions only have commercial value when they are performed. Thus a large measure of the value of a composition is directly attributable to the performers. While the “name artist” is primarily responsible for record sales, all performers contribute significantly to the overall result.

The rise of the phonograph record has had a great impact upon performing musicians. The recording industry has not become a substantial employer of musicians. While the American Federation of Musicians claims 270,000 members,\textsuperscript{145} only two or

\begin{enumerate}
\item\textsuperscript{140} Part 2, 12-14; Part 4, 456.
\item\textsuperscript{141} Bill § 504(c)(2) provides that, where the infringer establishes that he was not aware and had no reason to be aware that he was infringing copyright, the court may reduce the award of statutory damages.
\item\textsuperscript{142} Part 4, 456.
\item\textsuperscript{143} Ulmer, \textit{The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations}, \textit{10 Bull. Copyright Soc'y} 90, 98 (1962).
\item\textsuperscript{144} Corp\textsuperscript{rx} 82; 1965 \textit{Hearings} 949-50.
\item\textsuperscript{145} 1965 \textit{Hearings} 1390, 1410.
\end{enumerate}
three thousand musicians record with regularity. On the other hand, commercial uses of records have sharply reduced employment opportunities for musicians. Radio has steadily decreased its use of live musicians, replacing them with recorded music. In recent years a new form of night club, the discotheque, has developed which uses recordings to the exclusion of live music. The general availability of recorded music has tended to satiate the public need for music, lessening the popularity of activities centering around live musical performances.

For these reasons, the American Federation of Musicians has exerted great pressure in recent years to extend the benefits of the profitability of the recording industry and to curb the effect of recordings upon the demand for live performances. In addition to wages and other benefits to employee-musicians, record companies employing union musicians pay royalties of one-half cent per record sold to each of two union funds. The first of these funds is distributed annually to musicians participating in recording. The second, the Recording Industries Musical Performance Trust Fund, is used to finance live performances of music.

In furtherance of these same objectives, the AFM has favored the recognition of a performance right in sound recordings and has insisted that the performance right run to the performers. The union argues that free and unrestricted use of phonorecords by radio broadcasters and jukeboxes is unfair to the performers, since such commercial uses tend to displace live performances. Since commercial uses make recordings better known, and thus increase record sales, record manufacturers would not enforce a performance right in sound recordings in such a way as to substantially lessen commercial use of their products. Thus the union's objective of creating more employment opportunities can be achieved only if the right of public performance vests in the performers.

146. Letter from Mr. Samuel R. Rosenbaum, Trustee, Recording Industries Music Performance Trust Funds, April 12, 1966, on file in Minnesota Law Library. The AFM estimates that up to 4,000 musicians participate in recordings. 1965 Hearings 1395.
149. Phonograph Record Trust Agreement, Jan. 1964, pp. 17-18. The AFM proposal essentially splits copyright in the sound recording, with the record manufacturer retaining the exclusive rights to reproduce and distribute phonorecords of it and the performers having the exclusive right of public performance.
150. 1965 Hearings 1417-19. The AFM proposal essentially splits copyright in the sound recording, with the record manufacturer retaining the exclusive rights to reproduce and distribute phonorecords of it and the performers having the exclusive right of public performance.
151. Study No. 26, 29-30; 1965 Hearings 1393, 1404 n.18.
The concern about the decrease in employment of performing musicians is legitimate, and should be shared by performers, employers of musicians, and the public generally. The decline in employment opportunities not only operates as a hardship to musicians but also makes the music profession less attractive. Consequently, musically talented young persons may refrain from choosing a career in music, causing a general decline in the quality of music performance.

Nevertheless, the right of public performance in sound recordings should not be given directly to the performers. The right of public performance should be recognized and should be exploited to the benefit of the performers. Yet the interest of the performers in the suppression of commercial uses of recordings is too strong, particularly if the American Federation of Musicians holds the right as assignee or representative of the performers, for them to have sole control of the performance right. While substantial suppression of commercial uses probably would increase employment opportunities, it would greatly prejudice the interests of composers, publishers, commercial users of recordings, and the public. The performers should not be given such a powerful weapon to further their purposes.

Thus the drafters of a performance right provision should not grant the right to the performers alone. Such a provision should explicitly vest ownership of the performance right in the record manufacturer to preclude the performers from bargaining for ownership.

C. Record Producers

The phrase "record producer" is used here to denote the corporate or private individual who employs and directs the various talents necessary to the production of a sound recording. Approximately three thousand enterprises presently produce records. They range in size from one man operations, which produce master recordings and subcontract the preparation of phonorecords, to major corporations occupying a substantial share of the market.

The income of record producers is derived solely from the sale of records. Recent studies indicate that while record sales

152. 1965 Hearings 1404-05.
154. Id.
155. See 1965 Hearings 947 (statement of Alan W. Livingston, President, Capitol Records, Inc.).
have risen, profit margins have declined due to increased production costs. Although a new company can begin producing recordings with little capital, it has become difficult for a small operation, without a large and diversified catalog, to compete successfully. One study indicates that, notwithstanding the relatively large number of competitors, three major producers lead in almost all types of recordings.

Some manufacturers have urged recognition of a performing right in sound recordings. Probably the most persuasive argument favoring this position is that the existence of such a right in all other publicly performable works makes denial of the right in sound recordings unfair. For example, the performance right is recognized in movies under both the present act and the proposed Bill. Like a movie, a sound recording is a composite work, embodying the creative contributions of many persons. No distinction is apparent which can serve as a rational basis for treating them differently.

It may be argued that since commercial uses publicize recordings and increase record sales, record manufacturers have no need for the protection that would be afforded by the performance right. However, although the producers would probably find it in their best interest to waive the performance right in many instances, this is not an adequate reason for refusing the right. The producer of the sound recording should be permitted to choose which uses are to be allowed. Overexposure of a recording by radio broadcasters can have the effect of satiating public interest rather than stimulating record sales. Furthermore, because the commercial user profits from his use of a recording, the notion of fairness which underlies all copyright legislation would seem to demand that profits be shared with the creator of the recording.

The grant of a performance right to record producers would inure to the benefit of all contributors to recordings except the composers and authors. The performers, sound technicians, and other employees of producers are all represented by strong unions or individually enjoy a strong bargaining position with the producers.

158. Corry 251.
ducer. Therefore they would succeed in sharing the increased profitability which the performance right would bring to the industry and probably would be able to force the producers to refrain from allowing commercial uses which are highly prejudicial to their professions.

D. COMMERCIAL USERS OF SOUND RECORDINGS

1. Broadcasters

Radio broadcasters are the primary commercial users of sound recordings. As much as eighty percent of all broadcast time is devoted to recorded music. While the continued success of the radio industry probably depends upon the availability of recordings, radio plays a vital role in the development and exploitation of sound recordings. The popularity of any one recording is due in large part to the amount of exposure it receives from broadcasters. The payola scandal of recent years is evidence of the influence of radio upon record successes.

Radio broadcasters, through the National Association of Broadcasters, traditionally have opposed the grant of a performance right in sound recordings, contending that recognition of the right would unduly prejudice smaller stations operating at minimum profit margins. It is probably unavoidable that an innovation of the breadth of a performance right would necessitate a certain amount of economic adjustment. However, such an adjustment has been effected satisfactorily in those countries which have recognized a performance right in sound recordings.

Because of the great interdependence between the broadcasting and recording industries, it is unlikely that record producers would exercise the performance right in a manner imposing a substantial burden on even marginal broadcasters. For example, probably the greatest number of financially insecure radio stations are those concentrating on programming, such as classical music, which is not carried by most broadcasters. Producers of classical recordings utilized by such broadcasters would

161. Corry 99; 1965 Hearings 1394, 1404 n.11.
163. See Grevatt, The Artist as Businessman, High Fidelity, June 1963, pp. 32, 97 (by implication).
164. See Corry 97-98.
165. See, e.g., Study No. 26, 33-34 (by implication).
166. Part 3, 358; Study No. 26, 38-44; Ulmer, supra note 143, at 98.
certainly be willing to license their recordings at rates which would not endanger their principal means of broadcast exposure.\textsuperscript{167} Further, public demand for such specialty programming has developed to the point where any increase in costs caused by a performance right probably could be absorbed.\textsuperscript{168} Thus, unless the performance right is vested in a group, such as the performers, whose interest is adverse to that of the broadcasters, recognition of the right will not substantially impair the prosperity of the radio industry.

The broadcasters have also argued that a performance right in sound recordings should be denied because of the great role of radio in establishing the popularity of recordings.\textsuperscript{169} This is not an adequate reason for refusing recognition of the right. Whatever service is performed for record producers by radio broadcasting can best be accounted for in the bargaining for license privileges between the broadcasters and producers. Not all broadcasting of recordings is beneficial to the financial success of a recording. Certainly the indebtedness of the producer to radio broadcasters is not so great that the producer should be denied all profit from commercial uses of his product.

2. Jukeboxes

Since jukebox operators are also a major commercial user of recorded music,\textsuperscript{170} a performance right in sound recordings would also affect them. Jukeboxes, like radio broadcasting, are dependent upon the availability of sound recordings, but are also a significant medium for the popularization of new recordings.

Like the radio broadcasters, jukebox operators would undoubtedly oppose recognition of a performance right in sound recordings, based upon a fear that such a right would jeopardize

\textsuperscript{167} ASCAP presently charges stations specializing in classical music lower license fees than those generally prevailing in recognition of the low profitability of such enterprises. Interview with Midwestern radio station manager. Memorandum on file with Minnesota Law Review. Presumably the owners of copyright in sound recordings would adopt a similar practice.

\textsuperscript{168} Attempts by certain broadcasters to drop unprofitable programming have met with strong adverse public reaction, forcing those broadcasters to find additional financial support for the specialized programming. Variety, March 23, 1966, p. 37, col. 1.

\textsuperscript{169} See, e.g., Sruny No. 26, 36.

\textsuperscript{170} In 1961 fourteen percent of all unit sales at retail of recordings were made to jukebox operators. As many as 50,000 jukeboxes may now be in service. CORRY 12-16; HOUSE REPORT 111; 1965 Hearings 565, 847.
the profitability of their businesses and drive many marginal competitors out of the industry. Intensifying this fear is a provision of the Bill which peculiarly affects the jukebox industry. Under the present law, jukeboxes are operated under an exemption from the performance right of authors and composers.171 The proposed Bill would eliminate that exemption and substitute a compulsory license provision under which jukebox operators would pay a small license fee to the owner of copyright of the recorded compositions.172 Thus if a performance right in sound recordings were added to the Bill, jukebox operators would be required to absorb two new performance royalties.

However, it is unlikely that recognition of the performance right would seriously affect the financial position of the operators. Since the interest of record producers generally favors stability in the jukebox industry, performance right fees probably would not be set at rates which could not be comfortably absorbed.

E. The Public

Public benefit from a performance right in sound recordings could develop from several sources. The public interest favors the development of new creative talent and art forms. Representatives of the industry point to the present relatively poor profit margin prevailing in that industry.173 A right to remuneration for commercial use of recordings could certainly improve that situation. To the degree that record companies enjoy a more solid economic position, they might be encouraged to sponsor experimental projects having a lesser potential for immediate economic gain.

The record manufacturers have also contended that a performance right would permit them to place less emphasis on the teenage and sub-teen market.174 The supposition underlying this argument is that, while broadcasts of music appealing to the teenage market tend to stimulate record sales, other types of music are directed toward persons whose musical needs are largely satisfied by radio broadcasts and who do not buy records. Therefore, recordings of music of the latter kind would be dis-

171. 17 U.S.C. § 1(e) (1964) provides that a performance on a coin-operated phonograph is not a public performance for profit unless admission is charged to enter the establishment having the phonograph.
173. See, e.g., 1965 Hearings 895.
174. 1965 Hearings 951.
proportionately benefited by the performance right, enabling record producers to devote a greater portion of their efforts to such recordings.

A performance fee for commercial uses of sound recordings would almost certainly increase the costs of music to the consuming public. In many cases the costs would be passed on indirectly, as where a radio station increases its time charges to advertisers, who in turn raise consumer prices to meet the increased advertising costs. Since the public is the ultimate consumer of the recording, it seems proper that the public bear the costs. Experience in other countries indicates that the industry can and will make the economic adjustments required to accommodate the new interests granted.

A performance right in sound recordings would probably make the industry a more healthy one, and would encourage more people to make a career in the performing arts. It would, therefore, "promote the progress of science and the useful arts," and would be in the public interest.

VI. CONCLUSION

The question of the protection to be accorded sound recordings has plagued the courts and the copyright bar for a number of years. In the hodgepodge of common law theories, no one has been sure what rights exist in recordings. In clarifying the status of sound recordings and elevating them to the plane of other intellectual products, the Bill makes a significant advance over the present law. Its major deficiency is that it does not extend protection for sound recordings to the full scope of copyright accorded other works. Specifically, the following changes in the Bill appear warranted:

(1) Sound recordings should be accorded a right of public performance, limited to the right to receive remuneration for commercial use of the recording.

(2) The Bill should state explicitly that the producer of a sound recording is the author, as an employer for hire.