PERFORMANCE RIGHTS IN SOUND RECORDINGS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

PERFORMANCE RIGHTS IN SOUND RECORDINGS

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CONTENTS

Hearings held

Witnesses

ADDITIONAL STATEMENTS

PERFORMANCE RIGHTS IN SOUND RECORDINGS

MARCH 29, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Beverly Hills, Calif.

The subcommittee met, pursuant to notice at 9:30 a.m. in the Royal Suite of the Beverly Hilton Hotel, Beverly Hills, Calif., Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Railsback, and Cohen.

Also present: Bruce A. Lehman, counsel, Timothy A. Boggs, professional staff member, and Thomas E. Mooney, associate counsel, and Audrey Marcus committee staff.

Mr. KASTENMEIER. The committee will come to order.

Let me extend a welcome to our witnesses and those of you in the audience this morning on the occasion of this our opening day of hearings on the question of performance rights in sound recordings.

May I say at the outset, that in accordance with House rules without objection photographs or any other pictures may be taken during the course of the hearings.

The subcommittee is very pleased to be here in one of the Nation's centers, along with New York City, of the music, recording industry. These two geographical areas are those most affected, prospectively, by the proposals for a performance right in sound recordings.

With me this morning is the ranking minority member, Tom Railsback, a Member of Congress from Illinois who's been a member of the subcommittee for many years. We're also very pleased to have Congressman Bill Cohen, a member of the Judiciary Committee who formerly served on this subcommittee while we were taking up copyright questions several years ago. Also to be with us shortly is our colleague George Danielson from the Greater Los Angeles area who has offered a legislative proposal for a performance right in sound recordings. I expect him to arrive with us shortly.

Nearly 2 years ago this subcommittee began the process of marking up one of the most complex pieces of legislation in my memory, the Copyright Revision Act of 1976. It had a long prior history. Going back to at least 1962 when this subcommittee suspended the expiration of subsisting copyrights pending the enactment of a general revision bill. In 1965 we had hearings; I chaired those hearings. In 1966 we had markup. In 1967 we passed the bill which only became law ultimately when the Senate and the House were able to get together in common agreement in 1976.

One of the questions or controversies, if you will, that was left unresolved among the many that were resolved, was that of performance rights in sound recordings. And there have been proposals calling for this over the years. Certainly, I remember the proposal way back in 1965. It took somewhat of a different form than the present proposal, but in order to expedite the revision, the general revision in 1976, we specifically put aside that subject and called on the Register of Copyrights, Barbara Ringer, to report back to the Congress, by January 3 of this year so that we might further consider the subject.

The Register has issued a report, but even as January 3 came around it was difficult for her and for all those reporting to her to fully respond as of January 3. As a matter of fact, the Register has not yet been able to testify before this subcommittee on the subject yet. So this, in fact, opens the hearings on the subject. The Register will testify at a later date. However, these hearings in California must be considered the fundamental hearings on the subject in the year 1978. The Register, of course, will testify in Washington, and possibly there could be some supplementary hearings, but that which is testified to this morning will constitute our principal source of information on the subject.

I had hoped to call on George Danielson at this point for a few remarks, and I'm sure when he comes we can perhaps permit him to make the remarks he desires to make on the subject since he is a proposer of a bill on the question. But we do have many witnesses, and in order that we may proceed expeditiously, I would now like to call on our first panel of witnesses. I would urge witnesses generally to be as concise as possible, and in some cases you may have long, extended testimony which is necessary for the record. It may be submitted for the record, but you yourself may orally abbreviate your remarks so that we can get to the nub of the matter without impinging on other witness' time.

This morning I'm very pleased to call on our first panel. The first panel of witnesses include Jack Golodner of the AFL–CIO; Victor Fuentealba, president of the American Federation of Musicians; and Sanford Wolff, American Federation of Radio & Television Artists. Gentlemen, you are most welcome.

TESTIMONY OF JACK GOLODNER, AFL–CIO DEPARTMENT FOR PROFESSIONAL EMPLOYEES, ACCOMPANIED BY VICTOR FUENTEALBA, AMERICAN FEDERATION OF MUSICIANS, AND SANFORD WOLFF, AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, RAY BROWN, LOU PALANCE, JIM GILSTRAP AND JIM HAAS

Let me call first, as our opening witness, Jack Golodner.

Mr. GOLODNER. Thank you, Mr. Chairman. I am the director of the department for professional employees of the AFL–CIO, and as you've indicated I'm joined here this morning by Mr. Victor Fuentealba, president of the American Federation of Musicians and Mr. Sanford Wolff, the executive secretary of AFTRA, the American Federation of Television & Radio Artists. With them, also, Mr. Chair-

man, are several members of these two unions, and perhaps for the record before I begin my prepared statement it would be wise to have these two gentlemen introduced to the members who are accompanying them for the record.

Mr. KASTENMEIER. Yes, if you would.

Mr. GOLODNER. Yes, Mr. Chairman. To my left is Mr. Ray Brown, and to his left, Mr. Louis Palance, both members of the American Federation of Musicians. At the far right is Mr. Jim Gilstrap, and to his left, Mr. Jim Haas, both active singers here in the Los Angeles area.

Mr. KASTENMEIER. Thank you.

Mr. GOLODNER. Mr. Chairman, you've described for us the work of your committee for a number of years which culminated in 1976 in the copyright revision. I would like to extend to you and your committee the congratulations of our department and of the AFL-CIO. I don't think too many people realize the extent of the work that had to go into that. That was our Nation's first revision of the copyright laws since 1929. I'm talking about a complete overhaul. It was a great job, and you did a great public service. We wish to recognize it.

I appear here today to register the support of the department for professional employees and of the AFL-CIO itself for the principle of copyright protection for the public performance of sound recordings. I know that the AFL-CIO needs no introduction, but perhaps the department for professional employees does.

Our department comprises 26 national and international unions which represent approximately 1.5 million people employed in every major professional field. I appended to my statement a list of those 26 international organizations.

Mr. KASTENMEIER. Without objections, Mr. Golodner, the appendixes will be made a part of the record.

Mr. GOLODNER. Thank you, Mr. Chairman.

The department is the largest interdisciplinary organization of professional people in the country. Among these people are engineers and teachers, nurses and doctors, social workers and pharmacists as well as actors, singers, dancers, and musicians.

With regard to the issue before this subcommittee, our department must be, and is, concerned with the interests of both the creator of recorded works and those who enjoy them. We perceive these interests as being wholly compatible. And so did the authors of our Constitution. They knew that in order for the Nation to benefit from the talents of its inventors, authors and artists, these creative, unique people must be encouraged and assured of a just reward for their efforts.

The Bible, after all, warns us not to "muzzle the ox that treadeth out the corn," (I Timothy 5.18) and our forefathers knew their Bible. Perhaps because we are no longer an agrarian society, the meaning of this quotation has not been lost, at least insofar as the arts are concerned. We seem to have forgotten that it is the artists, not the machines, that are ultimately responsible for the benefits we derive from the lively arts and, having forgotten, in various ways we muzzled them.

For years, jukebox operations were regarded by Congress as an infant industry requiring encouragement and exemption from copy-

right law. The needs of composers and musicians were ignored while the infant was nurtured. In time, tens of thousands of musicians lost their jobs in restaurants, cabarets, dancehalls, and countless other sites. Then, as technology perfected both broadcasting and the sound recording, the two were linked.

When America's musicians pointed out that the unlimited use of sound recordings in broadcasting would destroy opportunities for thousands of talented artists, the industry cried for special protection, and Congress complied with the infamous Lea Act which imposes criminal penalties on artists who would dare question the use of sound recordings on the air through the collective bargaining process.

Within a few years, every station in the country, granted monopolistic conditions by government and special dispensation from our laws, dispensed with live music. Again, thousands of musicians and singers became unemployed. The pool of creativity in America was diminished, and the potential of America's cultural contribution to the world somewhat lessened. After more than a half century catering to the concerns of those who exploit recorded performances, the time is overdue for our government to attend to the needs of those who create these performances.

It, today, is the performing artist who comes before Congress and asks not for special protection or consideration, but only for what is just, fair, and equitable.

The performers' plea is just because it asks simply that Congress give to them some of the rights it has already granted to other creative people and for the same reasons. The Congress and the courts have determined that a sound recording is a "writing" and copyrightable under the Constitution. Who, then, we ask is the author of this right? This committee has received innumerable testimonials by experts—illustrious conductors, musicologists, the Register of Copyrights, the Chairman of the National Endowment for the Arts, even representatives of the broadcasting industry—attesting to the fact that the performer's contribution to the recording demonstrates a uniqueness, originality, and creativity of the kind protected under the copyright clause of the Constitution.

As Judge Learned Hand noted in 1955:

"* * * the performer has a wide choice depending upon his gifts, and this makes his rendition pro tanto quite as original a composition as an arrangement or adaptation of the score itself (which is copyrightable). Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution. (*Capitol Records, Inc.* v. *Mercury Records, Corp.* 1955)

Along with the composer, the lyricist, the arranger, the performer is an author. He's an author of that performance. It is unjust, therefore, that the latter is denied benefits that are enjoyed by the former. It makes no sense in art or law to continue this patent discrimination. Similarly, it is unjust that the sound recording is singled out as the only subject for copyright that is not protected by a performance right today. This inconsistency in our laws serves only one purpose: To protect the avarice of those who exploit sound recordings by denying the authors of the recorded performance just treatment.

The plea of the American performing artist is a fair one.

On July 8, 1975 the president of CBS complained to the Senate Subcommittee on Antitrust and Monopoly that it was unfair for cable television operators to transmit CBS programing to their customers and not pay CBS. He said he was "concerned" about cable "because it operates outside the copright structure, profiting from attractions of free television but not paying for them." Mr. Taylor also told the Senate committee that 85 percent of what cable television provides its viewers is what is received at no cost from the broadcasters, and, because of this, he labeled CATV "a parastic medium." He was right. And this committee and the Congress were right in remedying the situation in 1976.

In a similar manner, the jukebox operators, background music organizations, and broadcasters are now selling recorded performances and returning little or nothing to the creators who make it all possible. One hundred percent of what is pervaded by jukeboxes and background music firms and 75 percent of radio's programing is comprised of recorded performances arranged, produced, performed, and paid for by others.

I don't believe that broadcasters are unique here. Others in the history of our country and in other societies have ripped out our timberland. They've overexploited our farmlands in the search for profits. Only recently, we've come to realize that this is very wrong, that something must be put back, that forest lands must be replanted and our farmlands cared for in a better way. Well, the same is true with our human resources. We cannot keep taking and expect to keep taking from our creative people without returning in some measure the profits reaped from that taking.

The exploiters of recorded performances, however, claim that they do offer compensation by way of free air time which supposedly promotes record sales and the popularity of the individual artist. This self-serving, unsubstantiated claim ignores the following:

(a) That the goal of the broadcaster is to increase listenership so that advertising rates and profitability can also be increased. The goal is not to promote unknown, untested artists who may or may not attract listeners. Stations play the records of artists whose type of music or individual popularity will assure listeners; hence, it can be argued that the recorded work of the artist is used to promote the station rather than vice versa.

(b) Many stations do not announce the artists; so the listener does not even know who is providing him with entertainment.

(c) Individual singers or instrumentalists who are hired to make recordings on a casual basis but who contribute a great deal to the unique sound or performance that makes one record superior to or more popular than another are never given publicity on the air. They remain, by and large, anonymous to the general public. Some of these people are with us today at this table.

(d) Indeed, providers of background music, the music we hear at this hotel, in the elevators and in the lobbies, never promote the individual artist; yet, they exploit their work.

(e) We ignore the thousands of opportunities artists have lost through displacement by the sound recording, and this must be weighed against the ephermeral claims of those who are now recording.

I'd like to digress now with a personal experience. My father was a recording musician. He was fortunate enough to participate in the famous NBC Symphony as a violinist. He devoted himself to 12 years with NBC to building an orchestra which is probably the world's leading orchestra, ever, under the directorship of Toscanini. But then he was displaced by NBC because NBC didn't need him anymore. They still used his work. He made records for Hugo Winterhalter, for Kostelanitz, Percy Faith, Jackie Gleason. In his later years he listened to himself on the radio making money for others while he was unemployed. He had only social security checks when he died, but he made millions for others.

His case is a little bit different than the ordinary worker who is displaced by technology because other workers weren't asked to contribute to their own demise. He was working, as I say, via the record, but he wasn't being paid. It's little wonder that he didn't and could not encourage his children to pursue music as a career.

(f) The problems of overexposure to the individual artist. Testifying before this same subcommittee in 1975, the actor and folksinger, Theodore Bikel, pointed out that before the advent of sound recordings and broadcasting, many performers built their entire careers on the performance of certain plays or musical compositions. "Millions came to their touring performances," he said. "Today, however, such careers can be telescoped into a single recorded performance mechanically repeated time and time again and broadcast nationwide or even worldwide."

Finally, the broadcasters would have you close your eyes and ears to the future. The advent of inexpensive, easy to operate, quality taping equipment undermines whatever little validity there may be to their claim of increasing record sales. The day is rapidly approaching, gentlemen, when it will be possible for individuals to tape record music and other performances in stereo or monoral broadcasts. When this happens, who will then buy the records and help compensate our performers?

This once we plead, let Congress anticipate technology rather than respond to it only when it's too late. In our opinion, the argument that an exploiter of recorded performances also promotes the creator of the performance by the simple act of using his or her work is simplistic and irrelevant to the basic philosophy supporting our copyright laws. If it is accepted by this committee and by the Congress, the same arguments can later be used to deny performance royalties to performers, lyricists, and publishers. After all, it can be said that the broadcast of their music also promotes their fame, the sale of sheet music, and the purchase of their records.

In similar fashion, the cable TV industry argued that by strengthening and improving the broadcaster's over-the-air signals they provide the TV broadcaster with a larger audience and the justification for charging advertisers a larger fee. But the broadcasters, a few years ago, saw no merits to this argument when it was used against their interests. In light of this, how can their efforts to make this same argument against the performance and recording industry be taken seriously?

The performer's plea is for fairness from those who take their work and turn it to their own profit, for justice under our laws so

that they may be treated as others who make a creative contribution to this society, and, lastly, their plea calls for equity among those who benefit from their efforts and owe a measure of support.

In a statement delivered to this committee 3 years ago, Mr. Andrew Biemiller, legislative director of the AFL–CIO, pointed out that: "The overwhelming number of performers who make possible the recorded works we enjoy and take for granted almost every day of our lives are not famous or wealthy. Quite the contrary, they pursue professions that are among the lowest paid and highly unemployed in the country." His observation has been verified by the recent economic study conducted by the Register of Copyrights pursuant to Congress request and is further substantiated by other recent studies of the performing arts in this country that have been conducted by the Department of Labor and the National Endowment for the Arts.

You have the Copyright Office's study of the economic condition of the performing arts. You don't have to rely on just that study. We also have studies by the Department of Labor and the National Endowment for the Arts all showing that the American performing artist leads a precarious, marginal economic life.

Assuming that our society, like most others in the world today, wishes to encourage these and future talents so that the cultural benefits of their work will remain available to future generations, how does it correct the situation and insure proper financial incentives for this talent?

One way, of course, is through government aid. The United States has encouraged this approach indirectly for many years through tax expenditures that benefit nonprofit cultural institutions employing performing artists. But this method proved to be insufficient to the task, and, in more recent years, we have turned to the more direct method of providing appropriated funds through such agencies as the National Endowment for the Arts, the National Endowment for the Humanities, and others. Unless additional funding sources are found, both of these methods, which reply on government's taxing authority, will have to be expanded. An additional source, of course, is the beneficiary of the artist's work, and, in most areas, this is still the major source. By buying tickets to concerts and plays and purchasing records, those who enjoy and benefit from the performers' work directly compensate them. But the juke operator, broadcaster, and background music firm which also realizes a benefit from the artist's performance does not, and this places an inequitable burden on the others.

Mr. Chairman, you have received a letter from the Consumer Federation of America, and I would like, with your permission, to read a part of that letter which touches on this matter of the inequitable burden that the consumer must bear in paying for our talent.

Mr. KASTENMEIER. Please proceed. However, the letter in its entirety will be made a part of this record.

Mr. GOLODNER. Thank you, Mr. Chairman. This is a letter signed by Miss Kathleen F. O'Reilly, executive director of the Consumer Federation of America.

We believe creation of a performance right for recordings will be beneficial to the consumer. At present, the consumer finances the creation and production of recordings. Commercial users—broadcasters, jukebox operators, background

music services—realize substantial economic benefits from recordings. It is they who should pay for these benefits through a performance royalty. The present situation of imposing that burden on consumers is unfair and inequitable.

The economic reports prepared for the Copyright Office persuasively demonstrates that commercial users can afford to pay the modest royalties proposed. While the economic gain to singers, musicians, and record companies might not be great, the adoption of a performance right would be a much-needed step in the right direction.

At present, almost the entire cost for developing, producing, and distributing recorded programs, as well as paying the artists, is borne by the millions of individuals who buy records for their personal enjoyment. Relative to the profit they realize on the use of these same records, the broadcast industry and other commercial users return very little to the creative sources. The pressures of inflation rest wholly on the pocketbook of the individual consumer while those who profitably exploit the record enjoy a free ride.

The effect of this inequity among those who bear the costs for maintaining our performing arts is also felt by government at all levels. In a submission to the Register of Copyrights during her study of this issue last year, Mr. Stephen Sell, the chairman of the National Assembly of State Arts Agencies and director of the Minnesota State Arts Board, noted that, and I quote:

Agencies like mine throughout the country are asked to provide publicly appropriated funds to assist artists to carry out their creative work. At least part of the need for this type of assistance is directly a result of the inability of artists to support themselves from the marketing of their creative talents * * * Performing artists are frequently unable to earn sufficient incomes from their creative work to avoid calling upon various forms of government financial assistance. Commercial entrepreneurs and broadcasters are presently able to use the work of these artists without compensating them for it. While the change in the current system being suggested here may not relieve the government of all its financial responsibilities for performing artists, some improvement in performing artists' income potentials would definitely have an impact. As such, a royalty for performers in recordings would definitely serve a public purpose.

As I have indicated at the beginning of my statement, our Department and the AFL–CIO are concerned that with regard to the sound recording, our nation's copyright laws are flawed to the extent that they are overly solicitous of those who use the recorded performances. As new technological developments make it possible for sound recordings to be more easily transmitted and duplicated, the harm inflicted upon the creative core because of the parasitic position enjoyed by those who profit from its efforts will become even more severe. The broadcasters, the jukebox operator, and the background music suppliers have helped make it possible for many Americans to hear and enjoy the work of America's performing artists, but, because of our laws, they are not required to assume any obligations whatever for assisting or supporting the creative processes.

But condoning this situation, our laws are out of step with much of the world which does recognize the creativity of the performer and record producer and the need to provide them with appropriate remuneration from the uses made of their recordings. I believe the Copyright Office study indicates about 50 countries in the world now recognize a performance right in sound recording. Because we do not, and this is another aspect of the unfairness of the situation, our performers are not receiving any benefits from the play of these records overseas; whereas, European and other musicians are.

Indeed, in recent years, a growing number of individuals and groups within our own country have seen how wrong the present situation is and have called for a change. In addition to the AFL–CIO and all of the major artists unions, the following are some of the organizations and agencies that have publicly endorsed the principles of Representative Danielson's proposal: The National Endowment for the Arts; the Democratic party in its platform of 1976; the Republican party in its platform of 1976; the Consumer Federation of America; the American Council for the Arts; the American Symphony Orchestra League; the Committee on Arts and Humanities of the National Commission on the Observance of Women's Year; the Muzak Corp. which, incidentally, does not exploit sound recordings because they make their own recordings; the Committee on Patents, Trademarks and Copyrights of the Chicago Bar Association; the section on patents, trademark and copyright law of the American Bar Association.

It appears, gentlemen, that the only groups now favoring the status quo are those who have a direct interest in profiting from it.

Twelve years ago, this committee, through acknowledging the valuable contribution of performers and record producers and asserting the copyrightability of the sound recording, hesitated to recommend rights of public performance until the issue had been further clarified and a future Congress could give it "full consideration." Since then, this matter has been debated fully before this committee and its counterpart in the Senate, as well as in other forums.

The exhaustive report of the Copyright Office represents a definitive exposition of the major arguments that have been made over the years and the legal, economic, and social questions raised by this issue. The AFL–CIO believes the Register's conclusions fairly represent the weight of opinion on this matter, and we urge you to adopt them now as your own. Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Golodner. One of the few paragraphs you didn't read from your prepared text related to quoting Theodore Bikel in his testimony before the subcommittee in 1975. I note that that former witness and friend and well-known actor and folksinger is here today, and I would like to take note of the fact that Theodore Bikel is present. I'm very happy to see him again.

Before we proceed to the other two witnesses—and I think we would ask the other two witnesses to proceed, and then we will open up the questioning to everybody—I would like to call on my colleague who really should be the host here since the southern Californian on the committee contributed so much, really, to the enactment of the copyright revision bill and whose proposal it is that we are today considering. I'd like to call on our friend, George Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman. I welcome everyone. I'm glad you're here. I know you're not here to hear any words of wisdom that I may contribute; so this will be one of the shortest speeches on record, except I want to note that until the last witness, I didn't realize that the performers lived in Appalachia. I don't intend that they should live in Appalachia, but equity and justice, in my opinion, is the basis on which relief should be granted if relief is to be granted. I've never believed that people should contribute their property or their services to another without fair compensation. It just simply amounts to un-

just enrichment which is contrary to our theory of law. I thank you and yield back my time.

Mr. KASTENMEIER. Thank you, George.

Now Mr. Fuentealba. Is that correct, sir?

Mr. FUENTEALBA. Excellent. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, my name is Victor W. Fuentealba. I am the president of the American Federation of Musicians which counts 300,000 U.S. citizens among its members. H.R. 6063, which you are considering today, would, as you know, provide some small measure of compensation to those artists whose recorded works are appropriated by broadcasters and others for their profit.

I am joined today, Mr. Chairman, by members of the American Federation of Musicians, musicians who can tell you firsthand of their own experience in terms of what a performance right can mean to them. These are artists who have invested many years and many thousands of dollars to develop their talents, but who like countless others, have had their work exploited without their consent and without compensation to them.

Mr. Chairman, the artists whom I speak for thank you and the members of the subcommittee for your continued interest in this vital matter. It is fitting that these hearings are held in Los Angeles, the home of Congressman George Danielson, the author of H.R. 6063, whose interest in the welfare of America's performing artists is deeply appreciated by them, as is your interest, Mr. Chairman, and that of other members of the subcommitee.

A natural and proper concern of the subcommittee is the correction of inequities, since our country was founded on the principles of equity over 200 years ago.

While America's performing artists have not waited 200 years for the remedy which H.R. 6063 is designed to provide, we have waited 40 years.

It was in 1940, after 3 years of study, that a congressional committee first refused to recommend inclusion of a performance right in the copyright law. The delay at the time was justified on the grounds that "thought had not yet become crystallized on this subject * * * and no way could be found * * * of reconciling the serious conflicts of interest arising in the field."

James Petrillo became president of our union. He led our union for 18 years, during which time Congress not only gave us no relief, but made matters much worse by enacting the Lea Act, a most deplorable piece of antilabor legislation. This law, still on the books, makes criminal the use of any economic means—no matter how peaceful and lawful—to protect or enhance employment opportunities in broadcasting. The law, commonly called the anti-Petrillo law, was passed in 1946.

In 1961, the then Register of Copyrights, after several intervening years of further study, informed Congress that "the issues still have not crystallized" in regard to a performance right. How could recommendations be made on issues that had not crystallized? They couldn't, and, of course, they weren't.

In 1966, Congress did concede that the arguments in favor of a performance right were so overwhelming that there was little direct re-

sponse to them, but still it put off consideration of the question until a later Congress because of the concerted opposition of the broadcasters. That was the only reason given for not taking any action.

In 1975, this subcommittee considered a performance right within the context of the omnibus revision of the Copyright Act. While deferring action on performance rights at that time, the committee, Mr. Chairman, under your leadership, requested the Register of Copyrights to undertake another study and to report to Congress with appropriate recommendations.

You now have that most comprehensive study and the recommendations of the Copyright Office. It concludes that establishment of a performance right for sound recordings is a mater of simple equity; that there are no persuasive arguments against it; that no legal, constitutional, or economic barriers actually exist.

It is now 1978, and I am now before you on behalf of our musicians. Many years have elapsed, but the issue is the same: How long must we be denied what is rightfully ours? Why, alone, are radio stations and others who use our music without our consent, exempt from paying for the product on which they base their business? Where else in our Nation does one have to beg to be paid for the use of his work when the people who expropriate that work not only freely admit its value, but become rich by exploiting it?

And make no mistake, our work is exploited: 75 percent of radio broadcast time is filled with recorded music; they pay us nothing, they don't ask our permission, and they charge advertisers up to $150 a minute for local radio commercial time. Yet they pay composers; they pay for other services—for sports, features, news. Then, to add insult to injury, they say, as they have told you in the past, that a performance right would make the fat cats richer, but would not help anybody else.

That simply isn't true. In 1976, recording companies paid scale wages of $28,177,538 to 25,452 musicians. This means that the average amount earned by each of those 25,452 musicians was $1,707.08 from recording session fees in 1976. These are the people who ask your help. These are the people, as Benny Goodman wrote you when a performance right was last considered, who are "the majority of artists [and] do not make a lot of many."

Not too many years ago, broadcasters hired musicians and singers on a full-time basis. Stations had a staff orchestra and a small staff of singers who provided the music that was broadcast. They worked on a great variety of programs ranging from classical to popular. Now they are gone, replaced by themselves on phonograph albums and, more recently, on tape. Their recorded music fills the airwaves, without cost to broadcasters, without compensation to them or to their heirs; and, because of its profusion, most of them, or their successors, cannot find jobs after a lifetime of investing as much time and money in their training as does a lawyer or a doctor.

Nor does the problem begin or end with radio. Many more thousands of musicians and vocalists formerly employed in restaurants, clubs, and other businesses were displaced by sound recordings. Now their work is used in its record form to attract customers and help make a profit for the proprietors, jukebox operators, and background music concerns.

The recording companies cannot offer us relief because their work, too, is being used without payment to them through what is actually a form of legal piracy.

We are not asking for a law that will, in the broadcasters' words, "make the fat cats fatter" we are asking for overdue and justified relief for musicians who, for example, after years of service with the NBC Symphony, sit home with little more than a social security check and listen to their records on radio while all they get is the commercial message, because there is no more NBC Symphony or any other staff orchestra at any radio broadcasting facility.

That is a very bitter thing. It is bad enough to be displaced by technological change, but to be displaced by your own creation is intolerable.

Be assured, Mr. Chairman, that the hundreds of thousands of artists for whom we speak understand and fully appreciate the enormous political pressure that has, over the years, been exerted on the Congress by those who want things to continue as they are.

We feel every bit as deeply about this matter as the broadcasters, and we are confident that this committee and the Congress will decide the issue on its merits. When it does, we also are confident that you will have earned the gratitude not only of the hundreds of thousands of members for whom we speak, but also of the public who enjoys the artists' work. For, make no mistake about it, adoption of a performance royalty would also help the public because it would enable our legitimate employers, the recording companies, to defray some of the costs of a high-risk business. Presently, the entire cost of a record is borne by the consumer. Commercial users should help share that cost. The consumer is becoming tired of always having to bear the increasing costs of the arts, while those who exploit the artists' work do not share the burden.

We are confident that Congress and this subcommittee will arrive at a fair determination and that justice will triumph over political pressure. Again, thank you, Mr. Chairman, and members of the subcommittee for your dedication and your interest.

Mr. KASTENMEIER. Thank you, Mr. Fuentealba for your excellent statement which, in due course, will raise some questions.

Mr. Wolff, we now call on you.

Mr. Sanford Wolff, the national executive secretary of the American Federation of Television and Radio Artists.

Mr. WOLFF. Thank you, Mr. Chairman. I would just like to add to your recognition of the presence of Theodore Bikel here by merely saying for the panel that Mr. Bikel is the president of one of our foremost performing unions, Actors Equity. And also with us today is the president of the Screen Actors Guild, Miss Kathleen Nolan, and I would like her presence to be noted, please.

Mr. KASTENMEIER. Thank you, I noted her presence earlier.

Mr. DANIELSON. Mr. Chairman, hers was the first presence I noted this morning.

Mr. WOLFF. Gentlemen. I have appeared before this committee back in 1975, and we've appeared again before a panel in the Copyright Office during its hearings in Washington last year. Over the years, it seems that everybody has appeared before this committee and before

the Copyright Office. It may well be that everything's been said several times, and the record is pretty complete.

I am accompanied by other artists today as I was in Washington in 1975. They are not paraded before you for any purpose other than to give you panel members the opportunity not to become impressed, but at least to become informed about the working life of the background singer in the United States. Later on, I will take the time to introduce them and tell you something about them and about their work. You will recognize their works; you may not recognize any of their faces or names.

We do owe and acknowledge special appreciation to Congressman Danielson for his vision and persistence. It is my firm belief, reaffirmed today, that the morality of the issue has provided him the strength required to brave formidable pressures mounted by the foes of the legislation in several instances.

I would also, as a lawyer, for the record, thank Miss Barbara Ringer and Miss Harriet Oler for what must be one of the most objective, brilliant, and scholarly reports that has ever been handed to a congressional subcommittee. Each time this matter is studied, each time this matter is examined on its merits, we find more friends and fewer adversaries. I have, as I have noted, been following this subject for many years, both professionally and on behalf of the union that I represent. Slowly but surely, I've noticed that there isn't anybody opposed to us that I know about except commercial users of our works. That opposition seems to become incredibly hysterical, but it's also very powerful. They've invoked free enterprise, and they've invoked phony issues of constitutionality and economics. They have, as a matter of fact, even claimed that they really do us, the background singers and instrumental musicians, a favor when they use our product.

They've said that payment of performance royalties would—and I quote Vincent T. Wasilewski, president of the National Association of Broadcasters—"lead to a reduction in the quality and quantity of radio broadcast service upon which the American public relies heavily each day for news, information, and entertainment." They've complained that the Government has no right to require one industry to subsidize another. I'm sure I've heard that argument before, and I emphatically agree that the recording industry and American performing artists ought not to have to subsidize broadcasters and others by having our product pirated and sold by them. I'm quite certain that were Vince Wasilewski practicing law today he would be gravely embarrassed were he forced to make his arguments before a jury of his peers.

Now that all the facts are in: now that the distinguished Register of Copyrights, Miss Barbara Ringer has completed what has to be one of the most exhaustive, painstaking, objective, and carefully documented reports I think any of us has ever had the opportunity of reviewing, there just are no new arguments to offer. The tired, old reasons given for denying us what are our rights have been stripped of credibility and found bereft of truth.

What have we heard so far from people who don't want to pay our members for work they use? The only real argument the broadcasters have made is that they shouldn't pay a royalty because radio sells

records. The truth is that record sales often suffer from overexposure and overplay on the radio. The question is asked, why should one buy a record when you can hear it for nothing, and you can be assured of hearing it for nothing over and over and over again? It is well to to note now the tremendous advance in the technology of the tape recorder alone which makes it possible not only for you to hear a record played over a radio station, but to tape it and keep it, and, if you happen to be a pirate, to sell it to others by duplicating and making copies. I don't know quite how to explain it. The fact is that there are more blank tapes by about 2 to 1 sold on today's market in the United States than there are tapes recorded with music and singing. Now, I must admit immediately that a great deal of that, not most of it, but a significant amount of it, is blank tapes sold for industrial purposes.

Another point of interest, I believe, is that all background music and most broadcast music doesn't promote anybody because seldom is the talent given the credit. The anonymous singers or musicians working behind a star are never given credit, and therefore, their careers cannot possibly be said to be enhanced by the playing of those records. The argument almost results in our agreeing that Alex Haley should pay the American Broadcasting Company because it popularized "Roots." Then you ask yourselves is the network Haley's benefactor or the beneficiary of his creative efforts, and the mere asking of the question, I believe, answers it.

In trying to summarize, it seems clear that the radio stations and others are not making music for the public benefit. They are not playing it to sell records for the artists' benefit. Music gets an audience for a station. It takes in money at the jukebox. An audience means a rating. A station with a good rating can charge more, and does charge more, for its commercials. A philosophical question comes to mind. Does the mortar keep the bricks apart or hold them together? The only reason the recorded music is broadcast is to separate the commercials and get an audience to listen to them, to sell commercial time.

We have no quarrel with that. We believe in it. It's the American way: if you have something, you sell it. You make a profit if you can. But first you really should own what you sell before you sell it and don't just appropriate it. In harsher words, don't steal.

Broadcasters have said, in making an argument against the legislation, that the cost of collecting the royalty may be large and that singers, musicians, and producers, may not get as much money as the broadcasters would like them to receive. Well, that's a risk we'll have to take, but I would like to point out that already there are operating mechanisms in place which would make possible the economical and expeditious payment to the artist concerned.

Broadcasters have said—perhaps this is meant as their most telling argument—that radio stations couldn't afford to pay any royalty at all no matter how minor. Survey findings to the contrary, it would seem that they would walk a little more gingerly around this allegation. And, as a matter of fact, they never have offered any proof to the allegation. I allude to the study conducted for the National Association of Broadcasters by the consulting firm of Frazier, Gross & Clay as reported in the May 23, 1977 edition of Television/Radio Age magazine. The survey projected an 85.9 percent growth in radio sta-

tion profits between 1975 and 1985, going from $1.7 billion in 1975 to $3.2 billion in 1985. In December 1977, the Federal Communications Commission reported that 5,638 radio stations and 7 radio networks reporting to the FCC averaged a 97-percent increase in income before taxes. That increase in income was earned by stations which fill 75 percent of their cumulative air time with recorded music for which they paid absolutely nothing to those artists who provided the performances.

I should, at this time, I believe, merely refer you to a short paragraph in the report of the Register of Copyrights, and I quote:

> An independent economic analysis commissioned by the Copyright Office of potential financial effects on broadcasters in an effort to provide an objective basis for evaluating the arguments and assertions of both sides of this issue.

This study concludes that the payment of royalties is unlikely to cause serious disruption within the broadcasting industry.

I would like to point out to this committee again, just in case it got lost in the record someplace, that the performing unions in this field—the musicians and the American Federation of Television and Radio Artists, and the recording companies who hire our members and take the risks and absorb the expenses of production, have reached an agreement on the division of the modest proceeds from a royalty. As you know, 50 percent will go to the recording companies, as projected. The other half will be distributed in this way, and I will do it just as simply as I can just to make certain that none misunderstand. Let's take a for instance, a situation in which a leading soloist, a singer such as Mr. Sinatra, Mr. Como, or whomever. In the instance of the production and preparation of such a recording, let us say that the star or the soloist has singing behind him 6 singers, and that in the orchestra there are 15 musicians which would make a total of 22 performing artists. In this instance, whatever the royalty might be, each of those 22 persons would realize an equal share of the performer's share of the performer's royalty.

We're all aware that the fight against this legislation has been given top priority by the National Association of Broadcasters. We are, you might say, on their hit list again. It seems axiomatic, forgiving even the morality of the issue for a moment, that if any industry is going to continue to dip into the works of others for its own profit, that at some point they have to be called to account. Hopefully, you will consider this to be the point and recommend that this legislation be adopted.

Those of us who are active on a daily basis in the broadcast field are still somewhat puzzled about the peculiar double standard adopted by he broadcasting industry. On the one hand, they argue that they should pay the performing artists nothing. On the other hand, as they did in 1975, the National Association of Broadcasters have said: "It is unreasonable and unfair to let the cable industry ride on our backs, as it were—to take our product, resell it, and not pay us a dime." That's what the man from the National Association of Broadcasters said. He also said that it offended his sense of the way things ought to work in America. We agree. Thank you. If I've been unclear, if any of us have been, we're prepared to clarify, and we have some of the laborers in the vineyard in assistance.

Mr. KASTENMEIER. Thank you, Mr. Wolff.

Incidentally, for all witnesses I should perhaps say—perhaps it's unnecessary to say it, but nonetheless I'll say it for the record—that questions asked by those of us here which may seem antagonistic to a position are not necessarily meant for that purpose, but rather to explore the premises of the witnesses in adversary fashion. So do not take offense if a question does not reflect, let's say, your own interest.

I particularly appreciated Mr. Wolff's brief explanation of how, if enacted, the division would take place of the proceeds. Let me compliment all three witnesses; you've done an excellent job this morning in setting your position. You've indicated support for the Danielson bill, H.R. 6063. The first question is, do you support it in its entirety? That is to say, are you familiar with the bill in terms of its formula and so forth, or is there any section or anything in it which you have a reservation about or which you would amend if you had an opportunity? Mr. Wolff.

Mr. WOLFF. Not only do we support it in its entirety as it's now written, Mr. Danielson's proposed legislation, but I must say that we would equally support the draft bill as suggested by Miss Barbara Ringer even though there are some differences.

Mr. COHEN. I was interested in listening to the testimony, Mr. Chairman, because much of the passion was directed toward jukebox operators. For example, in this bill, I notice that they are exempted, and I wonder why.

Mr. WOLFF. That is correct, Mr. Cohen.

Mr. FUENTEALBA. As fixed in the current law, there would be no change made there because they would not be exempted from contributing to performers' rights.

Mr. KASTENMEIER. Mr. Wolff, do you say that you approve of H.R. 6063 and/or the draft of Barbara Ringer? Do they differ?

Mr. WOLFF. Well, they do. I've made some notes as to where they do differ. I'm afraid I didn't commit this to memory, but I can quickly run through them. In the first place, in her inimitable fashion—as you can tell, I have tremendous respect for Miss Ringer—when she immediately saw a flaw in the bill, the difference between the rights of one working for hire, employed for hire, and one who may be an independent contractor, and she has corrected that flaw. That's just filling in an oversight, I suppose, and it's not a difference in the bill. But there is a section in which—in the addendum, I believe it was called, addendum to Miss Ringer's report, in which she pointed out some of the changes.

Mr. GOLODNER. Mr. Chairman, I think Mr. Wolff is referring to the Register's report with recommendations on page 27. I think you'll find the comparisons between her recommendations and the Danielson bill. We at the AFL–CIO frankly had not had an opportunity to study Miss Ringer's recommendations. From what we can gather, they are refinements which Mr. Wolff has indicated we would be pleased to go along with in large part. But, in speaking for myself, I would like to reserve, if I may, a comment on exactly where we would draw the line, what we would accept, what we couldn't accept for further submission to the committee.

Mr. KASTENMEIER. That's an acceptable way of proceeding. I did not mean to get into technical, legal argument.

Mr. GOLODNER. They are fairly technical, Mr. Chairman.

Mr. KASTENMEIER. I am interested in how you feel about the general provision of H.R. 6063 and/or the comments of the Register on H.R. 6063. And I would invite further written admissions from you.

Mr. RAILSBACK. Would you yield to me for just a moment?

Mr. KASTENMEIER. Yes.

Mr. RAILSBACK. If I read the draft correctly, it would leave the rates or the royalty payments very, very, I think, identical with the Danielson bill. But there are some, I would say, more or less technical, I think, improvements. And then there's, I think, maybe a different provision relating to how the royalties would actually be allocated or distributed, and I think, instead of locking in the record companies to an automatic one-half allocation, the Ringer bill does not do that. If it would provide, in that respect, a little more flexibility.

Mr. WOLFF. There are some other provisions like criminal liability.

Mr. RAILSBACK. She would put this back in?

Mr. WOLFF. Right.

Mr. KASTENMEIER. Mr. Fuentealba, do you have any reservations about it?

Mr. FUENTEALBA. No; I think the bill and the draft are both acceptable to the American Federation of Musicians. There is nothing objectionable in either bill.

Mr. KASTENMEIER. Mr. Wolff, you mentioned the NBC Symphony Orchestra. I take it that is a sizable orchestra. How would each member be affected if H.R. 6063 were enacted into law?

Mr. WOLFF. Well, unfortunately, you have to have a starting place for all legislation, and I think the starting place in Mr. Danielson's bill is 1972. Is that correct for recordings made subsequent to 1972? I believe that's correct. At least there's a starting date, and, unfortunately, the Toscanini orchestra, and any NBC orchestra as such, has been out of business for a long time.

Mr. KASTENMEIER. Let's assume an orchestra that is in business.

Mr. WOLFF. But if, let's say, the NBC orchestra—I don't think any of us have any particular affection for NBC, but we had a great affection for that particular orchestra. It was one of the greats, and that's why we've used it for so many times. But in the event the orchestra were to make a recording, when that recording was used by stations or in a jukebox, which is highly unlikely, I guess. There may be such a classical jukebox on a background music, other than Muzak which makes its own music, or has, at least, to this day.

Based upon the rate schedule, you might say both in the draft and in Mr. Danielson's bill, they would make a payment and the—I think now I understand the question a little better. You are concerning yourself with one additional record, is that correct, that's put onto the play lists of the station and how is it going to be divided among all the people?

Mr. KASTENMEIER. Yes.

Mr. WOLFF. OK, I think that we must be quick to confess that we haven't worked out those details. It didn't seem like a logical thing to do to spend the time and effort and perhaps even dollars with experts in working out the details until we knew we had something to work with. But I must say to you that that has already been worked out in many other areas. For instance, in our pension and

welfare funds, in what we call our supplementary market funds, in television we have worked out manners in which and procedures by which each person concerned gets his allocated or pro rata share. And I see no difficulty in doing precisely that. ASCAP has done it. BMI has done it. Other performance copyright organizations have done it. There really doesn't seem to be much of a problem. We just haven't put our heads to it; so I can't give you a definitive answer.

Mr. KASTENMEIER. Well, that is a question, and there was some suggestion earlier that there had been studies and that the time has come, and obviously not all things have been worked out.

Mr. FUENTEALBA. We have adequate records of all the personnel who are employed in the making of the record as far as the American Federation of Musicians is concerned, and we have contacts that are filed with our regional and national office which have the social security number of every performer on recordings.

Mr. COHEN. The reason I raise the question on pages 6 and 7 of the bill is that it points out that where a coin-operated phonograph player is defined by section 116, and cable system defined by section 111, "the compulsory licensing rates shall be governed exclusively by those respective sections, and not by this subsection."

As you turn to those sections, you have a section dealing with the distribution of royalties. It doesn't talk anything at all about performers, but about composers, and that's why I raise the question about how the division is going to take place.

Mr. FUENTEALBA. We had the same question arising after our discussion, and it's answered on page 11 under paragraph G. It says:

> The public performance of sound recordings by means of secondary transmissions and coin-operated phono-record players is governed by sections 111 and 116, respectively, and is not by this section, except that there shall be an equal distribution of royalty fees for such public performances between copyright owners and performers as provided by subsection (e)(3)(A) of this section.

Mr. COHEN. So whatever royalty a jukebox owner would pay to the commission, that has to be divided up equally between the performers and the composers?

Mr. FUENTEALBA. Right. But the rate he pays is already fixed by sections 116 and 111.

Mr. COHEN. What does the composer have to say about that?

Mr. KASTENMEIER. The author-composer?

Mr. COHEN. Yes.

Mr. KASTENMEIER. The author-composer is not affected, as I understand, by this bill.

Mr. COHEN. He would be affected by this, would he not?

Mr. KASTENMEIER. No, because—I should let Mr. Danielson respond to that. As a matter of fact, I understand the bill is not opposed by the existing performing right societies because their understanding of it is that it is not affected.

The Chair recognizes the gentleman from Illinois.

Mr. RAILSBACK. I want to thank all of you for your testimony. The chairman said earlier that the questions that we ask are not meant to be hostile, and I'm just afraid mine are going to demonstrate my—I don't want to say ignorance. But, anyway, are there figures on the average number of working days for a musician right

now? In other words—I'm just very curious—how steady is employment for one of your members? Do you have any figures on that?

Mr. FUENTEALBA. That's a very difficult question to answer because our employment is based on the area. We have, in our federation, approximately 330,000 members in the United States and Canada. Practically all of the television work is done in the Los Angeles area. All of the film work is done in the Los Angeles area. In many areas of the country, musicians may work perhaps one night a week or two nights a week, maybe one night a month. There is a great deal of employment in a city like Las Vegas where you have all of your hotels and lounges that give full-time employment. So it's a very difficult question to answer.

Mr. RAILSBACK. But is it possible for you to develop that kind of information? I'll tell you why. These people, without a doubt, are creative, and the argument is made that they are paid very good wages for the work that they perform. That's my next question. What are the hourly scales for most, say, for band members or musicians that support, say, a singer?

Mr. FUENTEALBA. Well, here again, that varies. For example, for making a recording, the rate for a single session is $121 for a musician. That's the only payment that musician gets as far as recording is concerned regardless of who uses that recording and where it's played. A musician that's working in a nightclub will be paid the scale that is applicable for that particular area which, again, will vary depending on the economic situation in that particular area. If it's a small city, it's very low. If it's large metropolitan area, it may be higher.

Mr. RAILSBACK. You know, there again, I would think it would be very, very helpful for us to have some economic data as to their economic well-being or their economic problems.

Mr. WOLFF. Mr. Railsback, there's a study that was just made here. A major study was just completed by the Department of Labor which was just released about a month ago, and if you want some of those figures, I referred to them glancingly. Also, the National Endowment for the Arts has figures for the underemployment and poor earnings capacity of the performing artists.

I have a brief summary here for the record, a Department of Labor study of the membership of the five major unions here in this area which are the bulk of the professional performing artists in this country. You understand that we're talking about performers that may be primarily employed, say, in the live theater, but they will do recordings as well as concerts. About two-thirds of the members of Actors' Equity—this is Mr. Bikel's union—reported some unemployment during the year 1976. More than half of the AFTRA, AGMA, and SAG members, and one-third of the members of the American Federation of Musicians were unemployed in 1976 or had incidences of unemployment because they are casually employed. But compare this to 19 percent of the total labor force had experienced unemployment in 1976.

So, in other words, two-thirds of your actors experienced unemployment compared to 19 percent of the rest of the workers in this country. The duration of unemployment for performing artists is longer than for other groups of workers in the population. For the labor force as a whole, median duration of unemployment for all

workers was 16 weeks. That is, half of all the workers had less and half had more than 16 weeks of unemployment. In comparison, an average of 69 percent of the performing artists experienced more than 16 weeks of unemployment.

As you know, to qualify under CETA, the median earnings of about $7,500 would qualify you for assistance. The Labor Department is very concerned about who is qualifying. Twenty-eight percent of the actors were qualified because they reported household incomes below $7,000, 23 percent of the screen actors, 17 percent of Mr. Wolff's membership, 16 percent of the Guild of Musical Artists, and 15 percent of the musicians. This is total household earnings; so this is not just their earnings from their performing. It includes their spouses' earnings, for the children's earnings, if they are members of the household.

Here you have people, as the Department of Labor study points out, where more than half have a college education, compared to 16½ percent of the performing artists force. Yet, you have 28 percent total household earnings under $7,500 in 1976. I would be glad to have this summary in the record.

Mr. RAILSBACK. Does that study relate to a musician where it's his principal profession?

Mr. Chairman, could we get that study and make that part of our records? We'd have a better idea as to the economic situation of a lot of musicians. Would that be possible?

How big is the study?

Mr. GOLODNER. It is quite voluminous, Mr. Chairman. I think there is about a 12-page longer summary than this.

Mr. RAILSBACK. Perhaps what we could do is make it a part of our record without having it presented. Could we do that?

Mr. KASTENMEIER. Well, I would invite Mr. Golodner to submit that for prospective inclusion in the record. We will examine it, and if it's just a 12-page document, it might be suitable for the record.

Mr. GOLODNER. This is merely a pamphlet.

Mr. FUENTEALBA. Mr. Chairman, I think it important to bear in mind it was not too long ago when there were musicians employed upon radio stations, and now they're displaced by records.

Mr. RAILSBACK. I understood that from your testimony. I'm just very curious. I think a lot of us don't know exactly what their economic situation is. I had no idea how many of them had to moonlight, how many of them are unemployed. I can understand your allegation that there has been a serious disruption by reason of some of the sound recordings and so forth.

Mr. WOLFF. In further answer to Congressman Railsback—and I hope that it needs no saying—in the first place, we can very easily, this morning, privately or publicly demonstrate to you the life of the busiest type of singer doing this kind of work. Very easy. More importantly, I believe, is I hope that since 1975 we have been able to impress upon you it's really not important, basically, how much money the singer is making because you know darn well he's not making as much as the broadcast industry, and he's not using their material, they're using his. The morality of the issue must be the principal matter to be considered here. It just has to be or our whole structure collapses; our whole capitalistic structure collapses if one is allowed to

steal from the other and get the approbation of the public and the Government. This is the important think, sir, and I hope that we have in some way impressed that upon you.

Mr. RAILSBACK. Yes. That's all I have.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I'd like to amplify a little bit of what our chairman pointed out at the beginning. The purpose of this hearing is to obtain and collect information for the benefit of the committee so that if and when we get around to marking up a bill, we'll know what changes to make in it, what to do with it.

"Mark up" is our shorthand term for "writing the bill." The present context of H.R. 6063 is sort of a projected plan, a pro forma. That doesn't mean we're going to wind up that way. In fact, if we do wind up that way, it will probably be the first bill in the history of the United States that will wind up the way it started. Our questions are important because we need to have some feedback from those of you who have expertise in this field so that when we come to marking up the bill, truly writing the bill, we can make it serve its purpose.

I have a couple of specific questions that I'd like to put to any of you. We know that with a recording one stellar performance can be used time and time and time again. It eliminates the need for the artist or the artists, plural, to get together and play every afternoon at 2:30. I mean you've got a recording; now you can play it anytime you want to. That has more than one significance. One that bothers me is this: To what extent would the performance royalty do anything toward providing more jobs, more employment for performers? Any of you, please, field that question for me.

Mr. GOLODNER. I think, Mr. Danielson, it's important. I would like to reiterate before I begin to answer your question what Mr. Wolff has said. This is not a relief bill.

Mr. DANIELSON. That's my next question, but right now I'd like to know to what extent will this bill, if it's passed, create more work, more jobs. To what extent will these performers be working more frequently and be unemployed less frequently?

Mr. WOLFF. I don't believe it will have that effect at all, Congressman Danielson.

Mr. DANIELSON. I think that's correct, but I wanted to hear that from one of your gentlemen.

Mr. WOLFF. We have not found any make-work, any encouragement of employment in the bill as such.

Mr. DANIELSON. I don't quarrel with that. That was my understanding, but I wanted to hear it from the other side of the table. We still recognize that once a performance is recorded, it then is susceptible to being exploited time and time and time again, and that the effect of having a royalty would be that while the artist does not go to the studio and play live every day, he will at least get some compensation as a result of the occasions on which his work is exploited. In other words, his compensation will have some kind of a continuing effect based upon the use of the recording, but he doesn't go to the studio and play every day.

Mr. FUENTEALBA. This would augment the income which is sorely needed by all of our members and enable many musicians to continue

in the profession which they love, which today they are forced to go into other jobs and moonlight because they don't have an adequate income.

Mr. DANIELSON. I understand that. The effect of this bill would be that a performer who participates would continue to derive a degree of income from his earlier performance. That's about it, isn't it, in a nutshell?

Mr. FUENTEALBA. Yes.

Mr. DANIELSON. Now, one of you gentlemen in response to one of the questions said that you had not fully thought out the degree to which an individual performer would share in the pool.

I believe, sir, that it was you, Mr. Wolff. Would you expand on that just a little bit, please?

Mr. WOLFF. There's not much more I can say except that we know that there are other procedures and machinery already in place which have accomplished the same kind of distribution of pooled funds; so there are models that we can use.

Mr. DANIELSON. I wish to thank you because your answer is correct here, but I really am laying the groundwork to making a request.

Mr. WOLFF. Yes, sir.

Mr. DANIELSON. One of the facts of life in legislation, be it this bill or any other bill, is to make it fly. We have to get past this little subcommittee. Then you have to get past a full committee, and then you've got to get past the whole Congress. And at every step you have some tremendous thresholds to cross. I am as certain as I am sitting here that the question will be raised time and time again: Well, won't all this money simply go to the fat cats—I think one of you gentlemen have used that term before—how do I know that Tom Jones who plays the drums or somebody's who's playing the piano or somebody who's a little obligato in the background, how do I know he's going to get any money out of this? Would you and your best heads please get together and work out some kind of a pro forma idea as to how we might be able to share these things?

This committee will hold hearings again in Washington, if not here, and we're going to have to be able to answer that question when it's put to us on the floor of the House if we're going to have any possibility of passing this bill. So do a little constructive thinking and give us the benefit of it. It is not a legislative function to go into that intimate detail and to put it into a bill itself.

Mr. KASTENMEIER. If my colleague will yield on that, I'd like to endorse exactly what he has to say. I would like to be able to follow the royalty dollar from the broadcaster to the pockets of the two witnesses on the end, the singers. I would like to be able to see through what mechanism it will reach them and at what point in time, how long it is, life plus 50? How would it be monitored? On what sort of shared basis would this take place? We would have to be able to answer all those questions, very frankly, to convince others that it is a worthy idea.

Mr. WOLFF. Mr. Chairman, we had thought, back in 1975, of preparing such a pro forma, as I think you've called it, but we felt that this was just opening up another area in which we could be attacked. You've got to understand that if we give you a pro forma, it's going to be, I suppose, attributed to us as the thing that we insist upon; whereas, I

would hope it could be presented and received as one of the ways in which an equitable distribution could be made. Is that possible? I mean can it be accepted in that way?

Mr. DANIELSON. That's precisely what my opening comment was. We are asking questions in order to obtain information which will assist us in marking up the bill. I don't think that we would ever put such a schedule into a bill. It doesn't belong in law, but the information might wind up in a committee report which sort of provides the background music for the law. And I think it would be very helpful to us—I know it would be very helpful to us, and I think it would enhance the chance of this bill passing if it should reach the floor.

Mr. WOLFF. We'll do it.

Mr. DANIELSON. Fine. We'd welcome it. At least I certainly would. My last point that I want to make here, you have a statistic that the recording industry paid out some $28 million last year to pay scale wages to some 25,000 performers which would be around $1,100 each. Now, that's an interesting statistic, but to me it's not persuasive of anything, and I want to tell you why. Within that bracket you have counted every musician, every performer, who was paid at all. The one who came 1 day and got 1 day's scale is counted as well as, probably, the most overemployed performer in the industry, and it just doesn't work out that way: There's little potatoes and big potatoes. It's not too persuasive. If you want to give us some kind of a breakdown by bracket that there were so many who collected in this bracket and another, that might be of some help to us.

Mr. FUENTEALBA. We would furnish that information to you.

Mr. DANIELSON. I think it would be a more valid statistic. I see creeping into the background some of the questions precisely what Mr. Wolff said we're not trying to do here, and I'm glad to hear that. This is not a social reform measure. It's not the function of the Federal Government or, in my opinion, any government to solve all the social ills with which we're afflicted.

There are some, probably a little more primitive than I, who feel that the government's role is to protect the coastline and coin money. I go a little further, but you're not going to be able to solve all the ills that beset the entertainment industry through this bill or any other bill that we could generate. Capitalism, free enterprise, competition necessarily dictate that some who would like to be Sinatras or Comos or, heaven forbid, what's that beautiful girl? Olivia Newton-John. They're not going to make it.

Mr. KASTENMEIER. Congressman Railsback would like to add Linda Ronstadt.

Mr. DANIELSON. But everybody is not going to make the top dollar. It's tough if somebody who would love to be a Linda Ronstadt has to wind up as a checker someplace in a food store, but, you know, if you can't cut it on one level, you're going to have to cut it on another level; otherwise, you're going to have to roost someplace else.

I feel that if a performer has created, by his or her talent or performance, something of value that is recorded in some kind of tangible form so that it can be performed time and time again, then that person ought to get a fair share for his contribution. But I don't feel we have to guarantee to everyone the optimum livelihood, full employment, and all the other goodies that come down the line.

I hope you understand my point of view, and, frankly, I don't think you disagree with me on that.

Mr. WOLFF. We do have——

Mr. DANIELSON. You ought to have fair compensation for what you've created.

Mr. WOLFF. Did I interrupt you?

Mr. KASTENMEIER. No, but we do have a time problem here, and contributions will have to be recognized.

Mr. WOLFF. We do have some working singers here who can tell you what they did, what contribution they have made to the programming of the broadcast and the background music and the jukebox industry. We can tell you what their contribution has been, and we can tell you they have received absolutely nothing from those users. I know you have a time problem. Could we perhaps just enter into the record in written form a description of those gentlemen and ladies who are here today?

Mr. KASTENMEIER. Please. You may certainly do that for the record.

Mr. FUENTEALBA. I think, first, Mr. Brown would like to cite an example about a recording he had made if we have the time.

Mr. BROWN. My name is Ray Brown. I am a member of the musicians union. Some years ago, there was a gentleman who became very popular via recordings by the name of Jose Feliciano. I'm sure most of you must have heard of him at some time. He did a bluesy version of the "Star-Spangled Banner" for a baseball game in Detroit which got a lot of notoriety. He's a blind man, and we did some recordings. His very first album, he and I and a drummer went into the studio. Now, there's no way for him to read music; so he has to discuss it, and we just talked about what we were going to do. We discussed these things, and some of the ideas were mine and some were his and some were the drummer's, and we made up these arrangements and recorded them. Then they brought in an arranger who then took what we had done and recorded the music for the orchestra which they put over it. One of the tunes we did was "Light my Fire" just to say an instance. And this thing was being played all day long on the jukeboxes, on the radio, and I'm back in Detroit where my brother-in-law works in a factory and my sister-in-law works in a factory. One works at Ford; one works at one of the other plants.

They heard this on radio, and they knew I was on the record, you know, and they said, "Boy, you're going to be rich. We hear that record all day long." I said, "Listen, I'm not getting one penny." They said, "You mean you don't get anything?" Well, at that time scale was 70-some dollars. I said that's what I got, and that was it. If that record is played in 1990, if it comes back and it's a hit again, I still don't get a penny.

You know, a guy makes a car or drives a bus, at least he gets something besides social security. He gets a pension from Ford or from the plant, you know, but we don't get not one penny, and this is what we're talking about, not how much we make, per se, but musicians make what they make at the time, and then, although their stuff is being played, they never get anything else, and when they get old they don't even get a pension.

Mr. KASTENMEIER. The Frank Sinatras get so many cents a record, don't they?

Mr. BROWN. The stars get paid.

Mr. GOLODNER. Mr. Chairman, that is not on the use of the record. They get a royalty on the sale of the record. The consumer, we're keeping this whole thing going. But they don't get paid from the use of their record. And there comes a time when people will be taping right off the air and won't be buying those records, and they're not going to get any royalties out of the sales. This is what we're concerned about.

Mr. KASTENMEIER. Thank you, Mr. Brown.

I'd like to now yield to the gentleman from Maine and to say the gentleman from Maine is correct about the provisions of H.R. 6063 with reference to the distribution of jukebox royalties. This would be split, presumably, between author-composers and performers. And the presumption, I guess, was that it would be rectified by the copyright royalty tribunal, this division. But, in any event, he was correct in that assumption. I yield to the gentleman from Maine.

Mr. COHEN. Thank you, Mr. Chairman.

First, I'd like to say, in rebuttal to what appeared to be an intimation in the presentation by the panel, I'd like to take this opportunity to praise the chairman of this subcommittee. I had the opportunity to serve on this in the past, and he is perhaps one of the most independent and nonpartisan chairmen that I've ever worked with, and I want to tell you that he does not bend under the weight of pressure, no matter how dense that pressure might be or whatever its intensity, and so that the fact Mr. Wolff that you might feel that you're on the hit list of some associations or broadcasters does not mean that either the chairman or the subcommittee or the full committee shares the same sort of feeling, which is not to say that there are not some serious questions to be asked and answered, hopefully, before we ever proceed to the full committee or to the Congress itself. But there are, I think, some legitimate questions which have to be raised notwithstanding your reluctance, I think, to put forth a proposal which might be subject to attack.

Justice Holmes once said: "The truth of an idea is its ability to get itself accepted in the marketplace." And we have to deal in the marketplace of ideas to the extent that those ideas stand the test of criticism and scrutiny and otherwise so that we have a better product to go to the Congress with. Those questions will be raised, and if there are not satisfactory answers by us, it will be rejected.

Now, I'd also like to say, Mr. Golodner, I was very impressed with the presentation that you made. I think, however, one thing that you tended to get into which I don't feel was related to this matter was characterized as being exploitation. I think you touched upon the exploitation of the land in some sort of analogous situation, and I appreciate the intensity with which you are speaking. But it comes to mind, for example, that there is a very controversial measure here in California about the extension of the protection of the redwood trees. And there you saw, I think, that the AFL-CIO did not consider that to be a question of exploitation, that the workers actually had a commonality of interest with their jobs as far as that was concerned; so that was not necessarily consistent with conservation of the redwoods, but rather, I assume, the AFL-CIO took a different position on that.

I have a similar situation in Maine right now. For example, we have a proposal for the construction of a dam which would destroy 88,000 acres of land, and, of course, the AFL–CIO was in favor of that construction to produce jobs; so it isn't necessarily tied together, the exploitation of land and the exploitation of writers and performers, and that's something I think we got off on.

Mr. GOLODNER. I don't think we ignored the human considerations because the resolution of that did provide for those workers that were being displaced from the opportunity of making a living. In quite a heavy package, I believe, Congress voted to assist those workers. In the same way here, we're asking that the workers in the arts field be somehow compensated for their work. However, I don't think the analogy is quite correct because we are here, and I guess I get in trouble from speaking extemporaneously in reference to——

Mr. COHEN. I didn't find it in your prepared speech. Let me ask you this: How would this benefit the consumer? You made that statement. Mr. Wolff made that statement that such a bill would ultimately benefit the consumer. Do you really mean to suggest that prices of records are going down as a result of this bill?

Mr. GOLODNER. I don't think they're going to go down. I think it will moderate pressures for pushing them up. Obviously, when you're broadening the base of those who are sharing the costs of the production of these materials, you are relieving, to that extent, the total burden which is placed on the pocketbook of the consumer.

Mr. COHEN. I'm not sure I followed that because it seems to me, notwithstanding what we do on this committee, the price of records will continue to go up like everything else is going up. And I don't see how this bill will benefit the consumer in the sense that whatever advertising costs are passed from the broadcasters back to the advertisers will be passed on once again to the consumer in the form of higher prices; so I didn't follow the logic of that statement.

Mr. GOLODNER. That is theoretical. We don't know how much will be passed on to the advertiser. The various studies we've seen from the FCC, the Copyright Office, shows that the broadcasters are quite healthy and probably could absorb some of this additional cost. We're speculating here, now.

What we do know is the performer can't afford to subsidize this anymore, and the only place he can go for the money is the recording company. And the recording companies have to pass that on to the consumer, or, very frankly, the concern is that they can just as easily record in Europe where the musician there does not have to front load his recording session as much as the American. The American, when he goes and makes his recording, says, "This is the last chance I'm going to get any money out of the recording because I'm not going to get any further payments."

Mr. COHEN. We're pressed for time, and there are a lot of issues I'd like to discuss. To say that consumers are going to benefit, ultimately, from this particular measure, I don't think that would withstand analysis.

Mr. KASTENMEIER. I want to thank the gentlemen from Maine and also for his comments, although I must say the only hit list I know about is the top 40 tunes they play today.

Let me, on behalf of the committee, say that I appreciate your appearance here this morning, all the principal witnesses and those of you who have accompanied them for their contributions.

It is clear that there are other questions we haven't asked. There are areas we haven't explored. We may have to supplement this last hour and a half by other means in the future, but that doesn't diminish the contribution that you've made this morning. And on behalf of the committee, let me say that I appreciate it.

Mr. WOLFF. Thank you, gentlemen.

Mr. KASTENMEIER. Now I would like to call, as our next group of witnesses, the distinguished group of representatives of the National Association of Broadcasters, and I would like to call on Mr. Carl Venters who is president of the radio station WPTF, Raleigh, N.C., board member of the National Association of Broadcasters. If he and other broadcasters would come forward, rather than introduce you myself, I will defer to Mr. Venters and permit him to introduce members of this panel.

TESTIMONY OF CARL VENTERS, NATIONAL ASSOCIATION OF BROADCASTERS, ACCOMPANIED BY "BUDDY" DEANS, MAJOR SHORT, JOHN DIMLING, WILLIE DAVIS, PETER NEWELL, JOE RAYBALL, AND TED ARNOLD

Mr. VENTERS. Thank you, Mr. Chairman. As you said, my name is Carl Venters. I'm from Raleigh, N.C., president and general manager of Durham Live Broadcasting Service which operates WPTF–AM, WQDR–FM, and WRDU–TV. I also represent the North Carolina Association of Broadcasters.

Before introducing our panel members, I would like to introduce several people, several of the broadcasters sitting behind me: Wade Hargrove, who is executive director and general counsel of the North Carolina Association of Broadcasters; Frank McLauren, who is chairman of the California Association of Broadcasters from Santa Rosa; Howard Smiley, president of the California Association of Broadcasters; Bob Light, the executive director of the Southern California Broadcasters are among the other broadcasters behind us.

Introducing our group here—and several of those will make presentations after I do that—I'd like to first introduce, on my left, Mr. "Buddy" Deans, president of the Arkansas Association of Broadcasters and also president and general manager of radio station KOTN–AM–FM, Pine Bluffs, Ark.; and, next to me, Mr. Major Short, president and general manager of the radio station KOBH, Hot Springs, S. Dak.; and, immediately to my right, John Dimling, vice president, and director of research, National Association of Broadcasters, Washington, D.C.; and, to his right, Willie Davis, president of radio station KACE–FM here in Los Angeles; and, next to Willie, Peter Newell, general manager of radio station KPOL–AM–FM here in Los Angeles; and, also to his right, Mr. Joe Rayball, president of the Massachusetts Association of Broadcasters and also of radio station WARA of Massachusetts and vice-president of WVNA, Salem, Mass. And that, with all those call letters and details, is our panel. I forgot Ted Arnold down there. Ted Arnold is vice-president and

general manager of radio station WHBF-AM-FM, Rock Island, Ill. Pardon me. I think that's it.

Mr. KASTENMEIER. Just by happenstance, he comes from Congressman Railsback's district. Pure coincidence.

Mr. VENTERS. We'd like to begin by asking Peter Newell of KPOL-AM-FM, Los Angeles, to make a statement. We'll follow that with several other statements and then leave the time open as you suggest for discussion.

Mr. NEWELL. Mr. Chairman, I'm currently chairman of the board of directors for the Southern California Broadcasters Association. This is a trade organization representing some 125 southern California radio and television stations. A number of our members are present here today, and I'd like to recognize them.

Would the Southern California Broadcasters members please stand.

Mr. KASTENMEIER. For the record, I think there are perhaps as many as, at least, 20 persons so that obviously southern California is well covered by radio broadcast.

Mr. NEWELL. We are here, Mr. Chairman, to voice a very strong and very sincere opposition to this proposed legislation. We believe it creates a most unfair and inequitable situation and one that causes us a very grave concern.

A performance right in sound recordings is purely and simply a redistribution of moneys from one segment of the private sector to another. There will be no benefits to the Nation's economic system from such a transfer of funds and no benefits to the general public.

There will be benefits flowing, however, to record companies and to performers, but absent economic or public welfare improvements, any decision to restrict moneys in the private sector must be made on the basis of fairness and equity.

The premise put forward by the supporters of this legislation is that a current inequity exists, that radio stations use recorded performances in order to attract audiences which they then offer for sale to advertisers. Since the producers of the recordings are not paid by the radio stations for the programing material they supply, it is said that radio is exploiting their product. If, in fact, record companies and performers do not receive anything for the use of their product, then they should be compensated. But let's look at the realities of the two businesses. The record companies and performers derive most of their incomes from the sale of recordings. By far the most important factor in generating record sales is radio airplay.

Without radio, the record industry would be a small fraction of its present size. Fewer performers would be working, and those who worked would be earning less money. This is a most important point. Radio is responsible for the economic existence of today's recording musicians. I ask anyone who's testified here today if their industry would not wither without radio air play.

Record companies and performers make no direct payments for the free exposure of their product on radio. Radio stations, as yet, have nothing to sell but their air time. Advertisers have determined that that air time has a tangible value to them. It's a commodity on which a price has been set; yet, the record companies pay nothing for that which producers of other goods and services pay substantial sums.

In fact, record companies receive more benefits than paying advertisers receive. They get more repeated exposure for their product than commercial accounts, and they get more valuable exposure. Other advertisers must be content with a mere description of their product. In the case of recordings, the product itself is presented for examination by the potential purchaser.

There can be no question here that record companies and performers receive something of value from radio stations when they get free air play. The question is, is that value enough to compensate them for providing free product for use in stations' programing?

One way to determine the value of free air play is to listen to what record industry executives say about it. Bob Sherwood who's vice president of promotion at Columbia Records was quoted recently in Billboard magazine. He said, "If a record doesn't get air play, it doesn't sell." Last fall, I spoke with John Houghton, general manager of Licorice Pizza record stores in Los Angeles. He said, "Radio station air play is the most important factor in the sale of records. The more stations that get on a record, the more it sells, and the higher the play rotation, the more it sells." One record manufacturer's survey of rock sales found that over 80 percent of albums are purchased because people have heard a particular portion, one or two of the songs, over the radio and like them.

If you want more evidence as to how much importance the record industry attaches to the free use of radio's valuable air time, look at what they do, not just at what they say. Record companies give away their product to radio stations free of charge. They could charge us for this product, just as they charge the public, but they don't, except in the smaller markets.

They give us millions of dollars worth of their product free just to encourage us to play it. They spend millions more in trade paper advertising trying to get recognition for their new records. They maintain large staffs of promotion people who are told to get us to add their new records to our play lists. In 1976, the industry employed 185 people to do this just in the city of Los Angeles. Fifty-two record companies employed 684 people across the United States that year just to ask radio stations for free air play. They spend additional millions to buy advertising time on radio stations.

I've heard the testimony this morning about our exploitation, the legal piracy that we indulge in, the using of their product without consent. This is unbelievable. If they could legally do it, the record companies would not spend all this money to get us to play their product. If they could legally do it, they would force us to play the product.

So what record companies do as well as what they say tells us that radio air play is the lifeblood of their industry. Our product, our valuable air time, given to them in exchange for the use of their product is what makes the record industry what it is, a $2.7 billion-a-year business, a bigger industry than radio, their benefactor, by some $700 million a year.

What's more, radio's $2 billion annual revenue is divided up among almost 7,000 stations. By contrast, most of the $2.7 billion in record revenues is shared by fewer than 100 record companies. Radio is an industry made up mostly of small businesses. The record industry is

dominated by big business. And here we have their big businesses, made big by our small businesses, saying that they are being treated unfairly. That is unconscionable.

The record industry will tell you that a very small number of their records gets the kind of air play that produces high volume record sales. Even assuming this to be true, this group of hit records accounts for the great percentage of record industry profits and easily covers the costs of their unsuccessful releases.

If any inequity exists, it is that radio stations are not being adequately compensated for all this free advertising. The record industry generates $2.7 billion in sales using our product, and we generate only $2 billion in sales using theirs. Unfortunately, because the FCC limits the amount of air time we can sell each hour, stations are unable to charge for the records they play. If radio stations are to be charged a performer's royalty fee, the present balance in the marketplace would be destroyed. There's simply no rational justification for disturbing that balance. We hope the subcommittee will recognize that a performance royalty will create an unfair windfall for record companies and performers. We hope you will reject this legislation.

Some potential questions remain to be answered. What about the fact that European nations recognize performers' rights in sound recording? The answer here is that those nations have broadcast systems which are owned or controlled by the government, and it is the government that pays the performers' fees. This is simply an indirect government subsidy of performers.

Another question: Can radio pass these fees onto the advertisers? The answer is, in most cases, "no." The larger, more profitable stations would certainly try to recover these fees through rate increases, but if advertisers rebelled, the station would have to rescind. Most stations cannot raise their rates just because they want to or even because they need to. Rate increases have to be accompanied by increases in audience size or increased demand for air time. The Register of Copyrights was incorrect in her assumption that we can simply pass along extra costs. But the argument here is not whether stations can afford it, or whether they can pass it along. The question is whether our industry is going to be mistreated for the benefit of another. Others will testify regarding the Register's report, but I can assure you of another inaccuracy. It stated that radio station losses reported to the FCC are not real. I can tell you that the figures reported by my station are real, and I can never remember from my 19 years in the business reporting anything other than its actual income and expenses.

Another question: Aren't background singers and musicians poorly paid, and couldn't these fees remedy that situation? I don't have expertise in musicians' compensation. However, it is my understanding that most musicians are represented by labor unions, and it's their responsibility to get them fair wages. This is a problem between the record companies and the labor unions, and the broadcasters should not be brought into it. Moreover, if you assume that these royalties will be allocated to musicians based on frequency of record play, the musicians whose records are popular will be getting most of the money. Those who are doing poorly now, because their records aren't being played and aren't being sold, will continue to do poorly. The

record companies and the star performers are making substantial profits, and in many cases the income of the star is measured in the millions of dollars. It is these people—the record companies and the highly paid performers—to whom the musicians should turn for relief. The broadcasters, I have already stated, have already paid with their valuable air time. They are beneficiaries of our exposure of their work.

Another question: Shouldn't classical music and classical musicians receive support? I think perhaps so, but not this way. The record industry revenues and profits are growing rapidly without this legislation, but the percentage of classical music being recorded is declining. History has not shown that the industry will divert windfalls into the production of more classical music. Moreover, classical recordings represent a minute proportion of records played on the air, and, therefore, the percentage of rights fees they receive will be next to nothing. It will be spread thinly among a great number of musicians per each recording as well. Also, classical music radio stations tend to be unprofitable or marginal at best, and they will be hurt the most. The public will lose the services of classical music stations which will either change formats or go out of business. The loss of even a few classical stations would never compensate for the small sums generated for classical performers.

In summation, it might appear on the surface that broadcasters should pay for the music which is produced at great expense and at great risk by the record companies. But going deeper, you can see that broadcasters provide the record companies an equally valuable service and at no charge. The burden of proof that the present system is inequitable lies with the record industry. They haven't supplied that proof because they cannot. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Venters.

Mr. VENTERS. Our next presentation will be made by Major Short, president and general manager of radio station KOBH, Hot Springs, S. Dak.

Mr. KASTENMEIER. Mr. Short.

Mr. SHORT. Thank you very much. I don't envy you, you gentlemen on the committee, considering this kind of legislation when you have never been in either phase of the recording industry or in broadcasting. But for 20 years, starting in 1948, I was a traveling entertainer, musician, and recording artist. For 18 years I was a partner in a group known as "Somethin' Smith & The Redheads." With this group I recorded six albums as well as many single releases on the Epic and MGM labels. The recording phase of my career started in 1954 and ended around 1960. Since 1968 I've been a broadcaster. I own and manage radio station KOBH located in Hot Springs, S. Dak. Now, as you can see I've been on both sides of the situation, have had the unique experience of being a performer and a broadcaster, and from that experience I make these observations.

When I recorded, I recorded as a union musician in spite of the fact that I was a so-called artist and under contract to the recording company, I still recorded under union contract and, therefore, was paid union scale for the time I spent in the recording studio. In the event our record was a commercial success, we'd receive royalties from the recording company according to contract.

At recording sessions, all of the sidemen work on union contract and receive union scale at least. Scale for recording dates is probably the highest in the business; so recording jobs for performers are regarded as economic plums. I have known musicians who limited the number of months they would work in recording studios largely because it would not make economic sense to continue to work into a higher tax bracket. Since the recording musicians are the best in the business, many of them have other regular studio jobs in television and pictures, not to mention live performances if they choose to do so. In all the years I spent in the recording business, I never saw an underprivileged studio musician. As a matter of fact, even as a semisuccessful artist, I always somewhat envied the economic security of the studio musician. I still do. My conclusion is that there is considerably more greed involved in the promotion of this bill than there is genuine need.

My second observation is that the percentage of performers who would qualify for benefits under the proposed copyright legislation is very small. Under present conditions, companies can't afford costly errors during the recording session; so only the best performers are hired. They represent a very select coterie of musicians and singers. There is talk that the money collected from the broadcasters would go into a general union pension fund. What logic makes the broadcasters liable for the welfare of the vast majority of performers who never go near a recording studio? As a member of Musician's Union Local 47 in Los Angeles for the past 29 years, I have received union publications and have noted the political aspects of the arguments of union officials. They thirst for a union victory, but that victory would probably affect no more than a half dozen locals in the country, and that's an estimate.

One of the biggest questions that must be decided is "who is creative?" If it can be decided at all, it requires understanding of what goes into a recording session. A session calls upon the talents of producers, artists, composers, arrangers, conductors, musicians, singers, engineers, copyists, contractors, editors, not to mention countless other company employees who make contributions and decisions prior to the session. From my experience it would be impossible for me to conclude that a musician or singer or any performer, collectively or individually, makes any greater contribution or was more creative than any other member of the production crew. They must be competent, or they wouldn't be hired. But they need no greater degree of competence than a carpenter or electrician. They are hired to do a competent job, and they are paid for that job by the company that hires them. It makes no sense for performers to expect a lifetime annuity for 3 hours' work in a recording studio.

I would like to call to the committee's attention the fact that in almost every case there are many more performers on a record than there are composers. The cost of implementing this kind of legislation would, therefore, be significantly higher than the cost for distributing money to the composers. This fact presages higher rate adjustments for a not-too-distant future making the likely economic impact on broadcasters much greater than it appears with this "foot-in-the-door" legislation.

At present, recording companies are solely responsible for everything that is recorded. This demands financial responsibility, and

this consideration automatically requires the companies to search for quality in every phase of record production from the choice of studio to artist to the performers, technicians, et cetera. If the burden of financial responsibility is lessened, I think you can expect the quality of product to be affected negatively. There's a considerable amount of experimentation and indulgence with producers' fantasies now. If the broadcasters start footing the bill, I would expect the emphasis to switch from quality to quantity, thereby increasing the odds for a "far out" hit for the company. I conclude that the public would not benefit from a glut of recorded garbage.

My final observation is that the recording industry is one of the most successful industries in America. Visit the marinas on the east or west coast and see the expensive yachts of recording company executives. Visit Nashville, and you can take your choice of minibus tours that offer to show you the expensive mansions of performers. The only reason they don't point out the equally impressive mansions of the recording company executives is because the public is not aware of who they are. But I've been in them, and I know they're there. I don't wish to deny them their luxuries. I just don't think it's fair to expect me as a broadcaster to make donations to their welfare anymore than I expect donations to mine. Incidentally, I buy my records.

Mr. KASTENMEIER. Thank you, Mr. Short.

Mr. VENTERS. Our next presentation will be made by Willie Davis, president of radio station KACE–FM here in Los Angeles.

Mr. KASTENMEIER. I might say at the outset that Willie Davis is known to many Americans both to us in Wisconsin as a very special place because he was with the Green Bay Packers, and I recounted old times I spent with him when he was player representative for the Packers. I'm glad to see his success in California.

Mr. DAVIS. Mr. Chairman, I am president of FM radio station KACE in Inglewood, Calif., a close-in Los Angeles suburb. My station uses a great deal of music, mostly contemporary soul. My statement this morning will be brief and to the point. I oppose—and I am sure that nearly all owners and operators of black-oriented radio stations oppose—H.R. 6063. I am not a lawyer, and I am not qualified to discuss the constitutional issues involved here. I am a businessman in a very tough and competitive fight. I run a small class A FM station competing against a Los Angeles giant attempting to attract listeners in large enough numbers to secure advertisers in large enough numbers to make ends meet.

You realize, I am sure, that there are very few black people involved in station ownership. I purchased KACE from a trustee out of bankruptcy. We've had a tough time in getting the station on the air and trying to build a listening audience. I want to tell you on behalf of every small station operator that one thing we don't need is an additional payment for records that we play. I don't know if the artists who perform in the soul music area are creating something that is copyrightable. However, I do know that an extra 1 percent cost of doing business is going to hurt a station like mine. It will affect the quality and the extent of our public affairs programing. I urge you not to impose performance royalties on the broadcast industry.

I understand, gentlemen, that tomorrow your subcommittee is scheduled to take a tour of a recording studio. I would like to respectfully offer you a tour of KACE. It's located at 1710 East 111th Street out of the high rent district. I don't think you would find it very luxurious. While there, you could take a look at my books. I think you'd be impressed, for the dollar volume is not there. But I think you would also be impressed with the expense I face. KACE lost a considerable amount of money in 1977.

In conclusion, Mr. Chairman, let me quote from the November 24, 1977, issue of Jet magazine. Bill Withers, a popular black vocalist, whose hit record "Lean on Me" was one of the Nation's top sellers, a few years back said, "Every dime I've got is from records, and I live or die by radio . . ." Thank you.

Mr. KASTENMEIR. Thank you, Mr. Davis. Of course, I suppose if Mr. Bill Withers were here testifying, he would be testifying for the other side, don't you think?

Mr. VENTER. Our last statement will be made by John Dimling, vice president and director of research for the National Association of Broadcasters.

Mr. KASTENMEIER. Dr. Dimling.

Mr. DIMLING. Thank you, Mr. Chairman. My name is John Dimling, and as Carl says, I'm vice president and director of research of the National Association of Broadcasters. I'm also an economist, having spent most of my academic and professional background doing economics, and so today I'd like to talk about the issues in H.R. 6063 from the standpoint of an economist.

As you know, the Copyright Office commissioned an economic study to assist the Register of Copyrights in making here recommendations to Congress, and she has relied on some of the conclusions of that study in making those recommendations. I'd like, therefore, to review briefly for the subcommittee our analysis of the economic issues and to comment on how these issues were dealt with by the Copyright Office and by the economist retained by that office. I wanted to discuss, namely, the economics, the relationship between the record industry and the radio industry, and I don't think I really needed to say much more about that. I should point out that how much more record company artists derive from the sale of records has been documented in a study by the later Professor Fredric Stuart of Hofstra University. That study has been discussed with this subcommittee in previous hearings; so I'll not take the time now to review it unless you'd like me to do so. I would like to emphasize, though, that contrary to what Mr. Golodner said earlier, this compensation has been substantiated in that study.

Interestingly, nobody denies that the benefits accruing to performers from the free airplay of records are substantial, but the Register of Copyrights dismisses such benefits because, she says, they are "hit or miss"—a propitious choice of words. There can be no denying that some records "make it big," and others do not, but this is the nature of the record business, indeed, of all show business. As long as the success of records and performers is determined by the marketplace—that is, what the public wants to hear—performing music is likely to be a business where the rewards are spectacular but unpredictable.

The second point that I'd like to make has to do with the economics

of the radio industry. If the cost of operating a radio station are increased by the imposition of a performance royalty, many stations will be forced to cut costs in other areas in ways that will adversely affect the service they provide the public, and a few stations may even be forced to leave the air, in particular, classical music stations. The radio business is a very competitive business and one in which many stations lose money or operate on very slender profit margins. I'm amused to hear the radio industry characterized as "fat cats" when, according to the FCC, 35 percent of the stations in the country lost money, and last year was a very good year, generally, for the radio industry. In this economic environment, an increase in costs will naturally force a manager to seek ways of reducing other costs; so a performance royalty could force some stations, for example, to drop a wire service they now use for newscasts.

What is the response of the Copyright Office to this concern? Well, the Office apparently relied on the report of their economic consultants to deal with this concern; so I'd like to discuss that study now. That report—which I'll refer to as the Werner report, after the author—makes two points in response to our concern that a performance royalty would adversely affect a station's ability to serve the public. First, the report seems to say—and here I'll have to oversimplify—that either brodcasters arent' interested in making money or the FCC financial data can't be trusted. This conclusion of Werner's is based on the study's finding that some stations have stayed on the air in spite of having reported to the FCC that they had lost money for 5 straight years. On the basis of this information, Werner feels that there are "hidden profits" in the FCC financial data that broadcasters haven't reported to the FCC.

Because there are broadcasters here on this panel, I'll let them tell you whether or not they report information to the FCC with profit hidden in that data. You've already heard one of them say that that's not the case. I'll simply point out that as an economist there are many reasons why a firm might continue to operate over a period of years even if it's losing money. Economists and businessmen make a distinction between fixed costs and variable costs. Economic theory tells us that as long as a firm has prospects for eventually making a profit, it is rational for the firm to continue to operate as long as its revenues are greater than its variable costs. Fixed costs like interest payments, depreciation of property, and so forth, continue whether the station operates or not; so it makes sense for a station to continue to operate as long as it can cover its variable costs.

In practical terms, there are many reasons why a station might report losses for several consecutive years and still have hopes of making money. A station may have changed hands, and it may take the new owner several years to turn the station around; some stations may have begun operations during the period and may still be suffering substantial start-up costs. In some cases, an operator may decide that he can't make a go of it after 3 years, but it may take him 2 years to sell the station, as a practical matter.

By failing to consider these possibilities, the Werner report's conclusion—that the FCC financial data are suspect—is nothing more than conjecture and, we believe, wrong. We appreciate that this subcommit-

tee will consider the impact of a performance royalty on the radio industry. And we believe that the FCC data are a reliable source of information about the financial performance of the industry.

Now, Werner's second contention is that radio stations can raise their rates to make up for the cost increase. In economist's terms, Werner believes that the demand for radio advertising time is inelastic. This conclusion ignores the basic fact of radio life—that radio must compete with other media for the advertiser's dollar. As any one of the broadcasters in this room will tell you, a radio station competes not only with other radio stations for advertising, but with television, newspapers, magazines, and even media like billboards and direct mail. This, even if all the radio stations in a given market were to raise their rates, they would lose business to other media.

In reaching his conclusion that stations could raise their rates without reducing their revenues, Werner does several statistical analyses. His analysis, does not, in my judgment, support the conclusions he draws from it. I can discuss these analyses in as much detail as you like, but for now let me give you an example of what I mean. Werner examines changes that have taken place in the rates that radio stations charge and changes in station revenues over the same period of time. He finds, for a sample of markets, that between 1971 and 1975 station rates went up about the same amount as did station revenues, same proportion, and from this he concludes that the demand for radio advertising is increasing. This conclusion just doesn't follow from these data. Both the rate and the revenue increases reflect the effect of inflation in that time period, not any increase in the demand for radio advertising in any real terms. They simply reflect the shrinking value of the dollar.

Finally, and perhaps most importantly, the Werner report really makes no effort to examine whether a performance royalty would affect how stations serve the public. The author of the report, in reply to comments that we filed with the Copyright Office about his report, said this:

> If (the report) does not deal with the question of whether it is fair to broadcasters, nor does it deal with the effect the law would would have on the quality of public service programing. While cutbacks in "community responsive" programing are potential effects on the proposed bill, they are not economic effects.

Now, that may seem astonishing, that a study commissioned to examine the economic consequences of the proposed payments consciously ignored what effect the payments would have on public service programing. But even more astonishing to me is the manner in which the Register of Copyrights discusses our concerns about public service programing. They were quoted to you this morning by the earlier panel. In discussing whether performance royalties would cause some stations to curtail certain kinds of public service programing, she relies on the Werner report as evidence that performer's royalties would not disrupt programing, apparently overlooking the facts that Werner specifically disclaimed any interest in the issue. He just didn't look at that question.

There's a final economic point that I'd like to make, and that is that the financial problems of musicians can't be solved by imposing what amounts to a tax on broadcasters. Most records are made by a relatively small number of musicians. I'm going to depart from the paragraph I have there because Mr. Danielson raised a point that I think

is worth covering right now. Most records are made by a relatively small number of musicians. This is Mr. Danielson's small potato-large potato problem. In 1976 more than 80 percent of the recording jobs were held by only about 14 percent of the members of the A.F. of L.; that is, a few people do a lot of work. Nearly all the musicians who work this frequently do very well financially according to a survey that the A.F. of L. did. According to the Werner report, of musicians that had recorded, that had made records, 22 percent of the members of the A.F. of L. had individual incomes in 1976 of more than $21,000. These are the people that are recording frequently, people that are doing 80 percent of the recording business; so of the fees that broadcasters would pay under H.R. 6063 for airplay of recorded music, most of the money would go to relatively few musicians, the people that already earned substantial revenues.

Mr. RAILSBACK. May I just ask a question?

Did I understand you to say that 22 percent of the people that perform studio music made $21,000 or more? Is that right?

Mr. DIMLING. Yes, Mr. Railsback. According to this report, of the performing artists, whoever participated in making sound recordings.

Mr. RAILSBACK. Do you also happen to have the average?

Mr. DIMLING. I do not. I can't calculate the average from this number. It would be somewhere between $9,000 and $21,000 which doesn't tell you very much. But my point is that a few people are doing a lot of the work, and those people do quite well.

More importantly, there's some doubt about whether H.R. 6063 would actually benefit even the musicians because the costs of administering the system to collect and distribute the royalty payments could be so expensive that little money would be left over for the musicians. Again, this is the point that was raised by Mr. Danielson, and I think the subcommittee is to be commended for looking for some specifics in this area. We do have some information about specifics because the Werner report actually looked at three different systems for calculating and distributing the money. Werner's discussion of these three systems leaves some serious questions about the cost or the feasibility of each of these systems. He looks, for instance, at what the music licensing societies now spend in the terms of administrative costs. BMI spent $5.6 million in 1976. ASCAP spent $8 million in 1976 just in administrative costs. And I can be as specific about some of these other systems as you'd like, but the point is that Werner recognized that there was a problem here, but he didn't offer evidence that the problem could be solved in a way that would leave any substantial amount of money for the intended beneficiaries of the proposed royalty payments. Not only does this leave unanswered the question of whether the performers will really benefit from the proposed royalties, it also raises some question about the efficiency of the proposal, from the standpoint of an economist, since these so-called "transaction costs," the costs that really aren't contributing anything, appear to be such a large proportion of the total money involved.

Now, there's one solution here. Distribute the money without regard to how much the records are actually played on the air or even without regard to whether the recipients played the records. But if

this approach is taken, it seems to me that this would be dropping any pretense that this legislation is really dealing with any copyright legislation. I'm not an expert in copyright or constitutional law. I've always understood that the purpose of copyright legislation is to reward the performers for their work. It seems to me this makes it clear this is only a tax on broadcasters, not really a protection for the creators of original material. Thank you, Mr. Chairman.

I have been asked to deliver to you a statement from the National Broadcasting Co. in opposition to H.R. 6063, and I'd like simply to request on behalf of NBC that it be accepted for the record.

Mr. KASTENMEIER. Without objection it will be accepted for the record.

And that, Mr. Venters, concludes your testimony?

Mr. VENTERS. Yes, sir. And we're at your pleasure to discuss any questions that you might have.

Mr. KASTENMEIER. Thank you. That was an excellent presentation by your panel, and I appreciate that it covered a number of issues. The testimony seemed to me to be critical, not only of the bill, but really of the present system, that is, of the ASCAP, for compensating the composers and authors and whether it is a tax on broadcasters and so forth. How do you respond to that? Are you still sort of resisting, let's say, the royalties paid to performing rights societies for authors and composers? Do you still feel that's unfair, or have you made your peace with that? Do you now see that it's somewhat analogous in terms of systems?

Mr. VENTERS. I don't know that that was actually raised by any of the presentations made here.

Mr. KASTENMEIER. No, it wasn't. That's why I'm asking.

Mr. VENTERS. Excuse me.

Mr. KASTENMEIER. There was reference to how equitable the system was and the payout and so forth and so on. These were the same questions faced by ASCAP and other performing arts societies in the past. And, in a sense, it, too, could be said that the broadcast industry was taxed because they pay royalties to authors and composers. So what I'm saying is many of the same arguments you made in arguments in opposition to this bill are already implicit in the law with respects to authors and composers, and yet I take it you've made your peace with that particular aspect of the law?

Mr. SHORT. May I make a comment about that because that's absolutely true. We have made our peace with it. There is no other way for them to be compensated. The recording companies don't pay the composers and authors. Composers and authors go around and submit their material to record producers and so forth, and this is just the way it has evolved. They get all their compensation from copyright legislation. If this bill were to go through, though, it may be an entirely different means of compensation.

Mr. KASTENMEIER. Well, we don't know fully what means of compensation would be proposed here. We have an idea in general terms.

Mr. DIMLING. Could I also make a point from an economic standpoint My reference to the Stuart report—what was done in that study was to examine the revenues received by various parties involved in the production of records. The authors, composers, and publishers actually got the money from two sources—from the music licensing fees and

from the mechanical royalties from the sale of records. The artists obviously only get money—and the record companies—from the sale of records. What Professor Stuart found was that, for a sample of records he looked at, the authors, composers, and publishers were actually getting no more, in fact, a little bit less from those two sources than the artists were getting from the single source, from the source of record sales. So that's, I think, an important economic point.

There's also, I think, a distinction that ought to be pointed out here. The BMI and ASCAP and SESAC licenses are negotiated each year, and to the extent that negotiations reflect fair market value, I suppose one could argue that those licenses do reflect fair market value. In effect, the legislative rate of payment is what we're talking about here.

Mr. KASTENMEIER. You are certainly not saying that if this approach were enacted into law that you'd prefer a negotiating position than a compulsory license with the statutory fixed rate, I don't think you want to be open-ended in terms of negotiations, would you.

Mr. DIMLING. I don't think I would want to speak on behalf of the broadcasting industry. May I make a comment as an economist, though? I think that what goes on in the radio and record industry suggest that the payment, if it were negotiated, if there were any payment, would probably go in the other direction. But that's, in effect, what's being done now because the record companies are delivering their records free of charge to the radio stations. And, in any case, one would expect that a negotiated rate would probably be less than 1 percent.

Mr. KASTENMEIER. Let me ask you this. The panel before us, really, are broadcasters. Is television totally unaffected? We've seen television soul dance programs in the late afternoon. Those involve performing rights, do they not? Or what would be performing rights? Would they be covered, and many other aspects of television broadcasting? Is there anybody here able to speak for television?

Mr. DIMLING. They would certainly be covered. I think the concern of broadcasters is focused on radio for several reasons. Television is certainly interested in this problem.

Mr. RAILSBACK. Mr. Chairman, could I just comment a moment?

I think that it is significant that there is a different schedule again for television compared to radio. I'm not smart enough to know why the difference in rates, but radio does seem to have what constitutes a higher percentage rate than television.

Mr. KASTENMEIER. Let me ask you this about coverage; for example, a CBS affiliate radio station doing rebroadcasts of "Mystery Theater." Now, this is not music at all, but if "Mystery Theater" was originally produced while such a law were on the books, would the performers, nonmusical though they are, the actors in that radio drama be protected in this bill?

Mr. RAYBALL. It's all-encompassing legislation.

Mr. KASTENMEIER. What I'm suggesting is that there's a concentration on radio and music, but, really, the reach of the proposal goes somewhat beyond that.

Mr. DIMLING. Yes, that's absolutely correct.

Mr. KASTENMEIER. One final question of Mr. Dimling since he's probably the one person who could answer this. You raised serious

questions about the so-called Werner report. Do you have any reason to suspect Mr. Werner's or his company's neutrality, or do you feel it's a biased report? Do you have any criticisms of it other than those you've raised in the terms of basic credibility in the report?

Mr. DIMLING. Mr. Chairman, we submitted fairly detailed technical comments to the Copyright Office, and they haven't been shared with you. I would love to have an opportunity to send them to you. I don't think it would be appropriate for me to try to characterize anybody's motivations.

Mr. KASTENMEIER. I appreciate that, but, on the other hand, if this enterprise were engaged to conduct an absolutely, impartial, objective, unbiased report, one on which we can rely in this committee, that's one thing. But if the credibility or the bias as to that company or as to the person who prepared the report, well we would naturally want to know that, too.

Mr. DIMLING. Well, I don't want to suggest that they're biased. They have done some work under subcontract with the AFL-CIO. They are basically labor economists, I gather. But I think there are some serious technical objections we have, and I don't think their data supports their conclusions.

Mr. KASTENMEIER. The Chair recognizes the gentleman from Illinois.

Mr. RAILSBAK. Thank you, Mr. Chairman.

NBC filed a rebuttal to that particular report, and I notice that in the NBC rebuttal they specifically said they believed they did not have enough time. Now, I take it that what you're saying today is that you have filed perhaps a more detailed rebuttal, and I don't happen to have a copy of that. When did you file that?

Mr. DIMLING. The sequence went something like that. Harriet Oler, from the Copyright Office is in the room. She may have some better information than I have. The report was filed with the Copyright Office and released by the Copyright Office on November 7, I think. We got a copy of that next week. The deadline for filing comments was December 1. The several broadcast parties filed comments including NBC. I believe ABC filed comments. Those are the comments to which I refer. The copies that you have from NBC were filed with the Copyright Office. Since that time we have been able to take a somewhat longer look at the report. In fact, some of the data that I quoted somewhat earlier on performers' compensations comes from that report.

Mr. RAILSBACK. Now, that's what I want to ask you right now, then. Do you feel that you've had adequate time? Have you been able to put together a more formal rebuttal than you would like our committee to consider?

Mr. DIMLING. Yes, we have. I'm not sure that it's a more formal rebuttal, to begin with, since you haven't seen the comments that we filed with the Copyright Office. I think that that would be a good beginning point.

Mr. RAILSACK. But you've actually added to that, now?

Mr. DIMLING. Yes.

Mr. RAILSBACK. I think we ought to have the benefit of that as well.

Mr. DIMLING. Yes, sir.

Mr. RAILSBACK. Are you familiar that the definition relating to the rates is different than the base used for the current royalty payments

by stations to ASCAP and to BMI? Do you want to comment about that? In other words, as I understand the bills that we are considering, they would deal with either gross receipts or net receipts, and, then, in determining what constitutes net receipts, they permit you to deduct, I think, advertising charges, but there are some other charges that you are not permitted to deduct in arriving at a theoretical item; is that correct?

Mr. VENTERS. After commissions to representatives and agencies, and then the formula begins.

Mr. RAILSBACK. Then let me ask you very generally, and I know that Willie Davis addressed himself to this, but in looking at the fee that is set forth in the Danielson bill and also in what I'll refer to as the Ringer draft, the rates themselves don't seem to be very high. But maybe they're higher than I think. I guess they amount to about 1 percent, I think of gross receipts. Is it that rate that bothers you, or is it the principle, or is it both?

Mr. VENTERS. It's the principle, I think, that bothers all of us.

Mr. RAILSBACK. Are you afraid it's a foot in the door?

Mr. VENTERS. Camel's nose in the tent, or call it what you like.

Mr. RAILSBACK. I listened with interest to your experience. It seems to me that in dealing with this whole question that you have different persons that may derive benefits from what we do. Interestingly, you have the record companies, and you've made a persuasive argument that they don't need help by pointing out their revenues and so forth. But then you have your Frank Sinatras and your Olivia Newton-Johns, and it's true, I think, that they may not need help. But then we have the little guys. I don't see how you can quarrell with the fact that they may very well be in a very serious economic condition by reason of fact that now we have sound recordings that have taken the place of live musicians. And isn't it true that they're really three different groups? You object strongly to the record companies getting any more money, and then you point out Frank Sinatra and so forth, but I am not very impressed with your reference to 22 percent of the musicians that make $21,000 or more. I'm kind of curious what the others make. Did that include their total income or just income from studio music?

Mr. DIMLING. That was their total income, as I understand it.

Mr. RAILSBACK. And that's not a lot of money any more. That's their total income?

Mr. DIMLING. Yes. A little over half of the families in this country wish they had incomes of $21,000.

Mr. RAILSBACK. All right. But you're talking about people, as somebody pointed out earlier, that may have taken a lot of time in learning their particular talent or their art. That particular figure that you cited kind of bothers me. I'd like to know what the average income is, total income of a musician.

Mr. DIMLING. I'm sure that the A.F. of L. can get that for you. The point I want to make to pick up on our three groups, I was suggesting that there may be a subgroup, that third group of musicians; namely, the musicians who do a lot of recording work who I think, do quite well. I think $21,000 is a very respectable amount of money to make in comparison to what other people in the rest of the country make.

Then, the second group of people who either don't participate in records—and that's about half of the membership of the A.F. of L.—

and those who do participate, but only very infrequently. And these people, if the money that the broadcasters would pay would be distributed in accordance with the records they make and how these records are played on the air, these people wouldn't be helped by it.

Mr. RAILSBACK. To be honest, after you consider the administrative expense in administering any fund, and after dividing up the pie among everybody. I have to agree with you that it's certainly not going to be welfare as George pointed out. But, on the other hand, I think that an argument can be made that by reason of what has happened in this new technology and the industry—well, not new technology, but without a doubt, there are many talented creative people that really may be suffering by reason of, say, sound recordings and the fact that they are played to the public.

Mr. NEWELL. Mr. Railsback, I'd like to comment on that. The recording industry has been in business since somewhere around the early 1900's, I believe. I don't believe that there would be very many musicians today who are working who would have lost their jobs because of the changes in technology. I think the musicians who lost jobs because of the emergence of the recording industry are either no longer living or are out of business. That business has been around a long time. The recording business right now is a very rapidly growing and very lucrative business. In the city of Los Angeles in the last 30 months, 22 new recording studios have gone into business. We have approximately 150 recording studios in this city presently, and they are working 24 hours a day, recording day and night. The output of that——

Mr. RAILSBACK. Can I just interrupt to say that the charge has been made, and it's been repeated by the other side, that this is the fact that where you used to have live musicians.

Mr. RAYBALL. But how can a small or medium market support live musicians? Small and medium market stations do not depend on national advertising. It's in the local advertising. It's there. It's 90 percent of their business. All of these small broadcast stations across the country cannot support live musicians.

Mr. RAILSBACK. I don't mean to be quarreling.

Mr. RAYBALL. But I'd like to go one step further because we've had one panelist tell you they're already purchasing records. This is the medium and small market station. They are buying their records. They are not getting the free services. We have that figure plus BMI, SESAC, and now an additional tax on top of that.

Mr. NEWELL. I think you asked the question of whether it's principle or whether it's the amount of money, and I think it's really both. It's principle in the sense that we believe that we are adequately compensating the record companies with free airplay, and they, in turn, can compensate any performers who are undercompensated.

On the other side of the coin, the economic impact on the small radio stations and the marginal radio stations in the United States is substantial. And that injury could be done to as many as 50 percent of the 7,000 radio stations in this country who are either not making money or making very small sums of money.

Mr. KASTENMEIER. I'd like to now yield to the gentleman from California.

Mr. DANIELSON. I'm going to be extra brief this time. I appreciate your comments, and I've been following them very closely here. I don't

want to waste time by being redundant. The thrust of your argument is that the broadcasting industry can't afford this extra charge. Beyond that, I can't see any argument that goes to the substance of this theory. Now, under the brackets set up in this bill as drafted, the station with advertising gross of less than $100,000 would pay $250 in a year. That is 1 percent of the first $25,000. It's one-quarter of 1 percent of the $100,000. In the second bracket, $100,000 to $200,000 would be $750, a flat rate which is three-quarters of 1 percent of the first $100,000 and nothing, you might say, on the second $100,000. It's only after you get beyond $200,000 that you come into the 1 percent bracket.

I'm going to respectfully suggest this. First of all, this formula is not set in concrete. You have to have, when you draft a bill, some kind of a pro forma outline to put out for the people to kick around, which you're doing, and which I welcome. But at the risk of suggesting that you write your own sentence here which is not my point, I might suggest you come up with what you think is a more liveable formula. You know, you can't answer these questions by running away from them. If you'd like to suggest a more equitable formula, we'd be willing to consider it. And, beyond that, I say thank you.

Mr. KASTENMEIER. Well, that's a challenge to you. In conclusion, let me just ask a question. It's a very short question because it is a point well made by the preceding witnesses that everyone seems to support the performing rights royalty excepting the broadcasters and the jukebox operators. Even the consumer interests, the Council for the Arts—they're all, along with the recording industry, the performer, the AF of L—everybody is aboard. What about that? Is it only broadcasters that oppose this?

Mr. DAVIS. I would like to respond to that. To the extent that I've just bounced this off of people since I've been involved in testifying, I find it amazing, and I would almost suggest for anyone to do a public sampling, and do these performing artists come off as underpaid performers? I happen to have played in the National Football League for 12 years. I never shared 1 penny of that with television. I heard them broadcast over to industry. I have an extreme concern. I entered this business because I saw it as an orderly market. I'm concerned that this kind of thing always creates a certain kind of scramble. And, being a small broadcaster in an area like Los Angeles where I would think not only in Los Angeles but across this country black radio station owners right now are having a horrible time with monopoly rating service. And I cannot feel for a moment that I could pass on any rate increase when we don't have ratings. And if it's hard to get ratings from the ratings service, then you tell me that we don't have a problem as a group of black broadcasters or small broadcasters across the country. And I just feel that any cost is a cost that would have to be incurred and overcome as an operator, and I seriously question whether this business would invite other minorities. And I'm sure an additional tax would invite me to look elsewhere as a person presently in business.

Mr. KASTENMEIER. Thank you, Mr. Davis. But if you can identify any other interests, why, I'd be happy to know them. But it does seem that the broadcasters and perhaps the jukebox industry are alone in their opposition.

Mr. NEWELL. Mr. Chairman, I don't believe that any of these other organizations have been asked to finance this legislation [Laughter.]

Mr. KASTENMEIER. On that, we'll conclude. The subcommittee will convene at 3 this afternoon.

[Noon recess.]

Mr. KASTENMEIER. The committee will come to order. We're resuming our afternoon session, unfortunately, a few minutes late, and I apologize to the witnesses and to the rest of you, the audience, who are present today for being a bit late in resuming the afternoon session.

I'd like to acknowledge the presence of Tom Bolger, an old friend from channel 15, Madison, Wis., who happens to be here in Los Angeles. He's monitoring the hearings. I'm pleased to greet as part of our panel Mr. Ernest Fleishman who is an executive director of the Los Angeles Philharmonic Orchestra. Correct?

Mr. FLEISHMAN. Correct.

Mr. KASTENMEIER. Though not directly associated with Mr. Fleishman, also a part of our panel, Mrs. Tichi Wilkerson Miles, publisher of the Hollywood Reporter; and Steve Martindale and Joseph Farrell, president of the National Center for Survey Research connected with the Council for the Arts.

TESTIMONY OF ERNEST FLEISHMAN, LOS ANGELES PHILHARMONIC ORCHESTRA, TICHI WILKERSON MILES, HOLLYWOOD REPORTER, STEVE MARTINDALE, JOSEPH FARRELL AND THEODORE BIKEL

Mr. FLEISHMAN. I would like to call on you. I recognize the distinguished conductor of the orchestra, Zubin Mehta, with Marilyn Horne is not here at this moment, and when they come we will have them appear as witnesses as well, but, insofar as you are here we would have you speak.

Mr. FLEISHMAN. Thank you, Mr. Kastenmeier and members of the panel. Forgive me, please, for not presenting written testimony. There was some uncertainty about the time and so on and so forth of this hearing in our minds, and Mr. Mehta and Miss Horne, as a result, have had to offer their apologies. They're busy with a concert this evening in Santa Barbara, and they were, in fact, recording this morning, and this is rather appropriate.

In the first place, I think I would like to share with you some information regarding what's happened in places where I have worked before. I came to this country some 10 years ago. Until 1959 I lived for various reasons in South Africa and ran a radio production company which produced programs for commercial radio, produced them and packaged them and recorded them. And many of these involved the use of phonograph records, and the production companies producing these programs were in South Africa, for commercial radios were required to become members or subscribe to IFPI, the International Federation of Phonographic Industries and had to pay for every record used in any program, a levy. We had bank returns giving full details of each record used, and at that time the levy was 1 pound, which, unfortunately today isn't very much in the way of dollars. At that time it was nearly $5 per record, and, as naturally commercial radio used a great deal of recordings, there was a lot of money went to

this federation which then paid out proportionate shares to the various record companies according to the number of records from each company used, et cetera, et cetera. I do believe in those days those artists who had the right sort of contracts, infact, did get a share of those funds from the IFPI in addition to their royalties on sales.

I then moved to England where, for some 8 years, I was general manager of the London Symphony Orchestra and had many dealings with the BBC. The orchestra performed often for the BBC. Its recording tools played by the BBS, and the rule in England was that—in the first place, the BBC has always been restricted in the number of recordings it can use. There was an agreement which was negotiated every 3 years between the musicians union and the BBC regarding what was called "needle time," the number of hours per week that the BBC was allowed to use recordings at all so as not to prevent the use of live music because the BBC employs hundreds of musicians. It runs still five symphony orchestras in London and in the provinces in England. It also employs outside orchestras, independent orchestras like the London Symphony to do programs. So we have a situation there where the performers—and I speak from the classical side—derive a good deal of revenue from the broadcasting network largely through being employed by that network. One might say that the needle time in a way, or the restrictions on needle time, insured the live performance of music on radio and was in lieu of a performance royalty.

In this country, of course, classical musicians derive no income whatsoever from the radio stations and very little from television because there's some idea prevelant that the general American public is not yet ready for the riches, or whatever, that classical music has to offer. I differ with that, fundamentally, in the tremendous increase in our audiences. The Los Angeles Philharmonic alone plays to more than 1 million people every year, and I can't believe that there's a smaller public elsewhere in the country for classical music.

But the whole point I'm trying to make is this: That as the electronic media in this country have stopped virtually employing classical musicians—we're all members of the CBS Symphony, the NBC Symphony; all of these things have been discontinued. Nothing has taken its place. Radio stations are deriving their income from the use of musicians' services in the recording studios. There should be some form of recompense for this. It can be done. It has been done in South Africa. It was done in many European countries, in Denmark, for example. Not all companies are signatories to the IFPI agreement, and not all countries employ the use of needle time to insure the employment of musicians to provide live music on the electronic media.

There seems, first of all, as I said, a fair case for rewarding the use of musicians' services. There's also a tremendous need, as we all know, for the arts, for music, musicians, symphony orchestras, opera companies, et cetera, to find all kinds of sources of funding for them to survive at all. Historically, there's always been a tremendous gap between the potential income of a major performing arts institution and its expenses. We are not, as it were, cost productive. We try to be as far as possible, but to put an orchestra on the stage, pay the musicians, pay the conductor, pay the soloists, pay the stagehands, pay the ushers, pay the publicity, the rent, the electricity, et cetera, unless we

charge nowadays between $30 and $33 average for a seat, the costs couldn't be covered. I'm talking about a major symphony orchestra.

So we have to look to other sources of funding—corporate, private, foundation sector, and even Government has been extremely helpful, but not enough. And, as costs are going up, we've got to find these other sources of revenue, and it is obvious that those who are deriving benefits, making profits as it were, out of the services of the musicians should be required in some form to meet that income gap. Unless we close that gap, the great performing institutions of this country will, in the next 10 to 15 years, disappear.

Mr. KASTENMEIER. Thank you very much, Mr. Fleishman. I think we will take a question or two for you before proceeding with the balance of the panel because I understand you have to leave.

Mr. FLEISHMAN. I'm sorry about that.

Mr. KASTENMEIER. As I understand it, we will not be expecting Mr. Mehta or Miss Horne, but please convey to them my best wishes, and, if in any future time, they desire to communicate with us with respect to this matter, feel free to do so.

Mr. FLEISHMAN. I did inform them of the gist of my remarks that I intended to make, and they fully concurred with them.

Mr. KASTENMEIER. I understand. Perhaps you've heard testimony, at least this morning, that even if enacted this bill would not really produce very much in the way of revenues for classical musical artists, relatively speaking. It may be expected that there may be some debate about it. The most popular form of music would be the chief beneficiary, if at all, but that it would be a great disappointment as far as symphony orchestras and the like in terms of revenue they might expect. Do you concur in that assessment?

Mr. FLEISHMAN. No, not entirely. There is, in the major markets in this country, still a remarkably large listening public for the classical music stations. I believe there are 17 commercial stations broadcasting exclusively classical music in this country. That was the last count. Most of them are extremely profitable. There's certainly a very profitable one operating in Los Angeles, and its weekly listenership was only confirmed to me yesterday by a recording company executive. It's in the region of 2 million.

Mr. KASTENMEIER. Well, I'm very glad to hear that. I think in Washington, D.C., we have one station exclusively devoted to serious music, WGMS, a great music station which has been constantly on the border of failing or not making it. Its owners have been at least tempted to change the format, but the community has prevailed upon them to keep serious music. They're done so even though, apparently, they're not money producers. It seems to be our only classical music station in Washington; so I'm not sure that experience is universal.

Let me ask you this: How would you see any royalties collected under Mr. Danielson's proposal, or any other, distributed to the musicians? Do you see any model for distribution?

Mr. FLEISHMAN. Well, the IFPI model, International Federation of Phonographic Industries' model is one where the producer—in this case it would be the radio station—keeps a log and has to pay a levy for every record used. The collection part of it would obviously be similar to what happens with ASCAP, BMI, the performing rights societies in Europe, and so on and so forth.

The distribution, again, I think we can learn a lot from the composers and writers from organizations like ASCAP, how this can be done. I do believe, also, that the National Endowment for the Arts might be an adequate administrator for such funds, both for the collection and the distribution. I would also point out, as you rightly say, the chief beneficiaries would be the top performers, the popular music industry, who probably need it least. There's, again, some precedent in Europe where taxes in certain countries are levied on movie admissions, on sports admissions, and used for cultural purposes and, in fact, into the equivalent for what I suppose is the National Endowment for the Arts, the local ministries for culture and arts councils, and so on and so forth.

So I'm wondering how the recording industry would feel, the pop industry in general. I know there are quite a few artists in the popular field who have helped the great classical institutions, whether it be the Metropolitan Opera or some of the symphony orchestras or the Music Center here. They're interested in working with us where we've always tried to find new ways to interest great popular musicians in the classical medium. We, ourselves, do it with gospel music. We work together with gospel choirs and have produced a new idiom there. In some way, you may say we originated this mania that's now going on for concerts with and music from "Star Wars." But we gladly invite you to Anaheim Stadium where, I think, the laser and audiovisual spectacular to end all time—[Laughter.]

Mr. FLEISHMAN [continuing]. To end all audiovisual spectaculars will take place involving the Los Angeles Philharmonic. It's something we've put together.

But I do feel that the classical sector might benefit from this far more than it's generally thought if the popular music industry can be persuaded to, as it were, maybe pay its dues to where it all came from.

Mr. KASTENMEIER. I understand.

At this point I'd like to yield to that great patron of the arts, the gentleman from Los Angeles, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman, and thank you, Mr. Fleishman. I don't think I have much of anything to add. I've been concerned, as was the chairman, that even if this bill were to become law, would there be a substantial benefit for the performer in classical music. You have given us the opinion that at least in Los Angeles we have a classical music station which generates enough income so that there could be a payback.

I want to follow—in the hope that that would be true across the land—I wish to follow up on Mr. Kastenmeier's question of how would you contemplate that the proceeds should be distributed? I do not mean through what mechanism. But what persons would receive the benefit from the royalty?

Mr. FLEISHMAN. I feel very strongly it is not so much the individual persons but the institutions, the great performing institutions who generate much more activity than just providing performances. An orchestra like the philharmonic in Los Angeles—and obviously I'm close to it, and therefore, I can speak with most authority—not only employs on a 52-week payroll basis 106 outstanding professional musicians, for this it has a support staff of some 26 people. During

the summer it employs at the Hollywood Bowl hundreds if not thousands of casual workers, not only ushers, ticket takers, cleaners, et cetera, but in the catering, in the parking, in publicity, the printing that is generated. The whole benefits to the community that the Los Angeles Philharmonic provides——

Mr. DANIELSON. Sir, let me interrupt because I think we're in an area that we want to develop, but we may be straying a little. I had not thought of this at the time I drafted this bill, but hearing you talk and following along it occurs to me that the whole context of this bill was to provide a means through which the individual performers, the musicians, would receive a benefit over the productive lifespan of the recording based upon this royalty. Now, the L.A. Philharmonic, as I understand it, employs its musicians on a full-time basis. It's their job, their full-time career. They get paid 52 weeks or 12 months out of the year rather than the individual musician who may be hired out of the union hall at scale to play 1 day or 2 days in some recording studio. Let's see if I can articulate what I have in mind. The provision of the bill calls for a sharing of the royalties between the recording company and the performers. When you're treating with somebody like the Los Angeles Philharmonic, perhaps we should have an adjustment. You're really not talking about the individual performer. He's being paid a constant salary, wage, or whatever you want to call it. But the L.A. Philharmonic, as such, which may be the recording artist, if you can think of them collectively, would probably be the organism which equitably should receive the money to help defray its costs. This may not be a valid thought, but it has some appeal to me. Will you comment on that a little?

Mr. FLEISHMAN. Yes. This is, in fact, what I've been getting at, that the institutions are in trouble economically, throughout the country, the great artistic institutions. We all operate at a deficit which we try to meet by contributions from foundations, corporations, et cetera. It's, in many cases, not enough. This would help to underwrite the deficit which would enable us to continue to employ the musicians.

But I would like to say one thing on behalf of the musicians, too. While, yes, our musicians are paid on a 52-week basis all around the year, their salaries are by no means enormous, particularly, if one considers that these are the cream of the world's crop of classical musicians. There are, perhaps in the whole world, 15 orchestras of the quality of the Los Angeles Philharmonic where each of them has approximately 100 musicians. We're dealing with 100 of perhaps the 1,500 finest orchestral musicians in the world. Their remuneration very often doesn't come to what the casual musician who would go into a studio maybe for a day or two can earn in that day or two as compared with a week's or even a month's work on the part of a member of the Philharmonic. We'd obviously like to be able to pay our musicians more, but, in the first place, we are terribly concerned that we'll have enough money to meet that weekly payroll on an ongoing basis, and that's what's getting so tough.

The Los Angeles Philharmonic, in the last 9 or 10 years, has made roughly 70 or 75 long-playing records which have been played constantly on radio stations all across the country. With classical records, their lives, of course, are far longer than those of popular records.

If we had only a small percentage royalty from the performance of those records on radio stations throughout the country, it would help to close that deficit gap.

Mr. DANIELSON. Yes, sir. I'm not arguing with you here. I'm trying to explore a thought, and I think we're making some progress. Do you feel that that contribution, that earning from the royalty, should, in that event, then, go to the orchestra for use in meeting its payroll or whatever? Or should it be broken down into tiny little fractions and distributed among the 110 or 115 members of your orchestra on a per capita basis?

Mr. FLEISHMAN. In actual fact, if it goes to the association, eventually it is distributed to the musicians. Now, there are some friends of mine who have testified representing the musicians union, and we are friends. I am not sure in my own mind whether there shouldn't be some provision, probably for a 50–50 division between the individual musicians and the association.

Mr. DANIELSON. Well, this is a thought that has not been worked into our bill, and I don't expect it to be matured here in the 5 minutes we have available. But I'd like to respectfully make this suggestion: If you ponder this a little bit, and if you come up with some ideas which you think might be helpful, pro or con, would you be kind enough to submit them to us because you said there are 15 such orchestras in the world, apparently?

Mr. FLEISHMAN. Of that quality.

Mr. DANIELSON. Yes.

Mr. FLEISHMAN. I mean in this country there are some 1,400 symphony orchestras, but there are only 30 so-called major orchestras whose budgets are in excess of a million and a half a year, and only perhaps half a dozen or so of that great stature, of that world stature.

Mr. DANIELSON. But is it the custom in such organizations that the musicians receive a regular, even though small, but a regular paycheck?

Mr. FLEISHMAN. Yes, sir.

Mr. DANIELSON. As opposed to the casual musician who hires out whenever he has an opportunity?

Mr. FLEISHMAN. Yes, sir. They do get a fee for recording, in addition. In some orchestras, like ours, part of that takes the form of a guarantee which supplements their weekly paycheck for a certain number of recordings each year.

Mr. DANIELSON. I thank you and I yield back to the gentleman from Illinois.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. I really have no questions. Thank you.

Mr. FLEISHMAN. May I be excused now?

Mr. KASTENMEIER. Of course, Mr. Fleishman, and we thank you very much.

Mr. FLEISHMAN. Particularly with Mr. Danielson, as we live in the same city, if we can perhaps carry this conversation a little further, and if I can put some of these thoughts on paper and send them to Mr. Kastenmeier.

Mr. KASTENMEIER. I would be most pleased. I have a couple of other questions I will not have you respond to today, but there is a distinction to be made, it seems to me, between classical music and popular music. I should think that probably 99 percent of the proceeds de-

rived from this bill for popular music would be returned within this country to American nationals or American organizations. Probably only 50 percent of classical artists are American. There's a tremendous production of foreign symphonies and foreign nationals in terms of classical artists. They're at least 50 percent of the world's artists, and they're very widely distributed in the United States. It is a distinguishing feature, it seems to me, between the two forms of music.

Mr. FLEISHMAN. Yes, indeed. But there's a very important point you've raised now as far as the recording industry is concerned. Recording costs in this country are higher than in Europe. One of the reasons, therefore, why there is such prevalence on the classical recording market of European or foreign-made recordings is just this cost factor. There are other possibilities. If some of the royalty could be plowed back, as it were, to encourage more and help underwrite more recording in this country, classical recording in this country, another great service could be done. We're constantly aware of this and working particularly with musicians union locals here to try to improve this situation.

Mr. KASTENMEIER. I appreciate that fact, Mr. Fleishman. Thank you very much for your appearance today. One other question I had, and I will not pose it to you for answer now is: The broadcast witnesses suggested that there is a difference, also, between many European systems which the broadcasting system is either state-owned or highly state-subsidized, and the relationship between that system and the artist may be somewhat different than our own commercial system here in terms of approaching this question. But that is a more general proposition, and I think it could be responded to by others in letter and other forms as we analyze the competing systems somewhat more fully. Thank you, Mr. Fleishman.

Mr. FLEISHMAN. Thank you.

Mr. DANIELSON. Mr. Chairman, may I ask one question here? I'm terriby sorry.

Mr. KASTENMEIER. Of course.

Mr. DANIELSON. I want to follow up our dialog. Is there a recognized organization of classical, serious performers as opposed to popular?

Mr. FLEISHMAN. Well, it is the American Symphony Orchestra League which is headquartered in Vienna, Va., which is supposed to be the spokesman for all the American symphony musicians.

Mr. DANIELSON. Thank you. And perhaps we could get in touch with them. Is it sort of a clearinghouse?

Mr. FLEISHMAN. And the National Organization for Symphony Support in Washington, D.C.

Mr. KASTENMEIER. I will also take note of the fact that we have two other witnesses who are not at the table, Mr. Johnson and Miss Nolan. They're invited to come up at this time. Or as soon as the present panel is concluded, they may come up then as they wish, I say to them if they are in the audience.

At this time I would next like to turn to—now, I don't know, Mrs. Miles, whether you or Mr. Farrell would care to proceed first.

Mr. FARRELL. Well, I'll defer to Mrs. Miles.

Mr. KASTENMEIER. Fine. Then, Mrs. Miles, who is the publisher of the Hollywood Reporter, we will be pleased to hear your testimony.

Mrs. MILES. Chairman Kastenmeier, members of the committee, I am Tichi Wilkerson Miles, and I am the owner and publisher of the

Hollywood Reporter, and I would like you to meet Steven Martindale who is our counsel in Washington and Jeffrey Miles who is our counsel in Hollywood.

Mr. KASTENMEIER. Pleased to have both of you present.

Mrs. MILES. Thank you. The Hollywood Reporter is a daily newspaper which reports on issues affecting the entertainment industry. The Hollywood Reporter has a daily readership of approximately 70,000, and among our subscribers are many performing artists, musicians, broadcasters, and recording company producers, all of whom would be affected by the proposed copyright legislation.

My interest in being here derives from the fact that I have observed the entertainment industry close hand for over 15 years. I have witnessed its tremendous economic growth, and I've been fortunate enough to come to know personally many musicians, vocalists, dancers, actors, producers, directors, technicians, composers, authors—people without whom the industry's enormous economic growth would never have been possible. From my vantage point as an observer and commentator in the performing arts scene, I have concluded this: We possess, in the United States, some of the most creative and talented performers and producers in the world.

That is why it is surprising to me that our American performers and producers fail to receive a certain statutory right that 51 nations already grant, and that is a performance right in sound recordings.

Most of our musicians, vocalists, and technicians who contribute so much to the creation of a sound recording need this royalty. What's more, they deserve it; equity calls for it, and all sound legal arguments support it.

I will not endeavor to go beyond my expertise by discussing economic justifications or legal contentions. It is fairly well known that one-third of the musicians in the American Federation of Musicians earn less than $7,000 a year. I believe that point was brought up this morning. Someone was going to research the amount, and that's what it happened to turn out to be. More than half of them earned less than $13,000 a year. A recent study has reported that more performers are unemployed, and for longer periods, than other workers. Yet, while most performers are economically underprivileged, their sound recordings account for 75 percent of all radio programs and $1.9 billion in radio advertising revenue.

What I would like to relate to you today is something more than cold statistics, percentages, or dollars. It is the true story of a musical performer, typical of many, who "would have had an easier time of it," in her words, if performers' royalties had been in existence.

You may or may not know of Beatrice Kay. She has permitted me to report her story in hopes that "recording artists of today will receive compensation in the form of royalties when their recordings are played publicly."

Beatrice Kay is a vintage comedienne-singer whose accomplishments are many. During the thirties and forties, she made approximately 10 albums, most of which were for Columbia Recordings and RCA Victor. Her most famous hit was "Mention My Name in Sheboygan," which sold over 11 million copies. Also, she made famous the

recording of "I'm Only a Bird in a Gilded Cage." She also appeared in Billy Rose's movie, "Diamond Horseshoe" in 1945.

Today Beatrice Kay lives on a very small income and social security. A fire a few years ago destroyed all of her possessions. In her view she would have been a wealthy woman had she received royalties when her records were played on the air. In addition to the lack of compensation for air play of her records, she also recalls receiving nothing when a lot of groups used her records and would pantomime to them across the country. I'm sure you've all seen that. I've seen that recently.

I have heard many stories like Beatrice Kay's, economic situations which could have been helped by the granting of performers' royalties. We cannot neglect our creative talent any longer. There is no just reason why a sound recording should continue to be the only copyrighted work which can be performed without a performance right.

The fundamental principle in copyright law is that the creator is entitled to compensation for the commercial use of creative product. It is clear that composers are creators, and it is just that they are being compensated when their works are played publicly. However, it is also clear that vocalists, musicians, and producers are also "creators" in the true sense of the word. Without their talents and interpretations, the sound recording would not exist. It is only just that they, too, be compensated for their efforts when their sound recordings are performed publicly.

I would like to present some general observations on what I believe ought to be done to best protect performers in the proposed legislation:

Who should be included as the payors? I believe, first, that all commercial users of sound recordings—radio and TV broadcasters, jukebox operators, discotheques, nightclubs, background music operators, and cable TV operators—should be included as payors of the royalty fees. The Danielson bill is fuzzy on whether it includes jukebox and cable TV operators, and there is no reason to exempt them. Jukebox operators now pay performance royalties to composers, and cable TV presently pays royalties to broadcasters.

Who should the recipients be, and how should the royalties be divided? All supporters of the proposed legislation agree that the record company, the vocalists, and musicians should share the royalty, and the split has been suggested as 50 percent to copyright owner, the recording company, and 50 percent shared by vocalists and instrumentalists on a per capita basis. The Copyright Office draft goes a little further by stating: "In no case shall the disproportionate share of the performers be less than 50 percent of the amount to be distributed." I support the latter 50 percent minimum for performers. I believe these individuals should be afforded the ability to bargain for a greater share of the royalties. Also, I believe "workers for hire" should be included, as the Copyright Office suggested, as recipients of the royalties.

What collection mechanism should be used? So many have suggested that the composer-publisher—ASCAP, BMI, SESAC—collection system be used, but ASCAP, BMI, and SESAC have not testified as to whether they would, in fact, be willing to take on the added administration, collection, and distribution, even though some mutu-

ally advantageous benefits could result to all concerned. Since the American Federation of Musicians has raised the possibility of the records manufacturers' special payments fund as the vehicle for these tasks, I think this possibility should be explored further.

Who should set the rates? As to the method of rate setting, I believe it would be preferable, as RIAA and AFL–CIO have suggested, to have rates set by negotiations between the parties. And should this method fail, the Copyright Royalty Tribunal should determine the rate. This system has been used successfully by public broadcasters and composers under section 118 of the Copyright Act.

A great number of musicians and vocalists were displaced without copyright protection when live radio performances were phased out by sound recordings. What is frightening to me is that there is still no protection for performers as technology continues to advance. Ten, 20, 30 years along the road, we may see still another generation of displaced performers, and we cannot let that happen.

H.R. 6063, Representative Danielson's bill, will protect our performers' rights against ever-advancing technologies. It will raise the income of individual performers, and it will bring the United States into accord with prevailing international practice.

I believe that the time is ripe for performers' royalties. I am glad that the subject is being handled by this subcommittee. How much longer are we going to neglect this country's musical talent? How long are we going to allow the inequities of this situation to continue?

I am sure that when the subcommittee works out a bill on performer's royalties, the rest of Congress will be convinced that the legislation is necessary, fair, and well justified.

Thank you.

Mr. KASTENMEIER. Thank you very much, Mrs. Miles, for excellent testimony. I appreciate it. I think we will go on to other witnesses and, then, if you have no objection, questions can be asked of you as you care to respond to them. We'll now go to Mr. Farrell, and thank you for waiting. Mr. Joseph Farrell is appearing on behalf of the American Council for the Arts, and we're very privileged to have you with us.

Mr. FARRELL. Thank you, Mr. Chairman, and thank you, members of the subcommittee. Let me mention a gentleman that you acknowledged this morning, Theodore Bikel. Mr. Bikel is vice chairman, currently, of the American Council for the Arts. And so, with a certain amount of additional humility, let me deliver my remarks to you. It may be that after my remarks and the others have been made, Mr. Bikel would like to answer questions, too, on behalf of the American Council for the Arts.

Mr. KASTENMEIER. Mr. Bikel is here in the audience. I think it would be appropriate to invite him up to join the panel, if he would.

Mr. FARRELL. Let me just, by way of background, mention that the ACA is a nonprofit national coalition of arts interests. Its membership is made up of many different kinds of arts organizations and agencies including State and community arts councils and universities, libraries, and other institutions which are involved in the arts. A program of the ACA, which we call the Advocates of the Arts, comprises some 4,000 people who identify themselves as a constituency of citizens who are concerned about legislative action for the arts.

In the 1960's I was chief executive officer of the ACA and in the early 1970's became an executive with the Harris poll, as most of you know, and until last year was vice chairman of the executive committee under Mr. Harris. Mr. Harris is presently chairman of the American Council for the Arts. I am currently president of the National Center for Survey Research which is an organization which specializes in research for film, television, and media.

What I would like to take just a moment of your time on is what I think are two very critical considerations which, in part, have been discussed before, but, I don't think have been given quite the perspective that I hope I can give to it for these moments. A number of authoritative sources have brought up the reasons why the performers' rights in their recordings are a matter of fairness or correctness or, in some cases, even a matter of the Constitution. I will really pass over those, although, in my written testimony I mentioned some of those.

The two points I do want to reiterate are: Performers do create a unique experience that goes beyond the composer, and that experience is deemed after many years of difficult training and sacrifice to reach a high level of artistry. It seems to me there's a fairness in compensating for this effort. Certainly what I'm concerned about, as you will see, is encouraging more of that effort for great artistry. With the exception of a few pop artists—and there were many kinds of artists mentioned a few moments ago that we should be concerned with, in addition, not classical, but folk, jazz, and many kinds of recording artists—very few have high compensation for their work and, in fact, as recent studies by the Labor Department show, endure substandard pay scales through most of their lives.

The two points I'd ask you to consider with me, then, are really matters of supply and demand of the arts in the United States. And I think the issues are going to become far more acute in the next few years when the equipment is perfected of easily taping off broadcasts of recorded artists' work. You are being asked, in effect, to update constitutional interest to promote the progress of the arts for the welfare of the people. Surveys that were done by the Harris firm in the early seventies and then more recently—the last one last year showed that the American public in important, increasing majorities recognizes the important service industry that the arts represent. In studies in 1972, for example, a surprising, to us even, 89 percent of Americans felt that the arts were important to the quality of life.

Many other direct, blunt questions done in the Harris name, not in the name of any arts organizations, were asked of the American public. And, again, very high majorities replied positively about the arts interest in America. An even greater rise occurs, the acute cut, so to speak in these kinds of figures when we look at those who ranked in 1972. Fifty-seven percent of the American public ranked the arts very important to quality of life, and that went up appreciably more to 69 percent in 1976.

The effect of this has been visible in the arts. The attitude has been demonstrated in a major influx of audiences, visitors to museums. The Tut exhibit in this city is an astonishing example of that as it has been in other parts of the country, and I have been part of the studies of those, and I can tell you the incredible number of people who went to those shows who, 10 years, ago, had not gone to shows like it.

There is also the demand on the States and the community governments and the Federal Government for new funding for these increases in public interest as well as more attention given by the business community in support of the arts.

What I think the committee is asked to decide upon is an appropriate means of encouraging the arts supply by providing performers with future earnings in their recorded performance. It's appropriate, not only as compensation for the profits made on their talent by broadcasters, advertisers, and other commercial enterprises, but as compensation for the past years of persistence and sacrifice to achieve artistry and for the quality of performance which repeatedly enriches the public in the recording being broadcast.

This compensation is just plain justice, it seems to me, in getting back a return on one's own work. It seems, however, to me, and perhaps it is to you, ironic that the Congress of the United States provides substantial funds to artists and arts institutions who need funds through the National Endowment for the Arts in their authority to help create and sustain the material conditions facilitating the release of creative talent and at the same time ignore means of enabling artists to earn money through rights in their recordings. Surely the order of priority should be to provide means for Americans to make a living wherever possible in order to eliminate the amount of support necessary when they cannot make that living.

The committee is also—and this comes from some of the research we've done in recent years—asked to encourage and not discourage the public demand for the arts. Better distribution systems of the arts is a very acute consideration today in cultural planning. As we can show by a number of our studies at the Harris firm and the National Research Center for the Arts, the quality live performance is frequently unavailable to many people in this country. This was understood by Senator Hubert Humphrey who made the point last November that:

> People everywhere have seen and felt the impact of the arts now, and they will not be satisfied with the occasional trip to the East or West Coast metropolis. They want to see outstanding productions and hear great music in their local communities.

One distribution solution—of many which are also live types of solutions—is the recording where it can bring great value performances to many people who would not have it otherwise frequently available to them. And we know from research that such opportunities do whet the appetite for the live experience. More and more, the recorded artistic products will be a common means of reaching Americans.

At present, the consumer alone bears the total cost of the recording industry. Those who profit from it, such as broadcasters, but also jukebox operators and others, give profit, but they do not give a return in any way to the performers who provide that profit. Studies have shown that the broadcasters, as has been noted in testimony over the last few months, and in turn the advertisers and other commercial users would be asked to share only a small amount of the burden in carrying this cost with the consumer.

Keeping the cost down, it seems to me, even though it will increase over the years, is an important consideration for the committee, and it seems to me that is an element of what you are considering here. What is really at stake, then, in this rather technical matter of per-

formers' rights, is encouraging and sustaining American talent to come forward and fulfill the demands put on it by the public for more artistry in the future. This will continue to increase because, as we know from our research, and you know by observation, that the increase is not so much due to the efforts of the arts as it is to the more affluent and educated American public, generation after generation. But also at stake here is the opportunity to encourage the American consumer to participate to his highest interest levels in enjoyment of the artistic product by avoiding undue and unjust costs where that's possible.

Just a final point. As it has been true in the past about nations—we remember them mostly for their artistry and their cultural achievement—America, it seems to me, will be remembered by the way the artists are being treated today and the type of decisions you're being asked to make.

Mr. KASTENMEIER. Thank you, Mr. Farrell.

Mr. Bikel, would you like to add a comment?

Mr. BIKEL. If I might, Mr. Chairman. I'm very grateful, and I'm no stranger to this committee, having testified before and having heard the extensive testimony of the broadcasters this morning. It seems to me, once again, that we never condoned piracy of any kind. We live in a novel kind of an age; there's a possibility of electronic piracy. Just as we don't allow people to send their spy equipment into other people's homes because there's a privacy matter involved, although that's possible, technically, to do, so it is that the product of somebody's labor may be lifted in an electronic way. We hear all about how somebody can steal huge sums of money merely because he's learned how to operate a computer. Very simple: He types some code words, and all of a sudden millions have changed hands, and it sometimes takes weeks or months before we tumble to that. Now, this is not an obvious kind of electronic piracy, but it's piracy nonetheless.

We've established, I hope, that the artist is making a creative contribution, not merely an interpretative one, but that the interpretative contribution is, in itself, a creation because, as Erich Leinsdorf wrote, "If he did not, then why would there be a need of making any more than one recording?" You could make one definitive recording of a given composition and say, "that's it; there's no need for any more." But because there's not just 1, but 2, 3, 10, 50, in the classical field at least, that implies that the artist, the interpretative artist, is making a creation. If that is so then why is he excluded from the benefits that are reaped by other creators, namely, the composer and the lyricist? We've already established that they have that. Why not exclude the composer and the lyricist on the grounds that their record sales are being boosted? The same beneficence that the broadcasters show to the other performers by boosting their work through public broadcasting is an argument that applies just as well to the composer and the lyricist who does get a royalty as a matter of course and as a matter of practicality today.

It isn't the poverty or the helplessness, gentlemen, that we're talking about here, although that has also been misrepresented at this table this morning. They tried to make out that recording artists aren't that poor. Let us assume that they had a point there. Maybe they're not all that poor. I'm not granting the point, but for the purpose of the argu-

ment, let's assume that that's so. If we're talking about the justice of taking something from somebody without recompense, then it is irrelevant whether or not these people are poor. Nobody lifts oil from an oil producer without giving him oil rayalties. We've all established that. Why lift from an artist what he has done without giving him even the offer of a split fraction of a penny? The broadcasters ought to realize, in the dauphin's words: "What you get for nothing costs too much."

Mr. KASTENMEIER. Thank you, Mr. Bikel.

Now, I'd like to call on Miss Kathleen Nolan who is a very popular president of the Screen Actors Guild. I assume popular—elected by 35,000 members of the organization.

Mr. RAILSBACK. Sixty-two percent.

Mr. KASTENMEIER. In any event, we're very glad to greet you.

TESTIMONY OF KATHLEEN NOLAN, SCREEN ACTORS GUILD

Miss NOLAN. Thank you very much. I, too, have spent the day here and listened to the testimony of my colleagues this morning. I'm very grateful to them, and this is an issue that we, of course, join together on and have been heavily involved in for many years.

For the record, I am the president of the Screen Actors Guild, and I am speaking on their behalf. We are professional actors that earn our livings in motion pictures and television and television commercials and all other art forms including the recording field. It is the position of the Guild, along with the other unions, that this issue of performers' rights has been before us for a long time and it's been hashed and it's been rehashed and it's been talked about and we have testified and testified and it's been studied and restudied and the basic fact still remains: It's clear that the United States lags far behind almost every other civilized country in the world in this regard. I can say that along with Mr. Bikel we've traveled for many years now to FIA which is the International Federation of Actors along with the International Federation of Musicians. And it is a source of embarrassment always to us—it is not, Mr. Bikel?—that every year the issue of the Rome convention and copyright comes up at this congress, and they are amazed that this country is still that far behind. It's remarkable that a nation that is so-steeped in the concept of property rights and rights of the individual can be far behind the rest of the world in this regard.

As was pointed out this morning, the rest of the world in many ways looks to the performing arts in this country, at least in our labor negotiations, as a model for contracts, and we have given them our expertise and help over the years. In this one area, certainly, they are looking for some significant change, and, certainly, we are looking to that from you. It seems that the only barrier left in this regard is—I can't even say the loyal opposition and say it with a straight face. They are pretty stubborn, as we heard this morning and have heard over and over and over again, and I thank you for asking the question, Mr. Chairman, of who else opposes this legislation. We have not heard much other opposition, as you have heard. We are joined by many interest groups in this regard. They have, for years, unjustly enriched themselves at the expense of the recording industry and the artists who perform. And now, once again, today they want you to believe that they are entitled

to permanent benefit peformances by the artist. They, I think, should be rather grateful for the free ride they've had and recognize that it now has come to an end. Regretably, the drive for profit at anyone's expense just seems to be too great a motive for them to overcome, and the research and the studies clearly establish the feasibility of Congressman Danielson's bill, our good friend, and the draft legislation proposed by the Register of Copyrights.

The issue is plain: It's clear whose ox is being gored, and it's time to put an end to it. It's time to put an end to the continued exploitation of the artists without sharing any of the economic gain. You know, his country is now 200 years old, and it's time that we stopped merely thinking about survival and thinking about the quality of life, and the artist is certainly responsible for that, and we strongly urge you to support Congressman Danielson and, even more adamantly, the amendment proposed by the Register. Thank you.

Mr. KASTENMEIER. Thank you, Miss Nolan.

Finally, to wrap up today's formal testimony, I'd like to call on a distinguished American and friend who has served as chairman of the Federal Maritime Commission, also as a member of the Federal Communications Commission as he's perhaps even better known, and he may—who knows?—have been spared a fate worse than death when he failed in an election for the House in the State of Iowa a couple of years ago. That remains to be seen. But in any event I'm pleased to greet Mr. Johnson who is chairman of the National Citizens Communications Lobby.

TESTIMONY OF NICHOLAS JOHNSON, NATIONAL CITIZENS COMMUNICATIONS LOBBY

Mr. JOHNSON. Thank you very much, Mr. Chairman. Yes, those experiences have only led to more respect in what it is you're doing out here today. The National Citizens Communications Lobby seeks to represent the interests of listeners and viewer. We appreciate this opportunity to appear before you.

The principal arguments for this legislation seems to be simple justice and common sense, and certainly the NCCL does favor justice. But it is not really our mission to aid whichever industry employees or small businessess happen to be most depressed by broadcasters this week. For us it's the listeners and viewers who are paramount; it's their interests that we care about.

Too long has the audience left to closed-door negotiations economic struggles within the broadcasting industry only to find gratuitous violence and sexploitation forced on TV writers over their protests; that cable television systems are, for some reason, barred from carrying signals that any viewer can pick up with a rabbit ears or an antenna or that favorite programs are canceled because their high ratings include too many people over 49. So we finally decided that we have got to get into some of these seemingly technical issues to see to it that some of our interests get represented when we sit at home and listen to our programs and watch our television sets.

I would never say that what's good for General Motors is good for America, but the fact is, that more often than not, the interests of the

creative community and the audience coincide. The audience is not served when big business can treat entertainers like second-class citizens, turn its back on widespread unemployment, give us reruns rather than original works, simply decree that there will be no more live drama, engage in rampant profit oriented censorship, or permit a precious cultural heritage to become extinct because "The Gong Show" is somehow more profitable.

We've got to turn to you for help——

[Electronic pager or wristwatch alarm from somewhere in the audience provokes laughter.]

Mr. JOHNSON. I appreciate that, providing the soundtrack back there. I just hope they'll adequately compensated for it.

Now, the reason we've got to turn to you and to the rest of Congress for help is because the FCC has demonstrated a very severe hearing loss. It is, after all, the Government which has created this problem that you gentlemen have had to come out here and deal with. In most civilized countries, as you've heard, the broadcasting establishment is one of the principal sources of support for live music and drama. They keep on their payroll numerous writers and producers and actors and musicians and so forth. It's only because the FCC has no requirements whatsover for live performances that both worker and audience representatives have to come before you today in the hopes that you'll help solve this problem.

So long as recorded music is going to be used, however, we do support the notion that licensing should be compulsory. Fair compensation is one thing, and we support that, but it also serves the interests of listeners and viewers to prohibit the withholding of potential program material in efforts to exact the highest dollar.

Broadcasters are complaining about the 1 percent fee. There is something very heartrending about a man who argues that to take only 99 percent of the profit of another man's labor is not enough, that he must have the 100 percent. We need scarcely concern ourselves with ability to pay such amounts by an industry which can average nearly 100 percent per year return on depreciated capital and whose net as a proportion of gross is roughly four times that of the oil industry in one of that industry's greediest eras.

On the other hand, we recognize that there are exceptions. The public interest is also served by keeping the very smallest stations on the air, and we certainly support the exemptions for them that have been created in this bill before you.

Finally, we note with amusement, in looking at the text of the bill, that there is a way out of this legislation for the broadcasters, a gaping loophole which we laso support. Under the bill's definition of commercial time, a broadcaster may avoid the payment of royalty if he will offer the public 14½ minutes or more of programing uninterrupted by commercials. That is an option as delightful to contemplate as it is unlikely ever to be heard.

Mr. KASTENMEIER. Thank you, Mr. Johnson. I must say I didn't recall that commercial time option existed in the bill.

Mr. JOHNSON I may, in the speed of reading this legislation, preparing a statement, and getting it copied this afternoon, not have properly interpreted that, I should note with all candor. But there is a definition of commercial time which exempts from commercial time

anything over 14½ minutes, whatever the consequences of that may prove to be.

Mr. KASTENMEIER. Yes, that's very interesting. We should, I think, explore that further. We may again have problems with our sister subcommittee in the Commerce Committee which will want to have equal time with respect to reviewing anything that affects the broadcasters and television. But this is a very interesting option. May I ask the panel—Mr. Martindale, Mrs. Miles? If any of you also care to comment, you may, in addition to Mrs. Miles. Mr. Farrell, Mr. Bikel, and Miss Nolan. You all support, in general principle, the Danielson bill as may be modified—you may or may not have access to material relating to it—as modified by the Register of Copyrights' suggested modifications. You're aware of them? Is that more or less correct?

Miss NOLAN. It is, as far as we are concerned, yes.

Mr. KASTENMEIER. One other thing, tomorrow we'll have representatives of the recording industry with us. An apparent variant of the 50-percent payment to the recording industries—and perhaps for some of us it may go back to a conceptual notion when we're talking about creative contributions to artists and performer—whether, in fact, we're talking about the same degree, we're talking about technicians? And if so, what technicians? And are we talking about the recording industry as such? And to the same extent that we're talking about performers? If we can quantify, or if we can discriminate among or between these parties.

Mr. Johnson, let me ask you, do you feel the recording companies should be in for 50 percent of the 100 percent? Should it go to the performing rights?

Mr. JOHNSON. Well, I must say it concerns me. I mean I have less concern about the economic welfare of the recording companies—which, from all evidence, appear to be doing rather well—than I do for the performers themselves which is our principal concern. However, whatever the outcome of my congressional race, I can develop enough political savvy to know that one has to give a little in order to get a little, and I presume that was how we came up with this marvelous 50–50 share. Also, the opportunity is left open for the performers to bargain with the recording companies for something in excess of 50 percent. At least, I would share with Mrs. Miles the notion that 50 percent should be minimum, and above that they could bargain for more.

Mr. KASTENMEIER. My recollection was, as far as the recording companies, in 1965 the first prototypes or variations of this did not include the recording companies; it included the performers only, and the recording companies resisted as, indeed, the broadcasters do today, this particular formulation. And somehow, in later variations after 1965, the recording companies participate for a proportion as to performers and, indeed, as to authors and composers presently.

At the risk of being facetious, if we were to split this three ways, have the Government pay for it all and give the broadcasters one third as well, there might be no opposition whatsoever. [Laughter.]

Any comment?

Mr. BIKEL. Broadcasters get 100 percent anyway. They would resist such a partnership. It seems to me that if the principle of that

participation is not going to win, they're going to talk the formula to death, of collection and distribution. And I suggest that enough formulas have been put forward that are workable and equitable, both by way of the way Mr. Fleishman detailed it as handled internationally by the IFPI which distributes both to phonograph companies or record companies and to artists, or by way of our own model along which composers and lyricists act, and that is the ASCAP, BMI formula of collecting in bulk and distributing according to their own internal formula to the artists according to their time and other considerations.

Mr. RAILSBACK. Mr. Chairman, on that point, may I just kind of fortify what the chairman said about a concern that is really held by many of us? That is, whatever we may do we are going to have to sell to a lot of members that are going to be lobbied, assuming that we decide to report out a bill. I know what happened. I mean I think I have an understanding like Nicholas Johnson suggested, and I'm very much aware that sometimes we have a need to compromise. But it just seems to me, politically, that it's going to be very difficult for us to say look at these recording companies who need this 50 percent of whatever the royalty may be. I have a very high regard for the recording industry and Stan Grotikov, and I see my friend Jim out there, and I'm happy to say this publicly in front of them: I have really a lot of trouble justifying paying 50 percent of a performer's royalty to recording companies. I want to ask you this same question. I certainly agree with your constructive comment that would alter the Danielson bill, but I think we're going to have to do some thinking about this. Frankly, it may be easy for you to negotiate, but I think there's going to be a lot of concern about that kind of a division.

Mrs. Miles, did you want to respond?

Mrs. MILES. If that 50 percent that goes to the recording companies is, according to the Register's proposal, negotiable, and you can negotiate upward from there, then I suppose the mechanism would be that the creative individuals who comprise the team that makes the sound recording could then negotiate for their own additional share of the record company's 50 percent. This would be, in effect, negotiating for part of the producer's share. It could be left up to each individual.

Mr. KASTENMEIER. Now, I'd like to yield to the gentleman from California.

Mr. DANIELSON. Just following up where we were, I think we already have under our present copyright laws the facility for a star to negotiate a royalty at or before the time that the recording is made to share with the recording company.

Mrs. Miles, I think with Miss Kay, whom you mentioned, and who I'm sorry is not in the best of all possible worlds, that's tough because she's earned it. But even she, if we had been operating 30 years ago as we operate today, could have negotiated a special royalty for herself as does Mr. Sinatra, Mr. Como, and other names that have been mentioned here today—and I'm not opposing that; I'm for it. But what I'm concerned about is this very same point which was just mentioned here, and we raised it this morning. I would like to have you people who are interested in the performance to send us some letters or outlines telling us how you feel the distribution of the proceeds should be spread out.

I see Miss Nolan is waving her hand over there, and maybe she's seeking to respond to that. Would you, please?

Miss NOLAN. Yes, I would like to. I think this question of the share that the recording industry would, under the present formula, receive—I think it's the same, or there can be an equation to what the situation is as far as our negotiations with the motion picture industry. The motion picture industry producers have the copyright on the film. It is through collective bargaining that the artist in the film receives that compensation, that reuse payment, that percentage, whatever.

I am not frightened by this kind of split. For one thing, as has been stated earlier—and I don't think that it's any great secret—I mean, you know, there are compromises that must be made, and if it's got to be 2 to 1, it's better that it's 2 to 1 on our side than 2 to 1 on the other side, and we can negotiate. If the recording company has a percentage of the copyright, and it is negotiable through collective bargaining, then that doesn't disturb me. It doesn't seem a problem because it is stronger unions that can take care of those issues.

Mr. DANIELSON. And strong presidents and strong unions can help in that, I imagine?

Miss NOLAN. Well, we do our best.

Mr. DANIELSON. I do have a question, Mrs. Miles, for you. In your presentation, you mentioned not only vocalists and musicians, et cetera, but you mentioned technicians, I believe.

Mrs. MILES. That's right, I just don't think there are that many people involved in the making of a recording that it would be that difficult. And I think that we're trying to find perfection, and we're not going to find it. I think it's important to implement some sort of formula here and go ahead with it and then work it out on a piece-by-piece basis like Kathleen was talking about.

Mr. DANIELSON. But you've mentioned musicians, vocalists, you say dancers, actors, producers, directors, technicians. Most of them, their product is not audible as it comes off the record, but without their help you wouldn't have much of a record. Do you mean you feel that this should be broad enough to include persons other than those who create a sound?

Mrs. MILES. I think that we're talking about two different things here. When I say composers, directors, I mentioned all the people that I do know in the industry.

Mr. DANIELSON. You don't mean to include those within this royalty?

Mrs. MILES. I think in the recording industry we should talk about sound.

Mr. DANIELSON. All right.

Mrs. MILES. Because there will be enough things to get people off the track on this without our helping them.

Mr. DANIELSON. Well, the word "technicians" has come up a number of times.

Mrs. MILES. But I do think that technicians that are involved in the making of a phonograph certainly should be involved in this.

Mr. DANIELSON. What do you mean by "technicians"?

Mrs. MILES. The producers that produced the record, the people that technically make it because without those people—I mean I've seen so many variances in one recording to another where it comes to the type of recording, and it depended on a technician. And I do think that they're very important. They play a very important part in this.

This morning, also, if I may interject something, it came out about how a very few people are the ones that collect or the ones at the very top. And what we're looking at is a gross revenue; we're not looking at bottom lines. I do think it's important to think in terms of bottom lines because those people have to pay so many people in order to keep their image where they are and to keep them going. They're like baby companies, and what they get in the end is not that much, and they have to keep up this image of being very rich because people read about them making millions and millions of dollars, and it's going to attorneys and accountants and PR's and dresses and stagings and——

Mr. DANIELSON. Someone told me, ma'm, that sometimes you get a paycheck, and when you look at it you can't believe it's your own paycheck.

Mrs. MILES. That's true, and a lot of them are spending it at the rate of the gross.

Mr. DANIELSON. For the record, Mr. Farrell, could you explain on page 6, paragraph 1 of your statement, you say:

> What also is at stake here is the opportunity to encourage the American consumer to participate to his highest interest levels in enjoyment of the artistic product by avoiding undue and unjust costs where possible.

How would this bill make entertainment or artistic enjoyment any cheaper?

Mr. FARRELL. Well, I think the way I say it, I'm not addressing myself to being cheaper. Wherever there's ways to make it less expensive then it becomes, I think that's an important matter when you're talking about consumerism. Where I picked this up from was in partially my own thinking in earlier times about the costs of going to live performances, and it quite clearly was a relationship between the costs of performance and a lot of Americans who had some interest. But it could be a squelched interest by the cost of going to a performance. And then, when I read the statements by the Consumer Federation of America who made a point that the consumer buys the records for personal use, finances the creation and production of the sound recordings, it seems equitable that commercial users should pay a performance royalty to the creators of the sound record. It does make sense to me that those who are making a profit could in some way be participating in the increasing cost of getting recordings to the American people.

Mr. DANIELSON. I see your point.

Mr. FARRELL. May I continue?

Mr. DANIELSON. Surely.

Mr. FARRELL. Earlier it was mentioned that classical music goes through a few stations, comparatively, and is listened to far fewer times than pop. It seems to me that is a peculiar argument because it's the encouragement of all kinds of sound recordings that we're talking about. It's the folk, the jazz, the rock, the types of country, other kinds

of recordings that are all involved here. And the system that you're contemplating does something toward a contribution to the cost of all of those things which do not have as much commercial return to them for the recording artist or the recording company.

Mr. DANIELSON. I see your point. What I was searching for was probably one other good usable argument in support of the bill, and although there's merit in what you say, I don't think most people would get the point; so I'll just not use that argument, that's all.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. May I just say that I was going to ask about the practice in other countries as far as their payment of performers' royalties. But I see that we have Stan Gortikov coming tomorrow who is really the president of the Recording Industry Association, and I'm going to ask him what the practice is in other countries like West Germany, United Kingdom, Denmark. I'm not certain that they pay the recording companies' part of that performers' royalty. When Mr. Fleishman gave that example, I wanted to take issue with him, but I think maybe Mr. Gortikov, tomorrow, can really go into that. I think that's kind of a new concept. Does anybody happen to know offhand whether they do or not?

Miss NOLAN. Sure. Chester knows.

Mr. MIGDEN. It's different in different countries. Sometimes they share, and sometimes they don't, although I've never heard the practice that he described of the institutions sharing. That's new to me. But recording companies share in some countries.

Mr. RAILSBACK. Some recording companies?

Mr. MIGDEN. In some countries.

Mr. RAILSBACK. May I just say that I thought the panel's testimony was very helpful and very constructive.

Mr. MARTINDALE. It's my understanding that 45 of the 51 nations granting performance right as a matter of law also grant something to the producing company, apparently.

Mr. MIGDEN. I would agree with that. There are other problems, though, internally, for example, between——

Mr. KASTENMEIER. Would you come forward.

Miss NOLAN. Come up here, Chester.

Mr. DANIELSON. Mr. Chairman, would the gentleman state his name for the record.

TESTIMONY OF CHESTER MIGDEN, SCREEN ACTORS GUILD

Mr. MIGDEN. I'm Chester Migden, executive secretary of the Screen Actors Guild. We are very active in world artist affairs, and we do have a familiarity with a lot of the problems inherent in this. One of them that was going through my mind as you were talking is that the division sometimes is difficult. For example, the actors had to negotiate with the musicians as to what a proper share would be between those two groups. And, for a long time, money was being withheld until that could be resolved. That was resolved last year. Indeed, we were present while it was negotiated out—very, very fairly we all felt—between the actors and the musicians. So the problems get rather deep. Once you even adopt it, distribution within the performing group has to be determined. But basically it has worked in Europe. It has worked very, very effectively. And while the sums of money have been small, we all concede the recognition of the principle.

We tend, I think, certainly when you listen to the broadcasters, you think that this is going to be the biggest bonanza that ever hit performers. Not so. The amounts, when divided, are very, very small and very, very modest, but at least as a recognition that there's some equity. There's a sharing of revenues received because of use. I must say everybody should be aware that if they do have illusions that this is going to be some kind of enormous bonanza, it just isn't so.

Mr. RAILSBACK. Not only is it not going to be a bonanza, some people are predicting that the administrative expense itself may eat up practically all of the royalties which I understand why the broadcasters are a little bit upset about that.

Mr. MIGDEN. Well, that isn't so either. But I make the point simply to point out that the broadcast industry, which is doom and gloom, has greatly exaggerated their fate.

Mr. MARTINDALE. The other thing that's amusing is to read the testimony when the shoe is on the other foot, and the broadcasting industry was asking the cable TV industry to pay them a royalty right. There's some wonderful quotes of the broadcasters testifying. My favorite one:

> It is unreasonable and unfair to let the cable industry ride on our backs, as it were to take our products, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America.

Miss NOLAN. That was quoted this morning by Mr. Wolff from AFTRA, a now famous quote.

Mr. RAILSBACK. That's all I have, and I thank you all.

Mr. KASTENMEIER. I might say one of the difficulties is, of course, these are long rights indeed, life plus 50 years, and the corporate comprises 76 years of unsecured terms. There's a lot of complexity involved following these rights. There may be other difficulties following all the people individually who these rights may accrue to in one form or another. I have no further questions. Gentlemen?

Mr. DANIELSON. No. But I'd like to thank everyone in the panel and in other panels, both pro and con, for having the patience and the courtesy to come and give us the benefits of their point of view, and I'm delighted that everyone doesn't agree because it's a lot more fun when there's a controversy to be solved.

Miss NOLAN. Mr. Chairman, may I just say that we are absolutely delighted that you all came to our city, and the day was fascinating for all of us. Thank you.

Mr. KASTENMEIER. Thank you, although I must remind the panel and those in the audience we have another performance tomorrow at 9:30 in the morning at which time we will hear from the Music Operators of America to be followed by the National Association of Radio Broadcasters and then the recording industry.

Mr. DANIELSON. Mr. Chairman, I can't be here tomorrow, and I want you to know I'm not playing hooky. I hope you will make a recording, provided I can play it back.

Mr. KASTENMEIER. I realize that.

I thank the panel very much for their contribution today, and this concludes today's testimony. The committee stands adjourned.

PERFORMANCE RIGHTS IN SOUND RECORDINGS

THURSDAY, MARCH 30, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Beverly Hills, Calif.

The subcommittee met pursuant to notice at 9:30 am in the Royal Suite of the Beverly Hilton Hotel, Beverly Hills, Calif., Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Railsback, and Cohen.

Also present: Bruce A. Lehman, counsel, Timothy A. Boggs, professional staff member, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order. This is the second day of hearings on the question of performing rights in sound recordings, and we're very pleased to have as our first witness this morning representing the Amusement and Music Operators Association one who has appeared before this committee many times dating back as far as 1965 on copyright and its effect on the jukebox industry.

Mr. Allen, most welcome this morning, and we'll be pleased to hear what you have to say.

TESTIMONY OF NICHOLAS ALLEN, AMUSEMENT AND MUSIC OPERATORS ASSOCIATION

Mr. ALLEN. Thank you, Mr. Chairman. I'm Nicholas Allen, legislative counsel for Amusement and Music Operators Association, the national organization of operators of jukeboxes.

I am here to oppose H.R. 6063 both as it was originally introduced and as it would be revised by the substitute that has been submitted by the Copyright Office.

We're opposing this legislation on two basic grounds. First, on grounds of principle. Second, on grounds of the unfair economic burden upon jukebox operators that is implicit in this legislation.

First, as to our objections in principle. Included among the beneficiaries of this legislation are record manufacturers who cannot be viewed as "authors" of "writings" within the terms of the constitutional grant of authority to Congress, except by stretching those terms beyond their true meaning. Article I, section 8, clause 8, confers upon Congress the power to legislate, and I quote:

To promote the progress of science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Even this committee acknowledged that record manufacturers do not always contribute a copyrightable element to a musical recording when the committee stated in its report on the general revision bill that there are "cases in which sounds are fixed by some purely mechanical means without originality of any kind," and added:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

That is from the committee's report No. 94–1476, of September 3, 1976, at page 56.

Neither H.R. 6063, nor the Copyright Office's proposed substitute, expressly state that record manufacturers are intended to be included within the terms "owners of copyright in a sound recording" and "author of a sound recording." Nevertheless, it is unmistakably clear that inclusion of record manufacturers is so intended. By including record manufacturers in this indiscriminate fashion, the constitutionality of the bill is necessarily thrown into serious doubt.

We oppose the creation of a new performance right for record manufacturers and performers, also, on the ground that there should be only one performance right for any single performance that is played of a musical recording. If multiple rights are to be given statutory recognition with respect to the contributions that are asserted to be embodied in a recording, the most that can be claimed, we believe, is that a single play of a recording constitutes only one performance of all such rights. This is not just a matter of semantics. It is at the root of the question posed by the legislation of whether Congress should recognize more than one performance right in one performance of a musical record, and, so, imposed upon jukebox operators two liabilities instead of one, as in the present law.

We oppose the proliferation of claimed rights of creativity in sound recordings, also, because this can open a Pandora's box for the assertion of many more claims beyond those that are now covered by the definitions of the term "performers" in this legislation. In this connection, we note the failure to expressly include "record manufacturers" in the legislative definitions, thus requiring their coverage to depend upon interpretation of the legislative terms, "owner of copyright" and "author." An even more serious deficiency is the failure to attempt any definition that would identify those who serve the record manufacturers in ways that could be claimed as contributing creativity to their recordings. These ambiguities are matters of serious concern to jukebox operators as these operators are the ones who will bear the brunt of any further claims for performance rights that go beyond those that this legislation recognizes.

Here I'd like, also, to mention another flaw in the legislation that's proposed, and that is that there are no guidelines that are stated to govern the distribution of royalties by the record manufacturers, that is to say, to those people who are claimed to be contributors of creativity to the recording. And I'd like to remind the committee at this point

that there was a similar law in the general revision bill when there was no attempt to get into and to set out guidelines for the performance rights societies distribution of royalties to their membership and their licensors. This is a situation where a congressional grant of authority has been given to organizations and entities in the public arena without having gone into their system of distribution and having them disclose how they distribute their royalties. The only time, to my knowledge, that ASCAP was ever called upon to give such disclosure was back in 1958 when a subcommittee of the House Select Committee on Small Business conducted such an investigation. But, even then, the information that was given by ASCAP to the committee failed to disclose and disclosed only in anonymous terms the big beneficiaries of the distribution under their system. And we say this is something that Congress should not lightly pass over, but should require full disclosure and should be made subject to guidelines set down by the Congress itself.

Our second main point is that this legislation will create an unfair burden upon jukebox operators. H.R. 6063 and the Copyright Office's substitute stops short of creating any new royalty for the beneficiaries of this new performance right. Indeed, the Copyright Office states that the present beneficiaries of the $8 royalty under section 116 of the present law would be required "to share their pot" with performers and record producers.

It is unthinkable, we believe, that ASCAP, BMI, and SESAC are going to just sit back and let new claimants come in and take away their part, take away any part of their $8 royalty. Realistically, therefore, we know this legislation will be vigorously opposed by the performance rights societies unless a new royalty is added to the bill as an add-on to the $8 that those present beneficiaries claim is theirs.

Realistically, also, the recognition of this new performance right can only result in added pressures for still greater increases in the $8 jukebox royalty when the matter comes up for review by the Copyright Royalty Tribunal in 1980 under the provisions of section 804 of the Copyright Act.

The imposition of any new jukebox royalty at this time would create a burden that would be most unfair to jukebox operators. The new $8 royalty has just gone into effect, and the operators are now in the process of readjusting to this new economic burden. The Copyright Office, too, is only in the beginning stages of notifying operators with respect to requirements of the new law and in establishing a centralized system for the registration of jukeboxes throughout the 50 States and territories of the United States. Thus, extension of the scope of the new law as is now proposed is patently untimely.

We must remind the committee that jukebox operators are small businessmen and that this industry continues in a depressed condition. This committee recognized this fact in its report on the general revision bill in 1976 when it said:

> The committee was impressed by the testimony offered to show that shifting patterns in social activity and public taste combined with the increased manufacturing and servicing costs, have made many jukebox operations unprofitable.

That, again, is from the committee's report of September 3, 1976.

It will be recalled, too, that the jukebox business has declined to such an extent that Wurlitzer, one of the American manufacturers of jukeboxes, stopped producing jukeboxes in 1974. Thus, there are now only

three manufacturers of jukeboxes in the United States. While the operators' costs are increasing drastically, it is difficult for them to make changes in prices per play to keep pace with such cost increases. In some businesses prices can be increased by merely changing the price tag and the changes may not be noticed. In the jukebox industry it is a matter of reducing the number of songs a customer can play for a quarter and also of changing the coin receiving mechanism on every one of the operator's machines. Also, the location owner must be consulted and his consent obtained, as he can object to any increase in the cost to play music that could be detrimental to his business. Prices of two plays per quarter have been established by operators in some areas, but that is by no means generally accepted. In many areas, rates are still at 10 cents per play or 3 plays per quarter, and there are even some areas where the rate remains at 5 cents per play. Such conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from their operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations.

We wish to emphasize, therefore, the apprehension with which jukebox operators view any proposal that would create a new royalty and thereby increase their royalty burden under the Copyright Act. We believe the depressed condition of this industry demonstrates the unfairness of imposing any such added burden on it.

I would like to remind the committee at this point that the Record Industry Association occupies a dual role in this field of musical copyright. As users, record manufacturers pay royalties to copyright owners. They are subject to a small increase that took place in the enactment of the general revision bill, but they were successful in fending off any substantial increases beyond that. Now, in their other role, as the alleged creators of musical recordings, they are asking Congress for a grant of exclusive rights for themselves. We say the record manufacturers don't need congressional help. I believe yesterday there was testimony to the effect that the record manufacturers industry grossed some $3 billion last year which makes the little old jukebox industry look like real peanuts. We say the record manufacturers and performers traditionally have secured compensation for their recordings through contractually negotiated royalties, and they really don't need congressional assistance to obtain adequate compensation for their recordings.

As for the performing artists and supporting musicians, the artists, we have been told, are quite able to cope for themselves in securing adequate compensation through contractual negotiations with record manufacturers. The musicians union representative yesterday, however, complained of the low pay they receive from the record manufacturers. Trade papers have reported that musicians throughout the United States received a distribution last year of almost $12 million from the Phonograph Record Manufacturers Fund, that being an alltime high of the fund's annual distribution to musicians. That report was contained in Billboard and Cashbox magazines last June. We believe the musicians' complaint really is against the record manufacturers and that their proper recourse is to insist on better terms through their contractual negotiation process with the record manufacturers rather than seeking help from Congress to come against the

later users of music. We submit that, all things considered, jukebox operators should be allowed a considerable period of time to determine the impact of the recently enacted $8 royalty before considering the imposition of any additional royalty burdens upon them.

In conclusion, we would like to remind the committee that the new jukebox royalty of $8 per machine per year came about as a result of a compromise agreement among the parties in interest during the congressional consideration of the general revision bill. That compromise was intended to replace the old exemption of coin-operated musical performances from performance fees by a fixed statutory royalty that would serve as a maximum limit on jukebox royalties. Any increase in the jukebox royalties such as that which is implicit in this new legislation would be violative of the compromise agreement which led to the enactment of the new Copyright Act.

We earnestly hope, therefore, that the committee will see fit to take no further action on this bill.

Mr. Chairman, if I may, I was asked by the counsel for the phonograph manufacturers if I would submit for them, to save the expense of the extra trip here, their statement to the committee. And, if I may have you permission—it's not that long—I would like to read it into the record.

Mr. KASTENMEIER. Yes. We have it before us, and without objection it will be made a part of the record. Can you summarize it, give the highlights?

Mr. ALLEN. It's sort of hard for me to do since I didn't write it, Mr. Chairman. But if that is your wish, the thrust of the paper is to point out the ambiguities in the bill with respect to coverage as to those who support the record manufacturers' role and to point out the constitutional problems, objections that are involved in the grant of a right to record manufacturers.

Mr. KASTENMEIER. Yes. I'm reading through it.

Mr. ALLEN. The thrust of the paper is to, also, emphasize the difficulties that operators, music operators, will be faced with if they are subjected to increased royalties. This paper also makes the point, as we have, that it's most unlikely that this bill will go forward to enactment without some increase rather than expecting the performing rights societies to accept a diminution of the $8 royalty which they are now entitled to.

I believe the manufacturers' paper also objects, as a matter of principle, to the proliferation of performance rights for any number of different types of people who will be making claims to creativity in recordings.

That's about as good a job as I can do of summarizing the paper I didn't write.

Mr. KASTENMEIER. I appreciate that. I didn't mean to cause you that difficulty. I've just read it now, and you are correct. It essentially discusses, in general terms, what they understand to be the constitutional purpose of the "copyright monopoly agency," they put it, and they insist that, particularly with sound recordings, that record companies are not creators in that sense or authors. They assert an original creative contribution and, among others, they quote Senator Ervin to that effect.

Thank you very much, Mr. Allen. You are here this morning on behalf of the Amusement & Music Operators Association. Is that a successor to Music Operators of America?

Mr. ALLEN. Yes, Mr. Chairman. This is part of the picture of the diversification of the jukebox business to embrace amusement and vending and because so much of the business now is in these latter categories with the jukebox merely as an adjunct that the national organization realized that the time had come to make the name change and this was done last year. It is the same organization, however. And I might add, Mr. Chairman, we have, throughout the United States, about 30—I believe 30 is a good figure—State and local or regional associations such as the association in your State of Wisconsin, and there is such an organization here in the State of California, and it's called the Music Merchants Association of California. I was expecting some of them to be present today, and I don't know if they've come in.

Mr. KASTENMEIER. Are there any persons present, representatives or members of the Music Merchants Association of California?

Mr. ALLEN. Without their being here, Mr. Chairman, the California association is one of our largest State associations, and I suppose nationally, because I suppose California is that big a State. They're very active. And, as you may recall, for many years their president was also our national president, Mr. George Miller. They would be here, I know, if there hadn't been some mixup in the scheduling of the time to indicate their support of the statement of the national organization. We have discussed this with them, and I can say for them that I know they do support this wholeheartedly.

Mr. KASTENMEIER. Do you know how many members there are presently nationally in the Amusement & Music Operators Association who, in fact, do have so-called jukeboxes under their control?

Mr. ALLEN. Mr. Chairman, our membership is about 1,000 1,100 operators. We also have in the association some distributor, and I believe the manufacturers are associate members, but the answer there is about 1,000 or 1,100 jukebox operator members. And, without any exception, now, they all operate machines in addition to jukeboxes. Until about 3 years ago there was one exception, and he was from Congressman Railsback's State. It was Les Montooth, of Peoria. He was the only jukebox operator in the United States who operated only jukeboxes, and he operated successfully. None of us could understand how he did it, but he has retired now; so there are no jukebox operators who operate solely jukeboxes.

Mr. RAILSBACK. That's Bob Michel's district, whatever place it is in Peoria.

Mr. ALLEN. Pretty close to home, I guess.

Mr. KASTENMEIER. Does Mr. Patterson still represent the manufacturers?

Mr. ALLEN. No. He became Judge Patterson about 2 years ago, Congressman Kastenmeier. He's retired from this practice and is making his home in a private practice in Coudersport, Pa. The Kirkland Ellis firm, however, still represents the manufacturers, and it's they that asked me to give their statement.

Mr. KASTENMEIER. Maybe you could further identify for the committee, because I'm not precisely aware of it—perhaps even subsequent witnesses can help us—there was a distribution last year of nearly $12

million from the phonograph record manufacturers fund. You might further identify that. Is that a mechanical royalty, or what fund is this?

Mr. ALLEN. No. The manufacturers pay that. That's their other half. That's the half where they pay for music. No, they'll have to answer it, but I take it it comes from the royalties they collect, and there's some trust fund arrangement that is set up by the industry. I only know the sum total of it.

Mr. KASTENMEIER. We'll ask the subsequent witnesses who are expert and can fully respond to the question.

Shortly, if not you, Mr. Allen, I suppose others representing jukeboxes, or will be appearing before the Copyright Royalty Tribunal, and perhaps you can refresh my recollection as to the effect of this bill. They will be considering that during the course of next year, 1979, in advent of 1980, the germination of whether that rate is change or not, the $8.

Mr. ALLEN. Mr. Kastenmeier, I think the way the bill reads in that regard, come the 1st of January 1980, someone—I guess it's the tribunal. I forget now since they divided that responsibility. Someone there, by a declaration, initiates the review process, and by giving notice to the interested parties. Then, from there, there will be studies, I guess, and hearings. We really haven't gotten to that point. With the tribunal we have gotten to the point of the development of regulations for access to establishments where jukeboxes are located.

Mr. KASTENMEIER. I say that because if there is legislative movement with respect to this particular proposal or any variation of it, it may tend to run into that hearing, as you say, may have an effect on it, and we may do well to consider it. The fee is fixed during 1980 for a term of 10 years?

Mr. ALLEN. No. It is fixed in 1980, but then, I believe, other review comes up in 1987, I think it is.

Mr. KASTENMEIER. And each 10 years thereafter?

Mr. ALLEN. And in each 10 years thereafter. It's a staggered arrangement. You may recall the different industries are going to be reviewed at different times after the first go-around. I guess that's a matter of the workload of the tribunal. I can fix that date. I believe our first review—no, I was wrong. I guess our first review comes up in 1990. It's the other industries that come up just before that.

Mr. RAILSBACK. That's right.

Mr. ALLEN. I think it's 10 years and 1980. I haven't gotten that far down the road yet.

Mr. KASTENMEIER. Well, if it's 1990, there's no reason for you to.

Mr. ALLEN. I probably won't.

Mr. KASTENMEIER. I notice that the principal thrust of your statement is to suggest that the recording companies do not require this sort of payment, but you do not nearly so strongly suggest that performers do not; that is, musicians.

Mr. ALLEN. Yes, absolutely, Mr. Chairman. You can't argue those two groups, put them in the same category. I don't think it would be realistic or fair either, certainly not.

Mr. KASTENMEIER. Then do you concede that performers do have an equitable claim for some sharing of royalties by some mechanism?

Mr. ALLEN. I suppose I must, yes, yes.

Mr. KASTENMEIER. One last question. I asked the broadcasters yesterday whether it is, in fact, the case, as asserted by proponents of the bill, that, really, only the broadcasters and perhaps the music operators are opposing the bill, or at least the general nature of the bill. My question to them: Is that true, or are there others that you know of that oppose this bill for any reason?

Mr. ALLEN. I do not know, but I think some of us may not have waked up to how they're involved. The cable people will certainly someday be bearing the brunt. Frankly, I have enough problems figuring out where we stand on these things without thinking of others.

Mr. KASTENMEIER. All right. Of course, one of the reasons I asked the question is to try to identify those in interest who may be affected and whether or not they appeared or have been invited to appear so that there is yet an opportunity for people to comment on this issue.

Mr. ALLEN. I think this, that whatever is done to impose the Government into the economic process, creating rights and creating royalties, realistically, the fact of life is that the ultimate users will be the ones who are going to have to pay. It's inevitable that costs will be passed on the ultimate consumers, and the ultimate consumers are the members of the public. So, while you don't hear—at least I don't hear—complaints from those directions, I think it's just because the public hasn't any reason to know about this yet.

Mr. KASTENMEIER. Thank you, Mr. Allen. I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Mr. Allen, I happen to agree with your statement on page 5—if you could refer to your formal statement—where you suggest that the legislation is apt to be vigorously opposed by the present beneficiaries, that is, the performing rights societies—ASCAP, BMI, and SESAC. As I look at the bill, and even the Ringer draft, it seems to me, if I read it correctly, and I think it's a little bit complicated, but it looks to me like there's simply, in your case, taking the funds that you contribute, they're requiring now that those funds be divided and that the performers will derive, and the copyright holders will derive, half of the funds that have been contributed under the other mechanism. Is that they way that you read that?

Mr. ALLEN. Mr. Railsback, sure I read that as the way the bill is now. I have a little difficulty reading some of it, too. But just go back a few years. When this first surfaced, this proposal for performance right for recording artists, I think that's the way we talked about it.

Mr. RAILSBACK. I'll let you go back, but I want to pin this down.

Mr. ALLEN. I'm answering this question.

Mr. RAILSBACK. Is it not correct that they're asking, under the bill, that there not be any increase in payment from the jukebox people right now?

Mr. ALLEN. Right now. And I'm saying that the performing rights societies are not going to sit back and let that happen without coming in and protesting. They've made this statement before. I could find it in one of our earlier records where they said we will oppose this bill provided—provided it does not cause any loss to us in the royalty that we've got. I don't know if ASCAP's present here today.

Mr. RAILSBACK. What I mean to be doing is agreeing.

Mr. ALLEN. Thank you.

Mr. RAILSBACK. No, I think your assessment is correct. Then I have the further problem that if we are going to recognize a performer's royalty for public performance, public commercial playing of records, you know, if I end up buying that concept, I'm just going to be candid with you and say that it would seem fair to me, then, that the jukebox industry would, under the same rationale, be expected to contribute to the performers' royalties something over and above what your contribution is now.

Mr. ALLEN. Right.

Mr. RAILSBACK. So I'm just being very candid with you. I think the rationale is there and that you'd be expected to do that. But—I'm just curious—what is the economic situation of the 1,100 operators? And do you have any idea what their gross revenues are and what the net revenues are so forth?

Mr. ALLEN. Our industry statistics are not good, Congressman Railsback. Looking through the records, and I know you'll see some continuity going way back many years, there have been two economic surveys in the course of the general revision bill. One preceded in 1958, I believe, and the other one was in 1967. They sampled a cross section of some 1,000 to 1,500 operators at those times, and they got figures which showed the picture of gross and net. I don't have those figures with me today.

Mr. RAILSBACK. Could you get those for us, do you think?

Mr. ALLEN. I'm going to do better than that, maybe.

Mr. RAILSBACK. All right.

Mr. ALLEN. We're recommending to our board of directors meeting next week that a survey be made, an economic survey. We know we need it. We know we'll be needing it in 1980. The figures are presented in your own reports, Congressman Railsback. The only figures we have now are in the committee's report, the one that I've cited.

Mr. RAILSBACK. If I may, let me just suggest this to you: Under the Danielson legislation and under Barbara Ringer's draft, we are talking about certain annual payments to be made by the broadcasters or the television stations and so forth. Generally speaking, it's for, say, radio broadcasters under $200,000, a range figure that would be, I think, probably less than 1 percent, anyway, of their gross revenues. And then once they reach the $200,000 gross receipts figure, if my recollection serves me right, it's something like 1 percent of their net receipts which would permit them to—I'm not exactly sure of the formula. But, anyway, I think it would be very interesting for us, in dealing with this, to have some idea of what we're talking about as far as revenues derived from a jukebox.

Mr. ALLEN. We want to get that information. It's very difficult. I hope you appreciate these small outfits——

Mr. RAILSBACK. No, I understand.

Mr. ALLEN [continuing]. Ordinarily don't divide, set up their box to differentiate one type of a machine from another. We'll have quite a job to do this.

Mr. RAILSBACK. Right now, are all of these jukebox operators mandatorily licensed?

Mr. ALLEN. I would say yes, without exception, yes. It may be State; it may be county, but I think they're licensed everywhere.

Mr. RAILSBACK. Well, I would think, for instance, under the copyright law, aren't they expected now to pay $8 per box?

Mr. ALLEN. Yes.

Mr. RAILSBACK. I'm very curious what information they are required—I know the Federal Government burdens everyone with paperwork. I'm very curious as to what information they must report in making that even $8 per box payment. I wonder if they go into any revenue figures there?

Mr. ALLEN. Those, I'm sure not, and I believe I'm safe in saying that's based on the very language that the committee put into the bill before it was enacted. There is a reference in there to this type of problem. There is something in there to the effect—and I don't put my finger on it right now—that without adding any burden to the operators by way of recordkeeping.

Mr. RAILSBACK. That's good. I'm surprised we did that, but that is good. I'll tell you what: It would be helpful to us, in trying to be fair to everybody concerned, I think it would be very helpful to us in trying to understand what revenues are derived from jukeboxes so that we can try to be fair in whatever we decided to do, if anything.

Mr. ALLEN. I will be glad to tell you that this is in the same area of your inquiry, how the thing is going now, the registration process. The Copyright Office has very wisely limited the information, that's required on the forms and instructions they put out, just to what the bill says: Identification of jukebox by serial number or by other means, and that's it, except paying $8. The registration process is off to what I think is a really slow start, and I hope that's all that it means. At this point in time I can give you some figures that might be of interest. These figures are about 2 days old from the Copyright Office. They received $721,000, almost $722,000 in the $8 royalties, representing about 90,000 jukeboxes from about 2,000 operators; $722,000, 90,000, and 2,000. We have estimated a greater number of jukeboxes throughout the United States than this. The reason is not clear to us, nor is it to the Copyright Office. Our association has assisted in getting the information out to all our members and through the State organizations to all the State organizations' members, and we believe that the 2,000 figure pretty well reflects what the membership has done. It does not explain the great disparity yet.

Mr. KASTENMEIER. If the gentleman will yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIER. I had heard figures similar to this. We had also predicated the bill on approximately 500,000 boxes through the years from 1960 to 1975, and 90,000, as you indicate at least, falls far short of 500,000 jukeboxes.

Mr. ALLEN. About the time the bill was passed, we were providing information to the committee. We were saying 400,000 to 500,000, Mr. Kastenmeier. We knew there was diminution. Whether we were off on that—we could be, but I think it's also very likely that the information hasn't gotten out sufficiently to all the operators of the United States. Hopefully, that's what it is. At any rate, we're recommending, also, to our board of directors that the association conduct a survey through the State licensing authorities that Congressman Railsback

referred to see what kind of account we can get. We're concerned about it.

Mr. RAILSBACK. Well, I thank the gentleman. Thats all I have.

Mr. KASTENMEIER. Actually, I did not raise that issue because I don't mean to burden these proceedings with it, but that is, of course, of interest to the committee.

Mr. ALLEN. Mr. Kastenmeier, I'd like to add to an answer I gave you just before about the performer. That's my personal view that a performer, at least many performers in many instances do provide creativity, but I don't want to overlook the argument, the view as expressed by Senator Ervin very strongly during the debates that a performer is more a user than he is a creator. And, in the constitutional sense, there may be still that issue that has to be faced.

Mr. KASTENMEIER. I appreciate that as a comment, and the committee thanks you for a very professional statement today, Mr. Allen. It's always good to have you before the committee.

Mr. ALLEN. Thank you, sir.

Mr. KASTENMEIER. I'd like to acknowledge the presence in the room of another former witness who is not appearing today, but once ably, for a very long time, represented ASCAP, and I'm sure jousted with Mr. Allen and others for many years on legal issues, legislative issues, and that's Herman Finkelstein in the back of the room by coincidence, here in Los Angeles, in this very hotel today. And it is coincidence: He no longer represents that particular organization.

I should like to say—I might have said so yesterday, perhaps somewhat gratuitously—my view that despite the fact that people feel very deeply about these issues and sometimes get carried away in their characterizations of the opposition, that I have also found in the 15 or 16 years we have had hearings and had dealings with people interested on the various sides of copyright legislation, that the organizations and people that represented the organizations were, I think, of incredibly high professional and personal character. Sometimes we like to think of the other guy as sort of a bad guy denying something to somebody else, but, actually, it's been, at least for me, a joy to work in this field and work with the people who represent organizations of all types and all sides on this issue.

I'd like to call now, representing the National Radio Broadcasters Association, Mr. James Gabbert, who's president of KIKI in Honolulu, and Mr. John Bayliss, who is president of Radio Division Combined Communications Corp. We have a comment by the National Radio Broadcasters Association submitted by Mr. Gabbert. Would you like to go first, Mr. Gabbert?

TESTIMONY OF JAMES GABBERT, NATIONAL RADIO BROADCASTERS ASSOCIATION, ACCOMPANIED BY JOHN BAYLISS, RADIO DIVISION COMBINED COMMUNICATIONS CORP.

Mr. GABBERT. Yes, Mr. Chairman. I can save everybody the time of reading this since it's entered formally in the record, and I'd like to expand on this, if I may.

Mr. KASTENMEIER. Your statement will be received in the record.

Mr. GABBERT. The thing that concerns me here, if I came along and said that radio broadcasters could not afford this, I don't think I could

back that up. We would oppose it, but I think, ultimately, if such fee were imposed we would just pass it along to our advertisers, and it would ultimately end up at the consumer store.

But I think one thing that is important, as in our comments—a word I just love—is the symbiotic relationship between the music industry and the record industry and the radio industry. There was a change that occurred in the late fifties, early sixties, and that was the advent of top 40 radio which changed the picture of radio dramatically. As a matter of fact, I would recommend that everybody on the subcommittee, not because it's a work of art, but that they go see "American Hot Wax" which is now playing around at theaters because historically it shows the impact that the radio industry had on the record industry. At this time, when top 40 radio started at popular music stations, there was an emergence of new labels. Up until that time there were just basically RCA, Columbia, Decca, the major labels. All of a sudden anybody with a recorder could start a record company, and all they had to do was get record airplay and have one hit, and they had a record company. A lot of companies started at that time which are now established, large companies. This can be directly traced to radio play and exposure on the radio.

Another event which occurred in the mid-sixties was the FCC's mandate of nonduplication where FM stations and markets in excess of 100,000—that was the first cutoff—could no longer duplicate AM programs. They had to separate. This created a plethora of programming unprecedented in America. For instance, in San Francisco, where I own two stations, we have now 76 radio stations, all playing different types of music—jazz, classical, rock, various shades of rock, popular music, beautiful music, what have you. It's given the general public a plethora of music and choice.

At the same time this has happened, you go and you look at record companies' profits and sales, and there's a direct correlation. For instance, and I quote from CBC's stock report:

The U.S. recorded music industry sales claimed an estimated 22 percent during the year of 1977 following an unprecedented 18 percent in 1976.

Basically, record sales are booming today. At the same time this has happened, a very interesting thing in record stores: Once upon a time when I was a kid, and I'm sure all of you would remember going to a record store, the had listening booths. They would sit there, and you would take a record—"I want to hear the latest Patti Page record," and you would go in and listen to it. They had records allocated specifically to listen. No longer do record stores have listening booths. Why? How can a consumer go out and buy an album for $5 or $6 without knowing what that product is? How did they find out what that product is? Radio airplay. There's a definite value that radio airplay offers to the record industry. And that's why I say it's a symbolic relationship. I'm not saying that we could exist without the record industry, but I do feel they would have a lot of problems existing without us.

Now, in a free marketplace we would be able to charge the record companies for exposure of their records. This is what could be called "payola," and if you go back we are prevented from doing this. I'm not saying this is good or bad, but in a deregulated free marketplace, we would problably get more money from the record companies to

expose their product than we would pay in royalties back. This is hypothetical, but I believe it to be true just in what we're doing in record sales.

Mr. RAILSBACK. Mr. Chairman, could I ask a question?

Mr. KASTENMEIER. Yes; in fact, I was going to ask a question.

It might be useful for you to describe "payola." It's a sort of ancient term now and presumably has been outlawed. But could you briefly describe what the practice was, to make your point?

Mr. GABBERT. "Payola" was the practice where the record companies would pay either a disc jockey, program director, or somebody would receive either monetary or in terms of some type of compensation, remuneration, for exposing a record on the air. Today it's not in the form of "payola," it's in the form of—like our stations in San Francisco are hounded by record promotion people. I had to create a specific position with this person that isolates or insulates the disc jockeys and the air people and the people who make the music selection from the promotion or the "hype" people.

Mr. KASTENMEIER. Is it proper or appropriate for them, record companies, to give you free records?

Mr. GABBERT. Oh, yes, in fact, I counted last week alone there were over—last week it was 300 singles or 250 singles that were released of total types of music. And, in a market like San Francisco, we've received a lot of these. A lot of markets don't. Smaller market stations have to buy their records.

Mr. BAYLISS. Most of them.

Mr. GABBERT. Of the 5,000 or 6,000 commercial stations, more buy them than don't buy them.

Mr. KATZENMEIER. I'd like to yield to the gentleman from Illinois.

Mr. RAILSBACK. I know what you are saying, and I agree with what you're saying about the benefit derived from the fact that radio broadcasters certainly make known to the public the good music. But then I think we have to take it a step further. Who really benefits from record sales? And it occurs to me that, all right, No 1, the record companies would benefit from an expanded sale of records. Second, a performer who may have an agreement, a royalty agreement, that top performer would benefit. But I really wonder if the other musicians derive any kind of a benefit from the expanded record sales because they get right now any kind of a royalty. So I'm just curious how you feel about that.

Mr. GABBERT. Well, I see this is a problem between the employer and the employee, the employer being the record company and the employee being the performer. You look at record company profits, and if they're not sharing them with the celloist, it seems to me that's a problem between those two.

Mr. RAILSBACK. Is there an indirect benefit derived by the musicians, do you believe?

Mr. GABBERT. Yes, because records, you go back to, as I was pointing out, the record sales, and as long as records are still being manufactured. Now, getting away, because in popular music you get clear documentation of how radio is and Elton John is making millions of dollars.

Mr. RAILSBACK. I know that.

Mr. GABBERT. But an interesting fact I found out yesterday, there's a concert music broadcasting station. And I called RCA's marketing

division, and, unfortunately, I don't have the exact figures with me, but there's a definited correlation in classical music sales in a market that has a classical music station vis-a-vis a market that doesn't have one. It's dramatic. So it would affect every type of music sale.

Mr. RAILSBACK. You do not deny, I take it, that at the same time the record companies may be deriving a benefit. In fact, I think you're conceding in your statement, by the same token, even the fact you may get free records in a record company which records may be pleasing to your audience, that that certainly benefits the radio broadcasters. That benefits you, too.

Mr. GABBERT. That is correct. But the free records themselves—most stations today in the pop music formats run on what are called relatively tight play lists; so the quantity of records they give you, lots of records, most of those end up being thrown away. So the value there is small, I think.

Mr. BAYLISS. Yes.

Mr. RAILSBACK. Well, now, the value is you have your choice of those that may be a hit or those that may be very well received by your listening audience. That certainly helps your station.

Mr. GABBERT. That's true.

Mr. BAYLISS. I don't know if I can help. I tried to respond to this with Jim. I don't know that I understand where you're going, sir.

Mr. RAILSBACK. I'll tell you exactly. I don't mean to poorly characterize what you're saying, but a lot of broadcasters seem to be saying we do a tremendous service for the performers by playing their work and making public their work. and that results in sales. I guess the only thing that bothers me a little bit: At the time you're making those statements, at the very same time you are directly benefiting yourselves from their work product.

Mr. GABBERT. This is true. I think you could call that a trade-off. That's a value for value. I can't sit here and say that we're doing this out of the kindness of our hearts.

Mr. RAILSBACK. That's what I thought. You kind of conceded that in your statement. It is a trade-off between the record companies and the broadcasters. The question I have is: Do the musicians actually benefit, the backup?

Mr. GABBERT. Isn't that a problem between the record company and the musician?

Mr. RAILSBACK. I think it is a problem. We are confronted with the question: Do we want to recognize the creative talents of somebody that may not be, say, the top performer, but they may be a talented musician? Do we want to motivate musicians? And are they entitled to any kind of a royalty? I have reservations about record companies sharing in a performer's royalty. I do.

Mr. GABBERT. Well, I see a performer basically as an employee. I could be a performer as a broadcaster. I'm a broadcaster. And I'm able to negotiate what salary I take, and I work it out on the free marketplace. And, it seems to me, a performer, whether you're a good performer or a not so good performer that that is your trade, your stock; that is what you do for a living. And I have trouble with a law that would come along and say, "All right, guys, we're going to give you this because we feel you deserve it," because I would sit here as a broadcaster saying, "I serve the public interest. Why don't you pass

a law giving me more?" The record company profits are so huge that it seems to me what the performers need is a stronger union. It seems to me, basically, a free marketplace problem.

Mr. BAYLISS. The gentleman that preceded us said basically the same thing, and we would concur with that. If there is, in fact, an inequity in the system, it seems that a difficulty lies between the negotiated area between the performer, the artist, and the recording company.

Mr. RAILSBACK. That isn't exactly what he said. I think what he said is that I recognize there maybe should be a benefit for the performer, but I have problems—I'm speaking for myself—and then he said there may be constitutional problems, in other words. And then he pointed out Senator Ervin's statement saying that this was not an area constitutionally was meant to be protected. I think the preceding witness very candidly said there should be a difference between record companies and performers.

Mr. BAYLISS. Well, again, though, I think that what we would concede to in the general text of the statements submitted on behalf of the National Radio Broadcasters Association is that, really, the performer needs the recording company and the broadcaster needs the performing artists and the record company, and they, together, in unison, need us.

The business of whether we get free records and then use that talent and expose it on the air to our own personal gain—I don't think the general, major market broadcaster would have any problem with paying for records outright. Some do. Some will not accept any free records at all just to avoid any undue influence in their own mind as to what they should or should not be playing on the air. The trade-off there is, in the case of a classically strong artist with hit after hit after hit in a market the size of Los Angeles—take an Elton John record for $6, expose that on one of the dominant stations here. That could well result in a half million dollars in sales of that record in this particular marketplace.

Mr. RAILSBACK. Just to be very realistic, the way these bills are drawn, and I am not a cosponsor of any of the bills, but the way that bills are drawn, the Elton Johns and the Frank Sinatras who share equally with the little guys that contribute their talent—they're not fat cats. They don't get the big royalty payments.

Mr. GABBERT. We did an interesting thing which is not completed yet, but we started logging a lot of our member-stations on records played per week, and we intend to log about 200 radio stations coast to coast on the records played, numbers it plays. So far, just this morning, I was handed the results of nine stations. There are some interesting figures. You see, the FCC has limits on the amount of commercial time we can run on a station, and if Elton John bought time for us to play a record, that would basically be a 3 or 4 minute commercial, and if we assume that each record played on the station, if we were to bill the record company for exposure on that—most records today run about 4 minutes; so let's count it as 2 minutes and take an average spot cost—we came up with figures like in San Diego, $169,000 in a week; or in Phoenix, $70,000, or in Los Angeles, $479,000. The total over a million for nine stations.

Mr. RAILSBACK. May I just ask if you were to bill Elton John for that kind of time on a commercial basis?

Mr. GABBERT. At a trade-off, assuming that 2 minutes of it would benefit us, and 2 minutes would benefit him.

Mr. RAILSBACK. Do you know what Elton John would do? He would buy a radio station and play his music and capture your audience.

Mr. GABBERT. That's called the free marketplace.

Mr. BAYLISS. I don't know that people would want to listen to Elton John 24 hours a day.

Mr. RAILSBACK. What he would do is team up with Olivia Newton-John, and I would tune in, too.

Mr. BAYLISS. Sounds like a great idea.

Mr. GABBERT. This is interesting talking about record sales which you can correlate, again, to radio play as in MCA's report on their record industry in 1977 in the fourth quarter. Three albums sold over a million copies—Elton John's Greatest Hits, Olivia Newton-John's Greatest Hits, and Lynyrd Skynyrd's Street Survivors, those were getting maximum air play at that time.

So, in summary, what we're really saying is, I think it would be unfair to assess a fee to us on a performer's royalty fee when we aren't allowed to charge them for the value of what we're giving them; so I consider it a trade-off.

Mr. BAYLISS. And we should point out, too, again, that for the major market broadcaster, whether it's a dime a week or $100 a week or $1,000 a week, that really isn't the issue.

The issue is the principle of the thing: Should something like this be done? The real, the adverse effect, I think, while it would impose some difficulties for any broadcaster, the broadcaster who is going to feel the real heavy thrust of this is going to be the small market broadcaster, and the small market broadcaster makes up, I would say, about 75 percent of all the radio stations licensed for commercial use in the country where they, in essence, go out and buy the records that they play on the air, and they expose the product on the air. Then, through their licensing agreements, they pay the various licensing agencies—ASCAP and BMI and SESAC—and then in the proposed legislation they would turn around and pay again. And the cost for their participation there might well mean the difference between adding a newsperson in that station.

Mr. RAILSBACK. Now, where you're talking about $250 a year if you're under $100,000, or $750 a year if you have up to $200,000, between $100 and $200,000; so you're not going to add another newsperson for $250.

Mr. BAYLISS. In a small market, you would be surprised what you can add for $250.

Mr. GABBERT. Excuse me. I paid myself $68,000 last year, and ASCAP and SESAC fees——

Mr. RAILSBACK. I'm not talking about the regular copyright liability. I'm talking about the royalties that would be paid under this bill. It's $250 under $100,000 in gross receipts. You're even exempt if you're under $25,000, and then, if you go up from $100 to $200,000 it's $750. It's a total payment, as I understand it, of $750 a year.

Mr. GABBERT. Wasn't it 1 percent when the gross exceeded——

Mr. RAILSBACK. Then if you're over $200,000, it's 1 percent of your net receipts, deducting your sales commissions. I'm not sure, by the way, if the formula is correct, but we're not talking, under the bills, about a lot of money. But the people yesterday said we're concerned about the foot in the door.

Mr. GABBERT. The camel's nose in the tent. There is, I think, going back, income tax was an experiment. It was not going to hurt very much, and ASCAP and BMI fees at one time were not significant, and these things do have a way of getting out of hand. ASCAP fees were, according to Billboard magazine had a record of 270 some million dollars. It was a smash in the record.

I'm a free marketplace advocate. I have trouble with the concept. It's not the money. I consider that the performers are, as I mentioned, craftsmen, and the record companies are the employers, and they should just go on strike and fight for more money. The record companies are making a lot of money; so I guess that wraps it up.

Mr. KASTENMEIER. Mr. Bayliss, do you have anything separately?

Mr. BAYLISS. No, I'm just chiming along saying, "Me, too."

Mr. KASTENMEIER. All right. May I inquire, yesterday we had a number of radio representatives here, essentially, under the auspices of the NAB. As members of the National Radio Broadcasters Association, how do you differ from them in terms of either their viewpoint so their interest?

Mr. GABBERT. Well, just the associations are different in the fact that we represent radio stations only.

Mr. KASTENMEIER. Exclusively?

Mr. GABBERT. Exclusively. And the bulk of our membership is small operators, independent operators, and by the NAB we're considered a rebel organization, but I think on this we would concur, and, again, we have trouble with the principle of it, the concept.

Mr. KASTENMEIER. But, actually, on this point you're in total agreement with them? As a matter of fact, I think only radio broadcasters were represented, and, in a couple of cases, very small stations. I asked them the question if there was anyone else in the interest other than perhaps the music operators, jukebox operators, and radio broadcasters who opposed this legislation. I don't think they indicated that they knew of any other organization, group, or interest. Do you?

Mr. BAYLISS. In the form of organized opposition? No, sir.

Mr. KASTENMEIER. Organized or unorganized.

Mr. GABBERT. Can't think of any.

Mr. BAYLISS. I'm sure that the general public is not at all aware of any of this and may have some difficulty in understanding it at all.

Mr. RAILSBACK. I think you're right.

Mr. KASTENMEIER. Do you think the general public, if it did understand the issue, would take sides? If so, why? What sides would they take?

Mr. BAYLISS. I don't know that I can answer that question fairly. I have a pretty strong view that the general public would be more for the good old American enterprise system and overwhelmingly support us in the fact that this is a free enterprise matter and a matter between employer and employee.

Mr. GABBERT. I did an editorial in San Francisco on it, and, of course, the editorial was against it, and it generated lots of bravos.

And I explained the value that a radio station has to the performer and how the performer benefits, and it's a mutual trade-off.

Mr. KASTENMEIER. Did you provide equal time?

Mr. GABBERT. Nobody asked for it.

Mr. KASTENMEIER. I think that's all the questions I have, and I want to thank you both for appearing here this morning.

Mr. GABBERT. We appreciate it. Thank you very much.

Mr. KASTENMEIER. I'd like to, at this point, ask Mr. Allen, who is in the audience and was a preceding witness—he said that he hoped there would be present this morning some representatives of the California Music Merchants Association. I'm wondering if those folks have shown up yet.

Mr. ALLEN. Yes, Mr. Chairman.

Mr. KASTENMEIER. Would you like to introduce them?

Mr. ALLEN. If I may introduce our California respresentatives, here is Mr. Gabriel Orland who is the executive vice president of California Music Merchants Association and also a member of the board of directors of our national association. He's from Glendale and operates jukeboxes throughout this area. Then there's Mr. Carl Fisher who is from Inglewood and is also an operator here and is a member of the board of directors of the California Music Merchants Association. They understand our statement and are here to support it. Mr. Orland might speak to that point.

Mr. ORLAND. As a member of the California association, CMMA, which is California Music Merchants Association, we would like to oppose H.R. 6063.

Mr. KASTENMEIER. Go on record in opposition?

Mr. ORLAND. Yes, sir, along with supporting our national association which I am also representing today in opposing this bill. And I hope that you gentlemen will go along with our opposition.

Mr. KASTENMEIER. Your point of view was very well represented by Mr. Allen earlier, and if you have any statement you care to file with the committee, we would be pleased to have it.

Mr. ORLAND. All I want to do is oppose the bill. I think it's unfair, unjust, and unconstitutional.

Mr. KASTENMEIER. Well, I won't call upon you for a constitutional attack on the bill.

Mr. ORLAND. Just my opinion.

Mr. KASTENMEIER. All right, Mr. Orland, thank you for appearing here today, and your presence and that of Mr. Fisher are acknowledged.

Now, at this time, I would like to call on representatives of the Recording Industry Association of America. Mr. Stanley Gortikov, Mr. Alan Livingston, Mr. Stewart, Mr. Smith, Mr. Moss, Mr. Norman, indeed, the last panel in our 2-day hearing. Many of you, certainly Mr. Livingston and Mr. Gortikov, have appeared before this committee very ably in the past, and we're very pleased to say hello to you again and greet you along with your colleagues. Mr. Fitzpatrick is with you this morning?

Mr. RAILSBACK. Mr. Chairman, could I just mention that Mr. Stewart, I believe, flew all the way from England for this appearance. He's been very, very active and knowledgeable, and I just wanted to mention

that because Tom Mooney and I had the pleasure of meeting him in Europe.

Mr. KASTENMEIER. Mr. Stewart, you are especially acknowledged, and we look forward to hearing from you. Certainly your group has had the opportunity to hear all the comments that preceded this particular hour and, in terms of this proceeding will have, so to speak, the last word.

Mr. Gortikov, we'll call on you, sir.

TESTIMONY OF STANLEY GORTIKOV, RECORDING INDUSTRY ASSOCIATION OF AMERICA, ACCOMPANIED BY ALAN LIVINGSTON, JERRY MOSS, JOE SMITH, STEPHEN STEWART, GENE NORMAN, AND JAMES FITZPATRICK

Mr. GORTIKOV. Thank you, Mr. Chairman, members of the committee. I'm Stanley Gortikov, president of the Recording Industry Association of America whose member companies create and market about 90 percent of the prerecorded tapes and records that are sold in the United States.

With me are five industry representatives. Starting on my left, Mr. Jerry Moss, president of A & M Records and chairman of the board of RIAA; Mr. Joe Smith, chairman of Elektra Asylum Records; Mr. Stephen Stewart, director general of IFPI; Mr. Alan Livingston, president of Entertainment Group of 20th Century Fox Records; and Mr. Gene Norman, president of Crescendo Records; and Mr. James Fitzpatrick of Arnold & Porter.

We're the cleanup crew. We've been hearing lots of rhetoric here yesterday—broadcaster protests and disclaimers—and, along the way, we might have lost sight of our focus which is what I hold in my hand here. This is a copyrighted sound recording.

[Mr. Gortikov plays the recording for a few moments.]

Mr. GORTIKOV. That's why we're here. I don't want to lose sight of the fact that we're here to support that copyrighted sound recording and to recognize the uniqueness of that sound recording. What you just heard was "You Light Up My Life" by Debbie Boone, a hitherto unkown recording artist who was catapulted to stardom by that record, a talented singer in a unique performance who made a good tune come alive, and, to a great measure, the reason for that was traceable to the creative input of the recording company who identified that unique talent, found the right song, put the two together, provided the correct arrangement, brought creative people together, added electronic engineering, increments that made a hit.

Radio played that tune "You Light Up My Life" many, many thousands of times for a purpose—to attract audiences, to sell commercials, and to make a profit. Radio used that record, and radio still uses that record for those purposes.

As we remarked this morning, radio does pay composers and publishers. The witness who just finished said $68,000 alone from that gentleman's stations, and, yes, in this case Debbie Boone isn't going to get anything. The recording company copyright owner isn't going to get anything. The background performers you just heard on the record

aren't going to get anything at all. So radio gained a commercial benefit from that air play, but they did not pay for the privilege, and it's that inequity and that injustice that brings us before you today.

I'm going to depart from the prepared testimony. I want to talk about fairness, and I want to talk toughly about fairness, and I'd also like to talk about unfairness, our version as well as that of the broadcasters. The unfairness started yesterday when the broadcasters said they objected in principle to paying performance royalty, in principle, even though records are the only copyrighted work for which a performance royalty is not paid.

Those broadcasters that are given our records said they already compensated us through free air play. Specifically, Mr. Peter Newell who's president and general manager of Los Angeles station KPOL, said that "by far the most important factor in generating record sales is radio air play." That's what Mr. Newell said, and he's right. Air play is very important to us. We've never denied it, but Mr. Newell said what kind of air play. The records whose sales are most likely benefited from air play are records that are probably on these two charts from the most recent issue of Billboard magazine. These are the top 100 best selling LP's, the top 100 best selling single records.

Two days ago we monitored Mr. Newell's own station on Tuesday. We selected 4 of the most listened to hours, and during those 4 hours on KPOL only four records were played that apepar on these best seller charts. Fifty-three records were played not from those charts. So we can reason that four records that played within those 4 key hours probably helped sales. Fifty-three records that were played did not. So Mr. Newell's play list is at odds with his own testimony.

Now, there may be something unfair implicit in the monitoring we did of Mr. Newell's station, KPOL, because KPOL is kind of a middle-of-the-road music station. It's not a rock station, for example; therefore, we also monitored KLOS–FM which is the most influential station in the Los Angeles area, considered by record personnel the most influential station. In the same 4 hours selected on KLOS there were only 7 8records from these top selling charts and 40 records not from the charts. So, sure, air play helps sales, some sales, but certainly not nearly enough to cop out of a performance right. Broadcasters oppose a principle when it is a question of their paying for their commercial use of a sound recording. It's that simple.

Broadcasters have also told you, and it was refreshing to hear a refutation of that this morning, that they cannot afford to pay. The witness just before us said they could. And the broadcasters have used some ominous statements—they're going to go out of business or they're going to have to cut back on public service programs—but they have omitted the furnishing of any data that would support those statements. The only data on the record before you from the independent economic analysis provided by the Copyright Office suggests that they are overstating those claims by a long shot. Certainly they're offering no squawks about paying for any other form of programing which they use—news, sports, dramas, personalities, whatever.

Little stations like Willie Davis' station, a witness yesterday, certainly deserve some special treatment, and I think that's why the

royalty schedule in the Danielson bill is stratified—no cost for the tiny station, and that would cover about 2 percent of the stations in America. The next level up would only pay about $0.75 per day performance royalty under that schedule, and that would embrace about 23 percent of the radio stations in America. And the next level up would pay about $2 a day performance royalty and that would cover about 33 percent of the stations in America. So, therefore, 33, 56, 58 percent of the stations in America would pay $2 a day or less.

There's been a lot of talk yesterday about "fat cats," and the phrase was used liberally this morning, too—"fat cat record companies," "fat cat superstars," "fat cat musicians," earning $21,000 a year. Why do those fat cats need a performance royalty, it was asked. First of all, disabuse yourself of the stereotype that all record companies are fat cats. There are three large record companies, name record companies, in this area right now that are having serious profit problems. An I know: I was president of a fat cat record company, and I lost my fat cat job because our fat cat artist didn't do so well for 1 year. [Laughter.]

So that fat cat question that was raised here just misses the point with me. It isn't fat catism at all, and it isn't need. Need is not an issue here. We're talking about equity—equity of being compensated for the commercial exploitation of the copyrighted work. Broadcasters certainly know about equity versus need. Did Alex Haley need television income even though his television shows helped skyrocket the sales of his book?

And the broadcasters know about equity, too, because they got some of it last year from you. They gained a performance royalty and a performance right when their copyrighted creative programs were to be used by cable TV stations. So how can a broadcaster sit up here and look you square in the eye and say that our objectives are unfair? We ask for what they get, and we ask for it precisely the same reasons.

Yesterday several of you, understandably, asked how would these royalties be collected and how would they be disbursed, and how would all this be done equitably? We're going to work with the unions and hope to come back to you in the near future with a pro forma proposal of the type that Congressman Danielson described. It may sound complicated. We don't believe it is at all. It's being done all over the world in dozens of nations right now. It's being done right here in the United States. There's a wealth of experience for this plan. For 40 years ASCAP and BMI have been distributing royalties and collecting them for composers and publishers. Unions have lists of every vocalist and musician that appears on every record; so the data is at hand, and ASCAP, BMI, and SESAC have the information. There are a host of international systems they look to. And they're right now in the process of learning how to distribute income to three other beneficiaries—cable, public TV, and the jukes. The course of doing this? It's unknown at this point. But other countries prove it can be done efficiently and economically. The broadcasters themselves yesterday underscored the cost and complexity. If that's true, then let them work with us, too, in evolving a fair and simple system that would be acceptable and liveable for them.

Yesterday you also heard Mr. Newell of the broadcasters say that there were no benefits to the nation's economic system in a performance

right. Absolutely not true. He couldn't be more wrong. There are significant international ramifications in this bill before you. U.S. performers and musicians and recording companies are right today being deprived of income from abroad because there is no reciprocal right in this country. U.S. recordings are heavily air played throughout the world, and this could and should bring a flow of money right back here to the United States at a time when we need it, but that is not happening. Fifty-four nations of the world respect the performers' right. We want to be number 55. We want that income flowing back here, too, and the United States needs it.

You've heard some eloquent testimony yesterday from the unions about the impact of technology, literally in the form of the sound recording, and the impact on their members of that technological development many years ago, and Mr. Railsback acknowledged the technological displacement of live musicians by sound recordings. Who knows what the future holds for us in terms of technological change, what it holds for us, the record companies and singers and musicians? Technology in the future may very well intrude on our growth and our rights just as a past technology has displaced musicians. So if radio uses our product for profit, without paying, who knows what tomorrow may bring. Home copying? Pushbutton music at home? Equipment with memory? Any of those things are possible: so we need a performance right and a royalty now to protect the record companies and the recording companies in the future. Mr. Moss is going to say a bit more about this shortly.

Earlier today when I played "You Light Up My Life," you heard part of the creative role of the record company in the preparation of a sound recording. Later today your subcommittee, in an actual recording studio, is going to see more of those creative processes come alive through the actions of record producers and creative staff in intricate facilities. We know that creativity is the lifeblood of any record company, and we want to nurture all the forms of music—classics, jazz, contemporary music.

And to help in this realization, the members of the RIAA board have agreed that their companies would turn over to the National Endowment for the Arts 5 percent of any performance royalties that would be received by them, and such funds would be earmarked for further creative development of both music and recording. Both recording companies and performers, of course, do share a mutually creative role in making a recording, and it's that shared creative role that underlies the agreement that previals between RIAA, A.F. of M., and AFTRA to share any performance royalty on a 50–50 basis. We've all fostered that 50–50 sharing as a mandatory provision of any legislation. That 50–50 sharing was discussed here yesterday, and a question was raised: Should a record company permit as much as 50 percent? We certainly strongly feel that it should, and I'd like to cite the reasons in support of that rationale.

Record companies are an important creative factor and contributor in the making of a sound recording, and there are just no maybe's about it. And, second, 50–50 sharing is the basic principle of the Rome convention which is the underlying international document to the performance right. And, next, the recording companies' risk is huge, and congressional history shows that, at last count, about 77 percent of

sound recordings that are made and released fail to recover their costs. And, next, as I mentioned, because of the threat of future technology, we need that protection at least equal to other beneficiaries.

We're also talking about copyright law, and, in most instances, the recording company is the owner of the copyright, and often the owner's entitlement is 100 percent. We expect 50 percent, and as owner of the copyright, a recording company assumes all the responsibility of costs, of enforcing and protecting the rights granted to sound recordings through that copyright. For all those reasons there is no wonder that the parties most affected, that is the vocalists, musicians, and ourselves, the parties most affected have agreed over a decade to the 50–50 sharing, and the parties most affected still so agree.

So, in conclusion, we've come before Congress six times in the past, but this time is different. This time there are four brandnew considerations which justify your support of a performance right.

First, Congress has now passed the omnibus copyright law. The performance issue can now be considered on its merits alone.

Second, there's now a new royalty tribunal created to which Congress could turn when necessary for the complex, technical task of adjusting royalty rates.

Third, Congress has granted to broadcasters a performance royalty from cable television. You have set that precedent.

And, fourth, you asked for a thorough, objective study of this issue by the Register of Copyrights. You have it. That comprehensive study strongly recommends a performance right. It rebuts every broadcaster argument—constitutional, economic, political, even some of their smoke screens.

In summary, we ask you to enact a performance right in sound recording. Fairness requires it. Precedence requires it. Constitutional principle and judicial interpretation both support it. It's a deserved reward for creative contributions. We need that protection from future technological change. Commonsense compels it because American companies and musicians and singers are losing money from abroad, money they are entitled to.

And, finally, there's no longer any valid reason not to enact a performance right and royalty. The only opposition comes from those who now gain economic benefit from the absence of a performance right and royalty.

So, to round out my remarks in the prospectus presented, I'd now like to call on each of the other executives who are here at the table, and I first, with your permission, would like to call upon Mr. Alan Livingston, president of the Entertainment Group of 20th Century Fox, and he's our industry's pioneer in the performance right, Mr. Chairman, as you well know.

Mr. KASTENMEIER. Thank you, Mr. Gortikov.

Mr. LIVINGSTON. My name is Alan Livingston. I've been in the entertainment business for over 30 years. I've held the positions of president and chairman of the board of Capitol Records, Inc., vice president in charge of television programing for the National Broadcasting Co., and have been an independent producer of records and motion pictures. I am currently president of the Entertainment Group of 20th Century Fox Film Corp. I'd like to point out that, unlike most of the testimony, I am probably in the most unbiased position here, per-

sonally. Neither I nor 20th Century Fox would benefit by a performance right. Our catalog of records for air play is minimal.

On the other hand, we own three television stations and are actively seeking additional ones as well as radio stations so that it might seem, on the surface, that it were to our disadvantage to promote the issue at hand. Nevertheless, speaking as an individual and with the full blessing of the management of 20th Century Fox Film Corp., I strongly support the creation of a performance right in sound recordings for artists and record manufacturers.

More than 12 years ago, as you know, I made the additional proposal for a copyright in a recorded performance in the House subcommittee. I'm impressed by the ways of our Government which allow this matter to be still alive, and yet I'm dismayed by the fact that so much time can be taken by such a simple, and in my opinion, a definitive issue. A phonograph record is nothing more than a delayed performance. It was not created to be performed publicly for profit beyond the control of the recording artist and the record manufacturer. Those who oppose the performance right in sound recordings are those who now program their business free of charge.

As to the arguments of those who oppose a performance right, I'd like to make some brief comments. First, consider the position taken by radio stations that they provide free promotion for sound recordings through air play. The same position might as well be taken that they provide free promotion for the underlying copyright. The songwriter and music publisher benefit by radio play. And I might point out, in comparing the manufacturer's contribution to the performer, that you might look at the similar situation between a songwriter and a publisher. A music publisher receives 50 percent of the performer's income. He makes literally no creative contribution. He provides the financing for the printing of sheet music, for the promotion of music.

He seeks radio air play as well. And, yet, he justifiably so has taken that financial risk, and you might compare him, in a smaller sense, to the record manufacturer who receives the 50 percent. In fact, most music publishers employ record promotion men to encourage as much air play as possible. They recognize that air play exposes their product to the public, sometimes resulting in sales of records and sheet music on which they profit. But radio stations have accepted the fact that they must pay for the use of this underlying copyright. Therefore, the promotion value to the record is no different from the promotion value to the song itself. And there is no reason why their arguments should be used against the performer's copyright of a record any more than it should be used against the copyright of an original work.

In summary, I can find nothing in the broadcasters' claims which follows any logic or is in any way in the public interest. Radio does not promote the sale of recordings. It merely programs their performance and thus exposes them. People buy what they want to own whether they hear it first on radio, on a jukebox, in a discotheque, in a record store, or elsewhere. Actually, as we know, only a small percentage of what is programed by radio is purchased by the consuming public. The point being made here is so simple and obvious that it defies argument: The creative work of performers and producers and the financial risk and investment of manufacturers is being used for profit without compensation. Radio stations have profited by this use for

many years. It is time this inequity is brought to an end. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Livingston.

Mr. GORTIKOV. Our next presentation will be by Mr. Gene Norman, president of Crescendo Records, which is a small jazz and catalog label. He is going to address how the specialty record company is impacted by a performance right.

Mr. NORMAN. Thank you. I'm Gene Norman of Crescendo Records. I'm one of the "skinny cats" in this business. I have a typical small American business. I have five employees, and I have three manufacturer's representatives around the country. We produce about 20 albums a year, and we're essentially a catalog company specializing in an important segment of American music and that's jazz. We're typical of 100 other small labels in the United States, independent labels. We have chart blockbuster hits. We receive no wide radio exposure or any particular sales benefit, but many radio stations, both AM and FM, do use our production. They use them for production, background, and so on.

I'm reminded of a case several years ago when a leading program syndicator, a man who programs beautiful music, wall to wall tranquility, for some of the FM stations, called me and said, "I love one of your records, and I'd like to borrow your master tape in order to get better air quality." And I replied, "Do you announce the record or the artist or the label?" And he said, "No." I said, "Well, I'm sorry, we're not in business to provide free music for radio stations." So, in effect, he was using our music, and we would get no benefit from it. Obviously, our records have a limited potential, and recovery of costs is very difficult. It really seems unfair that we should not share in radio profits since we need every income source possible. Our risk is great, not only in money, but in creative control, and there is no more legitimate income source than performance royalties.

As a small company, we give opportunity for many artists who might not reach a wide audience. We have everything in our catalogue from pre-Columbian music—unfortunately, we found out there are not too many pre-Columbians to buy the records. We even have a country yodeler on the label. We have a group from Spokane, Wash., average age 60. We have a honky-tonk player from Las Vegas. These are all working people who are trying to make a living—and I think they deserve, as well as we deserve, some consideration here—not to mention the fact that we have albums by Louie Armstrong and Art Tatum, some of the jazz greats, and they have widows who need money. And I feel it is only fair that they should share when a radio station plays for profit. We simply service the appropriate stations knowing that they will use only what suits their purposes. They play only what's good for them, and, therefore, I believe they should pay for that privilege.

Curiously, I was a broadcaster myself for 18 years here in California. I was a DJ, and I always really enjoyed the incredible access I had to all the music in the world, so to speak—Sinatra, Crosby, Ellington, all the great artists and all the background musicians who performed with them—and the station paid no consideration to the record companies who risked so much money to produce all the records. I submit to you in what other business is the principal product marketed

received free, absolutely gratis? It's a curious and inequitable precedent. It's strange, and it occurs in no other country in the world. And, even though I was a leading disc jockey, however immodest that may seem—I rated No. 4 or better in every national poll—I always understood, I always realized that the only reason people listened to me was because of the music I played. They were listening for the records, not for me.

If I started to play lousy records, they wouldn't listen very long. I was active for many years in the concert presentation business here and also in nightclubs, and every time I presented talent for profit, I paid the performers and the people who produced their shows. I ask you: Why shouldn't radio pay for performances the way everybody else does who presents talent? There's an old saying that there's no free lunch. Well, perhaps we should amend that to read: "Except, of course, if you are a broadcaster playing records in the radio." Thank you.

Mr. KASTENMEIER. Thank you, Mr. Norman.

Mr. GORTIKOV. Next is Mr. Jerry Moss who's president and founder of A & M Records and also chairman of the board of RIAA.

Mr. Moss. Good morning. My partner Herb Alpert and myself started A & M Records in little more than 15 years ago on an investment of considerably less than $1,000. We consider ourselves part of the American dream, and we take pleasure and honor in that accommodation. Today, we're one of the top five recording companies in the United States, and we're, I believe, the largest independent company. The stock in the company is owned by primarily Herb, myself, our employees, and our families. Our income is based solely on our records and the acquisition of music, publishing, and copyrights.

Though I am not a technical man by trade, I would like to address my comments and support for what we believe in to the vast amount of technology today available that is, quite frankly, scaring me to death, and so I'd like to address myself to the wanton, unrestrained expansion of home taping and the encouragement of such home taping by many broadcasters.

This is another form of personal piracy with millions copying the commercial recordings with no compensation to the creators, performers, or risk takers. If carried to the extreme, our market will be ever diminishing. Therefore, we need the protection of legitimate income sources such as performance royalties to cushion against such technological onslaught.

New generations of home playback equipment for recordings, disc turntables, and cassette decks now have memory components that allow the listener to select and play any track from various recordings. Combine this with the home recorder capability, and you see created more millions of private, in-home manufacturers using our commercial recordings to make compilations of their own choice, again, without income to the creators, performers, and risk takers. Here, too, we need performance royalties to negate some of that income loss and to encourage continuing recording.

Premium, super quality tapes are now increasingly available, making home recording even more tempting than ever. Just down the road is metallic particle tape which will make possible micromini cassettes

within a couple of years, all with the capability of being hooked to portable recorders. Picture every teenager in America with a shirt-pocket-sized recorder-player and earphone. Just another reason why Congress just cannot pass up now the chance to compensate us where we deserve such payment.

Also technologically possible is the in-home retrieval via cable of pushbutton selection of recorded music of the home listener's choice without purchasing anything other than the service. Are we to be victimized by this, too, with no prospects of performers' rights and royalties?

Performers and recording companies are even more dramatically exploited by the broadcasters' own technology. Many stations are virtually fully automated. They buy and operate mechanical robots which are fed with special cartridges containing tape copies of our recordings interspersed with commercials, of course. Those mechanical monsters can spew out a straight 24 hours of canned broadcasting with no human in sight. Commercial time is paid for; the recorded performances are not. Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Moss.

Mr. GORTIKOV. Next, Mr. Stephen Stewart, director general of IFPI which is the International Federation of Producers of Phonograms and Videograms, has come here from London to give us some international perspective.

Mr. KASTENMEIER. You're most welcome, Mr. Stewart. You've come a very long way to give us the benefit of your wisdom and experience.

Mr. STEWART. Thank you, Mr. Chairman. May I emphasize that although it is perfectly true, as Stanley Gortikov has said, that I'm the director general of IFPI, that I would like to regard myself in this context, where you are dealing with the legislation of a country, just as a member of a bar and its current chairman who will give you the picture as he sees it. And, particularly, if you care to ask questions about it, I'll answer them as best I can regardless of whether I think it serves the interest of those I happen to represent or not.

The main point, on an international level, which was being made was that 55 countries recognized this right, and this is accurate. But I think you'll get a better picture if I give you the breakdown because it's the quality as well as the numbers that matter. They fall into three categories. Europe, category 1; Latin America, on your continent, category 2; and the Asian-Pacific area, category 3.

Now, Europe is the simplest to deal with because in Europe all countries recognize this right, bar four, recognize this right and the four exceptions are France, Belgium, Holland, and Switzerland, all countries of the French or Latin approach to legislation, and their sole difficulty is that they cannot reconcile the fact that copyright should reside in the limited liability company as opposed to a person. In other words, they have theoretical difficulties. Nonetheless, I think it significant for the purpose of this injury that the radio stations in those countries do pay for record play under contract, in other words, volume, thereby acknowledging a moral, although not to be a leading right.

In all other countries, a leading right exists. In Latin America, again, a majority of the Latin American countries recognize the right, and the number has been increasing rapidly in the last few years.

In the Asian-Pacific area, the key countries recognize the right. By the "key countries," I mean—in the copyrighted music sense—Australia, New Zealand, Japan, and India.

Having said that and enumerated these three groups, where are the other nearly 100 members of the United Nations? I believe the United Nations have over 150 members. They are the Communist world. Not without exception, funnily enough, both in Russia and China, the right exists, but it is pretty theoretical because both the record producer and the broadcaster and the users are nationalized enterprises, and therefore it wouldn't be very significant if one state pocket paid into another state pocket.

Numerically, the strongest part of the world which doesn't recognize the right are the developing countries in Africa and Asia, and there the reason is a very simple one, and that is that they are all importers of copyrights, and they take the view, and I may think not unreasonably, that it would cost their already poor countries too much to pay the rich countries for that sort of right, so that the picture is that the copyright countries, in the sense of the developed countries, users, nearly all recognize this right and that the United States is the outstanding exception.

The next point I'd like to address myself to, quite briefly, is the nature of the right because it varies considerably, but I think it makes very little difference. In the Anglo-Saxon context it is the copyright. In many other contexts it's called "neighboring right" and consists of a right to equitable remuneration as opposed to the right to allow us to forbid the play. The difference becomes almost nil if with the copyright goes the compulsory license, as it would under the bill here, but the copyright and the compulsory license is very little different from the right to equitable remuneration and the so-called neighboring right—the term was created to placate, particularly, the Latin element of jurists who, as I told you, saw theoretical objections to giving a copyright to a limited liability company.

The split is an interesting phenomenon, if you look at it. It's the split between the record producer and the performer. The producers and the performers, by their international organizations, have agreed some time ago that the fair and equitable split is 50–50.

And this has been implemented and is being implemented in countries where usually the record producer has the right and the performer has not because in the majority of countries the right is that of the record producer because it's in the nature of a copyright. And in all those countries we advocate the sharing of the proceeds of this right on a 50–50 basis. It's also interesting to observe that since the Rome convention was enacted—that's about 20 years ago—nearly all the countries which have legislated have given the right to both the record producer and the performer and, therefore, the 50–50 split does apply. There are a few exceptions, but they are in the nature of perhaps 5 percent of the total—Mexico, mainly in Latin America, and there's Germany in Europe where the right goes to a performer and the record producer then participates under the ruling.

The next point I'd like to shortly cover is the question of collection and distribution of royalties because it's often been said that what's the good of all this? The bulk of it will go into costs, and the benefits

to the people who should have the benefits will be small. This, internationally, has not proved correct. And the reason for it is that, particularly, air play must be logged now in any event because of the copyright royalty to an author, and the automated processes are such that the additional logging for the performer and the record producer causes no additional problem. Therefore, if you look at the cost of the societies which have been set up to collect and distribute the royalties, you'll find that those who deal with national collection and distribution run at about 5 percent which is low in the league of all those societies, and those who deal with it internationally run between 10 and 15 percent which is also on the low side compared with the costs of all those societies.

I'm reminded that my time is running out. May I leave you with two points which puzzle me because they don't seem to respond to ordinary logic or commercial reasoning. The first one is the position of the broadcasters, because it seems to me that their position vis-a-vis the cable producer is exactly the same as has already been said. They use the broadcasters' product without permission and make money out of it and don't want to pay. The position here is exactly the same. The broadcaster uses the product of the record producer and the artist without permission and is making money from it. And the point I'd like to make here is that it is extraordinary that this opposition is strongly voiced in the United States where all the radio stations are commercial enterprises; whereas, it isn't voiced half as strongly in other parts of the world where the broadcasters' public operations are not profitmaking. That puzzles me.

Now, the other point that puzzles me is that of the relationship of the United States with the rest of the world, economically, and in terms of balance of payments. Now, the United States of America—we're talking mainly about musical copyrights—is, I think one can say without any possibility of contradiction, the largest exporter of copyrights. The second one is the United Kingdom. And what puzzles me is that here is a source of income for the United States, for U.S. producers of records, and performers, which goes for a loss because foreigners obviously don't pay U.S. reciprocity. In the obverse position, the United States doesn't pay for record play abroad, and record play abroad is, in the Western World at any rate, between a third and a half U.S. copyrights.

Mr. RAILSBACK. May I ask, does anybody have any idea how much money that would be in record sales abroad?

Mr. STEWART. In the record sales——

Mr. GORTIKOV. An estimate is that, of world sales, U.S. sales are about half.

Mr. RAILSBACK. Do we have any sales figure, rough figure?

Mr. GORTIKOV. I don't have them here. I could get them for you.

Mr. STEWART. But the point I was trying to make is that half the air play in some countries is U.S. copyrights. I'll stop here if you want me to answer any questions of yours, either in writing by way of homework, or orally. It would be an honor.

Mr. KASTENMEIER. Your comments have been very helpful, Mr. Stewart. I think the second of the two puzzles, as you suggest, is, in fact, perhaps an inconsistency in terms of economic benefit. However,

the other one—we often find our organizations on the side of an issue that economically benefits, even the Record Industry of America will oppose author-composers in terms of increases in mechanical royalties, when it suits them, very vigorously. So that is not so much of a puzzle to us.

Mr. STEWART. Increase, yes, but existence of the right, no.

Mr. KASTENMEIER. I'm sure that there was a time when that was a question.

Mr. GORTIKOV. Mr. Chairman, our last presentant is Mr. Joseph Smith, chairman of Elektra Asylum Records.

Mr. SMITH. I'm the end man here; so you'll pardon in that we did not compare any notes. There might be some brief repetition. I hope the presentation will be brief, as well. My background is 12 years in the broadcasting industry and 16 years in the record industry as chairman of Elektra Asylum Records which gives me a rather unique perspective in this matter. I think you've heard both our industries, broadcast and music, take our best shots. We have told you that we have provided all this free, 16, 18 hours a day of programing to the broadcasting world, and they have told you how they have increased our sales by giving exposure to our artists. There is validity to both points.

However, it seems to me, for this interdependent relationship, the entire financial burden and the control has shifted one way over the past 15 years. The costs involved for record companies to develop new talent, to promote, to market, to provide 7,000 copies of each new album to so many radio stations, has gone one way while radio stations still, as you've heard, have kept the options of picking and choosing from those records, have become automated, have not identified records in many cases, have contributed too little in terms of creativity to our industry. In fact, the stations' cumulative effect in the past 15 years has restricted exposure, has denied us the opportunity to present new talent in so many cases, and has developed a philosophy of looking for winners only in radio stations, and we have had to turn to other means to market our records and find exposure.

We have invested millions of dollars in clubs subsidizing personal appearance stores by artists in and concert halls. We have spent hundreds of millions of dollars in radio, press, and television advertising. On the same radio stations where we find difficult in exposing our talent, we have bought the time. We are still dependent to the greatest degree on radio, but we are also aware we are at the mercy of radio station options which are theirs to change formats to all news, to two-way talk radio and the first is, gentlemen, that if the broadcasting world felt that the sound of ice water dropping on a linoleum floor were the way to attract listeners, then our records would be sent back to us and ice water dropping on a linoleum floor would be the prevalent sound in music.

Mr. Newell of KPOL has mentioned that if the advertisers pay, and we paid—he has equated the advertising costs for Coca-Cola and all other clients on his radio station with the fact that we should be paying. It's a specious argument. You could not present 1 week of broadcasting in a rating period of all advertising. The product that we have provided is the attraction for his advertisers. We have en-

couraged where the music goes. We have developed the new talent. To hear jukebox people and broadcasting people claim that we have no creative input is an insult to us. We have made the decisions to select the talent. We have found the new Linda Ronstadts and the new Paul McCartneys and the new Captains and Tennilles. We have provided the producers, the arrangers, the studios, and the technology, and the marketing. We make an enormous input. Radio is not involved in that process. Radio picks and chooses at the end of the line. We are not allowed to tell radio stations that a new Linda Ronstadt record is to be played.

In addition to playing our records, we are asked for artists for appearances for radio stations. We are asked for radio spots. We are asked for hundred of thousands of free records for radio station giveaways and promotions. The fact is that if we are partners, we have very little input, and we are bearing the financial cost, and as you've heard, we have no license to steal.

This is not an industry that guarantees success out of the box. The financial records of some record companies would be startling. ABC Records lost $22 million last year. This is a crap game mentality where we risk a great deal. The radio industry is on a free ride with our music, and we know that if they stopped playing our records, we would suffer. We would lose our main source of exposure, and, on the other hand, we know and they know that they would find great difficulty in providing 18 hours a day of broadcasting. We do provide 150 LP's a week and more singles; so we are at risk all the time, and we have no interest in damaging the financial health of the broadcasting industry.

There is, however, an inequity, and I don't think the broadcasters are addressing themselves to that inequity. Their main defense seems to revolve around the thesis that if it has not existed, it should not exist now. That is not logical reasoning.

Mr. KASTENMEIER. Thank you. Mr. Smith.

Mr. GORTIKOV. Thank you, Mr. Chairman.

Mr. KASTENMEIER. That concludes the panel's presentation. Mr. Gortikov, I noticed that you, in the panel, did not really mention jukeboxes, and I think that you really, all of you, talked about radio in terms of a target as far as how your productions are used. Does that mean that you're relatively disinterested in the jukebox part of it as to whether or not it's covered or whether it be a major source of income for the industry performers?

Mr. GORTIKOV. No. We are not disinterested at all. I did not mention jukes, nor the many other users of recorded music. We seek the right and the royalty from all. The one difference from that would be, to take some exception to the proposal, another legislative proposal of the Copyright Office which calls for a sharing with us of the income of the jukebox royalty to be enjoyed by the music composers and publishers. It is not our objective at all to reduce any income of composers or publishers. They should not pay the price for any benefits that could be gained by us.

Mr. KASTENMEIER. I'm sorry Mr. Danielson isn't here today, but obviously the history of the proposal is a long one. Do you have any particular knowledge as to, I'd say, the recent history of the develop-

ment of this proposal which ends up in sharing sections 111 and 116, the cable TV industry and jukebox, with the performing rights societies, with the author-composers? Do you happen to know how that happened?

Mr. FITZPATRICK. The first bill that was introduced that reflects the performance right was introduced by Senator Pete Williams in 1967. At that time there was a separate payment of a dollar on top of the $8 that was to come to the recording industry and the performers. At various times during the next 6 or 7 years as the bill moved through the Senate, as I recall, the bill that was reported out by the Senate subcommittee excluded any royalty payments at all for jukeboxes. This is my recollection. I would be glad to supply this in writing for the record.

At a later time, we understood the Danielson bill to exclude any payment from jukeboxes to us on a performance royalty. The language of the Danielson bill is not a triumph of clarity in that connection. There is some muddiness in the language, Stan says. We certainly support the conclusions of the Copyright Office that jukebox and cable should pay, but we object to the Copyright Office formula that we do get one of the $8 of the authors and composers and think that an additional payment from jukeboxes would be appropriate and justified.

Mr. KASTENMEIER. Thank you for that clarification. I must confess, many years ago when I was young and bought records and listened to records on the air, I assumed that broadcasters bought a different record than we did from the record store that probably had a different label and they probably paid more for it. I don't know. Perhaps that was never true. I don't know where I got that notion.

Mr. NORMAN. That was true for many years. In the early days of radio, because there weren't that many records produced that were suitable for air play, there were transcription companies. There was one out here called Standard, and they would make special 16-inch broadcast transcriptions, and those were generally not available because there was not the vast choice that there is today. And all those companies have gone out of business long ago because of so many records that were provided free. They used to have to pay for that music. That's a very cogent point. They used to pay for music made especially for broadcast.

Mr. KASTENMEIER. At one time, in terms of controlling the situation, the change was suggested that you could produce—whether this was for, let's say, ASCAP in terms of the jukebox industry—a separate label which would go for commercial purposes, a commercial purpose label. That record would sell for more. Now, your industry resisted, I think, in your own terms, wisely, the getting so involved for that purpose. Certainly, it wouldn't have done the recording industry any good to be a collector in part for, let's say, the performing rights societies. But the notion was at least presented. That might be a supportive differential that a station could not, in fact, play a record that didn't have, let's say, a black label, wasn't, in fact, a commercial label and would cost perhaps a dollar a side more or a dollar a record more or some other such figure. However, I just throw that out for historical purposes.

As I indicated, I think, to Mr. Fitzpatrick privately, I remember an earlier proposal which called for a performer's right in sound

recordings, but did not provide for that to be shared by recording companies. And, in fact, my recollection is it went back to about 1965. Recording companies naturally resisted that particular proposal. At some point subsequent in time, those who represented performers and yourselves, apparently, resolved this difference. I was wondering whether you could enlighten me on that.

Mr. FITZPATRICK. My recollection, Mr. Kastenmeier, is as follows: In the 1965 hearings that you chaired, at that time the unions appeared before your subcommittee and strongly urged the performance right. At that time the Record Industry Association also appeared. Mr. Livington, on behalf of Capitol, vigorously advanced a performance right proposal. At that time the RIAA's main concern was with the size of the mechanical rate increase, and the focus of the presentation of RIAA was directly on the question of what the size of the mechanical rate was going to be.

The proposal that had come forward from the Copyright Office was a 3-cent rate, and publishers were urging much higher rates, and that issue was not resolved until your subcommittee had come down on the 2½-cent rate. That was in early 1966. In 1967, for the first time after a face-off of almost 30 years between the recording industry and the unions, there was an accord reached between Jerry Adler and Herman Kenin, who were the leaders of the musician's union at that time, and Ernie Meyers, who was then the executive director of the RIAA, and myself, which reflected an accord and, for the first time a combined effort to secure a performance right. It was soon thereafter that Senator Williams had introduced the first bill that had captured the performance rights proposal, and it is my recollection that the first formal amendment that had come into the legislative process was Senator Williams' amendment, and that amendment did, in fact, reflect joint sharing of the 50–50 proposal. I think the earlier proposal was simply testimony to your committee in 1965, but I could be wrong on that.

Mr. KASTENMEIER. Thank you. That was very helpful for the record because, among other things, the proposal has been around a long while, but not altogether that long in terms of the history of at least the present proposal.

I'm wondering, Mr. Norman, given the smaller specialty house recording company, to what extent you would hope to benefit? I would think very marginally.

Mr. NORMAN. Well, not at all. Let me give you a good example of my problem. There's a television station—although dealing principally with radio, this is a good example. There's a television station in San Francisco that has a science fiction horror movie show every night, and every night they play one of my records as a theme song. Now, they don't mention what the record is. I have seen no sales result of the air play because they don't mention what it is. In other words, they're using an album of mine which cost a great deal of money to produce, and they're not compensating me for it in any way. Now, could you conceive that they would not agree to pay the producer of the films they show? So I'm providing music for them, and they don't compensate me in any way for it, and that happens frequently, you see.

Mr. KASTENMEIER. They compensate the author-composer?

Mr. NORMAN. Yes, they do, and they should. But they should also compensate my company for having invested those thousands of dollars and taking people into the studio and also the performer who had to conceive the arrangements, and so on. That is a good example, I think, of our view of it.

Mr. KASTENMEIER. Mr. Moss, I was interested in the specter you created with respect to home recording, the potential of electronic reproductions which are not susceptible to any remuneration whatsoever. But it seemed to me that almost everybody would be theoretically adversely affected. I mean I'm talking about radio as well, because somebody could record 3 hours and put it on tape, and they don't need to listen to the radio, at least for that period anymore.

The Betamax, of course, apparently threatens the movie industry, and almost every collection of artists or any industry use of music or creative works are, in a sense, threatened by that as a sort of replacement. But I'm saying that you're really not in a very much different position than anybody else in that regard. It's not easily susceptible to remedy, as we know. If a 12-year-old produces on tape a record at home and does nothing more with it, there's not very much that can be done about that. But I guess I'm also saying I don't really see this bill as a remedy for that type of situation since many industries are similarly affected or adversely affected by the same uses.

Mr. Moss. I think, Mr. Chairman, what I was referring to in particular in that case was the idea of the so-called "fat cat" record company where all they seem to be living on is a heap of income coming in from all sources. I was trying to explain that through these technological advances that we are being hit on from a lot of different sides as well as from the technology affecting broadcasting which affects us as well.

Mr. SMITH. Mr. Kastenmeier, if I might, I can't equate the use of Betamax. We have a commodity that the greatest enjoyment is playing it many times. If you were to take "All In The Family," you would watch "All In The Family," but it is unlikely that you would consistently play "All In The Family." You would erase programs and see it at a more convenient time. What I'm saying is to equate the reproduction of copyrighted materials is different because the radio station is constantly playing—there will be a new play list next week that they'll record, and that will stay in the box, and nobody will have to buy that record that they can play at their parties or for their own enjoyment.

And the effects are far more damaging for us than for television producers whose shows are aired and paid for and rated and generally seen once and then erased and another show taped, where ours are stored away and played over and over again.

Mr. KASTENMEIER. Thank you, Mr. Smith.

One other thing, I notice several members of the panel tend to equate the benefits to broadcasters as a result of the copyright revision legislation with respect to cable and this particular proposal, but, actually, the radio broadcasters are really scarcely benefited by the cable provision. It was largely designed to benefit not even television because, really, it is the proprietors of the programing, very often moviemakers, that are the principal parties, and sometimes television, but rarely the radio broadcaster who isn't really a competitor

of cable in any event. And so I'm not sure that that is a proper analogy in terms of quid pro quo. Did you want to comment, Mr. Gortikov?

Mr. GORTIKOV. Only to the extent there is strong ownership crossover between radio and television. It's the same people talking out of different sides of their mouths, and the basic principle is the same of a creative copyrighted work. And I think that's where we draw the parallel, but you're certainly right in observing the difference of the use of television versus radio. The parallel is very weak in that sense, but not in the description of the basic copyrighted work.

Mr. KASTENMEIER. Thank you, Mr. Gortikov.

Mr. Stewart, I wish we had more time so that we might comparatively look at other systems and a model, potentially, for the United States. When you spoke of any distinguishing characteristics among the different types of arrangements or recognition of rights various nations have accorded, one of the differences in a very superficial review suggests that we have a rank of neighboring rights, something less than actual copyright, that the term is also reduced, for example, I think Denmark, the German Federal Republic, in terms of 25 years. Do you think the term is important here in terms of whether it's 25 years or the full copyright term? In Great Britain, is it an actual copyright term? I actually don't know.

Mr. STEWART. You're quite right, Mr. Chairman. In the Anglo-Saxon countries—Britain, Australia, et cetera—the term is the same as copyright because it is a copyright. In the continental European countries, it is very often a shorter term—20, 25, 30 years. Until quite recently it didn't matter very much, but now that we are in the late seventies and the recordings of the late forties, shall we say, 30 years or 25, become free, broadcasters will try and save money by playing free records as opposed to the payable ones. That's the reason why, in those countries, particularly the performers, seek a longer term because they say that our old records when we were in our prime now compete with our records which we want to sell now, but perhaps we are not any more in our prime. This goes particularlly for classical performers, a soprano.

Mr. KASTENMEIER. I speculated yesterday to a point you made earlier that, in terms of this country, as far as popular music is concerned, we could expect that perhaps a very high percentage, 98 or 99 percent, would be essentially domestic as far as reproduction, the operation of this country. But as far as classical music, great symphonies and the classical singers, the opera singers, that perhaps that would be more or less a 50–50 proposition in terms of the United States. I just throw that out as an observation of its impact in terms of, as you observed, the mutuality that would occur in terms of, our adopting a right somewhat similar to many of the European countries, perhaps to Great Britain, that would be of economic benefit to us concerning the popular field, but not so much in the classical field. Would you not agree?

Mr. STEWART. I find it difficult to answer, Mr. Chairman. The first thing I think one ought to say is that record play on radio stations, if you look at it all round the world, is very largely popular. I should say two-thirds or more. In some countries, 90 percent is popular music, and this is, of course, where the American strength lies. In the classical record field, I would have thought that there is a more equitable distribu-

tion. It all depends what your law says because some laws, for instance, say that what matters is where a recording took place, the fixed issue, and some say it's the nationality of the company. Now, if it's the nationality of the company, American recording would do rather well because some of the big classical recording companies are American. If it's a fixation, it might be more evenly distributed between Europe, where the recording often takes place—places like Vienna or Paris or London—and the United States. But I still think it would be more like 60–40, 50–50.

Mr. GORTIKOV. Your observation is right in that there is more classical recording going on in Europe, for example, than there is in the United States. And, therefore, your conclusion is basically accurate. However, where a licensor, say a European licensor of a classical label sublicenses an American company as a sublicensee of copyright, if there were air play within the United States, it would probably, as it does with musical composition copyrights, the performance royalties from the U.S. air play would flow to the U.S. sublicensee, and then a share of that would flow back to the original European licensor, and the reverse would be true of an American-originated work that is licensed to play overseas, be it classical or pop.

Mr. KASTENMEIER. Yes, I appreciate that observation. It's helpful. There's one last question. Mr. Stewart, among performers in European systems, what is the customary division? Do you have, for example, a symphony of 100 musicians and a conductor, 101 persons, do they share equally in 101 pieces, or does it go into a trust fund? Is there any disposition to prescribe a division among artists or among performers in European systems?

Mr. STEWART. It varies greatly, Mr. Chairman. And the answer to your question is very largely philosophical. In the countries where they wish to benefit the underdog, that's the ordinary musician, they would tilt it heavily in favor of the musician. There are various ways of doing it.

Mr. RAILSBACK. May I just interrupt, Mr. Chairman, to say that there's one country that if an entertainer makes too much, they don't permit him to have anything. Isn't that right?

Mr. STEWART. Quite right, Congressman Railsback. That's Germany. If you make more than, I think, it's in the nature of $20,000, you don't qualify; so the super pop stars get nothing, and, be it said in their honor, are quite content. They suggested it, that the benefit should be to the small guy. So, really, the answer to your question is how heavily it's tilted in favor of the furtherance of the underdog, the ordinary musician, depends on the moral and political philosophy of a country in which the legislation is enacted.

Mr. KASTENMEIER. Well, I don't know that a political decision would be a very wise decision since there are many more violinists than there are conductors. But that may not be a question we have to face. I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman. May I ask some questions which I'm sure are going to be very basic to you, and I think you're going to have to do your very best at giving short answers, but I'm kind of curious how the whole system operates, in other words, your record company. Somebody comes in peddling a song. Say that you take a look at that song, and you like it. What do you do? What

kind of agreements do you enter into with the composer, and what does he get, and so forth?

Mr. Moss. Quite frankly, every situation is different.

Mr. RAILSBACK. That's what I was afraid of.

Mr. Moss. But in every situation the record company plays a creative role. I mean that is a fact.

Mr. RAILSBACK. Yes, but be more specific.Give us some examples.

Mr. Moss. A local band, let's say, is playing at a local club in a market. It doesn't only have to be Los Angeles. There could be a band just knocking them out in Pittsburgh, for example. The record companies from Los Angeles or from New York or even from Great Britain might hear about this band through their different networks of talent scouts, so to speak, and fly representatives to this place in Pittsburgh to hear this band. A certain kind of bidding or attraction for this particular group of artists would take place, and they would strike a deal with the band's representatives.

Mr. RAILSBACK. All right. Can you give us some examples?

Mr. Moss. Some examples might be that they would form a royalty, accept a royalty of, let's say, 10 percent of the retail price of the records that they sold.

Mr. RAILSBACK. That's what I'm interested in. Any front money at all?

Mr. Moss. There would be front money which would be negotiable. I would say probably any signing that takes place today takes place with front money to the artist. Then there would be plans made between the record company and the artist about who would produce or direct the actual recording or where the recording would take place.

Mr. RAILSBACK. Is there an actual assignment of copyright at all?

Mr. Moss. That would be another conversation between the potential publisher and the potential songwriters. If this band created all their own material, then obviously different publishers who might be associated with the record companies would be interested in those songs.

Mr. RAILSBACK. What would be the usual split there?

Mr. Moss. In some cases, or in most cases you might say that the publisher might give an advance of 50 percent of the copyright.

Mr. RAILSBACK. Is that, again, front money?

Mr. Moss. Yes, front money for the artist.

Mr. RAILSBACK. And then a percentage, usually, of record sales?

Mr. Moss. Well, in the case of the copyright and the publishing area, it's generally quite clear. There's a mechanical royalty which is clearly defined. Then there's a sheet music royalty which is negotiated.

Mr. RAILSBACK. So there's a division, then, an agreement reached for division of those payments?

Mr. Moss. Yes.

Mr. RAILSBACK. What is the usual division? I'm just curious.

Mr. Moss. You mean as far as the song?

Mr. RAILSBACK. Yes.

Mr. Moss. An advance might be given on the basis, as I said before, of ownership of half the copyright of the song, the publishing half. The writer's half is also his half. In other words, very rarely does the writer sell the writer's share of his half. That's done by some estates after perhaps a writer passes away. Generally the songwriter who con-

trols the copyright—until he places it in the hands of a publisher—owns 100 percent of that.

Mr. RAILSBACK. Is it quite typical that the record companies do have a publishing division?

Mr. Moss. Yes.

Mr. RAILSBACK. All right.

Mr. Moss. But there are other independent publishing firms as well.

Mr. RAILSBACK. Yes.

Mr. Moss. And we compete with those firms.

Mr. RAILSBACK. Now let me ask you this. You have the radio broadcasters paying into the BMI or the SESAC or ASCAP. Where do those payments go now? That big pool? Would that go back to the copyright holder? Do the record companies get anything out of that?

Mr. Moss. No. Only the record companies that own publishing companies, in a sense.

Mr. RAILSBACK. But if they own a publishing company, then they do——

Mr. Moss. They do get a share of the BMI or ASCAP or SESAC payments, yes.

Mr. RAILSBACK. Is there any kind of a breakdown on the revenues derived by record companies by reason of their publishing divisions? I'm just curious.

Mr. Moss. It's difficult to ascertain.

Mr. RAILSBACK. I'll ask Stan Gortikov.

Mr. GORTIKOV. I can't give you any accurate figures, but the relative importance of a record company, publishing company, varies all over the lot. For example, the Warner complex has a very important publishing complex under its corporate umbrella. CBS, being the second largest company, its publishing interests are rather modest.

Mr. RAILSBACK. Yes, I understand. It varies.

Mr. GORTIKOV. It varies completely from large to small companies.

Mr. RAILSBACK. It's significant, but at least some record companies that have their own publishing divisions do derive payments by reason of public performances by broadcasters?

Mr. GORTIKOV. I think that's wrongly characterized. It's accurate.

Mr. RAILSBACK. I'm not making a big deal of it.

Mr. GORTIKOV. The record company isn't doing it; it's the publishing company that's doing it.

Mr. RAILSBACK. What percentage losses, if you have any ideas or ballpark figures or any of the results of any studies, how many records fail to recapture the investments that went into producing the records? What percentage losses?

Mr. GORTIKOV. The last figures that we had accumulated showed that of popular albums, 77 percent of popular albums released failed to recover their costs.

Mr. RAILSBACK. When you talk about costs, that's production costs, promotional costs?

Mr. GORTIKOV. Yes; they're investment. Eighty percent of single records failed to recover their costs; 95 percent of classical records failed to recover their costs.

Mr. RAILSBACK. This is kind of different from the situation you were describing. When you hire an orchestra or a band, how are the musicians paid?

Mr. SMITH. The arranger and producer will mutually agree as to the instrumentation. They will then hire a contractor through the American Federation of Musicians who will book musicians. We will then pay them union scale. We will engage a studio, and they are paid regardless of whether the record recovers or not.

Mr. RAILSBACK. That's the point. So that in the production of records, the musicians, the backup musicians, I would think particularly, they don't have the risk involved?

Mr. SMITH. They don't have the down side.

Mr. RAILSBACK. They are paid?

Mr. SMITH. They don't have the down side. At this point they don't have the up side either.

Mr. RAILSBACK. So the rationale for including record companies in the payment of performers' royalties is the fact that they are a part of the creation and, furthermore, they've, in many cases, taken great risk so that it's only fair to recognize their input?

Mr. SMITH. In all cases we've taken the risk, Congressman Railsback. Obviously it's not a risk to record Paul McCartney at this point. But at one point in his career he was a risk.

Mr. RAILSBACK. Yes.

Mr. SMITH. And we do pay musicians whether or not we're getting our money back. We're part of the creative process in the financial end as well as the creative end of engaging producers and so forth.

Mr. RAILSBACK. Now, let me address some questions to Mr. Stewart.

Mr. Stewart, how many countries pay only the performer the royalty and not the record companies, if you know?

Mr. STEWART. The only one I can think of straightaway is Mexico.

Mr. RAILSBACK. And they pay only performers and not the record companies?

Mr. STEWART. I don't think there are any others, but I'd like to think about it.

Mr. RAILSBACK. Now, your one point, that the reson why that is or one of the reasons why that is is that the record companies actually enjoy the status of being the copyright owner in some of the countries which means that legally they're entitled to all of the royalties in some of those countries. But were you saying that they gratuitously and voluntarily share some of that with performers even in those countries where the performers have no legal rights?

Mr. STEWART. That's so, Congressman Railsback, just so. In 1954 the record producers internationally made the agreement with the Musicians Union, also internationally, the National Federation of Musicians, that just that, what you just said, would take place. If the record producer's paid a royalty and the artist is not, the record producer would take what was then a voluntary payment under contract to the performer.

Mr. RAILSBACK. May I just kind of recognize that in this country I think it's kind of ironic. We, in my opinion, have seen, I think, fairly serious legal questions raised as to whether—well, even in the case of musicians, whether their creativity—it could be argued that they are really not, under the constitution, an author and so forth—whether they should be entitled to a royalty. That argument is, in my opinion, even more persuasive when you deal with the record companies rather than the musicians. And so what we have to do is try to determine

whether the record companies fall into the category of people that should be entitled to some kind of creative protection, and your testimony addressed itself to that. You'do saying that you are creative.

Mr. SMITH. If Frank Sinatra were to sing "Strangers in the Night," he is not an author; he owns no copyright. However, his performance is one of a kind, and he is entitled, he has a right in that recōrd. He has a right in that record. We have provided another input. But if you were to proceed logically the way you were talking that the musician is not the author and deserves nothing, then——

Mr. RAILSBACK. No, I'm saying that argument has been raised, and, in my opinion, it's much easier to say that a musician is entitled to protection because of that musician's talent and creativity.

Mr. SMITH. And we're trying to take it a generation further. We have made decisions initially in bringing those people into recording studios. We have worked in the process of selecting songs and arrangers and producers.

Mr. KASTENMEIER. I wanted to follow up on that because, in fact, I wondered whether we are dealing with fiction that the process has to be affected with creativeness, and I would ask Mr. Norman, for example, if he took a live jazz performance, put it on a record without change, what creativity does he attribute to himself?

Mr. NORMAN. Yes. The creativity is plain and simple. I have to decide what is worth preserving, what is worth releasing. It's a matter of editing the performance; it's a matter of knowing what represents the artist's best performance. Over a period of 15 years, I presented hundreds of jazz concerts, but only a few were worthy of being released. That was my decision, and I also had to pay the musicians and guarantee them a royalty. And we also have to get involved in the graphics. No one has mentioned that today, designing album covers that will appeal to people.

Mr. KASTENMEIER. But that's a separate issue.

Mr. RAILSBACK. It may be copyrightable.

Mr. NORMAN. We're not asking for royalties on that. In any case, I'm the custodian of that man's talent. I have to be creative enough as an editor to know what should be released so as to preserve his reputation.

Mr. KASTENMEIER. Anymore so than his business agents?

Mr. NORMAN. Absolutely. For example, I've just been invited to release a jazz line of 200 albums for a company called Pickwick which has access to masters of other companies who are no longer being released. They're relying on me to pick selections of graphic for 200 albums. That's a highly developed skill, and very few people have it.

Mr. FITZPATRICK. You characterize the question as a serious one. From a legal point of view, of all of the difficult questions that committee has to deal with, this, I respectfully suggest, is not a serious problem. And, if it is, the courts are there to resolve it. The Copyright Office argues that sound recordings are not writings, and the performers and record prōducers are not authors. The courts have consistently upheld the constitutional eligibility of sound recordings under the protection of the copyright law, and we know something about that.

Mr. RAILSBACK. May I interrupt you, though?

Mr. FITZPATRICK. Yes.

Mr. RAILSBACK. There are some decisions in the *Waring* cases. I'm familiar with the *Waring* cases, and they would recognize that there should be protection to performers like the Fred Waring orchestra. I am unaware of any legal determination that said record companies are in the same category.

Mr. FITZPATRICK. Let me tell you of one because we took that case before a three-judge Federal court after the Congress gave us, the sound recording industry, a copyright in 1972. There was a challenge raised that a sound recording was not the writing of an author, and this went to a three-judge court because it was a constituional issue raised. And the court there held, quite squarely, that this was the writing of an author and that Congress had the authority to grant copyright protection to the record company for that right, and they said "sound recording firm."

Mr. RAILSBACK. Is that record piracy?

Mr. FITZPATRICK. Yes. But the question is: You have one disc, and it is the disc——

Mr. RAILSBACK. That is copyright protection. That is a copyright status. But I still think there might be a difference under American law in copyright status and performers' royalties.

Mr. FITZPATRICK. I would suggest this——

Mr. RAILSBACK. Even in Europe they're different.

Mr. FITZPATRICK. Under section 106 of the revision law, a copyright product is given a series of rights. There is a right not to have it duplicated; there is a right not to have it displayed; there is a right not to have it performed. That is the way section 106 is set up in the present law: A copyright item has all that bundle of rights. The way Congress wrote section 114 was to exclude the performance section. Now, the Copyright Office has made quite clear, and we think this is quite clearly the law, that there is not a separate issue in terms of writings of an author, as it relates to the two different rights that accrue to a copyright owner. That is the right not to have somebody copy it and the right not to have somebody perform it without paying.

Mr. RAILSBACK. I respectfully disagree. I think that you can make an argument, yes, we're expanding the protection of the copyright law. I think you can make that argument. But I think there's a little bit of difference in dealing with the problem of performers' royalties.

Mr. GORTIKOV. I'm a nonlawyer; so I'm reading in the Register of Copyrights' report. She faces this issue squarely and raises the question: Can sound recordings be the writings of an author for purposes of protection against unauthorized duplication? This is piracy or counterfeiting, but not for purposes of protection against unauthorized public performance. And the conclusion she reaches is "No." And her rationale is either a work is the writing of an author, or it is not. If it is, the Constitution empowers Congress to grant any protection that is considered justified. There is no basis in logic or precedent for suggesting that a work is writing for some purposes and not for others.

Mr. RAILSBACK. I know Barbara Ringer's position, but what I mentioned was, without really trying to resolve it, I said there are serious arguments the other way, and there are. Broadcasting has

raised some serious arguments—I think NBC, in their rebuttal—so I'm not so sure it is as clear cut as you would like us to believe.

Mr. FITZPATRICK. That, Congressman Railsback, is one case we would take on a contingent fee, to the constitutional issue.

Mr. KASTENMEIER. I happen to have the same apprehension. I guess I'm asking a larger question. I think the present copyright law and revision certainly contemplates inclusion for protection of a large number of activities that are not essential, that we have long since passed that point, and they're dealing with a fiction as to whether it's the right of an author or creator in that sense. And I'm not sure whether there's any really practical distinction between ordinary commercial communications in any form and something that is essentially constitutionally created as the writings of an author.

In so many respects, we covered CBS professional football games. These are not essentially creative works, but copyright protection of them is fixed in a tangible medium of expression as they are; so I think we've long since passed the point where it's necessary to prove creativity. Whether that's right or wrong, I think we find ourselves in that position.

We may be dealing totally just with a fiction in terms of trying to assign creativeness to finding talent or presenting it or packaging it. But, in that regard, I think you do not find yourselves in a position far different from many other activities that are, in fact, protected and covered.

For the record, I probably should ask Mr. Gortikov, since I asked the preceding witness, what the $12 million represented, the musician's trust fund there, he mentioned.

Mr. GORTIKOV. First of all, it's more than 12. I think it's somewhere between 13 and 15. Out of every record sold there's about 1½ percent royalty that is paid as a result of negotiation with the American Federation of Musicians into funds that were established as a by-product of that negotiation. That 1½ percent is split equally in two ways. Half of it goes into something called the MPTF, Music Performers Trust Fund, and that is about somewhere between $13 and $15 million a year. Those funds are administered by a trustee, and they are used for the employment of live musicians engaged to perform in live concerts, open, free to the public. So this money is dispensed through every union local in the United States and Canada for live public performances open to the public at which musicians are paid scale.

The other 50 percent of the money, the other $13 to $15 million goes into something that's called a special payment fund. That is distributed directly to recording musicians pro rata to the number of hours of recording work they had throughout a given period of time. So that's additional income.

Mr. KASTENMEIER. I wasn't aware of it. Probably something Mr. Petrillo negotiated years ago.

Well, this concludes the hearings, and we're indebted to all of you. Mr. Stewart, who came so far, Mr. Gortikov and all his colleagues, we thank you for your appearance and contributions, not only live, but for the record. This is the conclusion of the opening procedure in terms of the consideration of this question which has been delayed over to this year. We will have the Register of Copyright testify in

the near future and perhaps others in what I would characterize as supplementary hearings. Yesterday and today constituted the major, fundamental hearings which this organization is considering, and I'm only sorry that more of our colleagues couldn't be here to hear you.

We appreciate being here in Los Angeles, and those of you who came some distance to be here I know also enjoy the fact that we've selected, I think, an appropriate place for these hearings.

Accordingly, the hearings are adjourned.

36-510—78——8

PERFORMANCE RIGHTS IN SOUND RECORDINGS

MAY 24, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Santini, Railsback, and Butler.

Also present: Bruce A. Lehman, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will be in order.

We will have other members of the committee here shortly.

This morning, inasmuch as the House is in session on an important bill, the Department of Defense authorization bill, we may expect some interruptions. But we will proceed promptly this morning. I don't anticipate this need be a long, drawn-out session.

This morning the subcommittee reconvenes for its final 2 days of hearings on H.R. 6063, introduced by our colleague, Mr. Danielson, legislation which would create a performance right in sound recordings.

On March 29 and 30 the subcommittee conducted hearings in Beverly Hills, Calif., on the same issue. Those hearings, held in the geographic heart of our Nation's entertainment industry, provided an opportunity to hear from affected businesses and interest groups.

We received extensive testimony from representatives of broadcasting organizations performers' unions, the recording industry and public interest groups. In addition, we had the opportunity to visit a recording studio to see firsthand how a sound recording is made.

Today and tomorrow we will conclude our hearings with testimony from representatives of the five Government agencies with an interest in this issue: The Copyright Office, the Department of Justice, the Department of Commerce, the Department of Labor, and the National Endowment for the Arts.

Our first witness this morning is a longtime friend of the subcommittee, Miss Barbara Ringer, the Register of Copyrights.

She is accompanied by five members of her staff who were responsible for preparing the 1,200 page report on performance rights

which, pursuant to section 114 of the 1976 Copyright Revision Act, was submitted to the Congress earlier this year. That report is now being printed by the Government Printing Office as a committee document and will be available for distribution within the next few weeks.

On behalf of the entire subcommittee it is a great pleasure to welcome back to the committee Miss Barbara Ringer, Register of Copyrights.

TESTIMONY OF BARBARA RINGER, U.S. REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES, ACCOMPANIED BY; JON A. BAUMGARTEN, GENERAL COUNSEL, COPYRIGHT OFFICE; HARRIET OLER, ATTORNEY, COPYRIGHT OFFICE; CHARLOTTE BOSTICK, ATTORNEY, COPYRIGHT OFFICE; RICHARD J. KATZ, ATTORNEY, COPYRIGHT OFFICE; STEPHEN M. WERNER, ASSOCIATE, RUTTENBERG & ASSOCIATES

Ms. RINGER. Thank you very much, Mr. Chairman.

It's a pleasure for me to be here.

I am Barbara Ringer, Register of Copyrights, and since I last appeared before your subcommittee I have acquired another title. I am now Assistant Librarian of Congress for Copyright Services as well as being Register of Copyright.

[Ms. Ringer's statement follows:]

PREPARED STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES, ON PERFORMANCE RIGHTS IN SOUND RECORDINGS

Mr. Chairman, I am Barbara Ringer, Register of Copyrights and Assistant Librarian of Congress for Copyright Services. My testimony today is concerned with the issue of performance rights in sound recordings.

As you know, the Copyright Office has submitted its report on this issue, as required by § 114(d) of the 1976 Copyright Act. The purpose of this statement is to present to your Subcommittee, as briefly and succinctly as possible, a summary of that report's basic conclusions.

On the fundamental issue of public policy, the Copyright Office fully supports the principle of copyright protection for the public performance of sound recordings. We believe that arguments to the contrary can no longer be justified in the face of extensive commercial use of recordings, with resulting profits to users and harm to creators.

In my opinion there can no longer be any remaining doubt concerning the constitutional status of sound recordings as the "writings of an author." This principle was legislatively confirmed with the passage of the 1971 Sound Recording Amendment. It was upheld by the Supreme Court, and was reaffirmed by Congress in passing the 1976 Copyright Act. It is unreasonable to suggest that a work can be the "writing of an author" for some purposes, such as for protection against unauthorized duplication, and not for others, such as unauthorized public performance. To assert this argument simply confuses discretionary questions of statutory policy with the permissible scope of constitutional authority.

The constitutionality of copyright legislation was never based upon an affirmative showing of "need" on the part of the intended beneficiaries. By the same token, the adequacy of present compensation to the intended beneficiaries is irrelevant to the authority of Congress to "promote the progress of science and the useful arts." While these issues may be important to Congress in evaluating the desirability of granting certain rights or withholding others, they bear no significance to the Constitutional ability of Congress to act.

Performance rights in sound recordings would have no effect upon the First

Amendment rights of freedom of the press and freedom of speech of broadcasters and other users. The commercial use of copyrighted works, beyond the limits of "fair use," is ordinarily treated by the courts as copyright infringement, even where the users are in the news media. This is especially so where the use is primarily for entertainment purposes, or where access to the material is available through a compulsory license.

Economic arguments against a sound recording performance right have proved to be the strongest and most fervently asserted. Central among these is the claim, made chiefly by broadcasters, that the benefits to performers and record producers from the airplay of recordings—such as increased attendance at live performances, increased record sales, and increased popularity—are adequate compensation for the use of recordings. Exposure of recordings through airplay undeniably carries with it the potential for significant economic benefit. In most cases, however, the benefits remain just that—potential. Among all recordings that compete for airplay in the first instance, and also among those that actually receive it, the realization of these benefits appears to be sporadic and largely unpredictable. Where predictability does exist, it is usually closely bound up with the degree of public acceptance already achieved by a given performer.

It is also argued, again by broadcasters, that the payment of performance royalties would require the curtailment of high-cost, low-return programming, such as public service productions and that, in some instances, marginal stations would be forced out of business. No concrete evidence has been offered to support these contentions, and the independent economic study commissioned by the Copyright Office indicates that, to the contrary, payment of performance royalties is unlikely to cause any serious financial upheaval within the broadcasting industry.

Rather than representing an economic windfall for performers, performance royalties will provide some measure of remuneration to recording artists based upon the use of their work. The economic study demonstrates that only a small percentage of performers who make sound recordings receive royalties, that these royalties are based upon record sales, and that they do not represent a significant source of income. It is important to emphasize here that the proposed legislation is intended to benefit all performers on a given sound recording equally, and that principal, or "star" artists will receive the same payment received by any other individual contributing to the recording. According to amounts projected from the fee schedule of the Danielson bill, record producers are also not expected to receive excessive income from performance royalties.

With the preemption of state common law under the 1976 Copyright Act, protection of performance rights in sound recordings must come through federal legislation. The Copyright statute provides the most obvious and effective vehicle for this purpose. A system of compulsory licensing, with rates initially set by Congress and subject to periodic review by the Copyright Royalty Tribunal, appears to be the most desirable method of establishing these rights. This alternative is acceptable to all parties expressing support of the principle of performance rights, and would ensure continued access to sound recordings.

Both performers and record producers ordinarily contribute elements of copyrightable authorship to sound recordings. Thus, both should share in royalties generated from the public performance of these works. While the Danielson bill provides for an equal split of funds between these two groups, the draft proposal submitted by the Copyright Office would secure a minimum of fifty percent to performers and leave the remainder subject to negotiation between the parties. Additional matters for legislative consideration include the "employee for hire" position of many performers who create sound recordings, as well as the status of arrangers.

A final comment should be made concerning the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (known as the Rome Convention). Although the United States contributed much to the drafting of this document, originally adopted in 1961, it has never acceded to it. The Convention continues to gain acceptance throughout the world, and enactment of performance rights legislation of the kind proposed here should open the way for this country's participation.

ADDENDA TO REPORT

PERFORMANCE RIGHTS IN SOUND RECORDINGS

(The following excerpt is taken from Volume 42, No. 59 of the Federal Register for Monday, March 27, 1978 (pp. 12763–8).)

[1410–03]

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[Docket No. S77–6–D]

PERFORMANCE RIGHTS IN SOUND RECORDINGS

ADDENDA TO REPORT

On Tuesday, March 21, 1978, the FEDERAL REGISTER published a notice that addenda to the January 3, 1978 Report of the Register of Copyrights were transmitted to Congress and are available for public inspection (43 FR 11773). The following is the Register's Statement referred to in the previous notice at 43 FR 11774, preceded by the Statement's letter of transmittal. (17 U.S.C. 114.)

Dated: March 22, 1978.

BARBARA RINGER,
Register of Copyrights.

DANIEL J. BOORSTIN,
Librarian of Congress,

MARCH 22, 1978.

DEAR MR. PRESIDENT:
DEAR MR. SPEAKER:

On January 3, 1978, the Copyright Office submitted to Congress a Report on Performance Rights in Sound Recordings, pursuant to the mandate of section 114(d) of the 1976 Copyright Act. Pub. L. 94–553. At that time, I indicated the intention to submit four additional documents as addenda to the original Report. This is to advise you that these documents have been submitted. They include: (1) A Statement by the Register of Copyrights summarizing the position of the Copyright Office on the relevant issues, along with legislative recommendations; (2) an independently prepared historical analysis of labor union involvement in performance rights in sound recordings; (3) reply comments of the independent economic consultant who prepared the economic study included in the original Report of January 3, 1978, and submitted in response to comments on that study; and (4) a bibliography of works dealing with performance rights in sound recordings.

With the submission to Congress of the addenda described above, the Copyright Office believes it has fulfilled its responsibilities under section 114(d). The Copyright Office is prepared to furnish whatever further assistance the Congress deems necessary in this matter.

Sincerely yours,

DANIEL J. BOORSTIN,
Librarian of Congress.

BARBARA RINGER,
Register of Copyrights.

ADDENDUM TO THE REPORT OF THE REGISTER OF COPYRIGHTS ON PERFORMANCE RIGHTS IN SOUND RECORDINGS

Statement of the Register of Copyrights containing a Summary of Conclusions and Specific Legislative Recommendations.

INTRODUCTION

The Congressional mandate to the Register of Copyrights contained in section 114(d) of the new copyright statute reads as follows:

"On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcast-

ing, recording, motion picture, entertainment industries, and art organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any."

On January 3, 1978, I submitted to Congress our basic documentary report, consisting of some 2,600 pages, including appendices. The basic report includes analyses of the constitutional and legal issues presented by proposals for performance rights in sound recordings, the legislative history of previous proposals to create these rights under Federal Copyright law, and testimony and written comments representing current views on the subject in this country. The basic report seeks to review and analyze foreign systems for the protection of performance rights in sound recordings, and the existing structure for international protection in this field, including the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. The basic report also includes an "economic impact analysis" of the proposals for performance royalty legislation, prepared by an independent economic consultant under contract with the Copyright Office.

After reviewing all of the material in the basic report, together with additional supplementary material,[1] I have prepared this statement in an effort to summarize the conclusions I have drawn from our research and analysis and to present specific recommendations for legislation. With the presentation of this statement, the Copyright Office believes that it has discharged all of its responsibilities under section 114(d).

It was understandable that enactment of section 114(d) was greeted with raised eyebrows and cynical smiles. Some of those who favored performance rights in sound recordings viewed it as a temporizing move, aimed at ducking the issue and delaying Congress' obligation to come to grips with the problem. Others, opponents of the principle of royalties for performance of sound recordings expressed derision at the idea of entrusting a full-scale study of the problem to an official who had, in testimony before both Houses of Congress, expressed a personal commitment to that principle. The Register's Report could either be looked on as a time-consuming nuisance that had to be gotten out of the way before Congress could be induced to look at the problem again, or as something that could be dismissed as worthless because the views of the official responsible for it were already fixed and her conclusions were predictable.

Neither the idea nor the drafting of section 114(d) originated with anyone in the Copyright Office. When approached with the proposed compromise that subsection (d) reflects, we accepted the responsibility and the short deadline imposed by the new subsection with two thoughts in mind:

First, we agreed with those who felt that any full-scale effort to tie enactment of performance royalty legislation directly to the bill for general revision of the copyright law would seriously impair the chances for enactment of omnibus revision. Keeping the subject of performance royalty alive but splitting it off for later Congressional consideration reduced the twin dangers of lack of time to complete work on the bill for general revision, and concerted opposition to the bill as a whole.

Second, we also agreed that, with a problem as important and hotly contested as this one, Congress should have a fuller record and more thorough research and analysis on which to base its consideration of proposed legislation. Although the deadline for the report (January 3, 1978) coincided with the date on which the Copyright Office was required to implement the whole new copyright statute, we felt that it would be possible for us to complete both jobs on time.

As I viewed the mandate in section 114(d), the important thing was to provide Congress with a body of reliable information that would help it to legislate intelligently and effectively on the subject of performance rights in sound recordings. Regarded in this way, the basic documentary report, together with the other

[1] Three further addenda are being submitted to Congress currently with this statement: (1) a report, prepared by an independent legal consultant, of the history of labor union involvement with the issue of performance royalties over the past thirty years; (2) a supplementary report by the independent economic consultant; and (3) a bibliography on performance rights in sound recordings.

three addenda, are far more important than this statement of conclusions and recommendations.

In approaching our task under section 114, we set up a project under the leadership of Ms. Harriet Oler to address the entire problem without any preconceptions and as thoroughly, objectively, searchingly, and comprehensively as possible. Ms. Oler analyzed the problem, laid out the project, and directed its implementation. She and the other members of her team, notably Richard Katz and Charlotte Bostick, deserve the highest praise for the end product of their work. I believe that their basic documentary report, including the independently-prepared studies by Stephen Werner and Robert Gorman, will be of immediate value to Congress in evaluating legislative proposals on the subject and will also be a lasting contribution to scholarship and literature in the copyright field.

Let me state it as plainly as possible: none of the material in the basic documentary report or in the other addenda was prepared to reflect or support any preexisting viewpoint or position of the Register of Copyrights or the Copyright Office. The only directions that were given to anyone connected with the project were to be as objective and honest as humanly possible—to search out the relevant facts and law and follow them wherever they might lead. Aside from the general statements of the scope of their studies as stated in their contracts, the work done by Mr. Werner and Professor Gorman was entirely independent of any direction from the Copyright Office, and their reports were presented exactly as received.

As Register of Copyrights since 1973 I have taken a consistent and rather strong public position in favor of the principle of performance royalties for sound recordings. This was no secret to anyone when section 114(d) was added to the revision bill and, in enacting that provision, Congress could hardly have expected me to abandon beliefs and convictions based on many years of personal research and experience in the field. What it could expect were two separate things: first, as full and objective a study by the Copyright Office of the problem as possible; and, second, an honest and unbiased statement of my conclusions and recommendations, as Register of Copyrights, based on a fresh review of the Copyright Office study.

This statement is intended to fulfill the second of these two obligations. My hope is that it will be of some help to Congress in considering this difficult problem, but that no one attach undue weight to any of its conclusions or recommendations. In particular, I hope that it will be considered as entirely separate from the Copyright Office's basic documentary report, so that the attacks on my conclusions and recommendations will not undermine the usefulness of the body of information brought together in the basic report.

BASIC ISSUES AND CONCLUSIONS

The following is an effort to present, in outline form, the basic issues of public policy, constitutional law, economics, and Federal statutory law raised by proposals for performing rights in sound recordings, together with a bare statement of the conclusion I have reached on each of them, and a highly condensed discussion of the reasons behind each conclusion.

1. *The Fundamental Public Policy Issue*

Issue: Should performers, or record producers, or both, enjoy any rights under Federal law with respect to public performances of sound recodings to which they have contibuted?

Conclusion: Yes.

Discussion: The Copyright Office supports the principle of copyright protection for the public performance of sound recordings. The lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. Professor Gorman's fascinating study shows that, in seeking to combat the vast technological unemployment resulting from the use of recorded rather than live performances, the labor union movement in the United States may in some ways have made the problem worse. It is too late to repair past wrongs, but this does not mean they should be allowed to continue. Congress should now do whatever it can to protect and encourage a vital artistic profession under the statute constitutionally intended for this purpose: the copyright law.

Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any re-

quirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed, not only by the commercial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

2. Constitutional issues

a. *Issue.*—Are sound recordings "the writings of an author" within the meaning of the Constitution?

Conclusion: Yes.

Discussion: Arguments that sound recordings are not "writings" and that performers and record producers are not "authors" have become untenable. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright law. Passage of the 1971 Sound Recording Amendment was a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1976.

b. *Issue.*—Can sound recordings be "the writings of an author" for purposes of protection against unauthorized duplication (piracy or counterfeiting), but not for purposes of protection against unauthorized public performance?

Conclusion: No.

Discussion: Either a work is the "writing of an author" or it is not. If it is, the Constitution empowers Congress to grant it any protection that is considered justified. There is no basis, in logic or precedent, for suggesting that a work is a "writing" for some purposes and not for others.

c. *Issue.*—Would Federal legislation to protect sound recordings against unauthorized public performance be unconstitutional: (i) if there has been no affirmative showing of a "need" on the part of the intended beneficiaries and hence no basis for asserting Congressional authority to "promote the progress of science and useful arts"; or (ii) if there has been an affirmative showing that compensation to the intended beneficiaries is "adequate" without protection of performing rights?

Conclusion: No.

Discussion: These are actually disguised economic arguments, not constitutional objections. Congressional authority to grant copyright protection has never been conditioned on any findings of need, or of the likelihood that productivity or creativity will increase. The established standard is that Congress has complete discretion to grant or withhold protection for the writings of authors, and that the courts will not look behind a Congressional enactment to determine whether or not it will actually provide incentives for creation and dissemination. It is perfectly appropriate to argue that a particular group of creators is adequately compensated through the exercise of certain rights under copyright law, and therefore Congress should not grant them additional rights. It is not appropriate to argue that a Federal statute granting these rights could be attacked on the constitutional ground that it did not "promote the progress of science and useful arts."

d. *Issue.*—Would the establishment of performance rights interfere with the First Amendment rights of broadcasters and other users of sound recordings?

Conclusion: No.

Discussion: The courts have been generally unreceptive to arguments that the news media have a right to use copyrighted material, beyond the limits of fair use in particular cases, under theories of freedom of the press or freedom of speech. These arguments seem much weaker where the copyrighted material is being used for entertainment purposes, where the user is benefiting commercially from the use, or where the use is subject to compulsory licensing.

3. Economic issues

a. *Issue.*—Do the benefits accruing to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists?

Conclusion: No, on balance and on consideration of all performers and record producers affected.

Discussion: This is the strongest argument put forward by broadcasters and other users. There is no question that broadcasting and jukebox performances give some recordings the kind of exposure that benefits their producers and individual performers through increased sales and popularity. The benefits are hit-or-miss and, if realized, are the result of acts that are outside the legal control of the creators of the works being exploited, that are of direct commercial advantage to the user, and that may damage other creators. The opportunity for benefit through increased sales, no matter how significant it may be temporarily for some "hit records," can hardly justify the outright denial of any performing rights to any sound recordings. That denial is inconsistent with the underlying philosophy of the copyright law: that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain (*Mazer* v. *Stein*, 347 U.S. 201 (1954)).

b. *Issue.*—Would the imposition of performance royalties represent a financial burden on broadcasters so severe that stations would be forced to curtail or abandon certain kinds of programming (public service, classical, etc.) in favor of high-income producing programming in order to survive?

Conclusion: There is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programming, and drive marginal stations out of business.

Discussion: This has been the single most difficult issue to assess accurately, because the arguments have consisted of polemics rather than facts. An independent economic analysis of potential financial effects on broadcasters was commissioned by the Copyright Office in an effort to provide an objective basis for evaluating the arguments and assertions on both sides of this issue. This study concludes on the basis of statistical analysis that the payment of royalties is unlikely to cause serious disruption within the broadcasting industry. There are arguments aplenty to the contrary, but there is no hard evidence to support them.

c. *Issue.*—Would the imposition of a performance royalty be an unwarranted windfall for performers and record producers?

Conclusion: No.

Discussion: As for performers, the independent economic survey commissioned by the Copyright Office indicates that only a small proportion of performers participating in the production of recordings receive royalties from the sale of records and that, even if they do, royalties represent a very small proportion of their annual earnings. While the statistics collected with respect to record producers is less conclusive, the economic analysis concludes that the amount generated by the Danielson bill for record companies would be less than one-half of one percent of their estimated net sales.

4. Legal issues

a. *Issue.*—Assuming that some legal protection should be given to sound recordings against unauthorized public performance, should it be given under the Federal copyright statute?

Conclusion: Yes.

Discussion: Considerations of national uniformity, equal treatment, and practical effectiveness all point to the importance of Federal protection for sound recordings, and under the Constitution the copyright law provides the appropriate legal framework. Preemption of state law under the new copyright statute leaves sound recordings worse off than they were before 1978, since previously an argument could be made for common law performance rights in sound recordings.

b. *Issue.*—What form should protection take?

Conclusion: The best approach appears to be a form of compulsory licensing as procedurally simple as possible.

Discussion: No one is arguing for exclusive rights, and it would be unrealistic to do so. The Danielson bill represents a good starting point for the development of definitive legislation.

c. *Issue.*—Who should be the beneficiaries of protection?

Conclusion: There are several possibilities; some performers and record producers both contribute copyrightable authorship to sound recordings, they should both benefit.

Discussion: Special considerations that must be taken into account include the fact that many performers on records are "employees for hire," the unequal bargaining positions in some cases, and the status of arrangers.

d. *Issue.*—How should the rates be set?

Conclusion: Congress should establish an initial schedule, which the Copyright Royalty Tribunal would be mandate to reexamine at stated intervals.

Discussion: It would seem necessary to establish minimum statutory rates at the outset, rather than leaving the initial task to the Tribunal. Review of the statutory rates by the Copyright Royalty Tribunal should be mandatory after a period of time sufficient to permit the development of a functioning collection and distribution system.

LEGISLATIVE RECOMMENDATIONS

Section 114(d) asks the Register of Copyrights, among other things, to set forth "recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material by performance rights in such material," and to describe "specific legislative or other recommendations, if any."

Based on the conclusions outlined above, my general recommendation is that section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended both to performers (including employees for hire) and to record producers as joint authors of sound recordings.

Specific legislative recommendations are embodied in the following draft bill, which is essentially a revision of the Danielson Bill (H.R. 6063, 95th Cong., 1st Sess. 1977).

DRAFT BILL

A Bill to amend the copyright law, title 17 of the United States Code, to create public performance rights with respect to sound recordings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—

SECTION 1. This Act may be cited as "The Sound Recording Performance Rights Amendment of 1978."

SECTION 2. Section 101 of title 17 of the United States Code, as amended by Public Law 94–553, (90 Stat. 2541) is hereby amended by deleting the definition of "perform" and inserting the following: —

"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. In the case of a motion picture or other audiovisual work, to 'perform' the work means to show its images in any sequence or to make the sounds accompanying it audible. In the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists."

SECTION 3. Section 106 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended by deleting clause (4) and inserting the following:

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly; and"

SECTION 4. Section 110 of title 17 of the United States Code, as amended by Public Law 94–553 (90 Stat. 2541) is hereby amended as follows:

(a) In clause (2) insert the words "or of a sound recording" between the words "performance of a nondramatic literary or musical work" and "or display of a work."

(b) In clause (3), insert the works "or of a [1] sound recording" between the words "of a religious nature," and the words "or display of a work.";

(c) In clause (4), insert the words "or of a sound recording," between the words "literary or musical work" and "otherwise than in a transmission";

(d) In clause (6), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a governmental body";

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[1] Error; line should read: "(b) In clause (3), insert the words "or of a".

(e) In clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment";

(f) In clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "nondramatic literary work," and "by or in the course of a transmission"; and

(g) In clause (9), insert the words "or of a sound recording embodying a performance of a dramatic literary work that has been so published," between the words "date of the performance," and the words "by or in the course of a transmission".

SECTION 5. Section 111 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the antitrust laws," and "for purposes of this clause" the words "and subject to the provisions of section 114(c),".

SECTION 6. Section 112 of title 17 of the United States code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:

(a) In subsection (a), delete the words "or under the limitations on exclusive rights in sound recordings specified by section 114(a)," and insert in their place "or under a compulsory license obtained in accordance with the provisions of section 114(c),".

(b) In subsection (b), delete the reference to "section 114(a)" and insert "section 114(b)(5)".

SECTION 7. Section 114 of title 17 of the United States Code as amended by Public Law 94-553 (90 Stat. 2541), is hereby amended in its entirety to read as follows:

"§ *114 Scope of exclusive rights in sound recordings*

(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

(1) The exclusive right under clause (1) of section 106 is limited to the right to duplicate all or any part of the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording;

(2) The exclusive right under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in the recording;

(3) The exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording;

(4) The exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; and

(5) The exclusive rights under clauses (1) through (4) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(b) RIGHTS IN SOUND RECORDING DISTINCT FROM RIGHTS IN UNDERLYING WORKS EMBODIED IN RECORDING.—The exclusive rights specified in clauses (1) through (4) of section 106 with respect to a copyrighted literary, musical or dramatic work, and such rights with respect to a sound recording in which such literary, musical, or dramatic work is embodied, are separate and independent rights under this title.

(c) COMPULSORY LICENSE FOR PUBLIC PERFORMANCE OF SOUND RECORDINGS.—Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 116 through 118, and an addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

(2) When phonorecords of a sound recording have been distributed to the public in the United States or elsewhere under the authority of the copyright

owner, any other person may, by complying with the provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

(3) Any person who wishes to obtain a compulsory license under this subsection shall fulfill the following requirements:

(A) On or before ———, 19—, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

(B) the compulsory licensee shall deposit with the Register of Copyrights, at annual intervals, a statement of account and a total royalty fee for all public performances during the period covered by the statement, based on the royalty provisions of clauses (7) or (8) of this subsection. After consultation with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the statement of account and royalty payment.

(4) Failure to record the notice, file the statement, or deposit the royalty fee as required by clause (3) of this subsection renders the public performance of a sound recording actionable as an act of infringment under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(5) Royalties under this subsection shall be payable only for performances of copyrighted sound recordings fixed on or after February 15, 1972.

(6) The compulsory licensee shall have the option of computing the royalty fees payable under this subsection on either a prorated basis, as provided in clause (7) or on a blanket basis, as provided in clause (8), and the annual statement of account filed by the compulsory licensee shall state the basis used for computing the fee.

(7) If computed on a prorated basis, the annual royalty fees payable under this subsection shall be calculated in accordance with standard formulas that the Copyright Royalty Tribunal shall prescribe by regulation, taking into account such factors as the proportion of commercial time, if any, devoted to the use of copyrighted sound recordings by the compulsory licensee during the applicable period, the extent to which the compulsory licensee is also the owner of copyright in the sound recordings performed during said period, and, if considered relevant by the Tribunal, the annual number of performances of copyrighted sound recordings during said period. The Tribunal shall prescribe separate formulas in accordance with the following:

(A) For radio or television stations licensed by the Federal Communications Commission, the fee shall be a specified fraction of one percentum of the station's net receipts from advertising sponsors during the applicable period;

(B) For other transmitters of performances of copyrighted sound recordings, including background music services, the fee shall be a specified fraction of two percentum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period; and

(C) For other users not otherwise exempted, the fee shall be based on the number of days during the applicable period on which performances of copyrighted sound recordings took place, and shall not exceed $5 per day of use.

(8) If computed on a blanket basis, the annual royalty fees payable under this section shall be calculated in accordance with the following:

(A) For a radio broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend upon the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of at least $25,000 but less than $100,000: $250;

(ii) Receipts of at least $100,000 but less than $200,000: $750;

(iii) Receipts of $200,000 or more: one percentum of the station's net receipts from advertising sponsors during the applicable period;

(B) For a television broadcast station licensed by the Federal Communications Commission, the blanket royalty shall depend on the total amount of the station's gross receipts from advertising sponsors during the applicable period:

(i) Receipts of a least $1,000,000 but less[1] than $4,000,000: $750;

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[1] Error; line should read: "(i) Receipts of at least $1,000,000 but less".

(ii) Receipts of $4,000,000 or more: $1,500;

(C) For other transmitters of performances of copyrighted sound recordings, including background music services, the blanket royalty shall be two percentum of the compulsory licensee's gross receipts from subscribers or others who pay to receive the transmission during the applicable period;

(D) For other users not otherwise exempted, the blanket royalty shall be $25 per year for each location at which copyrighted sound recordings are performed.

(9) Public performances of copyrighted sound recordings by operators of coin-operated machines, as that term is defined by section 116, and by cable systems, as that term is defined by section 111, are subject to compulsory licensing under those respective sections, and not under this section. However, in distributing royalties to the owners of copyright in sound recordings under sections 116 and 111, the Copyright Royalty Tribunal shall be governed by clause (14) of this subsection. Nothing in this section excuses an operator of a coin-operated machine or a cable system from full liability for copyright infringement under this title for the performance of a copyrighted sound recording in case of failure to comply with the requirements of sections 116 or 111, respectively.

(10) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing U.S. securities for later distribution with interest by the Copyright Royalty Tribunal, as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a compilation of all statements of account covering the relevant annual period provided by subsection (c)(3) of this section.

(11) During the month of September in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(3) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may, subject to the provisions of clause (14) of this subsection, agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(12) After the first day of July of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (B) of this subsection (c)(3) during the twelve-month period of which claims have been filed under clause (11) of this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(14) The royalties available for distribution by the Copyright Royalty Tribunal shall be divided between the owners of copyright as defined in subsection (e), and the performers, as also defined in said subsection, but in no case shall the proportionate share of the performers be less than fifty percent of the amount to be distributed. With respect to the various performers who contributed to the sounds fixed in a particular sound recording, the performers' share of royalties payable with respect to that sound recording shall be divided among them on a per capita basis, without regard to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his right to the royalties provided in this subsection to the copyright owner or the performer.

respectively, and no such purported transfer shall be given effect by the Copyright Royalty Tribunal.

(d) EXEMPTIONS FROM LIABILITY AND COMPULSORY LICENSING.—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable annual period, if during such period—

(1) In the case of a radio broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a television broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $1,000,000, or

(3) In the case of other transmitters of performances of copyrighted sound recordings, its gross receipts from subscribers or others who pay to receive transmissions during the applicable period were less than $10,000.

(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) "Commercial time" is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by a spot commercial announcement at intervals of less than fourteen and one-half minutes.

(2) "Performers" are instrumental musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording. For purposes of this section, a person coming within this definition is regarded as a "performer" with respect to a particular sound recording whether or not that person's contributions to the sound recording was a "work made for hire" within the meaning of section 101.

(3) A "copyright owner" is the author of a sound recording, or a person or legal entity that has acquired all of the rights initially owned by one or more of the authors of the sound recording.

(4) "Net receipts from advertising sponsors" constitute gross receipts from advertising sponsors less commissions paid by a radio or television station to advertising agencies.

(f) SOUNDS ACCOMPANYING A MOTION PICTURE OF OTHER AUDIOVISUAL WORK.—The sounds accompanying a motion picture or other audiovisual work are considered an integral part of the work that they accompany, and any person who uses the sounds accompanying a motion picture or other audiovisual work in violation of any of the exclusive rights of the owner of copyright in such work under clauses (1) through (4) of section 106 is an infringer of that owner's copyright. However, if such owner authorizes the public distribution of material objects that reproduce such sounds but do not include any accompanying motion picture or other audiovisual work, a compulsory licensee under section 116 or 111 or under subsection (c) of this section shall be freed from further liability for the public performance of the sounds by means of such material objects.

SECTION 8. Section 116 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:

(a) In the title of the section insert the words "and sound recordings" after the words "nondramatic musical works" and before the colon;

(b) In subsection (a), between the words "nondramatic musical work embodied in a phonorecord," and the words "the exclusive right" insert the words "or of a sound recording of a performance of a nondramatic musical work,";

(c) In the second sentence of clause (2) of subsection (c), between the words "provisions of the antitrust laws," and "for purposes of this subsection," insert the words "and subject to the provisions of section 114(c).";

(d) In clause (4) of subsection (c), redesignate subclauses (A), (B), and (C) as "(B)", "(C)", and "(D)", respectively, and insert a new subclause (A) as follows:

"(A) to performers and owners of copyright in sound recordings, or their authorized agents, one-eighth of the total distributable royalties under this section, to be distributed as provided by section 114(c)(14)," and in the newly-designated subclause (B), between the words "every copyright owner" and the words "not affiliated with" insert the words "of a nondramatic work".

SECTION 9. In section 801 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), amend subsection (b)(1) as follows: in the first sentence, between the words "as provided in sections" and "115 and 116, and" insert "114,"; and in the second sentence, between the words "applicable under sections" and "115 and 116 shall be calculated" insert "114,". Amend subsection (b)(3) by inserting, between the words "Copyrights under sections 111" and "116, and to determine" the following: ", 114,".

SECTION 10. In subsection (a) of section 804 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), insert "114," following the words "as provided in sections" and "115 and 116, and with", and at the end of clause (2) of subsection (a) add a new subclause (D), as follows:

"(D) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 114, such petition may be filed in 1988 and in each subsequent tenth calendar year."

In subsection (d) of section 804, insert ", 114," between the words "circumstances under sections 111" and "or 116, the Chairman".

SECTION 11. Amend section 809 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541), by inserting ", 114," between the words "royalty fees under sections 111" and "or 116, the Tribunal".

SECTION 12. This Act becomes effective six months after its enactment.

COMMENTS ON DRAFT BILL

Among the many detailed questions raised by the Danielson Bill, the draft bill set out above, or both, the following deserve special consideration:

1. *Definitions.*—The draft bill revises the definition of "perform" in section 101 to embrace sound recordings. Another possible amendment in that section might expand the definition of "fixed" to include cases where a work is being fixed simultaneously with its performance. An important question involves the rights of performers who are employees for hire; the draft bill does not change the definition of "work made for hire" in section 101, but defines "performers" in section 114 in a way that is intended to insure their right to share in performance royalties despite their employee status.

2. *Limitations on Performance Rights Generally.*—The draft bill amends seven of the nine clauses of section 110 to add sound recordings to the material whose performances are exempted. Should clause (1) of section 110 also be amended to exclude from the exemption performances of sound recordings given by means of a phonorecord known to be unlawfully made? Should clauses (1) and (2) be amended to exclude from the exemptions sound recordings made expressly for instructional purposes?

3. *Exemption for Public Broadcasting.*—The draft bill retains the exemptions for public broadcasting now in section 114.

4. *Act that Triggers the Compulsory License.*—The draft bill follows the Danielson Bill in making compulsory licenses available when phonorecords of a sound recording have been publicly distributed anywhere. It does not limit the place of distribution to the United States (as in section 115), and it does not adopt proposals to allow a period of free use (30 days was suggesed) before any liability would accrue.

5. *Administration.*—The draft bill follows the pattern established in sections 111 and 116 of the Copyright Act of 1976, providing for filing in the Copyright Office and payment of fees there, but entrusting to the Copyright Royalty Tribunal the tasks of distributing royalties and adjusing rates.

6. *Criminal Penalties.*—The Danielson Bill subjected a user who had not complied with the compulsory licensing requirements to full liability for copyright infringement, but insulated such a user from criminal liability even if the infringement was willful. The draft bill restores the possibility of criminal penalties in this situation.

7. *Royalty Rates.*—The draft bill recasts the rate provisions of the Danielson Bill in an effort to make them a little simpler, but leaves the basic system and amounts largely untouched. The compulsory licensing rates for jukebox and cable performances are not increased in sections 116 and 111, so the beneficiaries of those sections would be required to share their pot with performers and record producers.

8. *Substitution of Negotiated Licenses.*—The Danielson Bill allowed for the substitution of negotiated licenses and urged the formation of collecting agen-

cies to make this possible. This raised a number of practical problems and inconsistencies, and the existence of the Copyright Royalty Tribunal adds a new factor. The draft bill is based on the premise that all licensing in this area will be compulsory.

9. *Distribution of Royalties.*—The Danielson Bill provided for a mandatory fifty-fifty split between performers and "copyright owners". It did not come to grips with the status of performers who are employees for hire. The draft bill gives at least fifty percent of the royalties to performers on a per capita basis, regardless of their employent status, but allows performers to negotiate for more (not less) than a fifty percent share.

10. *Exemptions.*—Both the Danielson Bill and the draft provide outright exemptions to smaller radio and television stations and music services.

11. *Definitions of Performers.*—Neither draft mentions arrangers, although in practice they are often assimilated to performers. Arguments can be made that employed arrangers should be entitled to share in the royalties under section 114.

12. *Soundtracks.*—The draft bill seeks to clarify a difficult question: are "soundtrack recordings" subject to compulsory licensing when they are publicly performed?

OTHER RECOMMENDATIONS

Finally, mention must be made of the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention, adopted in 1961. This nobly-motivated and ambitious international instrument was years ahead of its time, but it has retained its vitality and has much to offer the United States and its creative communities. This country could adhere to the Rome Convention if the proposed legislation were enacted, and the possibility should be thoroughly explored at the appropriate time.

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Ms. RINGER. My testimony today is concerned with the issue of performance rights in sound recordings, in general, and in particular the Danielson bill, H.R. 6063.

As you mentioned, Mr. Chairman, the Copyright Office has submitted the report on this issue, as required by section 114(d) of the 1976 Copyright Act.

The purpose of my testimony is to present to your subcommittee as briefly and succinctly as possible a summary of that report's basic conclusions and to answer any questions you may have.

Before going further, Mr. Chairman, I would like to introduce my colleagues at the table.

To my right is Jon Baumgarten, the general counsel of the Copyright Office.

To my left is Harriet Oler, who was the head of the team that actually did the job of implementing section 114(d).

To her left is Charlotte Bostick, attorney in the Copyright Office, who is a member of that team.

To Jon Baumgarten's right is Richard Katz, also an attorney and member of the team, and at the end of the table to my right is Stephen Werner, associate with Ruttenberg & Associates, the firm that did the independent economic survey that was a part of our report.

I would like to say a little bit about what each one of those did, without going into much detail. I think it is fairly obvious from the report itself.

The congressional mandate that you gave us, Mr. Chairman, essentially was one of consultation and reporting rather than recommending. I believe that was what you really had in mind.

We were asked under the specific language of the statute to consult with representatives of various organizations and groups, broadcasting, recording, motion pictures, entertainment, arts, organized labor, and performers of copyrighted materials, the whole range of interest groups that are concerned with this proposal.

You asked us to submit to Congress a report setting forth recommendations as to whether or not these provisions of section 114 should be amended in the way that is proposed, and you asked that we report on the status of rights in foreign countries, the views of interested parties, and the specific legislative or other recommendations, if any.

We have done this job, and I would like to give you a very general summary of how we went about it.

We started by setting up the team of which Mrs. Oler is the head. This team is still in existence and still functioning, as you can see.

We went public in April of 1977 after the team had organized and made its plans, and we asked for comments. We received 177 replies to our request for comments.

Hearings were held in July of 1977, four very, very full days, from dawn to dusk. Verbatim transcripts of these have been incorporated in the report.

After the California hearings we pondered whether or not to have a hearing just on the economic issues because the testimony we were getting was so equivocal that we didn't feel we could really go forward with any conclusions one way or the other without exploring further the economic questions that were being raised. We were hearing arguments rather than facts.

After considerable discussion within the office we decided to go out on a contract rather than having a hearing. We commissioned an independent survey by a group, and I will ask others to comment if you have questions as to how that was set up, why this group was chosen, and so forth. I think this might be of interest to you.

I will not give any economic testimony this morning, except to make some general observations, and if you want to probe into the economics, Mr. Werner is here.

In addition, as a result of the California hearing, which had some rather interesting testimony concerning the historical background of the wars, and I use the word advisedly, within the organized labor movement, on this general issue, we felt it would be useful to have a historical summary of how this had merged within the labor movement, and we commissioned an independent survey, actually, in effect, a legal summary of the history of this by a professor of labor law and copyright at the University of Pennsylvania, Robert Gorman.

I regret that a conflict made it impossible for him to be here today. I can try to answer any questions you have on that study, which is a part of the report, if you would like.

It is a superb study, and I hope it can be given very wide coverage.

The basic parts of the study, the documentary parts, were prepared by Mrs. Oler, Mr. Katz, and Mrs. Bostick. Mrs. Oler's principal responsibility, in addition to planning the whole survey, was the domestic case law, the actual legislative jurisdiction, judicial survey going back to the 1930's.

Mr. Katz' responsibility was the legislative arena, and he traced the legislative history of the subject. Mrs. Bostick prepared a very

extensive bibliography of both the domestic and form materials on the subject.

Your mandate called for us to make a full survey of the foreign experience with respect to performance royalties. Mrs. Bostick and Mrs. Oler visited seven countries in September of 1977, had a number of interviews, I believe just under 50 separate interviews on this subject, and prepared an extensive documentation based on those interviews and other materials that they collected, and they gave a general survey of foreign material and profiles on 8 countries; these are in your reports.

Patrice Lyons prepared an analysis of her own convention, which is also a part of your document.

We had the document ready for the deadline of January 3 except for the final go-around, the Gorman report, Mr. Werner was preparing a reply to the comments on the Ruttenberg study, and I had added an addendum, which is my own work, and which did make some suggested amendments in the Danielson bill.

I would like very much to try to disassociate that addendum from the rest of the report. I am not in any way trying to deprecate my own conclusions. I believe in what I said there, but I don't want them to color your reaction to the rest of what really was a massive job and which I think was largely the work of Mrs. Oler and her team.

It was understandable, Mr. Chairman, that your enactment of 114 (d) was treated with a certain amount of cynicism. It did look just like a way of putting the problem off on the one hand, and you gave it to someone, namely the Register of Copyrights in the Copyright Office, who was already rather firmly on position, on public record as having taken a position, so I suspect there were people who felt we were just going through motions.

I hope sincerely that is not going to be the ultimate result of all of these efforts.

We did, in fact, have a history of support of legislation in principle on this subject in the Copyright Office. I was not the first and I don't think I'll be the last.

On the other hand, I also had a personal commitment which I expressed rather firmly before the Senate and also before your subcommittee, at various times. I hope that our work will not be considered worthless because of this fact.

Mr. KASTENMEIER. May I interrupt to ask you what personal commitment you are referring to?

Ms. RINGER. I have taken a rather strong view that in principle I personally am, and also the Copyright Office under my leadership is, in favor of a royalty for the performance of sound recordings. This has been no secret to anyone, however, and I have testified to this effect in this room.

Mr. KASTENMEIER. But when you say a commitment, you make a commitment to someone and you said for a purpose.

Could you expand on that?

Ms. RINGER. A commitment in principle, Mr. Chairman. I think I am committed to the principle of copyright and I think I am committed to the principle of protection for performance, the principle of creative workers, creators of original materials, being entitled to share

under copyright principles in the remuneration that comes from the use of their works. That is the only commitment I am talking about.

What I am really trying to say, Mr. Chairman, and I say it also in the report, is that no one can really be surprised that I came out with the conclusions I did. On the other hand, what I am really trying to say very plainly, is that we took on this job with two thoughts in mind.

First, that we recognized, as everyone did at the time, that we could not go forward with this legislation as part of omnibus general copyright revision. It was too large a subject, the record was still imminent, and it probably would have killed off general copyright revision.

Second, we felt that Congress should have a fuller record, and that we were mandated under section 114 to provide that fuller record. This we really felt we should try to do.

I actually did, in setting up this team, give them an instruction. This instruction was to be absolutely as objective and factual as it was humanly possible to be, to take the facts as they found them and to go forward, and not to try to color this in any way, shape, or form.

I had really nothing to do personally with the contents of the basic report that we presented you with on January 3, plus the economic report, plus the Gorman report. None of this had any direction from me, and the independent contractors did their work also without direction from anyone.

I believe this is a factual statement to which I will adhere without any qualifications.

I do think Mrs. Oler and her team deserve the highest praise for coming out with what I think is an absolutely objective report. None of the material in the basic documentary report or in any of the addenda was prepared to reflect or support any present existing viewpoint or position of the Register of Copyrights or the Copyright Office.

The only directions that were given were to be as objective as possible.

I have tried to divide this into four parts; the basic issue of fundamental public policy is the first. The second has to do with the issues of constitutional law that have been raised continuously through this endeavor. The third deals with the economic issues, which I will simply sketch without going into detail, and the fourth concerns the issues of Federal statutory law raised by these proposals.

The fundamental policy issue, the one everyone must ask themselves before they go any further, is whether or not performance or record producers or both should enjoy any rights under Federal law with respect to public performances of sound recordings to which they have contributed.

My conclusion, Mr. Chairman, is that they should. And I feel strongly about this commitment or conclusion.

The Copyright Office does support the principle of copyright protection for sound recordings for the public performance of sound recordings.

The lack of protection for performance since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. I hope that you do have an opportunity to read Professor Gorman's study, which is a fascinating summary of how technology can simply wipe out a whole area of creative endeavor.

It also shows something else, and I think it's something you have to take into account, that in trying to combat this vast technology unemployment, which was like a tidal wave, in trying to protect the members of the organized musicians' unions from the impact of this, the labor union movement in this country did some things that perhaps made the situation worse. One can understand their desperation and the fact that you had two factions within the unions in conflict with each other. This was not as clear at the time as it becomes later on.

But the fact is you had performing musicians who were making records and wanted to be protected against the use of their own records in competition with them, and then you had this vast army of unemployed musicians who were not making records but were being put out of work by the existence of records and their performance.

Obviously, the labor union movement in this country had initially the experience of technological unemployment resulting from the sudden emergence of talking pictures and this army of live musicians being put out of work by them, and they were determined not to let this happen again; the leader, as some of you remember, was, of course, James Caesar Petrillo, who did adopt certain approaches that conceivably were self-defeating in the long run. That is what I think Professor Gorman's study shows, and it is a fascinating survey.

What must be recognized is that it is too late to repair those wrongs, if that is what they are, but it is not too late to try to do something to prevent them from continuing. It may be too little, but that does not mean that you should do nothing, and this is really where I come out.

Congress should now do whatever it can to protect and encourage what I believe is an artistic profession and a vital artistic profession, under the statute that was constitutionally intended for this purpose; namely, the copyright law.

Now, broadcasters and other commercial users, but primarily broadcasters, used sound recordings without paying royalties to their performers and their producers for generations. In fact, the entire radio industry, or a certain segment of it, has been built up since television came on the scene from the unpaid use of sound recordings.

Users today generally complain that they are going to have to pay a tax now, and they will call it a tax, there is no question about this. They are now confronting the situation that existed in the late 1970's, not the late 1940's and early 1950's, obviously.

However, it seems to me that any economic burden on the users of recordings for public performance is outweighed, on balance, not only by the commercial benefits that they receive directly from the use of the records but also by what I think can be shown to be direct and indirect damage done to performers whenever recordings are used as a substitute for live performances.

In all other areas where you have copyrighted works, and sound recordings are copyrighted works, you have creative works, and it is considered to be a copyright infringement if what the user is doing results in damage to the creator or in profits to the users, and in this situation you have both—you have damage and you have profits.

It seems to me that you should look rather closely in this situation at the justification for withholding some pittance of protection, which is really, in my opinion, all the Danielson bill would provide initially.

It does seem to me that sound recordings are creative works and their unauthorized performance results in both damage and profits, and that leaving their creators without any protection or compensation for the widespread commercial use of their creative works can no longer be justified.

This is my conclusion with respect to the fundamental policy issue confronting you.

As to the constitutional issues which are raised, usually obviously in opposition to this proposal, there are four, and I will try to consider them briefly one by one.

The first, which was the only one heard 10 or 15 years ago, is the question whether sound recordings are the writings of the author in the constitutional sense. I think this question has now been effectively answered both by the courts and by Congress. The answer is "yes", they are writings. And it seems very hard to me to argue otherwise any more.

The arguments are untenable because of a series of court decisions that have inconsistently upheld the constitutional illegality of sound recordings for protection under the copyright law.

The passage of the 1971 recording amendment, your subcommittee's bill, which became law in 1972, made sound recordings copyrightable subject matter but limited protection to antipiracy protection rather than to the protection against public performance. It does seem to me that this was a legislative declaration of the principle of sound recordings being the writings of the author: it could not be anything else. This, of course, was reaffirmed in the 1976 general revision.

The second issue which is heard, and more strongly now, is that, all right, something may be a writing for the sake of piracy, but it cannot be a writing for the sake of performance. You could argue, and it is argued, that a sound recording could be the writing of the author for protection against unauthorized duplication in artifacts, but when it comes to performance you are outside of the constitutional arena.

I cannot see any real justification for this argument. Either the work is the writing of an author or it is not. If it is, Congress is empowered under the Constitution to grant it protection. There is no basis, in my opinion, in logic or in precedent for suggesting that a work can be a writing for the one purpose of one use and not for another.

You also find this argument recurring, that Federal legislation would be unconstitutional unless it can be shown either that there is a need, an effective need, for the protection, or that protection under existing norms are inadequate. These are known as the need and adequacy constitutional arguments. And, in my opinion, these are actually disguised economic arguments.

There is also the issue that congressional authority to grant copyright protection has never been conditioned on findings of need or adequacy. These are absolutely questions that you should consider in reviewing the desirability of this legislation, but not for constitutional grounds.

The courts will not look behind a congressional determination that protection should be granted under the copyright laws. And it's up

to you, it seems to me, to decide on economic and maybe social and other grounds whether this is desirable, but not on constitutional grounds.

Finally, one hears frequently the first amendment arguments that broadcasters in particular are in a sensitive area, and that by withholding sound recordings from them without some sort of payment you would somehow be violating the first amendment. This does not seem to me to hold much water either.

There are two recent cases that weaken the argument quite effectively. One involved the human cannonball you have heard of. And in that case the Supreme Court itself held that the first amendment did not give a broadcaster the right to film and show on television a 10-second shot of a human cannonball hurtling through the air, and it was on the ground that this was, in effect, a sort of creative or quasi-creative work, and that that human cannonball had rights that the Supreme Court was supposed to protect.

The other, which is a little closer at home, involved a news service or newsletter that was in effect knocking off the bottom line of the Wall Street reports. This was in the financial report area, and the Court again held that although they were not exactly reporting the words, using the words of the service, that there was no first amendment right to report this as news since there had been a creative investment in what the Wall Street reporter was doing.

There are other cases along the same line, and you will find, I think, if you add the jurisprudence up, that there is really not much argument, even in the public area, even when you are talking about news and the like, but these arguments become infinitely weaker, in my opinion, when you are talking about using copyrighted material for entertainment purposes, commercial entertainment purposes and especially under the Danielson bill where you are talking about compulsory license and are allowing free use without advanced permission. These arguments seem to me rather weak.

Turning to the economic issues, I will not make a big point of these. I guess a lot of what I will say is just that the case is not proven. The first, and it does seem to me the arguments here that the broadcasters make are by far their strongest, is that as the music industry, as the broadcasting and as the radio industries have emerged, commercial radio is used a lot as a promotional device. We know that.

It's true, but can you say that the benefits accruing from free air play, as they call it, of sound recordings works, which could result in increased record sales, increased attendance at live performances and increased popularity of individual artists, in particular cases, are sufficient justification for withholding protection across the board? I think this is something you will have to consider very carefully.

There is no question that many, many record companies do promote their records very vigorously through air play. But I do not believe on balance this is a justification for withholding protection across the board.

It is all a hit or miss proposition, and it's entirely outside of the control of the people that are doing the creative work, the performers and the record producers. The popularity of a record may vey well be enhanced by its being played on the air, but this is completely accidental;

it's not something over which they have any control. The creators who under copyright law are normally given control over their market, have no control in this situation.

The situation, in effect, is anarchic and while some limited number of performers and record producers may benefit, in my opinion the great mass probably does not and, in fact, may very well be hurt by this situation.

In any case, the opportunity to benefit from having a hit record as a result of constant playing on disk jockey programs does not seem to me to justify the outright denial of performance rights in any sound recording.

It does seem to me that this argument is inconsistent with the underlying purpose and philosophy of the copyright law, that in securing benefits of creativity to the public by the encouragement of individual effort, through private gain, you do promote the progress of science in the useful arts and thereby the public interest.

The second economic argument is that imposition of performance royalties would represent a financial burden on broadcasters that would have various consequences. Probably the most realistic would be, if you would analyze it, that it might force some marginal broadcasters to drop classical music and public affairs programing and arts programing and go over to a hard rock or top 40 format, something like that, which is more commercially viable if they had to pay.

In other words, if the balance between profit and loss were so narrow in a particular case, they might very well have to change their format. They might have to abandon certain kinds of programing, and it has also been argued that they might actually go out of business, that some marginal stations would have to close down and that they would have to charge, everybody would have to charge their advertisers more, and that this would be passed on to the public.

All I can say on this point, Mr. Chairman, is there are no hard economic arguments or evidence to support these assertions. And to the extent that the Werner study sheds light on this subject, it runs in the opposite direction, that this would not be the case. I cannot say in my own knowledge, I am not sure anyone really can. There are a great many arguments on this whole subject.

On the other hand, what evidence we have does not seem to me to support the broadcaster's assertions. Third, and the last of the economic issues, is whether or not you would simply be stealing from the rich to give to the rich. That, in effect, this would be a windfall unjustified on performers that were already rich and, in my opinion, this is not really a valid argument.

The Werner report suggests and indicates that only a small proportion of performers participating in the production of recordings receive royalties from the sale of records and that even if they do, royalties represent a very small proportion of their annual earnings.

The statistics with respect to record producers are less conclusive. But, in my opinion, the overall argument that this would be an unjustified windfall does not have any hard economic support. I think you need to look at this, but the fact is that at least in the performer area, the beneficiaries would be the entire performer group and not the stars and, I think this, in effect, answers it very effectively with respect to individual performers.

Turning finally to the legal issues that are raised, there are four.

The first is whether the copyright statute, the Federal copyright statute is the place to do this. If you are going to do it, and there has really never been any doubt in my mind, that if you are going to do this this is the place for it. I think it is the constitutional home for legislation of this sort. You have the whole range of limitations that are written into the copyright law that could be extended in this area if you wished to.

I might make a point that what you did in 1976 and which became effective on January 1, 1978, in preempting State law in this area has altered the balance somewhat. One could have made an argument before this year that, of course, there might be the possibility of enforcing State rights against sound recording performances under the old jurisprudence and by analogy from the unauthorized duplication cases.

You can no longer make that argument. You have preempted State law in this area, in my opinion, very effectively and you simply cannot argue that there is any possibility of anything now. So you are actually, by that act, withholding protection under any law, State or Federal.

Second, what form should the protection take, and it does not seem to me anyone has or could make an effective argument for exclusive rights here. To expect broadcasters or anyone else to do one-on-one bargaining with respect to this mass of sound recordings does not seem very realistic. So what you have, it seems to me, is the alternative of some sort of the compulsory license, and I think that the Danielson bill approach is probably about the best you can come up with.

I have thought a good deal about other alternatives, and it seems to me it's an excellent starting point, and what I have done in a little bit of redraft is to take that as the base and go forward with it rather than to try to alter it. I think that is a fair statement.

Third, who should be the beneficiaries of protection, and if you get to this point, I think you will need to consider this very carefully.

There are several possibilities, but I have concluded, after a great deal of thought, and we have discussed this a good deal in the office, that both performance and record producers do contribute, maybe not in equal proportions, but they do both contribute to the creative elements that go into a sound recording; it does not seem to me wise to withhold protection from one group or the other, especially since an analogous and very closely analogous case can be shown in regard to motion pictures and television programs; you are, in effect, protecting both.

There isn't any effort in the present law to differentiate between performance and motion picture producers or television producers. All of the creative elements that go to make up a creative work are protected, and those are the people that contribute those elements—the authors of the work.

What is peculiar and special here is the status in this industry of almost all of the performers, not all but almost all, as employees for hire, in many cases under collective bargaining arrangements. What you woud be doing, it seems to me, if you single out performers who are employees for hire for expressly identified protection under this law is something new in U.S. copyright law.

You would be acknowledging that these people are not authors as you have defined authors in the copyright statute, because they are employees for hire. But you would be insuring them a certain amount of protection, and while this may be a little bit of a jolt at the outset, I come to the conclusion this is really wise.

There isn't any other way to do this if you are going to do it, and it does seem to me what the Danielson bill did indirectly and what my redraft of those sections does very expressly is to say, OK, we are expressly protecting employees for hire under the copyright law, even though we are not considering them authors or copyright owners.

Finally, how should the rates be set and, in this area, I think the Danielson bill was largely drafted before the Copyright Royalty Tribunal had its structure and responsibilities fixed, and it seemed to me that added a different dimension.

I think with that body in existence and with the uncertainties that would emerge from this, the best approach is what the Danielson bill initially did, set the rates in the first bill, and then allow the Copyright Royalty Tribunal, on the basis of economic and other evidence, to revise those rates at certain times.

Finally, Mr. Chairman, I would like to say a word about legislation, international aspects, and perhaps where you go from here.

I would hope that these hearings would be the beginning of active consideration of legislation which would be based on the Danielson bill and perhaps would include some of the suggestions which have been made.

I think that this is important for more than simply domestic reasons. This is a trend that is international in scope, and we are really in many ways behind the times in not granting protection in this area.

We are an active participants in the development of the Rome Convention in the early 1960's, which added the most controversial provision with respect to royalties and sound recordings. We have never done anything with that treaty, to our detriment, in my opinion, in other areas as well as this. We are a part of a very large international creative community, and it does seem to me that a modest breakthrough in this area would greatly enhance our ability to function on the international level.

Finally, and just as a very personal observation, Mr. Chairman, I recognized in my quest in the hearings we had in Washington and California that the hopes which I had about 2 years ago that the proponents of the legislation in this area would be able to sit down with the opponents and work out some sort of understanding, my hopes in that area are not going to be realized.

I cannot in my good conscience or heart blame the broadcasters for opposing this legislation out of hand. This is a generation of broadcasters that has grown up without paying anything, and why should they lie down and pay something. It does not seem reasonable to me at this stage to expect them to say, yes, of course, go forward, we will pay. One could hope that would take place, but I don't think it's realistic to expect it.

On the other hand, what I do see emerging is a power confrontation. I asked questions on both sides as to how this was going to go, and

that is the only conclusion I could draw, that the broadcasters who simply don't want to pay it are going to bring their full force to bear on this legislation, and it has been said and I think with some truth, that everybody in the world could be in favor of something and if the broadcasters were against it it would not go through Congress.

If that is the case, then we are probably going through a futile exercise here. But, in my opinion, these things go through gradual phases, and essentially you come to the point where the full justice and morality of the situation becomes kind of overwhelming.

I don't know whether we are there yet. I think there has to be a great deal more discussion and a great deal more hard legislative work. But the fact that you are having these hearings, Mr. Chairman, the fact that you are actively considering legislation in this area, seems to me very desirable, and it does seem to me broadcasters should listen to what they are hearing and perhaps try to figure out whether they can sustain an absolutely negative attitude up into the next decade or even the next century in this area.

We have seen and they have not seen, but we have seen I think in the overall historical sense, a whole area of creative endeavor almost destroyed by mistakes on both sides, and by historical forces that perhaps were beyond anybody's control. But the fact is that we have done very, very great disservice to our performing arts community, and I think it is time the Congress did something to repair that injustice.

Thank you, Mr. Chairman.

[The following material was supplied by Ms. Ringer:]

SOCIEDADE BRASILEIRA DE INTÉRPRETES E PRODUCTORES FONOGRÁFICOS,
Rio de Janeiro, May 17, 1978.

MISS BARBARA RINGER,
Register of Copyright of the United States of America, Library of the Congress, Washington, D.C.

DEAR MISS RINGER: Having studied your Report to the U.S. Congress on Neighboring Rights, we received the enclosed Opinion from our Legal Counsel and would kindly request your personal attention to the points referring to Brazil raised in the said document.

Please let us know if there is any further information required to clarify this matter.

Thanking you in advance for your kind interest, we remain,

Yours faithfully,

CARLOS GALHARDO, *President.*

FREE TRANSLATION OF AN OPINION GIVEN BY THE LEGAL CONSULTANT OF SOCINPRO

Mr. President, having studied, at the Board's request, the Chapter concerning Brazil in the Report of the Register of Copyright of the United States of America presented to Congress in January 1978, I share the Board's concern that parts of the said Report may cause misapprehension as to the real situation of SOCINPRO, owing to some incorrect statements contained therein.

It is not true to say that:

(1) SOCINPRO had high administrative charges (see page 6).

As a matter of fact, SOCINPRO's internal administrative expenses were (and are) moderate (16.4 percent on net collections on average for the last 5 years), this being a source of pride to SOCINPRO's administrator.[1]

[1] Even adding the collecting expenses by SDDA, the total deducted from the revenue of copyright owners was around 42 percent on average, a low percentage if we take into consideration the small individual amounts collected, the enormous extension of the territory and therefore the high charges caused by collecting agents. Anyway deductions were well under the "50 to 60 percent" referred to in the Report, and it should be noted that part of the expenditure went to the campaign for live-performance and social assistance, requested by the artistes, which are *not* related to the main operation of collecting/distributing public performance fees.

(2) SOCINPRO was "operating remote branch offices" (see page 6).

Apart from a small one-room office in the most important town of São Paulo, run by a single clerk receiving a modest wage, SOCINPRO had no branch offices at all.

(3) the CNDA "by Decision No. 1 suspended SOCINPRO's collection activities" in "response" to criticisms (see page 7).

As everybody knows, through Decision No. 1 (in which the name of SOCINPRO is not even mentioned) the CNDA applied Article 115 of Law No. 5988 which determined to centralise the collection of public performance through one central office (ECAD). This applied to all performing rights societies (including UBC, SBACEM, SICAM, SADEMBRA and, of course, SOCINPRO) but was not, as the Report implies, a measure directed against SOCINPRO in particular. On the contrary, SOCINPRO supported the measure, as recorded in the minutes of several Board and General Meetings.

(4) SOCINPRO sued successfully in 1976 "to increase its representation on the Board" (of ECAD).

Footnote No. 10 (page 7) expresses false concepts by distoring facts: the lawsuit against Decision No. 1 of the CNDA was not brought by SOCINPRO alone but by all the performing rights societies jointly. The grounds for the action were NOT "to increase" SOCINPRO's "representation" on the Board of ECAD, but to ensure the full and correct implementation of Article 115 of Law No. 5988, according to which all the performing rights societies were to organise ECAD, a legal right which had been denied them by CNDA.

(5) SOCINPRO "cannot continue to operate" with a revenue of 3 percent of fees collected (page 7).

This assumption, attributed to "some authorities "is erroneous because Opinion No. 43/77 of CNDA allows members to make contributions to their society and SOCINPRO's members have provided the necessary funds, voluntary, as demonstrated by the published accounts of the year 1977 attached as Annex I. Another false assumption is that direct contacts with ECAD will render membership of SOCINPRO redundant—while correct in theory, this does not correspond to the facts: no member of SOCINPRO has so far applied to ECAD for direct payment (after nearly 3 years of ECAD's existence) and new members are constantly joining SOCINPRO, 142 having been admitted at the last General Meeting, held on 30 March, 1978. It should be noted that, as Article 98 of Law No. 4944 (see page 4) provides, the power to collect is invested in the producer. There is, therefore, no direct link between performers and ECAD.

(6) Calculation of broadcasting fees is based on their "gross commercial income". Unfortunately, this is not the case. Broadcasters pay a "forfait" calculated on an estimate of the number of performances, in accordance with a fixed tariff agreed by ECAD and ABERT (the Broadcasters Association). SOCINPRO's remuneration is an additional 50 percent of the composers' copyright revenue.

From the above analysis, it may be anticipated that third parties, among them those foreign collecting societies with which you are negotiating bilateral agreements, may be misled as to the situation of SOCINPRO and reluctant to enter into contractual relationship with it, not only because of the doubts implied as to its past efficiency, but also as to its future stability.

No doubt the report was compiled in absolute good faith but it is clear that many misunderstandings arose in the interpretation of the information on which the report was based, and it may be that some of the sources from which the material was obtained were not the most appropriate.

In view of Miss Ringer's international reputation and her widely known professional integrity, we would recommend to the Board of SOCINPRO to request her to give her personal attention to these important details concerning the actual position in Brazil, and we are confident that, after verifying the information contained in this Opinion, she will take the necessary steps to rectify this situation, uncomfortable to both parties, by ensuring that the necessary amendments are made to her Report to Congress, a most important document which will be referred to as a major source of material by experts in the field, for many years to come.

HENRY JESSEN, *Legal Consultant.*

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
OFFICE OF THE REGISTER OF COPYRIGHTS,
Washington, D.C.

DR. CARLOS GALHARDO,
President, SOCINPRO, Soc. Brasileira de Interpretes e Productores Fonograficos Av. Beira Mar. 406—sala 1205, 20.000 Rio de Janciro, Brasil

DEAR DR. GALHARDO: Thank you for your letter of May 17, 1978 commenting on our report on performance rights for sound recordings, particularly with respect to the operation and administration of those rights in Brazil. This report is currently being printed by our Congressional Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. We will make every effort to have Dr. Jessen's comments included in the printed report. If that is impossible at this late date, we will transfer the comments to the Subcommittee at once for their consideration.

Our report was prepared independent by attorneys on my staff under severe time limitations. The statements it contains reflect opinions of interested parties, which my staff was generally unable to verify independently. They advise me that a staff member met briefly with Dr. Jensen during a meeting in Brazil, and that he suggested contacting Dr. Amaral. Also, staff members attempted to meet with Dr. de Costa during their sojourn to Paris, and in New York, but he was unavailable. Accordingly, I apologize for any misleading statements in the report, but I assure you that it was, as you suggest, prepared in good faith.

In response to Dr. Jessen's specific objections, please note that your comments on statements concerning SOCINPRO's administrative costs and branch offices (p. 6) were attributed in the report to "critics of SOCINPRO" and were documented to a published article by A. Chaves, "News From Brazil," 93 Revue Internationale Du Droit D'Auteur at 58, 66 (July 1977). The statement on p. 7 regarding CNDA was not intended to imply a causal action, directed only to SOCINPRO, but an effective one, which directly effected SOCINPRO, the only organization under discussion at that point. The same response applies to Dr. Jessen's fourth point. The report makes no pretense of discussing all performing rights societies, but only those most concerned with performing royalties for the public performance of sound recordings, as distinguished from the underlying music or other copyrighted works embodied on those recordings. I am certain that Congress will view the report in this very limited context.

Point five, regarding SOCINPRO's inability to maintain operation under the recent 3% restriction, is presented as an opinion of authorities, which in fact, it is. We certainly take no independent position on whether or not that will prove to be true. The report in fact acknowledges that SOCINPRO remains an operating body (p. 7), and we have no basis or intent to predict its future. Again, we have reported only what knowledgeable interested parties have told us, in an attempt to be as thorough and objective as possible.

With regard to point 6 (fees collected from broadcasters), our information was obtained from the published article by Professor Chaves. That article, at p. 66, states that distribution is based on the number of performances and that the sums collected from broadcasters for performances of sound recordings "are calculated on the *gross sums* invoiced to announcers on the basis of musical performances or the use of phonograms." Our report iterates that statement by saying "Broadcasters are to pay fees calculated on their gross commercial income from musical performances or the use of phonograms." I believe this statement reflects Dr. Jassen's comment that fees are calculated on an estimate of the number of performances. The report states the actual percentage fees reported by Dr. Claudio de Souza Amaral.

Again, let me assure you that your comments are most welcome, and that they will be given full attention. I regret that we were unable to discuss our findings earlier with Dr. Jassen, and regret any misunderstanding that may have resulted. Our report must be viewed for the limited purpose it was intended: to give Congress an overview of performance rights in other countries as reported in documented articles and personal interviews. It reflects no political positions, and attempts to be as objective as possible, and as thorough and accurate as we could make it in the limited time available.

If you have any further information or comments, please do not hesitate to contact me.

Sincerely,

BARBARA RINGER.
Register of Copyrights.

Mr. KASTENMEIER. Thank you, Miss Ringer, and I want to compliment your staff, to whom you gave credit at the outset for producing what at least in terms of copyright of this committee's work in copyright is consistent in terms of its voluminous character, and I think also for the quality of it, and we are indebted to you and to the staff that you have put together.

I might say that we have this morning at this moment a full panel of the subcommittee here, which is very, very unusual indeed.

Mr. SANTINI. Oh, Mr. Chairman, please.

Mr. KASTENMEIER. I was not making any reference to the gentleman from Nevada.

Mr. SANTINI. Perhaps I am hypersensitive about it.

Mr. DRINAN. Mr. Chairman, the entire subcommittee always comes when Miss Ringer comes.

Mr. DANIELSON. I might add the entire subcommittee is not here until Miss Ringer comes.

Mr. KASTENMEIER. I have a number of questions.

I will just ask a couple of them before yielding to my colleagues. With all of them here, it may take some time.

I wonder if you can tell us practically who is affected in what respect, who would be by adoption of the Danielson bill, or amended version of it, in its present form, more or less, apart from broadcasters and from musicians, performing artists and sound recording companies.

Are there other entities that may be marginally affected that we ought to consider in terms of the intended or unintended reach of this proposed legislation.

Ms. RINGER. I think the first group you think of are the jukebox operators. In effect, they are not directly impacted by the Danielson bill, in the sense that they come under their own section, and so they only pay a certain amount.

But, in reality, and this is true of other groups too, even if you have a compulsory license in another area that has a ceiling, then when you get to the point where the rates are going to be raised, then the fact that you have another area where payments are going to be made is going to affect the rates in that area. And the operators know this very well, and that is why they are opposing the legislation.

On the face of it, they would not have to pay any more, but eventually they probably would, marginally, and I guess even more than marginally. The same is true of cable, to a lesser extent, perhaps. It only pays certain amounts, but it would be retransmitting on a secondary basis some recorded music, a little but in the radio area, and to that extent the rates might be affected later on.

Directly, you have discotheques which do use sound recordings, that is their stock and trade, they use sound recordings for public performance, and they are paying copyright royalties for the music now to the Performance Rights Society, and presumably they would be very much involved in paying under the bill.

The other areas, background music services and live situations, restaurants, and so forth that are not discotheques, I think the effect on them would be marginal, but there is a range of use beyond broadcasting and the larger mass media that I mention.

Mr. KASTENMEIER. And to some extent television broadcasting as distinguished from radio broadcasting.

Ms. RINGER. Yes.

Mr. KASTENMEIER. Being marginal.

Ms. RINGER. Right.

Mr. KASTENMEIER. In terms of involving American jukebox operators, it seems to me one of the difficulties would be if we were to involve them at once is suggested by the fact that their compliance rate with respect to existing law is presently so poor and what is, indeed, the prognosis of imposing yet another liability on them, whether or not it's the ability or inability to pay or disinclination or whatever at least in terms of registration with your office up to the present time.

Ms. RINGER. This is true, Mr. Chairman, although the reasons for it are very, very conjectural, and I don't think we have enough experience to make any firm comments.

The predictions have been that those there would be about 400,000 jukebox registrations, and on the deadline we had vastly fewer than that, about an eighth I think of that, in the 50,000 or 60,000 range. It's risen to around 100,000 now. The deadline didn't seem to make any difference, and one conclusion you can draw is that this really is a widely dispersed industry and the word just has not reached everyone.

On the other hand, I think maybe another prediction was that they were waiting there for somebody to put their arm on them, and that may happen.

Mr. KASTENMEIER. Motion pictures and other audio visual works like sound recordings often have two copyrights; the copyright of the playwright, the copyright in the motion picture itself. When broadcasters use these works, do they now have to pay for performance rights for both kinds of copyright?

Ms. RINGER. Normally not, Mr. Chairman. Of course, if the broadcaster is doing the packaging, then they have to do the whole clearance bit. On the other hand, normally one person, the packager, the producer, or whoever you want to call it, obtains all of the rights and then guarantees to the network or the broadcasters, that if they play this they will not be infringing any copyrights.

There is an exception to this which you may know, which is in the music area, and that, of course, is what we are talking about, and there the broadcasters, network and station alike have their own licenses with the Performing Rights Societies for what are called small rights, the right to perform publicly a nondramatic work. The dramatic work situation is different.

Mr. KASTENMEIER. Thank you.

I might address this question to Mr. Werner.

During your study, did you consider the impact of the new performance rights on consumers?

Mr. WERNER. The effect on, for example, the consumer, the effect on consumers was not considered, and maybe I should directly, I might want to explain why our first involvement with the Copyright

Office actually involved surveying what data was available to assess the economic impact of a proposed chance as contained in the Danielson bill, and so the economic analysis did focus primarily on a data set that was identified in this initial feasibility study, and this is why, to some extent, it has the scope that it does have.

The possibilities for creating data on the possible impact on the consumer price index, the price of records specifically, was not considered because it would be very difficult to get a precise measure of the quantitative change.

While it can be stated without too much fear that there will be possibly an increase in the price of advertising, you know the question was, well, to what extent, and we tried to focus in the study on data that was available that would give us some hard facts on a quantitative measure of change.

So, for that reason, we did exclude considerations concerning consumers from the analysis.

Mr. KASTENMEIER. As a result of that, you would not want to hazard a guess as to what the impact would be on consumers, notwithstanding the fact that you didn't base it on that sort of data. Would you want to hazard a guess as to the impact of this legislation on consumers?

Mr. WERNER. If anything, it should be the case that it could be said that the price of records would actually go down if the record industry does enjoy some revenue coming back from the use of its material in the form of performance royalties from broadcasters.

One argument that we did look at was the possibility that record companies might produce more classical records, things that were less profitable from sales, it might be argued that the price of records would come down.

However, again, we did not have data on, hard data on which to base such a statement and we avoided that in the report.

Mr. KASTENMEIER. Did you or our organization have any prior work in the field?

For example, for over a decade the question of mechanical royalty and the economic impact of an increase in mechanical royalties has been an issue. Did your firm participate in that particular question?

Mr. WERNER. Our firm did not participate in the area of copyright economic issues previous to this current involvement.

I might point out that one of the principal reasons for our involvement was related to the fact we were already involved with the Labor Department in doing a survey of performing artists, their employment, underemployment, and it was because of the fact that we were already surveying the members on a randomly sampled basis, the members of the five major performing arts unions, that it was felt we might pick up on some additional work and research which we have incorporated this in the report, which might serve the interests of the Copyright Office with respect to this economic impact study.

Mr. KASTENMEIER. In connection with that, did you conclude passage of this legislation would have an effect on the employment of the performing artists and, if so, in what connection, what effect would it have in the employment or underemployment of performing artists?

Mr. WERNER. With respect to earning, we did discover there are

many people who have participated in making sound recordings who have very low earnings, on an annual basis under $7,000 a year. I have the figures in this report, but I would say approximately 30 percent of those surveyed who had participated in making sound recordings in 1976 had earnings under $7,000 a year.

The people who make records, and this is clearly documented in our survey, are very often not likely to receive anything in the form of royalties from sales. Something in the range of 10 or 15 percent of those surveyed who had made records ever received something in the form of royalties from sales. And one of the big problems stems from the fact there are recoupment clauses, for one thing, among those who may be entitled to get royalties from sales.

These recoupment clauses require that the record company recover all of the production costs associated with moneymaking records and records that didn't make money for this recording artist before he can enjoy anything from a current hit.

The other point to bear in mind is that very few of those who make records are of the status or stature that entitles them to enter into an agreement whereby they will get some money from the sale of a record. Again, I want to remind you that numerically, by far, the majority of the artists who will receive royalties from this, should it pass, are not the big name stars who are party to such a sales contract, but the backup musicians and side men who, in fact, are not party to a contract whereby they will get some percent of sales.

Mr. SANTINI. Mr. Chairman, could I explore that point with the gentleman?

Mr. KASTENMEIER. I was about to yield to Mr. Danielson. But, yes, I yield to the gentleman for that purpose.

Mr. SANTINI. If I understood your testimony, the backup musicians were not in a position to do anything about benefits derived from resale of the records, essentially was the point you were making, is that true?

Mr. WERNER. They are not party to a contract whereby they receive some percent of the royalty from the sale of the record.

Mr. SANTINI. What is the contractual relationship that is existent between the backup musician and the artists or the producer, what is the relationship there?

Mr. WERNER. You are getting somewhat away, maybe into a legal question, and away from the information I can answer directly from the survey data I have. So I would like to avoid that question, and maybe someone else on the panel can handle that.

Ms. OLER. I am not an expert but, briefly, from our study we found that the backup artists are generally paid when they work a session fee, in other words, but——

Mr. SANTINI. Who do they contract with for that fee?

Ms. OLER. Generally it's done through union contracts, but they get paid from the record company, of course.

Mr. SANTINI. Then the contract is between the backup artist and the record company?

Ms. OLER. Yes; through the union, though.

Mr. SANTINI. Through the collective bargaining process of the union contract?

Ms. OLER. Right.

Mr. SANTINI. Could that contract not make provision, going to the gentleman's point, that there should be some royalty type reimbursement for the backup musician?

Ms. OLER. It's possible, but it has not been done.

Ms. RINGER. Just to contribute to that, this was the big issue during the 1930's, and whether they could go after some kind of performance right based on the use of the record for commercial purposes, or whether they should try to build on something on top of the union, should build something on top of the contract, the collective bargaining contract between the union and the record company, and they did.

They built on these performance trust funds, which were intended, initially, to give employment to unemployed musicians rather than going the copyright route, and it did not work very well, though it still exists in effect.

The wars that emerged later on in the 1950's and I guess early 1960's within the American Federation of Musicians involved a conflict between those who didn't want the money being generated by their sessions, the employed musicians, to go only to unemployed musicians; they wanted some of the action, too, and so there were additional arrangements made whereby there are residual payments but, essentially, this is between the record company and the union, and the broadcaster pays nothing in this situation.

Mr. SANTINI. I understand. It does seem to me that perhaps a valid argument can be made that if there are inequities with regard to benefits of the performing artist, then those inequities ought to be rectified through the recording company, the principal beneficiary of the reproduction process. There seems to me to be a very logical connection between the two.

Ms. RINGER. That argument certainly has been made, Mr. Santini, but, of course, a record company isn't getting anything from the performance either, so nobody is paying for the performance; it's all based on sales and, therefore, you have a situation in which——

Mr. SANTINI. But, of course, the performance produces the sales from which the record company benefits.

Ms. RINGER. For some hit records, a very small percentage.

Mr. BUTLER. Would you yield on this point?

Mr. KASTENMEIER. Yes, I yield to the gentleman.

Mr. BUTLER. Just for my own information, to what extent are performers union members; is it pretty close to 100 percent in this field?

Ms. RINGER. As far as what is on commercial radio, I think it is very, very close to 100 percent, except for foreign records.

Mr. BUTLER. Except for the foreign records?

Ms. RINGER. Yes.

Mr. BUTLER. All right. Thank you.

Mr. KASTENMEIER. The Chair now yields to the author of the bill, the gentleman form California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman, and thank you, Miss Ringer, and thanks to your entire staff for a massive piece of work on this research.

I blush to confess I have not studied every page of it, but I think you have given us the essence, and it's a tremendous resource to review

any questions that may come up and will be very useful at the time of markup.

I would like to state first, I am not going to ask you many questions because, frankly, I think you have covered the ground very well.

I will just state first of all with respect to the bill which bears my name, I am not set in concrete on any provision. I perceive a bill as being simply a vehicle to enable us to conduct hearings, take testimony and, hopefully, to serve as the starting point for marking up the bill that will answer the public needs.

So there is not a solitary provision in that bill that I hold sacred, except, maybe, the name.

I want to make this point for a very good reason. The question of whether there should be a 50–50 split between a performer and record company constantly comes up. I am not bound to that. If you are going to have to start someplace, 50–50 seems to be about as equitable as anything you can pull out of the air. Maybe it should be 60–64, or something else.

We can work that out first in markup and, secondly on the basis of the experience, if this should become law. I want to comment that the question has already been raised twice here today. I think we must keep in mind what is the thrust of this bill. We are not talking about the contract between the performers and the recording studio, for example, or between the union and the studio or between the performers inter se. We are talking about something that transpires after we have a completed sound recording. Then, can that recording be used for commercial purposes without some kind of compensation to the performers who draw some life into it, and the purpose of this bill is to provide that performers should get some compensation. So should the record company. How much I don't know, but they ought to participate.

I understand the debate, the argument, we have a country that is founded on, or our economy is founded on, the profit motive, and it has been an excellent motive for making progress in forms of production, for developing the West, for example, for giving people incentives to produce beyond what they would normally produce.

It's a great motivation and has done more to bring our standard of living up to the highest peak in the world history than anything else. But there is a unique feature that goes along with the profit motive, and that is it does not provide much incentive to look after the economic well-being of the competitors.

In fact, it is just the contrary. To make the greatest profit you cut out the competitor as much as you can. Your cost of goods sold is reduced to the lowest possible denominator.

In our profit system we are just carrying forward the Biblical mandate, and I am hesitant in these surroundings to refer to Biblical mandates, but here is something in the Book of Matthew to the effect that the worker is worthy of his hire, I think it's chapter 3, but I am not real sure.

Mr. DRINAN. If the gentleman would yield, you get a C-plus.

Mr. DANIELSON. Thank you. But we carry that forward all the way through our economy. And it crops up in our Constitution, that people should not be deprived of their property without due process of law, and due process means usually they should be paid for it.

If you eat my bread, should I not be paid?

Mr. DRINAN. You are getting worse.

Mr. DANIELSON. That is a D-plus. But that is what we are talking about here, that performers bring some life into a piece of vinyl or some magnetic tape and they produce a sound recording, phonograph, which is a marvelous invention, and it can be played over and over and over again and render faithful reproductions of what those performers did.

They are performing it over again and over again and over again but, unhappily, they get paid but once.

Now, who profits from that? The people who use it commercially? There is no ban here, incidentally, from personal use. It's commercial use. Who profits from it? No one except the user.

Now, the radio stations are the principal persons upon whom we focus here, although commercial users would be covered. What else do they use that they sell which they get free? The average radio station I listen to sells or has two things, it has music, which is obviously the phonograph record, and it has news.

Do you suppose they get that news wire free? Do you suppose the AP or UPI ticker in their backroom is coming in without any charge at all? I don't suppose so.

Do they get their electricity free of charge? I don't think so.

When they need a new tube in their broadcasting equipment, do they get the tube free of charge? They can say, look, we use Ray-O-Vac tubes, we get them free. No, that isn't what happens. They go downtown and buy them someplace, at the drugstore or wherever they got them. There is nothing they sell, nothing that they use that they get free except the phonograph record. I mean, the use of the performer's right.

I think it does violence to my concept of equity. I think if they pay for the news wire, they should pay for the music which they play. And, in fact, except for the news and the music nobody would turn on that radio station in the first place, because the only thing left is commercials, and who in the world needs a commercial? I don't know.

I don't think we are dealing with welfare here. I don't think we should consider that by giving a performer some type of residual compensation for his work that we are indulging in welfare. We are simply paying him for what he has done.

He has suffered a damage, if he has lost a reasonable and potential profit. The law has recognized his loss of profits for many, many years as being a compensable damage, and I think he is entitled to it.

Now, the radio stations have told us, both in writing and in oral testimony, that actually they are benefactors to the performance, that by playing their works this enhances their reputation and standing of these performers. It may for the stars, but it certainly does not for the background musician, the man or woman whose name never appears on the label, who is never pronounced, who gets nothing from it except that one day at scale.

His or her compensation is not enhanced by a repetitive playing on radio stations, background music arrangements, or anything else, and I cannot believe that the psychic compensation is enough.

Psychic compensation is not very much for the trombone player who knows he played the trombone in the background of "Song of India" but his name is not there and there is no money coming in. In fact, nobody will necessarily believe he did play the trombone, so it isn't really there. We are kidding ourselves when we contend that that compensation is a great thing.

Now, someone, I believe you, Miss Ringer, raised the point that they will call it a tax. Do I really care what they call it? Everything is a tax, I suppose, if you have to pay for it. I get a candy bar, and I pay 15 cents, I suppose that is a tax; I don't know.

I don't really care that what they call it, and I don't care about the classical records. I happen to like them, but I don't think it's the role of Government to tell people what kind of music they should listen to. If they really want those classical records, they are going to buy them or they are going to listen to the station that plays them, and if they don't am I to tell them what kind of record they should listen to? I don't think so.

It's not the role of Government to dictate tastes or choice. You know, I suppose we could pass some kind of a law or do something that the use of poetry shall be free because it's an uplifting thing, but can you get along with that very long? I don't believe so.

I think your copyright laws will say that Robert Frost is entitled to compensation when his works are played or rendered, or whatever you want to call it. Even the cannonball has to get paid. That is a form of dance, I guess. But it has to be paid if you are going to use it again commercially, and I think that is very fine.

Now, in a nutshell those are my comments. But I want to add this, if I may.

I really appreciate your report and your comments. I think it's evidently clear that there is no constitutional reason why performance rights should not be granted. There certainly is no legal right, because we either provide it or we do not provide it.

I can see no equitable right to deny performance merits, compensation to people who produce something of sufficient value that others wish to use it. So, it looks to me like what remains is do we get to work with some kind of intelligent markup and see what would be a fair way to protect that right, fair to the performers, fair to the users, fair to everybody. And that is what I am looking forward to, and I thank you.

Mr. KASTENMEIER. Thank you.

Do any Members have any questions to ask the witness from California?

Mr. ERTEL. Mr. Chairman?

Mr. KASTENMEIER. Mr. Ertel?

Mr. ERTEL. I have a couple of questions

I am not intimately familiar with this and, obviously, I did not get here during your testimony, but I read it through.

On page 4 it states:

It's important to emphasize here that the proposed legislation is intended to benefit all performers on a given sound recording equally, and that principal or starring artist will receive the same payments as any other individual contributing to the record.

Are you saying all performers on the record, regardless of how minor their part on the record, will get equal payment?

In other words, if I play, and I can think of one, the symbols and I strike a gong, would I get the equal amount as the guy who spent the whole time performing? Is that fair?

Ms. OLER. What we have done is follow, in our draft legislation, the Danielson bill formula, whereby at least 50 percent would go to the performers in a lump sum, and that would be distributed equally among the performers regardless of the nature or quality of their contribution. That is right.

Mr. ERTEL. I guess the question is, Is that fair?

Ms. OLER. I think it was a matter of efficacy as much as anything, that the Government would not be, or Congress would not be, weighing the quality of a particular performer's contribution.

Mr. ERTEL. My question still is, Is it fair?

Ms. RINGER. I sat through the Senate debate on this issue in which the provision you are now questioning was absent, and the argument ran that this was an act for the benefit of Frank Sinatra and Dean Martin. Those names recurred frequently in the testimony. After that, in the debate. After that colloquy, there was, I think, some substantial rethinking within the proponents' camp, and the feeling was that Frank Sinatra or Dean Martin, and those are rather passé names nowadays, we talk about someone else now, I guess——

Mr. BUTLER. Talk about a singer.

Ms. RINGER. All right, John Denver is suggested to my left.

Mr. DANIELSON. Or Little Jack Little.

Mr. ERTEL. Or I don't care who we use.

Ms. RINGER. In any case, he is able through his bargaining position to obtain fairly substantial amounts from the sale of the record.

Mr. ERTEL. Let's not use a loaded name, if I might. Let's use the person who plays a piano, who may be an excellent performer and performs throughout the record, and the one person that comes in, the one striking the cymbals, should he get the same?

Ms. RINGER. He was sitting there; he or she was sitting there throughout the session.

Mr. ERTEL. Do we pay people in this country for sitting?

Ms. RINGER. The use of the cymbals may be very important. It is in certain cases.

Mr. ERTEL. My question still is, It is fair?

Ms. RINGER. Yes; I think it is fair, fairer than the opposite.

Mr. ERTEL. How can you justify that as fair?

Ms. RINGER. I cannot possibly quantify the qualitative contribution of the individual performer in a particular record. I think there are probably arguments that you can make that this is unfair.

As you are suggesting, obviously, if the violin part is the predominant part and you have just a little bit of percussion, then you are not exactly dividing it equally, but I am not sure in the area we are talking about. I am not sure this is germane.

I gave up worrying about this problem a long time ago, Mr. Ertel.

Mr. ERTEL. I don't really give up worrying about fairness, and I think that is something we ought to consider, and I think we have the problem of fairness here in many performances.

How about the chap who has just begun his musical career, who may be a novice, who may have his first job, and the chap who has become the accomplished artist, and he is in this background group, he is not the star who has spent a great deal of time perfecting his skills, he is a first violinist, or she, is it fair to give that novice who has just begun the same as that accomplished first violinist?

Ms. RINGER. Maybe not, but let me say two things:

First, you have got to have something to divide in terms of payment before you get to this problem. It's more important to me that the principle of payment by the user for the commercial use of music is established than how you divide it once the payment is coming in. I think you have to get over that hump first.

I think you have some points. I am not going to dismiss them out of hand. On the other hand, the performers themselves think this is fair, and I am not sure either of us is in a position to second-guess this.

I think it is fairer than basing it on pure economic power within the union. And I just don't see any way to quantify contributions of various performers when they are acting as an ensemble, that is really about my basic answer to you.

Mr. ERTEL. Let me go to another subject.

You suggested, I guess, that the Commissioner of the Copyrights collect this money and distribute it; is that right?

Ms. RINGER. No. The pattern that emerged in the general revision of the copyright law in two other areas, cable television and jukebox performances, involved certain amounts that you in Congress establish at the outset that are paid at regular intervals.

They are paid into the Copyright Office, but we are simply a conduit; we account for the money, and pay it into the Treasury where it becomes a fund that bears interest, by the way. Later on, after claims are made and evidence is heard, the Copyright Royalty Tribunal, which is a different independent body, separate rather entirely from the Copyright Office, on the basis of factual determinations, and conceivably one would perhaps hope for this, agreements among the copyright owners as to how the money would be used, would determine how it was to be paid out.

Mr. ERTEL. My question, following that, Is there any precedent for this kind of a system wherein the Federal Government is doing basically a fee collection system, and then providing a system for distribution of it?

Ms. RINGER. The precedents are principally the ones I just mentioned which were established by your own subcommittee in the copyright legislation. There are international precedents of bodies like this, but nothing quite this way. On the other hand, what you do have here is a compulsory licensing system which does have precedents in the copyright field going back to 1909.

There was a copyright compulsory license established in the act that your subcommittee just got through revising 2 years ago, which involved use without advance permission—it was not a fund, it was on a one-to-one basis—but it was paying in, and that whole system has become collectivized in many respects.

Mr. ERTEL. Who was it paid into?

Ms. RINGER. Into a group called the Harry Fox Office, which is a kind of a consortium of music publishers, and then it's paid out under that.

Mr. ERTEL. You have also said this would be subject to periodic review by copyright and we would set the fees. Does this interfere with any collective bargaining you can think of?

Ms. RINGER. No. In the sense that you have to assume the whole compulsory licensing scheme to begin with, in other words, obviously if you were starting at this problem in 1930 when the first——

Mr. ERTEL. We are starting it now.

Ms. RINGER. Yes, that is right. You have an entirely different industrial situation than you had in 1930—a situation in which the entire radio industry is based on this mass use of records; in this situation you cannot have individual bargaining, so you have to have some kind of compulsory licensing system if there is to be any payment at all. The money has to go somewhere, and it has to be paid out somehow.

Let me say, Mr. Ertel, this is the way the whole copyright field is moving, that the business arrangements are becoming so complex that this business of an individual author making his own deal, and collecting for each use of a particular artifact, is just breaking down. And you simply have to take into account, if you are going to have any remuneration at all for the use of the copyrighted works, that there has to be some kind of collective arrangement.

Mr. ERTEL. I guess what I am saying is, the Congress is going to be in a position of setting rates and fees. Is this wage and price control?

Ms. RINGER. What the Copyright Act did in 1970, and it did emerge at this table, by the way, this whole idea——

Mr. ERTEL. I guess I could disclaim, or whatever. I was not here.

Ms. RINGER. But there are some historical events that occurred at this table, and one of them was establishing a body, a Copyright Royalty Tribunal which, under congressional mandate, and with some other clearcut principles and standards to apply will be, and there are four compulsory licenses in the law, this would be the fifth, if it were adopted. In all four of those areas the Copyright Royalty Tribunal is charged under the statute to review the rates and, to some extent, the terms of the licensing arrangements.

Mr. ERTEL. Do they set them?

Ms. RINGER. They are set by Congress in the first instance, with one exception, and that is in the public broadcasting area now, and they are going through a rulemaking process right now that will establish a benchmark in the public broadcasting area on which they will proceed.

But in 1980, they are going to review everything and then at staggered intervals thereafter. So Congress, in effect, has said, and I think this was part of the thinking, the protagonists can say far better than I, because they are sitting here, that the economic and industrial situations are too complex for Congress, through the legislative process, going the whole legislative route, to set these rates and, therefore, it established this route, these four areas where you already have a compulsory system.

Mr. ERTEL. I am curious because I am no expert in copyright. I don't know a thing about it, and I am trying to learn, and I make that disclaimer.

If I take television pictures, a video tape of a baseball game, and then reproduce those later, would this be a precedent for paying all of those baseball players for the use of the video tape recordings of those ballgames, for instance, the World Series?

I take a video tape of that, whether it be with a Betamax in a home, and then reproduce them in a bar or some other commercial establishment, is this a precedent for saying to those baseball players that you have performed, it is a skill, it is not a muscle skill, it is not an artistic skill, it's an athletic skill——

Mr. SANTINI. Have you ever seen the Detroit Tigers? They are artists on the field.

Mr. ERTEL. Some are pretty good artists, I guess, the way they contort. But is this a precedent for giving them performance rights?

Ms. RINGER. In a way, no, because they are——

Mr. ERTEL. They are paid by the individual performer.

Ms. RINGER. You are now in the video area where there are a whole other set of consequences. What a filmed or taped sports——

Mr. ERTEL. I am not sure the senses between the eyes, and ears are that much different.

Ms. RINGER. I agree, and that is part of my problem with not having this legislation. You are giving protection to the sports event when it is only television; under the copyright law, it is clearly identified as a motion picture or other audio visual work under the law, and I don't know whether the performers are protected or not.

Mr. KASTENMEIER. I am going to——

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. I am going to allow the gentleman from Pennsylvania to pursue this later, but I would like to break in at this point as much of this is rehashing other matters, and we will return to you, and you can further pursue this, but I would like to have some of the other members who have been waiting have an opportunity to ask questions.

Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

Help me a moment. One of the principal beneficiaries of a performance royalty would be those musicians who play classical music. I am interested, what is the percentage of the classical musicians that are foreigners, and after you answer that question, I want to ask you what percentage of pop performers are foreigners?

Ms. RINGER. What has happened in some respects in the overall classical music area is that the costs of sessions became so high that there was a fleeing abroad. The classical market dried up in some respects, and there just was not that much demand for records, because you are talking about the sales of records rather than playing of records.

Mr. BUTLER. I guess that is so. The originators of the performance are really what I am shooting for.

Ms. RINGER. The session cost, because of the numbers of performers involved, were just so much higher here at one time than they were abroad that there was a lot of fleeing, and a lot of classical recordings, almost all of the opera recordings for a while, were made abroad, and that was true to some extent ofsymphonic music, too.

It was also true of some background music where you could just hire performers cheaper there than you could here. So that I guess the obvious conclusion is drawn that the sad plight of the employed performer in this country became even worse because of that.

Mr. BUTLER. I guess what I am searching for, that is not quite the same problem with the pop performers.

Ms. RINGER. No. I think obviously there was a very great fad for British rock there for a while, but I don't think it had anything to do with the pricing.

Mr. BUTLER. Maybe this is classical, I don't know.

Ms. RINGER. It is now, I guess.

Mr. BUTLER. I guess what I am searching for is a complaint I received from a person very knowledgeable in this area that it would create, the rights we create in this legislation will benefit primarily people who don't live in the United States when we deal in the classical music area.

Now, is that a fair statement?

Ms. RINGER. No. I don't think so, but I am not sure I can tell you exactly why. It seems to be an overstatement. There is a mix here and, obviously, a record company if it can't get performers in this country, is going to go abroad. The fact that broadcasters are asked to pay a rather modest amount into a fund that will benefit both record companies and performers does not seem to me to affect this one way or another.

The charge is made, and I did refer to it, that this would further dry up the sources of commercial or other use of sound, of classical sound recordings. To the extent this was part of the mix there might be some arguments there. But I think the two are basically unrelated issues. This is my own opinion.

Do you want to comment on this?

Mr. WERNER. I was trying to see whether or not we had anything on the number of members of the American Musician Guild who are virtuosos ordinarily and might be engaged in producing records for classical.

Mr. BUTLER. I won't burden you for the moment, but could you explore that and let us have something for the record?

Mr. WERNER. I will have to come back with that another time.

Mr. BUTLER. Could you do that?

Mr. KASTENMEIER. Would the gentleman from Virginia yield?

Mr. BUTLER. Certainly.

Mr. KASTENMEIER. This is part of the colloquy we had in California in which I guess as the Chair I concluded with the witnesses from the recording industry, or some other, I am not sure, witnesses that in the classical field probably 50 percent of the artists just arbitrarily were likely to be foreign born, and musicians, wherether or not the recording was made in this country or certainly released by a recording company, a U.S. recording company, probably made in Europe, obviously except for the British rock stars, that nearly all of the rest, 98 percent of the rest would be American musicians and American artists except, as I say, for the well-known British rock artists who probably would command a fair percentage of the market.

But, as to recording companies, I think it's a little more uncertain whether the recording company is probably an American company,

at least they have the release rights, they are the people who probably printed the recordings in the United States, and the artists may be foreign in the classical field.

Mr. BUTLER. I thank you.

Mr. KASTENMEIER. However, I think the committee would like some more definitive information rather than the mere conjecture we have here.

Ms. RINGER. Let me ask Ms. Oler, and let me say we will provide you with what information we can on the basis of what facts we have.

Ms. OLER. I would also say the point has been made repeatedly if this legislation is enacted and we do reach agreement with other countries which have performance rights, and many of which pay as much as 90 percent of their recordings by American artists, that the flow back would be, the balance of payments would be largely in favor of American recording artists.

Mr. BUTLER. All right.

I thank you.

May I go to another question or yield?

Mr. DRINAN. Would the gentleman yield for just a moment?

I, unfortunately, have to leave.

I just want to thank Miss Ringer and say she is always a great educator.

Thank you.

Ms. RINGER. Thank you.

Mr. BUTLER. I apologize to the gentleman from Massachusetts.

Do you want to go ahead and ask questions now?

Mr. KASTENMEIER. I will yield to the gentleman from Massachusetts.

Mr. DRINAN. No. Miss Ringer, as usual, has made everything very, very clear, and I have several questions, but I am certain we may have to have another hearing on this matter, but I do thank you and your associates again.

Mr. BUTLER. I think the selection of the symbol striker as the ultimate performer, gratuitous beneficiary of this transaction is a pretty good illustration.

Do you basically feel like we are by rewarding a symbol striker, we are promoting the progress of science and useful arts as contemplated by the Founding Fathers?

Ms. RINGER. Yes, without any qualifications.

Mr. BUTLER. Thank you.

You know more about symbol strikers than I do.

How do you reward excellence when we are uniform in our compensation?

Ms. RINGER. I am not sure that the quality is what you are really asking for. I think you are asking for the quantitative aspect. But, in an ensemble there undoubtedly are some that are more important than others, but every one has to be there, and every one contributes. And it seems to me that what the ensemble is doing in an ensemble musical performance is unquestionably a creative work. There is just no doubt about this in my mind.

Everyone that contributes to that is a creator, and I think that you have to know a little bit about timpani or what have you to realize

just how creative that is, and what has to go into this in order for that one sound to come out.

Mr. DANIELSON. Would the gentleman yield on that point?

Mr. BUTLER. Certainly.

Mr. DANIELSON. I think we may be looking at a different aspect here. When a record is made, it's my recollection from previous testimony, the company, the producer of the record, can hire the music that goes along with it, the background music, et cetera.

Now, some of that they might get straight from the hiring halls, just plain union scale, but if they want somebody with some special attributes, some high excellence, they pay them more, not just union scale but they pay them more because they are trying to get somebody who is absolutely qualified in a given field, a real first-class performer. But that has nothing to do with the royalty from performance rights, but it does have to do with his compensation for his day's work.

I think that is a factor you have to consider.

Well, I guess my ultimate question here is when we start striking a balance to distribute it fairly equally, you referred to it as a pittance.

I don't know how to ask you this question exactly, but does this pittance really justify all of this effort in terms of a cost-benefit proposition, what we are imposing on the broadcasters, and what we are imposing on the entire industry to reward the performer, and that is the ultimate objective? Can you give me some rough idea in dollars how we could arrive at this?

We know it is a pittance, but can you give it to us in dollars, perhaps, and I would like to know whether you really think this amount justifies all this effort?

Ms. RINGER. The amount that the Werner study came up with is around $15 million which, in the overall scheme of things, is really a pittance.

Mr. BUTLER. Give it to me in dollars based on the volume of traffic that produces this $15 million.

What would a performer of an average recording get?

Mr. WERNER. We didn't go to that point. We did estimate if the Danielson bill had been in effect, what would have been collected from radio and television broadcasting using the blanket royalty rates specified in the bill.

What Ms. Ringer is referring to there, or estimate, is within the range of the broadcasting industry and the record industry, some $15 million to $20 million, perhaps, might be generated, would have been generated if the bill had been in effect in 1975.

We have not taken that additional step of determining how much would have been received by each person who may have participated in making a sound recording.

Mr. BUTLER. Answer this for me. Will you select in 1975 a representing report and run it though whatever you run it through, and tell me what you think in dollars this would produce for the cymbal player, if you have got one in a pop orchestra? That would be a pretty good trick, but any musician. I want to know really how much we are talking about rewarding them. Is that a big deal? I know it is a big deal.

Mr. WERNER. We get paid by the hour, right?

Mr. BUTLER. We will pay for the performance what it is worth.

Ms. RINGER. Of course.

I think your question is absolutely valid, Mr. Butler. I think you are asking something beyond that though. You want to know how this would quantify out and whether my pittance characterization is accurate, and I think that is absolutely fair.

I have asked myself, though, the basic question that you are asking a number of times, because this is a major effort to go through in order to come out with something that isn't going to reward very greatly any individual performance. That is for sure.

My answer is yes, that what you would be doing would be taking a rather modest step to reverse what I think is a major social injustice, which is the lack of protection of any sort that individual performing artists in this country have had. I don't know where it would lead, and I think that this is what scares the broadcasters, because I think they would see that $15 million, if that is what it is, would become more; $15 million is better than nothing, and they are getting nothing now.

Mr. BUTLER. I thank you, Mr. Chairman.

I am not going to argue with the witness. I just don't want my silence to represent acquiescence.

Mr. KASTENMEIER. I think, at least indirectly, this raises a serious question in my own mind.

Why, for example, should not an actor, whether it is a film or any other fixed medium of expression, also have a copyright to his or her performance, whether it is in a motion picture or otherwise?

Ms. RINGER. I am going to say something rather bold, which I have said before, and I will repeat, and, that is, I think they do.

Mr. KASTENMEIER. The motion picture industry then better be aware of this.

Ms. RINGER. They are.

Mr. RAILSBACK. You mean they should or they do?

Mr. KASTENMEIER. Should.

Ms. RINGER. The existence of motion pictures in the copyright laws. with certain historical events that brought that about, they were added in 1912 without a great deal of thought, and as the years went by, of course, there were all sorts of patterns within the industy—collective bargaining and individual complications and the old saw about the lunatics taking over the asylum at different times. These are the individual performers who became entrepreneurs and so forth. The motion picture industry of course is highly collectivized in the sense that practically everything that is top is done under union contracts, and yet there is built into this—and this has been especially true since television came on the scene and they started using the old motion picture on television—the whole concept of residuals. And residuals are nothing more or less, in my opinion, than copyright royalties by another name, and they are going to performers.

Mr. KASTENMEIER. It does raise the question whether musicians ought to go to residuals or something short of copyright, or whether screen actors ought to go to a copyright extension.

I yield to Mr. Santini.

Mr. SANTINI. Thank you, Mr. Chairman.

Initially, I want to commend you for the quality and substance of your testimony before this committee. At least insofar as this member

is concerned, it is a pleasure to sit and listen to someone as authoritative and as articulate as you are.

This is an issue that is of concern to me, and you have aided me, at least in dispelling in my mind the constitutional concerns that I have, at least at this point.

I continue to be concerned about stage 3 in your presentation, the economic arguments. It does seem to me, in response to the earlier questions, that there are some very legitimate questions that can be pressed on the propriety of transferring this burden to the broadcasters. It seems anomalous at best, in the context of recent history, wherein recording studios, representatives of various artists, promoters, were paying radio stations for selective playing of various recordings, recognizing the direct financial benefit recording studio or performer would realize as a consequence of that production.

Now in effect we will be punishing them for playing, because however it is characterized, it will be attacks. There is a notable lack of enthusiasm in this country for increased taxes of any denomination or origin.

I don't think it is the 250 bucks that creates the concern as much at the camel's nose in the door, or tent, as the case may be, depending on the economic conditions of the recording studio or the broadcasting station. But it seems to me that if you start with 250 and certain additional administrative burden for reporting, that is only the beginning. Rarely are such measures ever rescinded or diminished in proportion, so the administrative burden grows, the tax grows.

For particularly any rural radio stations, that are marginal operations in many instances, at best, it really looms in dire proportions for these marginal operations. Bigger radio stations, as you suggest, just pass it on to the advertisers. That option isn't as readily available to the smaller radio station operators.

I would like to take with you, if you would help me, go through how this $15 million to $20 million would be disbursed upon collection. The radio station pays its fee, and where does that money go?

Ms. RINGER. Do you want to pick up on this? This is more in the economic area, and I can answer, but I think others can do it better.

Ms. OLER. Under our draft proposal, the radio station and other public users would pay the fund into the Copyright Office on an annual basis. The Copyright Office would make an accounting and send the money to the Treasury Department, where it would be invested in interest-bearing accounts. Then the copyright owners, everyone entitled to payment under this legislation, would annually file a claim with the Copyright Royalty Tribunal, and the Royalty Tribunal would then give that money to them, assuming it were an undisputed matter. That is basically how it works.

Ms. RINGER. I think your basic question is, would the broadcasters have to worry about what happened to the money? And the answer is no. That is the way all of these compulsory licenses work; they pay into a fund, and that is it.

Mr. SANTINI. My question goes more particularly to the disbursal of the moneys rather than to the collection of the money. Assuming there is $15 million to $20 million in interest-bearing bonds in the Treasury Department, Sam, who is a noted trumpet player, or, Sherry,

the drummer, as the case may be, leads a somewhat itinerant existence, goes where the jobs are and moves about.

Sherry or Sam then are going to be required to make annual application for their money as a result of recording that they made earlier that year or 2 years before.

Is that generally your thought?

Ms. RINGER. I don't think anybody really knows how this would work out within the union, but it would be done within the union by their regular methods. And there are residual payments within the union, which I think this would probably hook on to.

Mr. SANTINI. Then the union, the local whose members were involved in the production of that record, it makes an annual application to the Treasury Department for these moneys?

Ms. RINGER. No, the overall union would do this, and there is more than one union in the picture. But basically it would be the American Federation of Musicians, one union with locals obviously.

And I had the same question as you did, Mr. Santini, when we had our hearings. I asked questions, and the impression I got was that this had not been worked out in any great detail, but they are trying to establish the principle, and then they will work it out within their own outfit. The basic idea was 50 to the record companies, and then 50 to the performers unions, with whom the record companies had contracts.

Obviously there are going to be some exceptions to this, but basically that would be the plan. I asked if the unions had complete records as to who participated in a particular session, and they claim that they do, and that there would be way to get this into the actual hands of the individuals. I have not gone beyond this point in trying to work it out. I think you need to. I think you are right.

Mr. SANTINI. I would urge, Mr. Chairman, that these are awfully important details because the mechanism could suggest that the very inequity that you wish to reach would in fact never occur, that you would have, as you suggested, at best, the prospect of a mere pittance dribbling back down to the individual artist; that the administrative cost entailed in trying to find individual artists or reward individual artists or compel individual artists to make application and appeal for conjures in my mind an immediate administrative burden of sizable proportions. And if we are talking about nickels and dimes and no real rectification, then the question that poses itself is, Can you justify this kind of serious administrative burden when all you ultimately are doing is providing a pittance in compensation?

Ms. OLER. For whatever it is worth, that was one thing we did concentrate on when we were in Europe—asking how their systems worked out, and what the administrative costs were. They have various systems of various degrees of specificity with which they pay the ultimate performer. But generally, in the 54 countries in Europe, the average cost for national distribution is about 5 percent, and the average administrative cost for international is somewhere in the neighborhood of 15 percent. That is a ball park figure.

Mr. SANTINI. That is a valid, factual response. I would be concerned very much, however, because of the significant disparity between the United States of America and the countries of Western Europe, first

of all, in geographical size and, second, in population, that you have a significantly different problem in collecting money in a country of 220 million people and disbursing it to the performers than you do in a country of 14 million or 6 million, and where the performers within that country would be much easier to locate. They would probably work within reasonably fixed geographical boundaries, and that this is a very, very serious question that ought to be examined in detail.

Ms. OLER. I think at the Los Angeles hearings, Chairman Kastenmeier did ask the record industry and the unions to submit specific proposals on ultimate distribution, and I believe they are working on that.

Mr. KASTENMEIER. The witness is correct, if the gentleman from Nevada will yield.

Mr. SANTINI. Certainly.

Mr. KASTENMEIER. The Chair will say that it is my understanding that we will receive these proposed mechanisms within the next few weeks.

Mr. SANTINI. I appreciate that.

Mr. KASTENMEIER. This very question was raised, and it is a valid question. We would have to know these sums would be managed and disbursed. We have to have the end result as well as the conceptual aspects firmly in mind before we move forward with legislation.

Mr. SANTINI. A second area of concern of mine is that it would seem to me that a more immediate and direct result of the inequity of the performer not receiving just compensation for the performance, whatever it may be, should legitimately be the subject of the bargaining relationship between the musician and the person with whom the contract is entered into, and going to performance royalty concept, and that this kind of resolve would be perhaps a more logical and immediate way to provide a solution to the problem you suggest than superimposing Federal Government-national union-individual performer relationship which are waters in which I don't believe that we have ever attempted to swim as a nation.

Has there been a relationship like this every created?

Ms. RINGER. Let me give you a little bit of historical background. This is going to be oversimplified. The whole tragic story is laid out in Professor Gorman's study, but the answer to your question is yes. This would have been the more logical way to handle it.

Back in the 1930's and 1940's, the radio stations employed a lot of musicians, and there was a lot of employment for live musicians in various fields, and there was a strong union, and then records came in and there was a sort of desperation in the union, in the performer community, to try to do something to prevent the use of records in direct competition with live musicians who were then employed on a session basis or otherwise.

At one point the performers had the weapons, the labor weapons, that they could use to influence broadcasters, and this is what happened in other countries; in other countries there was a weapon, a strike or other labor weapons, that performers could be against the broadcasters, but in the AF of M situation I think they went to far.

As a result the Congress passed an act with one dissenting voice, the Lee Act, which withheld that weapon from them completely. They

could not do anything—strike, secondary boycott, nothing—and as a result they were simply deprived of the one real collective bargaining weapon they had.

And when television came in, there was no longer any desire to have live performances on radio. It was already beginning to dry up, but it is quite dramatic when television really hit the public eye that there are no full-time employed musicians in any of the radio stations in the United States today, I am told, and there were hundreds of thousands then, and so there was nobody to strike or do anything, and they couldn't have a secondary boycott, so they were completely deprived of any ability to deal in this area.

This is when they went to the record companies and tried the trust fund approach, but that didn't work very well either, and resulted in further controversy.

Mr. SANTINI. Why is that?

Ms. RINGER. What it was, and I am no big authority on this—my information comes largely from the Gorman report, which you have—but essentially the idea was to have a rather massive trust fund that the record companies would pay into, and the union itself would sponsor without any control, nonprofit performances that would give employment to musicians.

Well, you think about it, I mean this is playing on the Capitol steps type of thing or in the school auditorium and so forth, there wasn't that much interest in it, and there wasn't that much employment. There was some, but it wasn't any effective nationwide weapon against technological unemployment. It just didn't keep enough performers employed on a full-time basis to make it worth their while.

What really happened was that they became, I think, a little bit fixated on this idea that this is the way to handle it, not copyright, and therefore they were not paying anything in the way of residuals.

The collective bargaining arrangements did not provide for any payments to the employed musicians whose records were being used over and over again, and sold over and over again in multiple copies, and this resulted in a great revolt within the A.F. of M., which is documented in Gorman's study, which is very interesting, and which resulted in a complete restructuring of the union and, in effect, some changes in its leadership, and a growing recognition that copy right was the way to go.

Mr. SANTINI. I thank you, Mr. Chairman.

I have found this very rewarding. I could go on for the balance of the day but my ignorance does not justify that kind of time consumption. Thank you very much.

Mr. KASTENMEIER. I recognize the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I thank you, Mr. Chairman.

I want to thank Barbara Ringer for again educating some of us more lay people, and I certainly am one of them.

One of the persuasive arguments that influences me why we should have some kind of payment of performance royalties is that we may be behind, and that there has been a recognition abroad that performers should receive, and in some cases do receive, a payment of royalty. However, there are substantial differences in the structure

of I think the organizations involved. Government involvement in some cases, and I am curious, for instance, to know whether in some of these other countries are there actually copyright laws that provide for performers royalties, or are the performers royalties done by agreement, collective bargaining or negotiation?

I am curious also whether, for instance, in some countries instead of having private broadcasting, you have, in effect, public broadcasting, which would mean you might have the general taxpayers paying these performers royalties.

I wonder if either you or any of your fine people could address that situation.

Ms. OLER. Yes. There are 54 countries now in the world which have performance rights by law. Other countries such as France do it simply by contract with performers and broadcasters, but the major——

Mr. RAILSBACK. What is the breakdown?

Ms. OLER. Fifty-four countries.

Mr. RAILSBACK. I know about at 54, but what is the breakdown among the 54 as to how many countries are doing it by law, and is it by a copyright type law or what?

Ms. OLER. Fifty-four are doing it by law. It is generally considered to be a so-called neighboring right. The way the Rome Convention views it is in an international sphere, and there are now 20 members in the Rome Convention, international rights covering performers and broadcast organizations.

Mr. RAILSBACK. Some of those laws are similar to the law that has been proposed here, and by that I mean some of them differentiate between normal copyright protection for life, 50 years or whatever, and they set a reduced——

Ms. OLER. That is true.

Mr. RAILSBACK. In other words, they distinguish between the pay of performers royalties and what an author or composer, that he or she may receive, which leads me to ask: Is it kind of an extraordinary right? Is it part of a general copyright law in most cases? Isn't there a difference between providing payments for performers and copyright protection protecting authors and composers?

Ms. OLER. Yes, there is, in a sense. Many of the Western European countries like Germany and Denmark, or for example, Austria, view these as related rights rather than a full copyright, which is what the producers have in Britain.

Mr. RAILSBACK. Is that what you meant by a "neighboring right"?

Ms. OLER. Yes, it is a so-called related right. In a practical effect it works somewhat like a compulsory license in that once the record has been commercially produced, then another person can use that but must make a payment to the producer or performer or both, whichever is recognized under the law.

Mr. RAILSBACK. All right.

Now in how many countries do they have the private sector involved to the extent that it is involved in this country, and in how many countries do they have in effect public broadcasting?

Ms. OLER. I think it is fair to say that most countries in Europe have what you think of when you say public broadcasting, that is, the government in some way licenses broadcasting stations, but, of

course, in Britain, for example, there is an independent broadcasting, commercial broadcasting station, which gets its revenue solely from advertisements, and they, of course, also are subject to payment of performance royalties.

Mr. RAILSBACK. But in respect to those that we call public broadcasting, are the profits derived from the public radio broadcasting stations—do they go to the private people that manage the publicly licensed facility? Where do the revenues go?

Ms. OLER. The revenues, the broadcasters' revenues generally are limited under the particular legislation.

Mr. RAILSBACK. Is that because they don't have many commercial sales?

Ms. OLER. That is right.

Mr. RAILSBACK. When I was in France, we have the wonderful situation where you are not interrupted with commercials all the time. I wonder if it is more of a public-service-type deal in a lot of those countries so that there aren't great profits, or what?

Ms. OLER. Not exactly. Most of the broadcasting statutes have general standards. They license a station but they say the station has an obligation, which is almost a moral obligation, or it is viewed as almost a moral obligation, to provide a variety of programing. So you don't have the station competitiveness which you have in this country.

Mr. RAILSBACK. Right.

Ms. OLER. But the government doesn't actually dictate the broadcasting, the programing as it were. It is usually an independent board.

Mr. RAILSBACK. Then are you saying or do I understand that in that case where they are kind of closely supervised and they are expected to do such and so, that there are not many profits derived, other than salaries, derived by the people operating these stations? Is that a fair explanation?

Ms. RINGER. We were visited by the representatives of the performers of British radio "Commercial Network," or group of stations. It is a corporation, and there are stockholders, but the amount of profits that they can make—I think it is done in percentages—is limited, and what is over that goes back into the corporation, which is a corporation, and it is profitmaking, but there is no windfall to anybody.

Mr. RAILSBACK. Is it a government corporation?

Ms. RINGER. No; but they have to compete on a toe-to-toe basis with others wanting the franchise, and the government does a lot of controlling, and they were saddled, if that is the right word, with the same royalty contracts and other obligations vis-a-vis performers and copyright owners at BBC.

Mr. RAILSBACK. I see.

Another thing that was told to me, and you may care to comment on this, I am told that the administration of the performers royalty payments program, that there has been a great deal of evasion in some countries where they have set up broadcasting right outside the limits of the sovereign country. In other words, I guess some of them broadcast from right offshore. They go out the required number of miles, and things like that.

I guess the point I am trying to get at is, in this country, politically, without a doubt there is going to be, in my opinion, tremendous diffi-

culty getting any kind of new performers' royalty enacted into law, the reason being we have all of these rather small, oftentimes small radio broadcasters that are in everybody's district, and they are all motivated, and they are all going to be lobbying against your new concept.

I am just trying to get a handle on how, in those other countries, the situation may have been different.

It seems to me that perhaps where they have performers' royalties, they may not have had the opposition to the concept that we have in this country. I just wondered if you had any experience with that.

Ms. OLER. Yes. I think from our interviews in Britain, particularly, the opposition exists there as well, because the rates which the government allows or charges, I guess, for licensing for television fees, the user fees, are not really governed by performers royalties, so every time the performance royalty, an increase is proposed, they do meet the same sort of opposition from the broadcasters that they do in this country.

Mr. KASTENMEIR. Will the gentleman yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIR. Of course the bills before us usually have scaled down rates or exemptions for the very smallest of the broadcasters under the bill. When you refer to the smallest broadcasters, I think you have to be talking about a broadcaster who may not be affected at all, or will be minimally financially affected by the bill.

Mr. RAILSBACK. As I recall, without having gone over it, I think when you deal with gross income, you are really not going to be exempting very many people.

Mr. DANIELSON. Will the gentleman yield on that point?

Mr. RAILSBACK. Yes.

Mr. DANIELSON. I would like only to state that the initial form of the bill is not obviously binding on this committee, and when we get in to mark up, we should realistically try to pick out a threshold that conforms to economic needs, and whether it is $25,000 or $50,000, I don't know.

Mr. RAILSBACK. Yes.

Mr. DANIELSON. We can cross that bridge later.

Mr. RAILSBACK. You know I appreciate that, but I want to remind you of a fear expressed by some of the broadcasters in response to a question that I asked of them, and I asked them are you troubled by the size of the fee? This was at the L.A. hearing. Are you concerned about the $250, or are you concerned about the foot in the door?

If the administrative costs are as great as some have estimated, like 12 million, 13 million, or 14 million or whatever somebody estimated, that is going to eat up all of the royalties. I am not sure of those figures, but there has been a charge made that to administer this program is going to cost a lot of money.

I am just saying you know without a doubt we all have to realize that they are concerned that when the tribunal reviews and sees that the people that we want to benefit are not getting any royalties, they are going to have to do something to escalate it. It is something we are going to have to deal with.

I think this is all I have, Mr. Chairman.

Again I want to thank our witnesses.

Mr. KASTENMEIER. Do any other members have questions?

Mr. SANTINI. No, Mr. Chairman.

Mr. KASTENMEIER. If not, the Chair would like to thank Ms. Ringer and her noble colleagues for their contributions here today. Obviously, we have explored many areas, probably not all the areas, as fully as we might, but nonetheless this does make an enormous contribution to the subcommittee's deliberations on this question. It is particularly useful, since all members of the subcommittee were here this morning.

As somebody suggested, we may yet have to have beyond these 2 days some further hearing. I am not necessarily anticipating it, but I do anticipate we will be in further touch with the Register of Copyrights and/or the Assistant Librarian of Congress for copyright services in this matter.

Thank you very much.

I would like to call on the Deputy Assistant Attorney General for the Department of Justice, Mr. Ky Ewing, who is our next witness.

Mr. Ewing, you have a rather brief statement. You may proceed from it as you wish or in any other form.

TESTIMONY OF KY P. EWING, JR., DEPUTY ASSISTANT ATTORNEY GENERAL ANTITRUST DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY MARK TARLOV, EVALUATION SECTION

Mr. EWING. Thank you, Mr. Chairman.

If I may, in the interests of your time situation, I would like to submit this statement for the record, and, even though it is brief, summarize it even more briefly.

Mr. KASTENMEIER. Without objection, your statement and, indeed, that of the preceding witness, Ms. Ringer, will be accepted for the record.

[The information follows:]

STATEMENT OF KY P. EWING, JR., DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

I appreciate the opportunity to testify today on behalf of the Department of Justice on H.R. 6063, a bill to amend the Copyright Act to provide for performance rights in sound recordings.

The bill would require certain users of sound recordings, such as broadcast television and radio stations and background music services, to pay license fees for the right to play copyrighted sound recordings publicly in their commercial operations. One half of these new license fees will ultimately be distributed to the owners of the copyrights in the sound recording and the other half will be distributed to the performers.

The bill purports to permit the user, at its option, to pay the license fee on a per-use, prorated, or blanket basis; however, it does not seem to provide a mechanism for calculating per-use license fees. The bill also seems to allow for the negotiation of higher license fees than those specified in the bill for blanket or prorated licenses, but it is unclear under what circumstances, if any, such negotiations would be contemplated. In general, the liability of most users under the bill will be fixed by the provisions concerning blanket license fees. These fees are calculated based upon the advertising revenues in the case of radio and television broadcast users and upon gross receipts in the case of background music services. The bill exempts from the requirement to pay license fees radio stations with gross advertising receipts of less than $25,000, television stations with gross advertising receipts of less than $1 million and background music services with gross subscription receipts of less than $10,000.

The compulsory license fees will initially be collected by the Register of Copyrights who will then distribute the fees to copyright owners and performers who have submitted claims for a portion of the fees. Controversies over the appropriate distribution of fees among claimants will be settled by the Copyright Royalty Tribunal. The bill encourages copyright owners, performers, and users to establish a private, nongovernmental entity to assume the collection and distribution functions initially assigned to the Register of Copyrights. The Register of Copyrights will continue to be involved in the collection and distribution of the compulsory license fees as long as "there remain copyright owners, performers and copyright users" who are not party to any private collection and distribution entity established pursuant to the bill.[1]

The bill permits performers and copyright owners to agree as to the proportionate division of the compulsory licensing fees among them and to aggregate and jointly file their claims with the Register of Copyrights.

The bill exempts from the coverage of the antitrust laws agreements among copyright owners, performers, and users relating to the collection and distribution of the compulsory licensing fees.

The creation of new property rights in the performance of sound recordings will necessarily impose increased costs on users who will be required to pay the compulsory licensing fees. These costs will ultimately be passed on to the public through higher advertising rates to sponsors and increased prices for the sponsors' products. Of course, the costs imposed by the creation of these additional rights should be balanced against the benefits which are expected to be derived from supplementing the current system of compensating record companies and performers in the marketplace. In this regard it should be noted that those record companies and performers who are most successful in the marketplace are also likely to receive an equally large proportionate share of the compulsory licensing fees. However, the resolution of this income distribution issue is essentially a balancing of equities on which we express no ultimate view. Nor do we express any view as to whether a workable system of compensating claimants could be implemented under legislation along the lines of H.R. 6063.

The Department of Justice's primary concern over this bill is with the provisions that would confer blanket immunity from the proscriptions of the antitrust laws for the activities of copyright owners and performers in the collection and distribution of the compulsory licensing fees. I recognize that the Copyright Act contains similar antitrust immunities in the cable television, jukebox, and public broadcasting areas. The Department of Justice expressed its opposition to the enactment of this type of provision in its October 7, 1975, letter to Senator Eastland concerning the public broadcasting immunity provision. We adhere to the position stated in that letter.

Exemptions from the antitrust laws are generally disfavored because they remove a principal barrier to anticompetitive behavior. Such behavior has the capacity to impose societal costs not contemplated by the proposed bill and not justified by any public benefit conferred by the immunity.

Although the maximum liability of users for the payment of compulsory licensing fees is fixed by the bill, the opportunity for collusion among claimants still exists. The immunity conferred in the bill could arguably extend beyond the mere aggregation of claims and equitable distribution of the compulsory licensing fees. Agreements which are intended to injure certain claimants or classes of claimants or which have the effect of injuring such persons might not be actionable under the antitrust laws either in a case brought by the government or an action brought by an injured party. Parties injured by such anticompetitive conduct should not be deprived of their recourse to an antitrust suit in the absence of some compelling justification. I am unaware of the existence of any justification, compelling or otherwise, for the inclusion of the antitrust immunity provisions contained in this bill.

Mr. KASTENMEIER. Do you have a colleague?

Mr. EWING. I would like to introduce Mr. Mark Tarlov of our Evaluation Section.

We have in essence two points to make about this bill, H.R. 6063.

First, the creation of new property rights in the performers of sound

[1] Use of the word "and" raises questions as to whether members of each named class must remain unaffiliated for the Register of Copyrights to remain involved.

recordings will necessarily impose increased costs on users who will be required to pay the compulsory licensing fees. We believe this bill involves, in essence, an income redistribution, but at the same time we believe you must realize that there will be, in total, some increased costs to be borne by the users in this country. We take no position and express no view as to whether the one outweighs the other. We believe that is a judgment you should make, but we are, from our point of view, as competition analysts and advocates, desirous of pointing out to you that there is an additional cost to the ultimate consumer being created here.

I might add in connection with this first point that we don't express any view as to whether H.R. 6063 is in fact creating a workable system for compensating claimants.

Our second major point is really our primary concern, and that is with the provision that would confer blanket immunity from the proscriptions of the antitrust laws for the activities of copyright owners and performers in the collection and distribution of the compulsory licensing fees.

Generally, exemptions from the antitrust laws are disfavored because they remove a principal barrier to anticompetitive behavior. We believe that the system being created here could be, as it were, the new game in town and should not have associated with it an antitrust immunity for the various players in that game.

Our basic concern, then, boils down to a concern with the antitrust immunity granted under this bill, and we oppose that grant of antitrust immunity.

I believe that summarizes the major points of my statement, the details of which will be available to you in the record.

Mr. KASTENMEIER. Thank you, Mr. Ewing.

By the same token, you would have opposed or perhaps did oppose, I am not sure, the copyright revision bills. It contained certain exemptions as well.

Mr. EWING. Mr. Chairman, we did oppose the antitrust exemption in those bills and we expressed the opposition in a letter of October 7, 1975, to Senator Eastland. We continue to adhere to that position.

However, I would like to emphasize that the bill in front of you today, H.R. 6063, does have a different kind of antitrust immunity from that created for either the jukebox or CATV industries——

Mr. KASTENMEIER. Would you spell it out for us? In what respect?

Mr. EWING. In several respects.

First, the critical difference between the immunity in this bill and the existing jukebox and CATV immunities is that the existing immunities go only to the distribution and apportionment of claims among the copyright holders, whereas the immunity here goes to the collection of the fees as well as to the distribution among claimants.

Second, the immunity here may have a more pernicious effect than those in the jukebox and CATV areas. This is so because the nature of the claimant pool here differs markedly from that of the cable or jukebox systems situation. There are relatively few cable systems compared with the number of broadcast stations nationwide, and CATV draws its programing from only a few sources, primarily network or syndicated television programing. This makes it easier

for an individual claimant to present an authenticated claim to an impartial entity; namely, the Copyright Tribunal, which has ready access to much of the necessary data, and thus is able fairly to adjudicate the claim.

The jukebox situation is also different inasmuch as the function of ascertaining performance credits for individual claimants is already performed by either ASCAP, BMI, or SESAC, which represent most, if not all, of the composers and publishers entitled to payment under those provisions.

I might add that the number of persons entitled to compensation under the bill is many times greater than the number of composers and publishers entitled to distributions from ASCAP, BMI, or SESAC.

I might also add that those three entities are subject to the provisions of the antitrust laws, and indeed are regulated by a series of consent decrees obtained by the Antitrust Division. Now while it is conceivable that a new organization to monitor jukebox performance rights might be immune from antitrust attack in its administration of claims and its distributions to its members, it hardly seems likely to us that such a new organization will be created to supplant the existing organizations in the field, principally due to the cost of it and the membership duplication.

Mr. Chairman, to continue a very long answer to your question, in the situation created by this bill, performers have neither the advantage of dealing with a relatively small number of users or suppliers, or an existing monitoring system regulated by the antitrust laws. Nor does it appear that the performers would have an impartial government entity collecting their moneys, investing them at interest, and adjudicating their claims.

Under the bill as it is presently drafted, as opposed to the Copyright Office's suggested substitute, the performer is left in the position of not being able to represent his own interest, and in fact, as a practical matter, being compelled to join some new entity. This gives the new entity or entities a leverage over performers. That leverage may be exercised in either the distribution or the collection process in any number of ways. For example, the agencies may exact higher rates or fix rates among competing collective organizations for administering, monitoring, or collecting claims. They conceivably might engage in boycotts of certain claimants to exact some advantage for other claimants. Precedent, Mr. Chairman, for this kind of activity—for this kind of interclaimant anticompetitive behavior—can be found in the ASCAP and BMI activities of the early and mid-1960's. Abuses were corrected by consent decrees and the continuing supervision of a district judge in New York over the working of these organizations.

Performance groups under this bill, H.R. 6063, would be exempt from the antitrust laws, and enable to engage in anticompetitive activities, and this we don't think is healthy, and we oppose it.

Mr. KASTENMEIER. One of the unknown factors is what sort of entities, if any, will be created under this bill for the purposes of collection, distribution, and apportionment, but there are already organizations involving virtually all the parties here. There is the National Association of Broadcasters, there is the Record Industry Association of America, and there are the two or three labor organizations which

represent the musical performers. Whether or not these organizations play a role is another question. But you indicated that you thought that they would be required to form a new organization. I think you were referring to broadcasters, were you not?

Mr. EWING. What I was referring to, Mr. Chairman, was the fact that we think under this system, as a practical matter, the individual performer is not going to be able to prosecute his own individual claim. Necessarily, in the real world, he will have to get his claims presented by some organization, whether it is an exising entity or whether it is a new one. The likelihood is that more than one such entity will be created, and our concern is that when you have those multiple players in the game, with the prize being large, whether it is $15 million or $200 million, those players should be subject to our normal antitrust laws, as indeed the players are in the ASCAP–BMI situation.

Mr. KASTENMEIER. Are you arguing that they could effectively discharge whatever responsibilities they would have for collection, distribution and apportionment without an exemption?

Mr. EWING. Yes, sir. We think that it is possible to create a system here legislatively, without an antitrust exemption, that does not have the same problems.

Mr. KASTENMEIER. And if they got out of bounds, why you would immediately bring them into court and obtain a consent decree from them presumably to operate within certain——

Mr. EWING. If they violated the antitrust laws, we would certainly attempt to bring them into court, and I would say hopefully we could obtain a consent decree.

Mr. KASTENMEIER. I think you are correct, in terms of individual musicians, there are a vast number potentially to be covered, but, on the other hand, we have any number of, for example, as far as music operators, we have presumably thousands or tens of thousands of them that are covered under the present legislation. We have vast numbers of entities, of individuals or groups, that are affected by present law in the copyright field, do we not?

Mr. EWING. We have most of the players in the present situation covered by the antitrust laws. We don't have an enormous exemption, except where Congress created it for the cable and jukebox situations.

Mr. KASTENMEIER. Yes.

Mr. EWING. I tried to explain why we believe this is very different as it is presently drafted.

Mr. KASTENMEIER. Let me ask you whether you have examined prospects, alternatives, to the extent that you could suggest that there would be as efficient and as economically a method of distribution of royalties without this antitrust exemption. We are talking about a more complex system that would have to result if you didn't have this exemption?

Mr. EWING. I think my answer has to be twofold.

One, we haven't attempted to go out and build a different model and analyze its competitive costs or economic costs in any form, but, second, we have taken a look at the Copyright Office's version of this, which is substantially different, because it does not give to private——

Mr. DANIELSON. Would the gentleman speak up a little, please? It is hard to hear.

Mr. EWING. I am sorry.

We have examined the Copyright Office's version, which is substantially different, because it does not contemplate private entities being able, free of the antitrust laws, to agree on both collection matters and distribution matters, but rather relies on the Copyright Tribunal to do much of the work.

We have fewer antitrust problems with that portion of the Copyright Office's bill than we do with the present draft of H.R. 6063. I am not yet prepared this morning to say that we find that other alternative satisfactory to us, but we have at least answered your question, Mr. Chairman. We have examined that as an alternative.

Mr. KASTENMEIER. Let me yield to the gentleman from California. Thank you.

Mr. DANIELSON. Thank you, Mr. Chairman, and I thank you, sir, for your contribution.

I have read your statement, and the portion you read as a fairly long answer to my chairman's question was not in it, though I am glad it is now in the record so we can study it.

I would like to make just a couple of comments.

First, I recognize that your basic position here is that you do not favor the bill because of the exemption from the antitrust laws. That goes back to your letter to Senator Eastland in October of 1975, the position which you still maintain. I am going to make first of all a request, and that is that you have, if you have, or can devise, some constructive, helpful suggestions or criticisms which would enable us to meet the problem which is before us for solution.

I invite them and would welcome them, because it is no desire of mine, and I am sure not that of the committee, to report legislation which is either defective or which doesn't meet as closely as possible the requirements of the antitrust laws and all other laws that we have in the country. So if you can help in that regard, I personally request it, and invite it. That may be of some help to us.

Would you care to respond to that?

Mr. EWING. Yes, sir, Mr. Danielson.

Let me respond by going back to your very first comment. I want to make it very clear on this record that the Department of Justice does not oppose this bill as such. We only oppose the grant of antitrust immunity.

Mr. DANIELSON. Yes; that was all I meant in that statement.

Mr. EWING. Yes, sir.

Mr. DANIELSON. I am looking at the top of page 4 of your written statement, and that is where that language is set forth.

Mr. EWING. Second, Mr. Danielson, we are of the opinion that you could in fact create and have the same system that you want to create here without giving the players in that game antitrust immunity and still meet the objectives that you have.

Mr. DANIELSON. Fine.

Now if you could come up with that kind of suggestion, I am satisfied that not only will I appreciate it, but I have a feeling that the entire committee would appreciate it. We have no desire of creating any more problems than we have to in this type of legislation.

As to antitrust, I would like to make one thing clear. I am a supporter of the antitrust laws. I think they have been very beneficial to our

economy and to our country, but there is nothing sacred about them. They are a creature of the Congress, and to the extent that Congress created them, Congress can modify them or make exemptions to them. They have no life of their own. They have a life which has been granted to them. I won't get biblical now, but I think you follow.

I would like to remind you of your statement that there were abuses with the ASCAP and BMI and SESAC situation some 15 or 20 years ago but they were corrected. I respectfully submit that if abuses should develop under this law, if it should become a law, there is no reason why they cannot be corrected. I certainly would assist in correcting them if it should become necessary or desirable to do it.

I depart from you in two respects.

One is your comment that there is no way that an individual performer can present an individual claim under the framework of this proposed legislation. It is true that it would be very difficult for him to do so, but it is also true, and has been demonstrated by history, that the individual performer today has no recourse whatsoever, none at all, and to the extent that we can remedy that, at least to a little bit, we have improved the situation.

There is no instance today where the individual performer has any recourse at all. Under this bill he would have some recourse, so that would be a step forward.

I do hope that you can give us some assistance here. We don't want to run countercurrent to the antitrust laws, at least no farther than we have to. I do recognize though a problem that you must bear in mind.

The ordinary rules of competition are not an effective remedy to protect the property right of an individual performer in a field of music and in a situation that prevails in this country. With 220 million citizens, heaven knows how many performers, the individual probably has so little at stake that many courts would say he doesn't even have standing to sue. He doesn't have a sufficient amount to make it a justiciable controversy. I think you have to provide a remedy if that is a problem. That is what we are trying to do here.

Again we invite and would greatly appreciate constructive suggestions you have of a constructive nature.

Mr. KASTENMEIER. This concludes our hearing.

I would say, Mr. Ewing, I would echo the sentiments of the gentleman from California. If and as the more definitive models are developed of distribution, collection, distribution and allocation, we will certainly want to check them out with you and get your comment from your special perspective. We appreciate your testimony here this morning.

Mr. EWING. Thank you, Mr. Chairman.

Mr. KASTENMEIER. That concludes today's hearing.

The subcommittee will meet on the same subject tomorrow at 10 o'clock in the morning in this room, 2226. Until that time the committee stands adjourned.

[Whereupon at 12:50 p.m., the subcommittee was adjourned, to reconvene at 10 a.m., Thursday, May 25, 1978.]

PERFORMANCE RIGHTS IN SOUND RECORDINGS

MAY 25, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Drinan, and Ertel.

Also present: Bruce A. Lehman, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning the subcommittee will conclude its hearings on H.R. 6063, legislation creating performance rights in sound recordings.

We will receive testimony from two agencies of Government with an interest in the issue, the National Endowment for the Arts and the Department of Commerce.

The Department of Labor, which was scheduled to present testimony, has indicated recently a preference to submit a written statement, which will be received for the record.

Our first witness this morning is one of our Government's highest ranking officials whose duty relates solely to the encouragement of the arts.

I am very pleased to greet the Honorable Livingston Biddle, Chairman of the National Endowment for the Arts.

It is a pleasure to welcome you, sir.

TESTIMONY OF HON. LIVINGSTON L. BIDDLE, JR., CHAIRMAN, NATIONAL ENDOWMENT FOR THE ARTS, ACCOMPANIED BY ROBERT WADE, GENERAL COUNSEL, NATIONAL ENDOWMENT FOR THE ARTS

Mr. BIDDLE. Thank you, Mr. Chairman.

I have brought with me, with your approval, our counsel, Mr. Robert Wade.

Mr. KASTENMEIER. Mr. Wade.

Mr. BIDDLE. I consider Mr. Wade to be one of the country's leading experts in this area, and someone who has assisted me a great deal.

I am delighted to be with you.

As you know, for many years I worked in the other body as a special assistant and subcommittee director for Senator Pell, and since

that time I have become somewhat upwardly mobile and so it's always a great delight for me to be back in the House or Senate.

I am very happy to provide this morning, Mr. Chairman and members of the committee, with our views, the views of the National Endowment for the Arts on H.R. 6063, a bill to amend the general revision of copyright law by establishing performance royalty rights in sound recordings for performing artists and record producers.

Mr. Chairman, the National Foundation on the Arts and the Humanities Act of 1965, as amended, the law creating the National Endowment for the Arts, contains an eloquent declaration of purpose.

In part, that declaration states:

> . . . It is necessary and appropriate for the Federal Government to help create and sustain not only a climate of encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;

We believe the proposed legislation, if enacted, would go a long way toward helping to create adequate material conditions for performing artists and record producers.

I am, of course, speaking of the commercial use of the talent and skills of performing artists and record companies whose creative efforts bring to life and preserve in sound recordings a song, a sonata, or a symphony.

The primary users of these recordings—that is, radio and television broadcasters, jukebox owners, background music companies, and others—as we all know, freely utilize these efforts to their commercial benefit.

Indeed, it can safely be said that without the performance creations of musicians, performing artists, and record makers, the broadcast and jukebox industries would not exist as we know them today.

The proposed legislation has been the subject of a great deal of discussion over the past few years. The Congress has been fully informed as to the merits of the proposals and has, as well, heard some voices in opposition.

As you know, the National Endowment has joined those who support this copyright revision. Rather than go through all of the numerous arguments that have been set forth in support of this bill, and with which we are in agreement, I would prefer to enumerate here some of those that seem most persuasive to the National Endowment for the Arts.

(1) The Copyright Office of the Library of Congress supports the principle of copyright protection for the public performance of sound recordings, finding that sound recordings are a proper subject for copyright protection under the Constitution and laws of the United States.

The Register of Copyrights has recommended in her report to the Congress of January 3, 1978, that legislation be enacted to create public performance rights with respect to sound recordings. A draft bill was included in that report which was essentially a revision or modification or technical clarification of the bill introduced by Congressman Danielson, H.R. 6063, presently under discussion at these hearings.

And, I might add, as I am sure you are aware, that the Register of Copyrights, Barbara Ringer, was directed by Congress to do that study.

(2) A second persuasive argument for us is the fact the composers, songwriters, and publishers, all of whom similarly enjoy copyright protection under our laws, receive performance royalties.

(3) Many nations, in fact, 51 all together around the world now recognize by law performance rights for performers or recordmakers, or both, including the United Kingdom, West Germany, Japan, Italy, Sweden, Mexico, Spain, and Israel, to name but a few.

(4) An International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in 1961. Phonogram means record, sometimes it's referred to as a phono record, and this convention, known as the Rome Convention, stated in article 12:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both.

So far the convention has been ratified by 15 countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden. We agree with the Register of Copyrights that this international instrument was years ahead of its time and that it has much to offer to the United States and this country's creative citizens.

Enactment of the proposed legislation would bring copyright protection in this country into conformity with that of the convention and thus the laws of those nations which have thus far ratified the convention.

(5) Independent studies have shown that no undue hardship, we believe, would be imposed on those industries affected, since the relatively all, in terms of advertising and user revenue, additional costs of performance royalties probably would be passed on to the ultimate economic beneficiaries of the commercial use of sound recordings, for example, advertisers, jukebox users, background music users, et cetera.

Further, it is our understanding that such studies have shown that increased costs to the advertisers and other commercial users of sound recordings would be minimal. Numerous other observations have been set forth in the study concerning the benefits to broadcasters stemming from the uncompensated use of sound recordings. We are in agreement with such observations.

It is true that details of implementation have yet to be completely worked out by the various groups involved in the support of this legislation. While most such details are not a proper subject of concern for the National Endowment for the Arts, I would like to make one or two comments in this regard.

First, it is my understanding that the record industry and the performing artists' unions are in agreement with the principle that all performers on a given record would share equally in the distribution of royalties derived therefrom. That is, there would be an equal distribution of fees between a solo performer and his or her supporting musicians. We heartily endorse that principle.

Second, Mr. Chairman, we would favor an implementation approach which would insure substantial benefits to performing artists involved in the creation of artistic works falling outside the commercially successful category, for example, the category of popular "hits".

In other words, the National Endowment for the Arts would favor a distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involved in the creation of artistic works which are worthy in themselves, but which by their nature do not have, at this time at least, the ability to generate mass sales.

This is particularly important in view of the severe economic strain presently being felt by symphony orchestras, opera companies, and nonprofit arts groups across the country.

I might add that there has been some concern recently with respect to a decline in recordings of symphonic, operatic and folk music. We believe that this bill could serve to encourage more activity in this direction. We believe that the opportunity to receive performance royalties will encourage musicians through their representative associations to seek ways in which there can be more recording in these art forms.

In this connection, there is one important difference between the Copyright Officer's draft bill and H.R. 6063 concerning the distribution of royalties.

The Danielson bill provides for a mandatory 50/50 split of royalty proceeds between performers and "copyright owners," record companies. The Register of Copyright has pointed out that the bill does not come to grips with the status of performers who are employees for hire.

The Register's draft bill gives at least 50 percent of the royalties to performers on a per capita basis, regardless of their employment status, but allows performers to negotiate for more, not less, than a 50 percent share. We concur with that recommendation.

Also, where other differences may exist between the two bills, the National Endowment would associate itself with the views and recommendations of the Copyright Office.

Finally, Mr. Chairman, we are most pleased that members of the Recording Industry Association have agreed to a provision in this legislation which would allocate at least 5 percent of any performance royalty income received by them to the National Endowment for the Arts to be used for purposes consistent with the Endowment's enabling legislation.

The industry's attitude in this regard is most encouraging, as it demonstrates, we believe, a beneficial kind of partnership between private industry and the Endowment's work being used for example, in this case, for the support of classical, folk, poetry, narrative, or other noncommercial recording projects, or perhaps for providing advance training opportunities for musicians wishing to further their careers.

In conclusion, Mr. Chairman, we heartily endorse the view that artists, musicians, and record companies who contribute their creative efforts to the production of copyrighted sound records should reasonably share in the income enjoyed by radio stations and other commercial organizations who use the recordings for profit.

This legislation would be an important step toward achieving one of the Endowment's major goals, to encourage and sustain development of creative American talent by helping to insure that American artists will receive a just financial return for their creative work.

That concludes my statement, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Mr. Biddle, for an interesting statement.

The provision which would allocate at least 5 percent of the performance royalty to the National Endowment for the Arts, that is not presently——

Mr. BIDDLE. That is correct.

Mr. KASTENMEIER [continuing]. A part of either bill, either the draft bill or the Danielson bill?

Mr. BIDDLE. That is correct.

Mr. KASTENMEIER. May I inquire how recently this was agreed upon and negotiated?

Mr. BIDDLE. I think this goes back at least a year and one half, Mr. Chairman. I will defer to Mr. Wade on the exact time of an agreement in that respect.

Mr. WADE. Yes, Mr. Chairman. This does go back to the earlier conversation the Endowment had entered into with the representatives of the Musicians Union and the recording industry. prior to the time that the Endowment had adopted any official position.

The recording industry at that time raised the possibility that they would be willing to agree to such a provision, which would allocate some of the royalties they had received to the National Endowment, if it were consistent with our legislation and, at that time, we indicated to them that, given our special gift authority, that is, our authority to receive gifts (monetary or property) in support of our legislative mandate, that we would not feel that would be inappropriate.

I believe Mr. Gortikov, the president of the Record Industry Society, recently has also indicated that the members of the recording industry association are agreeable to that kind of approach.

Mr. KASTENMEIER. However, am I not correct in assuming from the statement, Mr. Wade, that you were prepared to deliver earlier that you would like to hold out for 10 percent?

Mr. WADE. I will confess to a little personal greed perhaps on that point. I would like to see us. of course. be able to use such proceeds for the purposes that Mr. Biddle alluded to. I think they are very good and worthy purposes.

Mr. KASTENMEIER. Presumably you are talking about possibly 5 percent up to 10 percent, and then it depends, I suppose, as far as the recording industry. whether. in fact, they get 50 percent or something less than 50 percent by contract, so there would be some variables involved here, I take it and. plus the fact, I assume, not all records manufactured, I may be wrong, certainly not foreign records necessarily would be manufactured or published by members of the Record Industry Association of America. There may be some outside.

Mr. WADE. Yes. We understand this is not binding on every record company in the country but that they do have a consensus that this is agreeable to the industry generally.

Mr. KASTENMEIER. You deal somewhat with the question of a distribution formula, and while I think you would destroy any intention to

suggest or impose a formula on the unions or on the performers, nonetheless that is a problem we will have, and while you indicate a preference for distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involving creation of artistic works, how can that really be achieved, quite apart from the humanities, quite apart from the National Endowment being involved, aside from that?

Mr. BIDDLE. My own feeling there, Mr. Chairman, is that that kind of a formula would have to be worked out very carefully with those involved, and it would be in their discretion to devise that formula.

What we are just saying is that here those major hit records which do return large sums of money to the individuals and others involved should be weighted in less favor than those than relate to other types of music that would have less than mass appeal.

I think perhaps one factor here would be the number of sales involved in the record, but we would be happy to do a little soul searching on that and come back to you on more specific ideas.

Mr. KASTENMEIER. Fine. We appreciate that, because I think there may be an inconsistency. Certainly the advocates yesterday in the colloquy referenced to a principle which you re-express here, that is, all shall participate and shall participate equally, and I am talking about musicians on a given record.

In the colloquy that ensued it was suggested that there was no way of measuring excellence or merit or other preferences, and that when you take an equal or all type of simple formula, you really eschew the notion of being able to make distribution on some other grounds.

Mr. BIDDLE. Yes. I see that clearly and I do agree, as we have said in the statement, that the team that produces the end result has to be equally treated, and that is the individual performer, whether he be the first violinist or the timpani person that simply plays a note or two during a given performance should receive equal treatment. But we will try and suggest some ways in which a weighing could be appropriate.

Mr. WADE. If I might add, Mr. Chairman, that this might reflect some concern with the advance of technology relating to media presentations of recorded music. There may be a greater adverse effect on the classical area. For example, you cannot put symphonies on television 3 or 4 hours a day or operatic-type works. By their nature, as they say, they are heavier and require more concentration.

The advent of technology and the use of the media in presentation of these works could adversely affect symphonic, operatic, or other classical performance audiences perhaps more than the audiences for the type of music that generates by its nature more of a mass audience over a more regular period of time.

But as Mr. Biddle has said, a formula will not be easy to work out, and there is a lot of work to be done by the parties who get down to the nitty-gritty on this.

Mr. KASTENMEIER. In looking at this legislation from the conceptual standpoint in terms of scope, after all, perhaps she was only arguing constitutional grounds, but the Register yesterday said it should not be based on need but rather on principle.

The question was asked if the principle, if it is a principle, and certainly you would be another witness who ought to have an opinion

then, in fact, wherever a performer's work, where fixed as a tangible medium of expression, whether it be a sound recording or not, then they ought to be entitled similarly to a copyright. This would theoretically apply to the motion picture actor in a film or in a television play, as well as many other performers one must conceive of.

How do you feel about the theoretical coverage of other creative performers, quite apart from sound recordings?

Mr. BIDDLE. I had not really thought about the expansion of this principle, but merely the relationship to the area that we are concerned with here where we have already recognized that composers and arrangers and publishers have the rights that are already prescribed by law, and then performers and record producers now have, should have a similar right. I think that is an equitable kind of solution here in principle as well as in fairness and in the needs of the artists.

I would have to reflect, I guess, Mr. Chairman, on a broader interpretation of that.

Mr. KASTENMEIER. Because the National Endowment for the Arts, I take it, is interested in other artistic forms of expression besides music.

Mr. BIDDLE. Oh, indeed so and, indeed, in all of the arts, and in a wide variety of the arts, and we have addressed ourselves to other kinds of legislation over the past years and most that deal with other aspects of the fair treatment of visual artists, for example, performing artists.

In our legislation there is a clear mandate that any professional performer or related or supporting professional personnel must be paid at the prevailing wage in the area, and our grantees all have to give us that assurance before receiving Federal funds. So that is another area where an equitable kind of principle is involved.

But if we are talking about a copyright for a motion picture actor or in an area of that kind, I would have to think a bit about amplification. I would not want to expand beyond what I have said today.

Mr. KASTENMEIER. I suggest to you the principle is the same, and that while there may not be say a need or a political, any impetus to accomplish that, nonetheless, I think it could not be resisted on the basis that it's not the same principle.

Mr. BIDDLE. No, I would say the principle is a very strong one, and certainly a motion picture actor who contributes his or her talents to a film is doing very much the same thing as a musician who contributes to the individuality of a given performance that is recorded.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman, and thank you, Mr. Biddle and Mr. Wade.

Every day I get a new insight into this matter. Everyone keeps saying that the costs will be minimal and, if that is so, then why are so many perturbed about this? Apparently the broadcasters feel this is the foot in the door.

Would you have any comment on what the hysteria is about at a rather high level from one group of people? Why are they so fearful?

Mr. BIDDLE. Congressman, I have studied this legislation, and I studied it earlier in a slightly different version when I was working

for the Senate subcommittee, and it seems to us, after reviewing this as carefully as we can, that the provisions that are contained on page 4 of my draft bill, which deals with the distribution and the amounts required by the different broadcast stations, if a station's gross revenues are between $25,000 and $100,000——

Mr. DRINAN. I am familiar with that, and why are they so upset about the whole thing?

Mr. BIDDLE. We cannot judge their concerns, but our feeling is that this is a very small amount. One thing that I might contribute here, you may have heard already, is that those stations whose gross receipts are between $25,000 and $200,000 are, according to the information I have, 65 percent of the stations that are involved. So it seems to us a modest sum.

Mr. DRINAN. It may be they have nothing else at the moment to be concerned about. But the international dimensions of this are very intriguing and, in the paper that is to be given after your good testimony by Ms. Louise Wiener of the Commerce Department, it is very intriguing in that it tells that American performers and producers right now receive foreign royalties to the tune of $13 million per year, and that 50 foreign nations have established a right to royalties for performers and record producers.

If we did, in fact, enact this legislation and if then we would be able to join the Rome Convention, would we be giving and receiving rather substantial sums in performance royalties to foreign people?

Mr. BIDDLE. To foreign people? I don't have the answer to that, Congressman. I know that is a factor here. Maybe Mr. Wade has a comment on that.

Mr. WADE. I don't believe I have the answer either. But it would seem to me that the conclusion or the answer to that question would be a function of the marketplace, so to speak. There is a competitive factor here between cultural institutions and between nations, if you will.

What the net result would be as to how many foreign musicians as opposed to Americans——

Mr. DRINAN. Let me just quote from the subsequent testimony because this shows the depths of the problem and how American artists are being affected.

It is estimated that American performers and record producers would receive a royalty income from foreign sources equal to if not greater than that which they would receive in royalties from American sources.

So the estimate I have is for openers they would receive $13 million from all of the radio and television broadcasters of America and they would receive that or more if, in fact, we joined these 50 nations, and implemented the right that artists in America have to a royalty when their performance is audited overseas.

Mr. WADE. I would say that sounds reasonable, because when you look at the situation in terms of cultural institutions, American symphony orchestras, and American dance groups are in great demand.

Mr. DRINAN. The real intriguing question in the bottom of my mind is, Will you get 5 percent of the foreign royalties?

Mr. WADE. We wouldn't.

Mr. DRINAN. Why not?

Mr. WADE. Sorry, I misunderstood you.

Mr. DRINAN. The endowment would get 5 percent from the Recording Industry Association, but who will receive the foreign royalties? Wouldn't the Recording Industry Association, and wouldn't they give you the 5 percent?

Mr. WADE. It would fit in with it, yes. We had not really reflected on that, but since you mention it——

Mr. DRINAN. Would you like to hire me as your assistant general counsel?

Mr. BIDDLE. Any day, Congresssman.

Mr. WADE. Any time.

Mr. DRINAN. You have added a dimension, as I say, and I have found it very, very helpful.

Mr. WADE. I just didn't want to sound too greedy.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The committee is indebted to you both, Mr. Wade and certainly you, Mr. Biddle, as Chairman of the National Endowment for the Arts for coming here today and helping edify us on this piece of legislation that is pending in Congress.

We appreciate your appearance.

Mr. BIDDLE. Thank you, Mr. Chairman, and I do greatly appreciate the privilege and honor to be here. I think this is an immensely important subect, and I am delighted you invited us.

Thank you.

Mr. WADE. Thank you.

[The prepared statement of Mr. Biddle follows:]

STATEMENT OF LIVINGSTON L. BIDDLE, JR., CHAIRMAN, NATIONAL ENDOWMENT FOR THE ARTS

It is a pleasure to be here this morning to provide you with the views of the National Endowment for the Arts on H.R. 6063, a bill to amend the General Revision of Copyright Law by establishing performance royalty rights in sound recordings for performing artists and record producers.

Mr. Chairman, the National Foundation on the Arts and the Humanities Act of 1965, as amended, the law creating the National Endowment for the Arts, contains an eloquent Declaration of Purpose. In part, that Declaration states:

". . . it is necessary and appropriate for the Federal Government to help create and sustain not only a climate of encouraging freedom of thought, imagination, and inquiry *but also the material conditions facilitating the release of this creative talent;*" (emphasis added)

We believe the proposed legislation, if enacted, would go a long way toward helping to create adequate material conditions for performing artists and toward correcting the present inequitable situation with regard to the commercial exploitation of the creative work of performing artists and record producers. I am, of course, speaking of the commercial use of the talent and skills of performing artists and record companies whose creative efforts bring to life and preserve in sound recordings a song, a sonata or a symphony. The primary users of these recordings, i.e., radio and television broadcasters, jukebox owners, background music companies, et al., as we all know, freely utilize these efforts to their commercial benefit. Indeed, it can safely be said that without the performance creations of musicians, performing artists, and record makers, the broadcast and jukebox industries would not exist as we know them today.

The proposed legislation has been the subject of a great deal of discussion over the past few years. The Congress has been fully informed as to the merits of the proopsals, and has, as well, heard some voices in opposition. As you know, the National Endowment has joined those who support this copyright revision. Rather than go through all of the numerous arguments that have been set forth

in support of this bill, and with which we are in agreement, I would prefer to enumerate here some of those that seem most persuasive to the National Endowment for the Arts.

(1) The Copyright Office of the Library of Congress supports the principle of copyright protection for the public performance of sound recordings, finding that sound recordings are a proper subject for copyright protection under the Constitution and laws of the United States. The Register of Copyrights has recommended in her report to the Congress of January 3, 1978, that legislation be enacted to create public performance rights with respect to sound recordings. A draft bill was included in that report which was essentially a revision of the Danielson bill (H.R. 6063) presently under discussion at these hearings.

(2) Composers, song writers, and publishers, all of whom similarly enjoy copyright protection under our laws, receive performance royalties.

(3) Many nations around the world now recognize by law performance rights for performers or record makers, or both, including the United Kingdom, West Germany, Japan, Italy, Sweden, Mexico, Spain, and Israel, to name but a few.

(4) An International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in 1961. This convention, known as the Rome Convention, stated in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

So far the convention has been ratified by fifteen countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden. We agree with the Register of Copyrights that this international instrument was years ahead of its time and that it has much to offer to the United States and this country's creative citizens. Enactment of the proposed legislation would bring copyright protection in this country into conformity with that of the convention and thus the laws of those nations which have thus far ratified the convention.

(5) Independent studies have shown that no undue hardship would be imposed on those industries affected, since the relatively small (in terms of advertising and user revenue) additional costs of performance royalties probably would be passed on to the ultimate economic beneficiaries of the commercial use of sound recordings, i.e., advertisers, jukebox users, background music users, et al. Further, it is our understanding that such studies have shown that increased costs to the advertisers and other commercial users of sound recordings would be minimal.

Numerous other observations have been set forth concerning the benefits to broadcasters stemming from the uncompensated use of sound recordings. We are in agreement with such observations.

It is true that details of implementation have yet to be completely worked out by the various groups involved in the support of this legislation. While most such details are not a proper subject of concern for the National Endowment for the Arts, I would like to make one or two comments in this regard.

First, it is my understanding that the record industry and the performing artists' unions are in agreement with the principle that all performers on a given record would share equally in the distribution of royalties derived therefrom. That is, there would be an equal distribution of fees between a solo performer and his or her supporting musicians. We heartily endorse that principle.

Second, Mr. Chairman, we would favor an implementation approach which would insure substantial benefits to performing artists involved in the creation of an artistic works falling outside the commercially successfully category, i.e., the category of popular "hits". In other words, the National Endowment for the Arts would favor a distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involved in the creation of artistic works which are worthy in themselves, but which by their nature do not have, at this time at least, the ability to generate mass sales. This is particularly important in view of the severe economic strain presently being felt by symphony orchestras, opera companies, and non-profit arts groups across the country. I might add that there has been some concern recently with respect to a decline in recordings of symphonic, operatic and folk music. We believe that this bill could serve to encourage more activity in this direction. We believe that the opportunity to receive performance royalties will encourage musicians through their representative associations to seek ways in which there can be more recording in these art forms.

In this connection, there is one important difference between the Copyright Office's draft bill and H.R. 6063 concerning the distribution of royalties. The

Danielson bill provides for a mandatory 50/50 split of royalty proceeds between performers and "copyright owners" (record companies). The Register of Copyright has pointed out that the bill does not come to grips with the status of performers who are employees for hire. The Register's draft bill gives at least 50 percent of the royalties to performers on a per capita basis, regardless of their employment status, but allows performers to negotiate for more (not less) than a 50 percent share. We concur with that recommendation.

Also, where other differences may exist between the two bills, the National Endowment would associate itself with the views and recommendations of the Copyright Office.

Finally, Mr. Chairman, we are most pleased that members of the Recording Industry Association have agreed to a provision in this legislation which would allocate at least 5% of any performance royalty income received by them to the National Endowment for the Arts to be used for purposes consistent with the Endowment's enabling legislation. The industry's attitude in this regard is most encouraging, as it demonstrates a beneficial kind of partnership between private industry and the Endowment's work being used for example, in this case, for the support of classical, folk, poetry, narrative, or other noncommercial recording projects, or perhaps for providing advance training opportunities for musicians wishing to further their careers.

In conclusion, Mr. Chairman, we heartily endorse the view that artists, musicians, and record companies who contribute their creative efforts to the production of copyrighted sound recordings should reasonably share in the income enjoyed by radio stations and other commercial organizations who use the recordings for profit. This legislation would be an important step toward achieving one of the Endowment's major goals: to encourage and sustain development of creative American talent by helping to insure that American artists will receive a just financial return for their creative work.

Mr. KASTENMEIER. Next the Chair would like to call Ms. Louise Wiener, Special Assistant to the Secretary of Commerce for Cultural Resources.

We are very pleased to have you here today.

TESTIMONY OF LOUISE WIENER, SPECIAL ASSISTANT TO THE SECRETARY OF COMMERCE FOR CULTURAL RESOURCES

Ms. WIENER. Thank you, sir. It is a pleasure to be here.

Mr. Chairman and members of the subcommittee, I am Louise W. Wiener, Special Assistant to the Secretary of Commerce for Cultural Resources.

I appreciate this opportunity to testify before you for the Secretary on H.R. 6063, the Performance Rights Amendment of 1977.

As you are well aware, the Register of Copyrights, in response to her congressional mandate in section 114(d) of the General Revision of Copyright Law, Public Law No. 94–553, has prepared and released an exhaustive report on public performance rights with respect to sound recordings.

I, as a spokesperson for the Department of Commerce, applaud the Register's effort and concur with the position and legislative recommendations set forth in her report. In an addendum to that report, the Register has proposed a draft bill embodying those recommendations, entitled:

> To amend the copyright law, title 17 of the United States Code, to create public performance rights with respect to sound recordings, and for other purposes.

That draft bill, to be cited as "The Sound Recording Performance Rights Amendment of 1978," is essentially a revision of H.R. 6063, fondly known as the Danielson bill.

Briefly, the Register's draft bill would provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and would extend the benefits of those rights both to performers, including employees for hire, and record producers as authors of sound recordings.

The Department supports the Register's draft bill and urges its enactment.

I would like to offer some general comments as to why we feel the copyright law should be amended to provide public performance rights with respect to sound recordings and as to why we support the Register's draft bill:

1. American music composers and publishers, based on exclusive rights under U.S. copyright law, receive compensation for the public performance of their works in the United States.

Music composers and publishers from foreign nations which are signatories of the Universal Copyright Convention also receive compensation when their works are performed in the United States. Likewise, since this country is a signatory to that convention, American music composers and publishers receive royalties from signatory foreign countries for the performance of their works in those countries. American performers and record producers, however, are denied this form of compensation both here and abroad.

2. More than 50 foreign nations have established a right to royalties for their performers and record producers with respect to the public performance of sound recordings to which those performers and producers have contributed.

Under the International Convention for the Protection of Performers. Producers of Phonograms, and Broadcasting Organizations, referred to as the Rome Convention of 1961, a scheme of reciprocity exists amongst signatory foreign nations. Since our laws do not provide performance rights in this country for any performer or record producer regardless of nationality and since we have not signed the convention, American performers and record producers are generally denied compensation abroad.

As a matter of public policy, American and reciprocating foreign performers and record producers should be granted performance royalty rights in the United States. Such a grant would be equitable considering that composers and publishers already have such a right. American industry and labor should not be denied this form of income either on a national or an international basis.

It is estimated that American performers and record producers would receive a royalty income from foreign sources equal to if not greater than that which they would receive in royalties from American sources. Presently, they receive little such income from foreign sources because, as stated earlier, we do not grant performance royalty rights to foreign performers and producers, let alone to our own.

It is estimated that if we were to create a right to royalties for our own performers and producers and if we were to make that right reciprocal by signing the Rome Convention, foreign royalties to American performers and producers would be of the same magnitude as foreign royalties to American composers and publishers. In 1976 that amounted to over $13 million through ASCAP alone.

While creation of a right to performance royalties could hardly be cast as a solution to our balance-of-payments problems, neither should it be dismissed out of hand.

It is important that any performance royalty legislation be in harmony with the Rome Convention of 1961 to insure that American performers and music producers will receive an appropriate income from the foreign market. Both H.R. 6063 and the Register's proposal would appear to be in harmony with that convention.

3. Effective resolution of this issue opens an avenue for future wage negotiations within the music industry. Currently this industry suffers from intense pressure from labor for increased wages to keep pace with the cost of living, and pressure on the industry side to keep prices down so that public access to recordings is as wide as possible.

The introduction of performance royalties offers a safety valve to diffuse the pressures of these opposing economic forces. The draft bill of the Register of Copyrights would allow for future flexibility when and if that is in accord with the best interest of both the unions and the industry.

4. The proposed method of additional payment as proposed by the Register and by H.R. 6063 provides an incentive for superior performance and further reflects a level of respect and recognition for the contributions of performers, both artistic and economic, which is long overdue.

We have carefully reviewed the statements of the broadcasting industry and respect their concerns. However, we were not persuaded by their arguments in this instance.

The costs to them would be minimal and fees to them are formulated to take into consideration the economic dimensions of individual stations.

At the point at which projected costs do become burdensome, it is probable that they would be broadly shared with the advertisers; that is, the general business community and the public at large. This would so diffuse and mute the economic impact on any individual constituency as to be insignificant.

The broadcasters note that they rely on recording for approximately 75 percent of their programing. Therefore, in the long range, it is probably in their own best interests to do all they can to promote a healthy and creative recording industry.

In conclusion, we fully support amending the copyright law to provide performance rights in sound recordings. We believe that the long-range economic interests of all parties would be best addressed through the activation of performance royalties in America in concert with the Rome Convention of 1961.

We cannot continue to economically penalize musicians for their choice of profession and expect to attract the creative talent which provides a lifeline both to the recording and the broadcasting industries.

We believe the Register of Copyrights has drafted a bill based on exhaustive independent study which will provide a sound legislative basis for such a performance rights system, a system which would contain flexibility for the future.

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Accordingly, we urge enactment of the Danielson bill as it would be revised by the Register's proposal.

Mr. KASTENMEIER. Thank you very much, Ms. Wiener, for your helpful testimony.

On page 5 you say that broadcasters ought to do all they can to promote a healthy and creative recording industry.

Isn't the recording industry today healthy and creative?

Ms. WIENER. Yes; it is, but I think it is important that we continue to insure that both the recording industry and the broadcasting industry remain that way. We must look back at who is feeding that system and providing its creativity and see that they survive in an economic environment conducive to continued creativity and health.

Mr. KASTENMEIER. On page 4 you say the proposed method of additional payment as proposed by the Register in H.R. 6063 provides an incentive for superior performance. How does it do that?

Ms. WIENER. I think that, if you provide an economic incentive to all who contribute to a recording, it becomes increasingly in their own best interest to see that that is the best possible recording made.

Mr. KASTENMEIER. As I say, the bill is not based on the premise that it will reward excellence, it is based on a one-for-one and equal division.

Ms. WIENER. I think, however, that, while it is hardly going to be a major quip, I think it will contribute to the degree of investment each musician feels he has at each recording session, because he may continue to enjoy the benefits of his labor if, indeed, his recording of a given piece is superior to someone else's recording of that same piece.

Mr. KASTENMEIER. Miss Wiener, you represent the Department of Commerce?

Ms. WIENER. Yes.

Mr. KASTENMEIER. How much would this bill cost in a given year, as far as you can calculate, broadcasters and other users of sound recordings?

Ms. WIENER. I regret to confess two things. One, that the best data bank available to me, a gentleman by the name of McDonald Nyhen from the Industry and Trade Administration could not join me today. I suspect he could provide me with a ready answer and I would like to take the opportunity to respond to that when I can see the figures.

It is our impression that this is based on a rather small percent and in the grand scheme of things is not likely to be a dramatic figure.

Mr. KASTENMEIER. The reason I ask you is, of course, you have said in 1967 foreign royalties for American composers and music publishers amounted to over $13 million, and you have also indicated if we were to create the rights to royalties for our own performers and producers and make it reciprocal, foreign royalties to American performers and producers would be of the same magnitude as foreign royalties to American composers and publishers; that is, $13 million.

So, obviously, in your statement there is some implicit knowledge or at leaset opinion about what sort of revenues this would produce.

Ms. WIENER. Yes, sir. Let me clarify where those figures come from and what I intended to suggest by those statements.

Currently, when the royalty is calculated for composers and publishers, a royalty is frequently calculated in this foreign nation for the recording artists as well because the mechanism is all tied together, particularly in Europe. However, those funds are then not returned to the United States because we have no reciprocity with them.

Precisely what happens to them we have not been able to find. We do know we would not be able to receive any back payments.

However, as things currently stand, American recordings abroad appear to be or American music abroad appears to occupy a larger percent of their market than they occupy of ours. That, of course, is always subject to change. But under the current situation, our artists would not only be eligible for the royalties due them from American broadcasters, but what would appear to be a rather substantial amount of money due them from foreign broadcasters as well.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman.

Just following up on this, everywhere you go in the world you can't get away from American music, and am I to understand that the performers are being cheated actually because of the failure of the Congress to enact this law and the failure of the United States to go into the treaty?

Ms. WIENER. Congressman, that would appear to be true, and it's particularly ironic because the Rome Convention which created the international mechanism for this correction, was spearheaded by efforts of America.

We are now one of the nations who is not a signatory, but this so-called creative and forward-looking element was drafted largely through the influence of American industry.

Mr. DRINAN. Are we the only major nation that is not a signatory, if 50 nations belong?

Ms. WIENER. No, there are 50 nations which have recording rights, performance rights royalties. Of course, there are 15 who are signatories to the Rome Convention. We do not currently fall into either category.

Mr. DRINAN. Just tell me about the mechanics, if you will, as to what would happen if this bill passed in some form and if then the Senate concurred in, is this a treaty, the Rome Convention? Would the Senate have to concur?

Aside from that, suppose we became a member of the Rome Convention, what is the mechanism or method by which the composer in Peoria or the performer would, in fact, collect some money?

Ms. WIENER. Both the Danielson bill and the Copyright Office proposals agree, propose a method of collection.

Mr. DRINAN. That same method would apply to foreign payments, too?

Ms. WEINER. Yes, whatever, once we have a vehicle for collecting performance rights, that would also be the vehicle which would address the foreign funds as well.

Mr. DRINAN. Going back to the Rome Convention, were the composers and artists and performers active in seeking this Convention or was it the industry?

Ms. WIENER. I am sorry, Congressman, I can find that for you, but I am not that well versed in it.

Mr. DRINAN. You're not expected to know that, but I am just wondering why the performers have not brought their case, so to speak, to the public more aggressively than they have. You may recall during the copyright bill this question came up, and it lost in the subcommittee, as I recall, four to three, but I don't recall being struck with the equity of the case as I am now.

Ms. WIENER. I think, Congressman, that when you talk about performers and when you talk about the arts constituency in general, you are talking about a group of people who are working extremely hard at their profession under economic situations that would be, with the exception of a few nameable major stars, are clearly not to be envied. And the time and funds available to them to really make the case for their needs is not always what it ought to be.

Mr. DRINAN. Would you say that the theory is very clear that these things are copyrightable and copyrighted and there should be some compensation pursuant to the basic principles of copyright law, would you say, therefore, that the only argument against it is the argument of the broadcasters that they cannot afford it?

Ms. WIENER. That would appear to be the only constituency who is opposed to it. Previous testimony which we have reviewed indicates a very impressive commonality of interest between labor and management on this particular effort, as well as support from consumer organizations and professional arts organizations, and it would seem in this instance that the broadcasters stand alone in their dismay or distress.

Mr. DRINAN. Thank you very much. This is excellent testimony, and I am grateful.

Ms. WIENER. Thank you, sir.

Mr. KASTENMEIER. Does the gentleman from Pennsylvania have any questions?

Mr. ERTEL. I have no questions. I am sorry I was not here to hear your complete testimony. I have read it, and thank you.

Ms. WIENER. Thank you.

Mr. KASTENMEIER. The committee thanks Ms. Wiener for her presentation this morning, and the Chair should announce this concludes our regular hearing on copyright.

We have a number of submissions yet to receive related to this issue of performance rights in sound recordings.

The Chair would not totally rule out the possibility we would again need to have a hearing date set for possible other aspects of this legislation but, as of the moment, this concludes our regularly scheduled hearing on the subject.

The Chair would remind Members that we have a bill on the floor this afternoon and, with that, the meeting is adjourned.

[Whereupon, at 11:15 a.m., the Subcommittee on Courts, Civil Liberties and the Administration of Justice adjourned.]

ADDITIONAL STATEMENT

STATEMENT OF AMERICAN BROADCASTING COMPANIES, INC.—MAY 2, 1978

American Broadcasting Companies, Inc. (ABC) submits this statement to the Subcommittee in connection with its hearings on H.R. 6063 which proposes to institute a performance right in sound recordings.

Since the institution of proceedings in this matter by the Register of Copyrights in April, 1977, ABC has been an active participant in opposition to the granting of another use royalty for sound recordings.[1] Comments opposing the performance royalty proposal were submitted by ABC on May 31 and June 15, 1977. In July, 1977, witness John Winnaman, General Manager of ABC's KLOS (FM), testified in hearings convened by the Register of Copyrights in Los Angeles for the purpose of further presenting ABC's views on this matter. And, on December 1, 1977, ABC submitted comments on the so-called "Werner Report" which was commissioned by the Register for the purpose of evaluating the economic issues presented.[2]

While each of these presentations is included in the official record compiled by the Copyright Office during the last twelve months, and we respectfully call the Subcommittee's attention to them, a summary of our views may be helpful to the Subcommittee.

In its earlier comments in this proceedings, ABC demonstrated that

> Performers and record companies do not provide a sufficiently unique contribution, cognizable under the Copyright Law, that is not already adequately compensated;[3]
>
> In view of the fact that broadcast stations represent the principal promotional device leading to the success and well-being of recording artists and companies, the proposed performance royalty would amount to an unfair (and burdensome) tax on the broadcast industry;[4] and,
>
> Creation of a performance royalty, contrary to the intent of Article I, Section 8 of the Constitution, would likely produce disadvantages to the public welfare and would not stimulate artistic endeavor.[5]

And, in subsequent comments on the Werner Report, ABC noted that

> Rather than presenting an independent and objective analysis of the economic merits of the performance royalty proposal, the Report is designed simply to rebut arguments presented against the proposal;
>
> The Report—being directed solely to the question of whether the performance royalty will force some broadcast stations out-of-business—fails to address the principal broadcaster position that the proposal is unfair and would likely engender reductions in public service oriented programming;[6]
>
> The evidence offered to support the Report's conclusion that radio station FCC financial reports do not accurately reflect broadcast station profitability is not only seriously deficient but is premised upon a series of assumptions and hypotheses which have no basis in fact;[7] and
>
> Because the Report's assumptions and conclusions concerning the economics or radio broadcasting are in conflict with reality, it fails to support its principal conclusion that the radio broadcast industry can afford to pay a second use royalty fee.[8]

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[1] At present, the broadcast industry pays over $100,000,000 annually for music license fees.

[2] "An Economic Impact Analysis of a Proposed Change in the Copyright Law", by Stephen M. Werner of the firm Ruttenberg, Friedman, Kilgallon, Gutchess and Associates.

[3] See ABC Comments, pages 9–13; ABC Reply Comments, page 6.

[4] ABC Comments, pages 14–16; ABC Reply Comments, page 5.

[5] ABC Comments, pages 5–9; ABC Reply Comments, pages 3–4.

[6] ABC Further Comments, December 1, 1977, pages 4–7.

[7] ABC Further Comments, pages 7–12.

[8] ABC Further Comments, pages 12–15.

Rather than again detail the basis for these conclusions—all of which are already set forth in our earlier filings—ABC will herein address what it considers to be the essence of the performance royalty question. As discussed more fully below, when viewed in its proper context: (1) the performance royalty issue is, in reality, a proposal to readjust economic relationship between the record companies and their "employees";[9] (2) it is unnecessary to require the broadcast industry to shoulder this burden when the record industry is well able to do so; and (3) the performance royalty is most unfair to broadcasters who represent the principal promotional vehicle leading to the success and well-being of recording artists and companies.

THE PRINCIPLE JUSTIFICATION FOR THE PERFORMANCE ROYALTY PROPOSAL THAT IT WILL COMPENSATE UNDERPAID PERFORMERS IS A RECORD COMPANY CONCERN AND NOT ONE FOR THE COPYRIGHT LAW

In the myriad of comments filed and testimony offered by the proponents of a performance right in sound recordings, one overriding justification now emerges; that a performance royalty will provide additional income to background singers, musician sidemen, and the like. However, when one considers that the record companies are to receive 50 percent of the royalty revenues and that the administrative costs of implementing the royalty proposal are expected to be substantial, very little, if anything, will be left to the remaining participants.[10]

More importantly, whatever the validity of this justification, it is a record industry concern—not one for the Copyright Law. The Constitutional basis for Congressional authorization of copyright protection is to "promote the Progress of Science and useful Arts"[11]—not to provide a means for redistributing income from one industry to another.[12] Nor is it intended as a substitute for collective bargaining procedures under applicable labor laws.

If non-star performers such as background singers and sidemen are underpaid, this is a matter for the recording industry to deal with in the context of traditional employer-employee relationships; it should not be clouded by the injection of so-called "copyright" considerations. Government intervention in such a process here will inevitably lead to requests that Congress "legislate" compensation adjustments in other industries. We do not think the Constitution intended that Congress thrust itself into commercial enterprise in this manner under the guise of the Copyright laws.

THE RECORD INDUSTRY IS WELL ABLE TO AFFORD COMPENSATION ADJUSTMENTS TO ITS EMPLOYEES

A very critical aspect of the economic issue involved in the performance royalty matter has been ignored by the Copyright Office; it similarly finds no place in the multi-page Werner Report. While both conclude that the performance royalty will not yield a substantial windfall to the record companies, neither acknowledges the fact that the record companies do not need such royalties and, in fact, are in a better position to fund additional compensation to background musicians and singers than is the radio broadcast industry.

In 1976, total record and tape sales exceeded $2.7 billion—a 15.9 percent increase over 1975.[13] Profit figures for some of the major producers are similarly impressive:

"RCA Records celebrated its 75th anniversary with an all-time high in sales and a doubling of earnings for a second consecutive year. . . . RCA Records

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[9] The term "employer" is used broadly to include those individuals hired to provide specific services on a contractual basis.

[10] Evidence in the record before the Copyright Office indicates that, under certain assumptions, the administrative costs of implementation could well "eat up" all of the estimated $15,000,000 in royalty payments. And, even if this were not the case, testimony by proponents of the bill (Los Angeles, July, 1977), indicate that these individuals are likely to receive only several hundred dollars annually as their share of the royalties.

[11] Article I, section 8, clause 8.

[12] Copyright protection as we know it is a statutorily created right to which no individual or entity is automatically entitled as a matter of law or policy. The courts have consistently held that in enacting copyright legislation pursuant to the grant of Constitutional authority, Congress must give paramount consideration to the advancement of the public welfare: remuneration to the owner—or, in this case, the performer—is only of secondary importance. *Mazor* v. *Stein*, 347 U.S. 201 at 219 (1954). See also *Kendall* v. *Winsor*, 21 How 322, 327–28 (1859).

[13] Billboard International Buyers Guide, 1977–78, page 8.

improved its market share at home and abroad." (RCA Annual Report, 1976, page 4.)

* * * * * * *

"Arista Records experienced the most productive year in its history, showing nearly 300 percent growth in net revenues since its formation under the direction of President Clive Davis in 1974." (Columbia Pictures Industries, Inc., Annual Report, Fiscal 1977, page 22.)

* * * * * * *

"Warner Communications "recorded music and music publishing showed gains of 32 percent in revenues and 13 percent in pretax income over last year's results. . . ." (Securities and Exchange Commission Form 10–Q for the quarter ending September 30, 1977, page 9.)

The record industry as a whole is clearly prospering without a public performance right, as are many recording artists.

By contrast, the radio broadcast industry is characterized by declining profit margins.[14] And recent Federal Communications Commission (FCC) statistics show a decline in the number of radio stations reporting profitable operations.[15]

In this connection the Register, relying on the Werner Report, concludes that there "is no hard economic evidence in the record to support arguments that a performance royalty would disrupt the broadcasting industry, adversely affect programing, and drive marginal stations out of business." [16] Logic, however, compels the conclusion that the imposition of an additional royalty payment on radio stations (particularly unprofitable or marginal operations) would require that radio broadcasters make certain judgments concerning the implementation of operating adjustments and other cost saving means to offset the additional costs incurred.[17] As suggested by many of those participating in the hearing, such measure would include cutback in news services, public affairs and other program areeas that are generally not highly profitable in their return to the broadcaster. The question here—not fully addressed by the Register—is whether the risk of a reduction in broadcast service quality is outweighed by the necessity of imposing upon radio broadcasters the obligation to provide additional compensation to record company employees. We do not think it is.

THE PROPOSED ROYALTY IS UNFAIR TO BROADCASTERS WHO ARE LARGELY RESPONSIBLE FOR THE SUCCESS OF RECORDING ARTISTS AND RECORD COMPANIES

A second royalty payment for sound recordings would be most unfair to broadcasters in view of the fact that it is the broadcast industry which is singularly responsible for the financial success of composer, artists, record publishers and producers, alike. No recognition at all is given in the bill to the substantial value inherent in broadcast air play. The Register states that this "is the strongest argument put forward by broadcasters. . . ." [18] Nevertheless, she concludes that while "there is no question that broadcasting and jukebox performances give some recordings the kind of exposure that benefits their producers and individual performers through increased sales and popularity", the "benefits are hit-or-miss." [19]

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[14] See FCC Public Notice, Nov. 8, 1976, Mimeo 73357, Table 2:

Year:	*Radio profits as percent of revenues*
1968	11.09
1972	9.55
1975	5.30

[15] According to the FCC, in 1973, 69% of AM and AM/FM stations reported a profit; in 1974 this percentage dropped to 65%; in 1975, the percentage dropped to 61%; and, in 1976, it rose slightly to 67%. Only 49% of independent FM stations reported earning a profit in 1976. FCC Public Notice, Dec. 13, 1977, Mimeo 92277.

[16] Addendum to the Report of the Register of Copyrights on Performance Rights In Sound Recordings, page 10.

[17] These adjustments would not necessarily be tied to a station's profit level, although stations in a poor financial condition could be expected to implement such cost saving adjustments much more quickly than their more profitable counterparts. It is important to remember in this context that the payment schedule in the proposed legislation is tied to "receipts" not profits, so that a station showing revenues of $400,000 would still pay a royalty fee of $4,000, even though it was a loss operation.

[18] *Addendum, supra,* page 9.

[19] *Id.*

As the Register reluctantly recognizes, there is no question that the record industry is dependent, in large part, upon radio broadcasting for its success. The comments filed, and the oral testimony given, show conclusively that the radio broadcast industry represents the principal promotional device leading to the success and well-being of recording artists and companies.[20]

For more than fifty years broadcasting stations have substantially benefited recording companies and artists (not to mention the composers who are already entitled to use royalties under existing copyright) by providing essentially free and valuable exposure for new recordings:

"Broadcasters would seem to be doubly injured. They must pay fees for playing records which they previously played without charge [i.e., for performer's rights], and they are deprived of the opportunity of using negotiations over public performance fees as a means of recouping the value of the free advertising they provide the record industry."[21]

The contribution made by air play to the sale of records is more than enough to permit the record companies to make whatever increased payments are merited.

CONCLUSION

ABC firmly believes that the establishment of a record public performance right is unsound public policy. ABC urges the Congress to retain Section 114 of the Copyright Act (17 U.S.C. § 114) in its present form and that a new performance royalty in sound recordings not be established.

SUPPLEMENTAL STATEMENT OF AMERICAN FEDERATION OF MUSICIANS, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This Supplemental Statement is submitted by the American Federation of Musicians (AFM), the American Federation of Television and Radio Artists (AFTRA), and the Recording Industry Association of America, Inc. (RIAA) in response to the request of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee for additional information regarding the implementation of the collection and distribution of performance royalties under H.R. 6063.

I. INTRODUCTION

Some have suggested that collecting royalties from the users of copyrighted sound recordings and distributing them to performers and recording companies would be highly complex. They have stated that the collection and distribution of royalties will impose substantial paperwork burdens on radio stations and other users. Critics of the legislation have predicted that the cost of these administrative functions would be prohibitive.

The fact is, however, that collecting and distributing royalties for the public performance of sound recordings is not complicated at all. Such administrative functions are already routinely performed, efficiently and economically, by performing rights organizations in the United States (ASCAP, BMI, SESAC) and all around the world (*e.g.*, Gramex, PPL, LSG, GVL). Moreover, the 1976 revision of the Copyright Law provides still additional models for the collection and distribution of royalties now required to be paid by cable system operators (Section 111), jukebox operators (Section 116) and public broadcasting (Section 118).

To put an end, once and for all, to these concerns about the implementation of a performance right for sound recordings, AFM, AFTRA and RIAA have jointly developed, for the record, a model system for the collection and distribution of royalties. This model is simple, cost-effective and equitable. It can be accomplished, we believe, for less than $750,000 a year.

We do not propose this model as the only method for collecting and distributing royalties. There are undoubtedly other workable approaches. This model, cer-

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[20] The hearing record shows that almost without exception record companies and individual artists plead with broadcast stations to air their records—sometimes going to the extreme of offering illegal payments in exchange for air play.

[21] "A Public Performance Right in Records: How to Alter the Copyright System Without Improving It", Robert L. Bard and Lewis S. Kurlantzick, The George Washington Law Review, Vol. 43, No. 1, pages 152–238, November, 1974, as page 204.

tainly, will illustrate that a performance right in sound recordings can be administered fairly and efficiently.

II. A PROPOSED MODEL

We set forth below, step by step, each of the administrative functions that must be carried out to monitor the public performance of recordings, and to collect and distribute performance royalties. We then describe what we believe would be an efficient technique for accomplishing each such function.

A. Collection of royalties

1. *Registration.*—A prerequisite for the collection of performance royalties is that users of copyrighted sound recordings register to obtain a compulsory license. We propose that users do so by filing a single form with the Copyright Office (with updated filings as necessary). The form to be filed should be promulgated by the Copyright Office, after consultation with the Copyright Royalty Tribunal.

The procedures for such registration are already well-established under existing copyright law. There are two direct precedents:

(1) Cable system operators are required to file in the Copyright Office "a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system. . . ." 17 U.S.C. § 111(b)(1).

(2) Operators of coin-operated phonorecord players (jukeboxes) are likewise required to file in the Copyright Office "an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player. . . ." 17 U.S.C. § 116(b)(1)(A).[1]

In both situations, the Register of Copyrights is to prescribe by regulation (after consultation with the Copyright Royalty Tribunal) the information to be included in the form. Section 114(c)(3)(A) of the draft bill prepared by the Copyright Office proposes essentially the same registration procedure for users of copyrighted sound recordings. We endorse that approach.

It is noteworthy that, under this system, registration forms would have to be filed with the Copyright Office only infrequently. Cable systems, for example, are required to file either one month before they commence operations, or within 180 days after the enactment of the copyright law, whichever is later. Registration is required thereafter only when the ownership or control or the signal carriage complement of the cable system changes. This model is probably appropriate for sound recordings, too.

Thus, the administrative burden on users of copyrighted sound recordings would be minimal, limited in most cases to the filing of a single form with the Copyright Office.

2. *Collection of Fees.*—We propose that the collection of the royalty fees also be handled by the Copyright Office.

The Copyright Office is already performing this function in connection with two of the compulsory licenses newly created by the 1976 revision of the copyright law. It is collecting royalties on a semi-annual basis from cable system operators (Section 111(d)(2)), and on an annual basis from jukebox operators, (Section 116(b)(1)(A)). It would be just as simple for the Copyright Office to collect once each year a royalty payment from radio stations and other users of copyrighted sound recordings.

B. Distribution of royalties

1. *Monitoring and Weighting Airplay.*—To determine the appropriate distribution of royalties among performers and record companies, it is necessary to develop a data base which will (a) identify the copyrighted sound recordings being performed, and (b) measure the use of those copyrighted sound recordings on a comparative basis.

We proposed that this administrative function be performed by a private entity under the supervision of the Copyright Royalty Tribunal. The Tribunal

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[1] Unlike the situation with jukebox operators, the major users of copyrighted sound recordings—radio stations—can easily be notified of their obligation to register. They are readily identifiable since they are licensed by the Federal Communications Commission.

would be directed to review the procedures developed by the private organization to assure that its monitoring approach accurately depicts the performance of copyrighted sound recordings in the United States.

The actual compilation of the data can be performed by either of two existing performing rights societies or by another organization. Existing organizations—ASCAP and BMI—have been identifying and measuring the use of copyrighted musical composition for 64 and 39 years, respectively. We believe it would be possible for either of these organizations to augment their current systems to accommodate the information required for logging sound recordings, too.[3] The use of one of these existing organizations could be advantageous in that it should be relatively inexpensive to augment a system already operational.[3] Moreover, composers and publishers could benefit from a reduction in their share of the administrative costs of the operation.

Because we cannot assure the Subcommittee that either or both of these private entities would be willing to perform this function, however, and because we cannot now estimate the incremental costs of such activities to ASCAP or BMI, we have chosen an independent approach. We solicited the advice of one of the nation's leading experts in opinion research and data gathering—Burns W. Roper, Chairman of The Roper Organization Inc. (Mr. Roper's background is described in an attachment to this Statement.)

We asked Mr. Roper to devise a system to measure the public performance of copyrighted sound recordings across the United States. He came up with a system that is of startling simplicity and relatively modest cost.

A copy of Mr. Roper's proposal is attached to this submission. It is the proposal itself that most clearly describes Roper's system for achieving a reliable and continuing measure of the recordings played over the nation's radio stations. We briefly summarize the key points:

Roper would monitor a statistically valid sample of radio time segments to determine airplay. He offers two alternatives for monitoring: (1) on-air monitoring, using panels of experts to identify the recordings, and (2) special station logs. There are precedents for each approach (ASCAP uses both techniques, while BMI relies on logs exclusively), and Roper discusses the pros and cons of each. On-air monitoring imposes virtually no burden on the radio station being taped. The logging system costs less and produces a larger sample.

Roper's sample would be many times greater than that employed for a typical national opinion poll. He proposes monitoring 20,000 radio time segments. This sample would encompass some 50,000 recordings, if done by on-air monitoring, or 300,000 recordings, if done by logging. Roper calculates the margin for error at less than plus or minus three-quarters of one percent, compared to three percent for the typical national poll. The size of the sample reduces to a practical minimum the chance that an individual performer or recording company will not be compensated because "their" recording was missed in the sampling.[4]

A weighting system would be used to achieve a fair distribution of royalties. These weights would reflect such factors as airplay on large stations vs. small, prime time vs. off-hours, length of recording, etc. We suggest the weighting formulas be developed by the Copyright Royalty Tribunal to assure fairness to all royalty recipients.[5]

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[2] Indeed, the prevailing international practice is for the composer/publisher performing rights societies to collect royalties for the public performance of sound recordings for distribution to recording companies and performers. See Sixth Ordinary Session of Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, ILO/Unesco/WIPO/ICR. 6/7 Add. 1, Paragraph 2.5 (December, 1977).

[3] The economic report prepared for the Copyright Office in connection with its study on the creation of a performance right in sound recordings likewise suggests that the operations of ASCAP and BMI could be augmented, and notes that the "incremental costs" of doing so "should not be considerable." "Performance Rights in Sound Recordings," Committee Print No. 15 of Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 95th Cong., 2d Sess. at 108–109.

[4] This chance can be lessened somewhat—although not by much—by increasing the size of the sample substantially, at much greater cost.

[5] Any number of factors can be accounted for by the use of a weighting formula. ASCAP attempts to reflect differences in the economic value of performances by the use of a very refined weighting formula, which adjusts for the following variables, among others:

The use of the copyrighted sound recordings (*i.e.*, whether it is the featured performance, used as a theme for a show, as background, as a jingle, etc.);

The time of day that the performance is broadcast (*i.e.*, morning, evening, weekday, weekend, holiday, etc.);

The medium of the performance (*i.e.*, local radio station, network radio, local television, network television, etc.);

The length of the actual performance; and

The nature of the work (*i.e.*, entertainment, concert and symphonic, religious, etc.).

The end product of the Roper proposal is a computer printout listing all recordings played on the air throughout the year, and the percentage of the royalty pot to which each recording is entitled.

Using this data, a paymaster can allocate and distribute the royalty funds to recipients—50 percent to the singers and musicians, and 50 percent to the recording companies, as provided in H.R. 6063, and advocated by each of the organizations submitting this Statement.

The proposal envisions monitoring radio airplay, but not television or jukeboxes, discos, restaurants, etc. We believe that the public performances of recordings over the radio should reflect with reasonable accuracy the public performance of recordings generally.[6]

Roper estimates that it would cost around $500,000 a year to operate this program using the on-air monitoring approach. Using station logs, it would run around $300,000.

2. *Distribution Procedures.*—Royalty payments should be disbursed by a private firm with the computer capability to handle large-scale distribution of funds. Such a firm can be retained by the Copyright Royalty Tribunal to perform this managerial function in accordance with procedures approved by the Tribunal.

This firm would receive from the monitoring firm (such as Roper) the names of those recordings which are entitled to a portion of the total royalty pool. The firm would maintain a computerized data bank identifying the royalty recipients for each of the copyrighted sound recordings earning performance royalties. The names and addresses of those royalty recipients can readily be provided by the recording companies, since such information must be maintained by them in accordance with their agreements with AFM and AFTRA. (A sample of the forms required to be completed at the time of the recording session is attached.)

The United States Trust Company of New York City estimates that it can perform this function for $100,000 to $120,000 a year, exclusive of postal costs (which are difficult to calculate at this writing). This estimate has been calculated on the assumption that there will be around 40,000 royalty recipients.[7]

3. *Distribution Disputes.*—In the event of controversy over the equitable distribution of the performance royalties, we propose that the Copyright Royalty Tribunal adjudicate the issue.

The Tribunal has already been assigned this task in connection with controversies concerning the distribution of royalties from cable system operators (Section 111(d)(5)(B)) and jukebox operators (Section 116(c)(3)). Those provisions specify that, where such a controversy exists, the Tribunal shall, pursuant to Chapter 8 of the new copyright law, conduct a proceeding to determine the distribution of royalty fees. That chapter specifies that the Tribunal shall be subject to the provisions of the Administrative Procedure Act, and that final decisions of the Tribunal may be appealed to the U.S. Court of Appeals (17 U.S.C. §§ 803(a) and 810).

Section 114(c)(12) of the draft bill proposed by the Copyright office adopts this same approach with respect to distributions of royalty fees for the performance of copyrighted sound recordings. We endorse that proposal.

III. CONCLUSION

We hope and believe this proposal will demonstrate to the Subcommittee that the provisions of H.R. 6063 can be implemented promptly, fairly, and efficiently.

We hope the relative simplicity and modest cost of this proposal will alleviate the concerns expressed by several Members concerning potential administrative complexities. The fact that other organizations routinely perform similar functions today should minimize some of those concerns. Mr. Roper's ability to devise an independent system to measure airplay of recordings should provide further assurance of the feasibility of implementing a performance right in sound recordings.

Should Members of the Subcommitee, or its Staff, wish further information concerning this proposal, we will be happy to provide it. Mr. Roper is also available to respond to any questions or suggestions that may arise.

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[6] Neither ASCAP nor BMI monitor performances by jukeboxes, discos, restaurants, etc. They do, however, monitor television airplay, with good reason. Musical compositions are a fundamental element in TV programming, as ASCAP/BMI royalty revenues reflect. For measuring the use of sound recordings, however, we believe that television monitoring would be an unnecessary additional expense. It can, of course, be included in the sample should Congress or the Tribunal deem it necessary.

[7] We estimate that 27,000 musicians and 8–9,000 singers make recordings each year.

THE ROPER ORGANIZATION INC.

A RESEARCH PROPOSAL

Purpose

The purpose of this proposed research is to provide a reliable and continuing measure of the recordings played over radio stations (AM and FM). The results will be used as the basis for an equitable allocation of performance royalties to the performers and recording companies whose recorded works are being publicly performed.

Basic research method

For this purpose, we suggest that recordings played on radio may adequately reflect public performance generally—on television, in discos, night clubs, restaurants, and on juke boxes. The recordings heard on radio are undoubtedly a large portion of the total recordings heard in public performances. Moreover, the mix of recordings played on radio is probably not dissimilar to the mix of other public performances of recordings. While other areas can, of course, be monitored if the government thinks it necessary, there may be no need to take on this additional expense.

We propose that a *sample* of all the recordings played on air over the course of a year be developed. (To audit every recording played every hour of the day every day of the year on each of the AM and FM radio stations in the country is unnecessary in terms of accuracy and excessive in terms of cost.) The sample we propose, while a small fraction of the total recordings played in the course of a year, will be huge in opinion sampling terms and will have a miniscule sampling error. Specifically, we propose to monitor some 20,000 broadcast time segments over the course of a year. Depending on the data collection system used, this will represent some 50,000 recordings played during the course of a year (if on-air monitoring is the data collection method used), or some 300,000 recordings a year (if station logs are used). While 300,000 recordings clearly will provide somewhat greater reliability than 50,000, the sampling error resulting from either size of sample is so small as to be inconsequential.

It might be asked why 50,000 or 300,000? Why not more? The maximum likely error on a sample of 50,000 is plus or minus 0.61 percentage points. That is, if our proposed sampling method showed that 50.0 percent of total plays during the year were on recordings made by Company X, the actual plays of Company X's recordings would be not less than 49.39 percent of total plays and not more than 50.61 percent. If the sample were increased fivefold—to 300,000—the error range would be little reduced (49.75 percent to 50.25 percent).[1] At lower indicated percentages of total recordings played, the error would be even less—plus or minus 0.37 percentage points if the indicated percentage for a company or artist was 10.0 percent and the sample size were 50,000; plus or minus 0.12 points if the indicated percentage for a company or artist was 1.0 percent.

The 50,000–300,000 range seems optimum to us—large enough to insure that no significant injustice is done to a recording company or artist, yet economical enough to insure against a large proportion of the "royalty pot" being used to pay for measurement costs rather than royalty payments.

Universe to be sampled

It would be relatively simple to develop a sample of broadcast hours and then to determine what recordings are played during those broadcast hours: the transmitting hours by day of the week could be determined for every AM and FM station in the land, every nth hour could be selected, and the recordings played during those nth hours could be determined. This would give an accurate representation of what is *played*—but not of what is being *heard*. Such an approach would give equal weight to a given recording played over a five watt station in a remote rural county at 3:00 in the morning and the same recording played over a major AM station in a large metropolitan area in prime time.

In our judgment, the measurement to be obtained should not be merely what is played, but should take into account, at least in part, what is heard also. In other words, it should take into account audience. In most performer/audience situations the compensation to the performer is highly related to the size of the audience.

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[1] If 5,000,000 recordings were sampled a not much smaller error would *still* exist—49.96% to 50.04%. Thus, increasing the sample 10 times, and increasing the costs nearly 10 times, would increase the accuracy by just over one-half of a percentage point.

Thus, the universe to be sampled as we see it is not total broadcast hours, but rather those hours that the nation's population can listen to radio. This is the universe that we recommend be sampled.

While a sample of the radio hours the nation can listen to does not necessarily equate with the radio hours the nation does listen to, we will describe procedures subsequently which will convert the hours (and recordings) the nation can hear into the hours (and recordings) the nation does hear.

The sample

We propose to use our standard 100 point [3] national sample. This set of counties is representative of the nation's population and has produced a high degree of accuracy under all kinds of situations and measurement tasks.[3]

Since those sampling points represent the nation's population with a high degree of accuracy, what is broadcast by the radio stations that serve those sampling points is representative of the recordings that the population of the United States can hear. Were we conducting a national survey of the public's radio listening and if we decided to base that survey on 2,000 interviews, we would conduct 20 interviews in each of the 100 sampling points.[4] In fact, that would be one approach to determining what recordings the nation does hear—to interview a sample of people in those 100 sampling points and ask them what they hear. We do not propose this, however, because people cannot accurately recall all they have heard; and to ask them to keep diaries would be onerous, hence conducive to great error and informational gaps.

But, in theory, a national sample of people—listeners and potential listeners—is an appropriate base from which to determine what is heard.

We propose, however, to determine what is heard by sampling listening hours rather than listeners. Hence, in this national population example, we would have to change the sampling unit from 20 people per location to 20 potential listening segments per location.

Actually, we propose substantially more than 20 time segments per location. In fact, over the course of a year we are proposing in excess of 200 time segments per location. Of the less than 9,000 hours that exist in a year, we will sample over 200 hours in each sampling point. When all of the sampling points are combined, this will provide over 20,000 time segments, which will distribute uniformly through all 100 markets, over all 365 days of the year, through all 24 hours of the day. To be sure, there are some markets where there is no all night radio. Some of the 20,000 plus time segments selected will be at such times in such markets. But these time segments will be represented in the design and they will get their proper weight—namely "0".

So much for the representativeness of the hours. Once a given hour on a given day in a given location is selected as a sample hour, a single station will be selected at random from all of these stations in that market which are on-air in that time period. Over the course of the 200-plus time segments per market per year, all of the stations in any given market will be selected several times and in some markets possibly 30 or 40 times. It might seem that picking one station out of the, say, 20 that are on the air at a given time in New York and similarly picking one station in a rural area out of the, say, four or five that are on the air is overrepresenting the smaller market relative to the larger. But since the appropriate universe is potential listening hours, not broadcast hours, and since the limit that any individual can listen to the radio in any given market is 24 hours and the limit to the number of stations that any person can listen to at any one time is one, one station in each market in each selected hour represents equity as between large and small markets.[5]

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[3] A "point" is a county.

[3] It is, specifically, the set of sampling points that we used to predict President Carter's victory in 1976. It was also the basis for selecting the precincts which the Associated Press used for its "exit interview survey" on election day. We are told that the 2500 interviews conducted by the AP in the 100 sampling point precinct sample we designed for them came within one-tenth of one percent of President Carter's actual vote.

[4] It is unnecessary to vary the number of interviews in each sampling point to reflect the differing sizes of the communities, because the size of a community was taken into account in the original probability of selection of each of the 100 points. That is, a city of two million had ten times the chance of being selected then a city of 200,000 did. Thus, putting the same number of interviewers into each selected point represents the differing populations of the communities proportionately.

[5] To be sure the potential listener in a many station market has more *choices* than in a market with few stations, but he cannot listen to more than one at once. And over time all stations in the 100 sampling points will be represented.

Converting what can be heard to what is heard

Nevertheless, while there will be proper representation of stations as between one market and another with this suggested method, there will be an imbalance or inequity of representation among sizes and types of stations within a market. For example, in New York during a given time period, say 6 to 7 p.m., a small audience FM station would have the same likelihood of being selected to represent that time period as a major AM station like WABC, despite the sizable difference in the audiences of the two stations. Clearly a play over WABC is "worth more" than a play over a tiny FM station in New York. To correct for this inequity—to bring what can be heard more nearly into line with what is heard—we would recommend establishing a set of three or four or five or six station classifications which would give extra weight to a play over a large audience station, lesser weight to plays over small stations, and still less weight to plays over the smallest audience stations. Similar weights could be established to compensate for peak listening hours—prime time versus early dawn listening hours when most are asleep.[6]

These stations time of day, and length or recording weights—and any other weights that seem appropriate—would have to be established with reference to audience sizes and in a manner satisfactory to the recording artists, the record companies and the Congress.

Data collection

There are two basic methods by which it can be determined what recordings are played during the sample time segments. Broadcasters can keep logs of the recordings played on the days and in the hours during which a specific station's output is being sampled. Alternatively, on-air monitoring can be employed to determine what the selected stations are playing during the sampled time periods. Logs have the definite advantage that longer time periods could be "processed" with fewer research personnel, and hence that costs would be lower. They also have the advantage of eliminating the inability of a listener to a monitored period to identify a given recording. However, there are also disadvantages to the log. To obtain the information by log requires the cooperation of the broadcasting station in compiling the log to a uniform method of specificity and in legible fashion. That is, all broadcast stations included in the sampling operation would have to provide uniform data, on a common form, legibly enough so that it could be read. A second drawback to the log method is that people outside our organization would know which stations were being included in the measurement for which hours, and efforts might be made to insure that certain recordings got played more than normally in those sampled segments. The possibility of "rigging" could be eliminated by requiring stations to keep logs for a substantially greater number of time segments than are actually going to be used in the measurement operation, thus facing the would-be rigger with so many hours to rig that he cannot do it. (Under the monitoring approach, the station would not know whether it was going to be monitored, much less when. Hence no rigging would be possible.)

Under a monitoring approach, we would assign each of our interviewers in each of the 100 markets a certain number of time periods every other week (in 50 markets the even numbered weeks would be monitored; in the other 50 odd numbered weeks would be monitored). Each time period would be identified to the interviewer by the day of the week, time of the day (or night) and station call letters and kilocycles. Each interviewer would be furnished with an AM/FM radio, with a jack which would permit a tape recorder to tape off the line (rather than over the speaker). She would record the designated time segments on the cassettes and would identify each segment recorded by a segment serial number. On completion of recording the designated time segments for a week, she would return the cassette(s) to our offices.

We would have on staff two teams of recording experts—the kinds of people that high volume recording retailers have on their staffs. The job of these experts would be to listen to the types and identify each recording played by title of the recording, featured recording artist or group, and record company. Each team would consist of three experts. Where the experts could not identify a recording, it would be held aside for subsequent review at a later date.

[6] A weight also might be established for the length of the piece played. While this weight would *not* be designed to adjust for *audience size*, it would seem that a 20 minute recording should probably get more weight than a 3 minute recording.

In addition to the two full time panels of recording experts, we would maintain on a consultant basis additional recording experts of a more specialized nature—classical music experts, soul music experts, country and western experts, etc. These experts would be convened, perhaps once a month, to review those recordings that the on-going panels were unable to identify.

Once the recordings are identified, whether by log or by listening to tapes, the recordings so played will be entered into a computer by a serial number [7] which will identify the recording and the recording company. At the same time, appropriate weights for station size, time of day or night, length of play, etc. will also be entered. Since royalties are to be paid once a year, it will be necessary to summarize the data just once a year.

If the data is collected by log, we would recommend that all recordings played during each full hour period be entered into the computer and tabulated. If the data is collected by on-air monitoring, we would recommend that a randomly selected ten minute period of each sample hour be taped, identified and entered into the computer. Obviously, logs for a full hour represent six times as many potential recordings as taped segments of ten minutes each. However, the economics of the situation argue against recording and listening to a full hour of tape. Moreover, the gain in the accuracy of information that would be obtained from an hour's log versus a ten minute sample is small, as noted earlier. But since an hour's worth of data can be entered into the computer from logs with fewer man hours than ten minutes' worth of data can be entered from tapes, the marginal gain in accuracy is worth it since it results from less time and cost.

If monitored ten minute segments are used, no entry would be made for any recording played for less than one minute. Identification of less than one minute's worth of a recording could, in certain circumstances, be extremely difficult. Hence, the concluding seconds of a recording at the beginning of a ten minute segment or the opening seconds at the close of a ten minute segment would not be counted in the tabulation unless there were a minute or more of play.

Assembling the data

Part of the process of assembling the data has already been described—entering in the computer the number of the recording, including the designation of the recording company and the appropriate weights for station size, time of day or night, and length of play.

The output of the computer will consist of the weighted number of plays of every specific recording that was played in any of the time segments in any of the markets in any of the stations over the course of a year. The weighted total number of plays of all recordings will be added up in the computer—the total "credits" that the royalties collected are to compensate. In addition, the computer will print out the number of those total credits that are allocable to each recording played. Thus the total royalty pot, divided by the total number of credits (all recordings played in all time segments in all markets in the course of a year) will determine the value of a credit. The number of credits a given recording receives, times the value of a credit, will determine the total dollars value of the royalties for public performances of that recording.

A fiduciary company will handle the computing, check writing and mailing of individual monetary payments to recording artists and record companies. We will supply that company with a printout at year end that will show total recording plays (or total credits) for all recordings, number of plays for each record company (credits for each company), and number of credits for each recording (credits to be divided among the artists involved in the recording). This will enable the fiduciary company to compute the value of a credit once the value of the "royalty pot" for the year is known (total dollars divided by total credits or plays equals dollars per play). This in turn will enable the fiduciary company to make appropriate payments to each recording company and artists whose works have been played over the air.

Costs

It is our estimate that once the first three months of measurement is completed and the various technical problems and "bugs" have been worked out, such an on-going audit could be conducted at an annual rate of approximately $500,000 if the data collection method is on-air monitoring, and approximately $300,000 if the method involved is station logs. During the first year, however, because of the initial three month "shake down cruise," these annual costs would be in-

[7] Possibly the Uniform Product Code number.

creased by about 20 percent. These cost estimates provide for all measurement costs through delivery of the printout to the fiduciary company, but do not provide for the subsequent work of the fiduciary company.

Conclusion

Twenty thousand time segments per year spread uniformly over the 365 days of the year, the 24 hours of the day, and 100 sampling points throughout the country will form the basis for determining public performances of recordings. Since something on the order of 75 percent of these segments will be music segments and since something like two and a half recordings on average will be contained in a ten minute segment, a total of approximately 50,000 recordings played will form the basis of the measurement if on-air monitoring were used; approximately 300,000 recordings played will form the basis if station logs are used. Each of these numbers is far in excess of the number of "subjects" employed in a normal opinion research survey or poll. *

There are various other ways that a sample representing the extent to which recordings are heard over radio stations by the nation's population could be selected—with equal validity. We have suggested the particular method outlined here because of the existence of our 100 point national sample and our access to experienced, trained and reliable interviewers in those sampling points. This design would accomplish the desired result as effectively as any other we know and more efficiently than any other that our organization could implement—with a minimum of the "royalty pot" being diverted from royalty payments to measurement costs.

Burns W. Roper, Chairman of the Board of The Roper Organization Inc., One Park Avenue, New York, New York 10016, has been engaged in marketing and opinion research since 1946. He has directed marketing and opinion studies, legal evidence surveys, and public affairs and political polls for such diverse clients as American Broadcasting Co., The American Distilling Co., American Institute of Certified Public Accountants, the Associated Press, H&R Block, Columbia University, Commonwealth of Puerto Rico, Corporation for Public Broadcasting, Exxon Company, Girl Scouts of the U.S.A., Harvard University, Kaye Scholer Fierman Hays and Handler, McDonald's, Miller Brewing Co., Mobil Oil Co., Philip Morris Inc., Plainview-Old Bethpage School District, Television Information Office, and Xerox Corp., among others.

He and one of his partners developed and are responsible for the implementation of Roper Reports, a ten times a year public opinion research service subscribed to by approximately 50 leading business, governmental and other organizations. Roper Reports regularly explores public atttiudes on a whole host of political, social and economic issues on a trend measurement basis.

Mr. Roper has authored a number of articles, both for research and other journals and has made frequent appearances on both radio and television. In addition, he has served on a number of occasions as an expert witness in legal cases involving consumer research and public opinion.

He is a member of the Market Research Council (former President), the American Marketing Association, the American Association for Public Opinion Research (and a former member of its Executive Council), the National Council on Public Polls (Vice President). He is the Chairman of the Board of The Roper Public Opinion Research Center. (The Center is jointly hosted by University of Connecticut, Williams College and Yale University and is not a part of The Roper Organization. It is the largest archive in the world of original public opinion research data containing studies not only of The Roper Organization but of most other leading commercial, governmental and academic research organizations in this country and abroad.)

Mr. Roper is a member of the Board of Freedom House, a member of the Board of The Environmental Fund, a member of the National Council of The United Nations Association of The United States of America, a member of the Corporation for UNICEF, and a member of the National Institute of Social Sciences.

Mr. Roper, born February 26, 1925, in Creston, Iowa, attended Yale University and served as bomber pilot in the Eighth Air Force during World War II. He is married to Helen Lanagan Roper and is the father of four children—Bruce, David, Douglas and Candace.

* Typically 1,500 to 2,000.

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