SOUND RECORDINGS AND THE NEW COPYRIGHT ACT

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HISTORICAL BACKGROUND

The Copyright Law of 1909 was amended on October 15, 1971, to provide for the creation of a copyright in a sound recording.[1] Until this enactment, sound recordings were not considered to be among those categories of "writings" for which federal copyright protection had been provided and were not accepted for registration by the Copyright Office.[2]

The state of the federal copyright law regarding mechanical reproductions of recordings from the enactment of the 1909 Act until the 1971 sound recording amendment can be summarized as follows:

(1) The composer or publisher of the underlying musical composition was entitled to a copyright protecting the composition embodied in mechanical reproductions.[3]

(2) No copyright existed with respect to the mechanical reproductions themselves. Such reproductions included piano rolls, and prerecorded tapes. Only the compositions used in the records, piano rolls, or tapes were protected.[4]

(3) Once the owner of the composition copyright allowed another to mechanically reproduce the musical work, any other person could make a similar use of the composition upon the payment of a royalty of two cents to the composition copyright holder.[5]

(4) No criminal action would lie with respect to infringement

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1. 17 U.S.C. §§ 1(f), 5(n) (Supp. II, 1972), *amending* 17 U.S.C. §§ 1, 5 (1970) [hereinafter referred to as the 1909 Act].
2. 37 C.F.R. § 202.8(b) (1972).
3. 17 U.S.C. § 1(e) (1970).
4. *Id.*
5. *Id.*

of the composition copyright by unauthorized mechanical reproduction.[6]

The 1971 amendment marked the first recognition in American copyright law of sound recordings as copyrightable works but extended protection only against unauthorized duplication.[7] Sound recordings qualifying for such protection must have been "fixed" and first published with the statutory copyright notice on or after February 15, 1972.[8] The 1971 amendment also provided that infringers of copyrighted sound recordings were subject to the civil penalties of Title 17 dealing with infringements of copyright generally and, in the case of willful infringement for profit, to criminal prosecution.[9]

The amendment was tested and upheld in 1972 when an action was instituted in the District Court for the District of Columbia to enjoin the Attorney General and the Librarian of Congress from enforcing and implementing the provisions of the 1971 sound recording amendment. Plaintiff contended, *inter alia*, that sound recordings did not qualify as "writings" of an author which may be copyrighted under Article I, Section 8 of the Constitution. A special three-judge court unanimously held that:

> Technical advances, unknown and unanticipated in the time of our founding fathers, are the basis for the sound recording industry. The copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form.
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> [Activities of] sound recording firms . . . satisfy the requirements of authorship found in the copyright clause . . . .[10]

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6. 17 U.S.C. § 101(e) (1970). However, a civil action for injunction could be brought and the copyright owner could recover a royalty as provided in 17 U.S.C. § 1(e) (1970) in lieu of profits and damages. *Id.*

7. 17 U.S.C. § 1(f) (Supp. II, 1972), *amending* 17 U.S.C. § 1 (1970).

8. 17 U.S.C. §§ 1(f), 5(n) (Supp. II, 1972), *amending* 17 U.S.C. §§ 1, 5 (1970).

9. 17 U.S.C. § 101(e) (Supp. II, 1972), *amending* 17 U.S.C. § 101(e) (1970). Under this amendment, criminal penalties included a maximum fine of $1,000 and/or a maximum sentence of imprisonment for one year. In 1974, 17 U.S.C. § 104 (1970) was amended, and special provisions were added for willfully infringing copyrighted sound recordings. The penalties were much more stringent than they had been previously. For a first offense, the penalties were a maximum fine of $25,000 and/or a maximum one year imprisonment; for a second offense, the maximum fine rose to $50,000 and the maximum sentence was increased to two years imprisonment. 17 U.S.C. § 104(b) (Supp. V, 1975).

10. Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972). *See also* Goldstein

As a result of this decision, sound recordings are today afforded copyright protection which the New Act[11] continues and expands.

At the outset, it should be noted that specialized terms and phrases are used in connection with copyrighted sound recordings. A brief look at these terms should be had before any discussion of the New Act is undertaken.

Counterfeiting. This practice deals essentially with forging or duplicating the label, art work, album cover or packaging of a legitimate record manufacturer. Prior to 1962, counterfeiting was so widespread that Congress in that year enacted a law to provide criminal penalties for interstate trafficking in phonograph records bearing forged or counterfeit labels.[12] If the counterfeiter also duplicates the original recording without authority or license, a transfer of such recording would constitute either "copyright infringement" or "record piracy", depending on whether the original recording was fixed after or prior to February 15, 1972.[13]

Bootlegging. This practice is the unauthorized recording of a live performance. Such activity may violate state laws designed to protect the management of the theatre at which the performance is being held[14] and may also constitute an infringement of the underlying copyrighted musical work.

Piracy. This activity consists of the unauthorized duplication of a legitimate sound recording fixed prior to February 15, 1972.[15] Penal laws of twenty-seven states and the common law of all states

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v. California, 412 U.S. 546, 561 (1973); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 656 (2d Cir. 1955); United States v. Bodin, 375 F. Supp. 1265, 1268 (W.D. Okla. 1974).

11. Pub. L. No. 94-553, §§ 101 *et seq.* (Oct. 19, 1976) [hereinafter referred to as the New Act and cited as Pub. L. No. 94-553].

12. 18 U.S.C. § 2318 (1970). The penalties were a maximum fine of $1000 and/or a maximum one year imprisonment. In 1974, section 2318 was amended to provide the more stringent penalties of a maximum fine of $25,000 and/or a maximum one year imprisonment for first offenses; second offenders were subject to a maximum fine of $50,000 and/or a maximum two years imprisonment. 18 U.S.C. § 2318 (Supp. V, 1975).

13. If the original recording was fixed on or after February 15, 1972, and if a copyright had been secured on the recording, the unauthorized duplication would constitute an "infringement" of the exclusive right granted under the 1971 amendment. 17 U.S.C. § 1(f) (Supp. II, 1972), *amending* 17 U.S.C. § 1 (1970).

14. *See* N.Y. GEN. BUS. LAW § 399-a (McKinney Supp. 1976). "Management" is defined as the operator of the theatre or "with respect to a particular performance, the person hiring the theatre to present such performance." *Id.* § 399-a(1)(c).

15. The unauthorized duplication of a legitimate sound recording fixed on or after February 15, 1972, constitutes an "infringement." See note 13 *supra* and accompanying text. Thus, what was once a "piracy" is now considered an "infringement."

where courts have considered the question have proscribed the practice.[16]

THE NEW COPYRIGHT LAW

The New Act, which will become effective on January 1, 1978,[17] adds little to the substantive rights currently enjoyed by the sound recording industry against unauthorized duplication, and it does not disturb decisional law favorable to the industry. Before describing the scope of rights granted in sound recordings after January 1, 1978, some statutory definitions should be kept in mind.

Definitions

What is a sound recording? A sound recording is a work that results from the fixation of a series of musical or spoken sounds, such as music, drama and narrations. The definition does not include the sounds accompanying a motion picture or other visual work.[18] A sound recording qualifying for copyright protection as a published work under the New Act must be fixed and published with the statutory copyright notice.[19]

What is fixation? A sound recording is "fixed" when the total amount of sounds is produced on the final master recording. These sounds are to be later reproduced on a disc or tape or other form of phonorecord for distribution to the public.[20]

Phonorecords are the material objects (discs, tapes, etc.) from which the sounds are reproduced with the aid of a machine.[21]

Publication "is the distribution of phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending."[22]

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16. Meyers, *Sound Recording Copyright*, in 2 PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN COPYRIGHT LAW 133 (1975).

17. Pub. L. No. 94-553, Trans. & Supp. Prov., § 102.

18. *Id.* § 101. Section 101 contains the definitions of terms used in the New Act.

19. *Id.* § 402(a).

20. *Id.* § 101. To be "fixed" the sound must be transferred to a "tangible medium of expression" in such a way that it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

The concept of fixation under the Act is important because it erases the distinction previously made among various methods of fixation; it now makes no difference what form or medium of fixtion is used. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52 (1976) [hereinafter cited as HOUSE REPORT].

21. Pub. L. No. 94-553, § 101.

22. *Id.*

Exclusive Rights

The exclusive rights of the owner of a copyright in a sound recording provided for in the New Act are:

(1) To reproduce the copyrighted sound recording.[23] Under the New Act, reproduction of a copyrighted work in the home will constitute an infringing act. This was not so under the 1971 amendment, where such a reproduction did not constitute an infringement. Thus, the New Act appears to bring copyright protection for sound recordings into line with the protection afforded other copyrightable works. The exclusive right to reproduce the copyrighted sound recording

> is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works that recapture the actual sounds fixed in the recording.[24]

(2) To prepare derivative works based upon the copyrighted sound recording. The exclusive right to prepare derivative works based upon the copyrighted sound recording is limited to remixing, or otherwise altering in sequence, the actual sounds fixed in the sound recording.[25]

(3) To "publish" or distribute the phonorecord to the public by any method which the copyright owner deems desirable.[26]

The exclusive right to reproduce and distribute a copyrighted sound recording provided for in section 114 of the New Act does *not* extend to the following:

(1) *Performance Right*. The New Act does not create a performance right in sound recordings.[27] However, the Act expressly requires the Register of Copyrights to submit a report to the Congress on January 3, 1978, setting forth recommendations as to whether the New Act should be amended to provide for a performance right in a sound recording. The Register is to consult with all affected industry constituencies and "to describe the status of [performance rights] in foreign countries [and] the views of major interested parties, and [to present] specific legislative or other recommendations, if any."[28]

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23. *Id.* § 106(1).
24. *Id.* § 114(b).
25. *Id.*
26. *Id.* § 106(3).
27. *Id.* § 114(a).
28. *Id.* § 114(d).

(2) *Independent Fixations.* The exclusive right to reproduce and distribute a copyrighted sound recording does not extend to the making 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.[29]

(3) *Public Television and Radio.* The exclusive right does not extend to sound recordings included in educational television and radio programs distributed or transmitted by or through public broadcasting entities, provided that phonorecords of such programs are not commercially distributed by or through public broadcasting entities to the general public.[30]

(4) *Ephemeral Recordings.* A transmitting organization entitled to transmit to the public may make no more than one phonorecord of a particular transmission program embodying a copyrighted sound recording if: (a) the "phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it;" (b) "the phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security;" and, (c) "unless preserved exclusively for archival purposes, the phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public."[31]

A governmental body or other nonprofit transmitting organization may make no more than thirty phonorecords of a particular transmission program embodying the copyrighted sound recording, if: (a) no further phonorecords are reproduced; and (b) the phonorecords are destroyed within seven years from the date of the first transmission program. One phonorecord may be preserved exclusively for archival purposes.[32]

A governmental body or other nonprofit organization is "qualified" to make for distribution no more than one phonorecord for a public transmitting organization provided that (a) they make no charge, direct or indirect, for the distribution of such phono-

29. *Id.* § 114(b). This section makes clear that statutory protection for sound recordings does not extend to a separate recording of or other performance in which those sounds are imitated, even if the second performer deliberately set out to simulate the sounds on the original recording. HOUSE REPORT at 106.

30. Pub. L. No. 94-553, § 114(b).

31. *Id.* § 112(a)(1), (2), (3).

32. *Id.* § 112(b)(1), (2).

records;[33] (b) the phonorecord is not used by a qualified transmitting organization for more than one performance (under the license created by this exception);[34] (c) all phonorecords be destroyed within one year of this particular transmission, with the exception of one which may be retained for archival purposes.[35]

The transmission program embodied in such ephemeral phonorecords is not subject to protection as a derivative work except with the express consent of the owner of the copyright in the preexisting works.[36]

(5) *Fair Use*. A copyrighted sound recording may be reproduced for use as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.[37] To determine whether the use made of the phonorecord is a fair use, among the factors to be considered are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[38]

(6) *Libraries and Archives*. A library or archive may reproduce no more than one phonorecord of a copyrighted sound recording or may distribute such phonorecord under the following conditions: that the reproduction or distribution be made with no purpose of direct or indirect commercial advantage; that the collections of the library or archive be open to the public or be available to researchers; and that the reproduction or distribution of the phonorecord include a notice of copyright.[39]

The New Act will permit reproduction and distribution by libraries and archives where a phonorecord of the copyrighted work cannot be obtained at a fair price or has been damaged or lost.[40]

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33. *Id.* § 112(c)(1).
34. *Id.* § 112(c)(2).
35. *Id.* § 112(c)(3).
36. *Id.* § 112(e).
37. *Id.* § 107.
38. *Id. See generally*, Freid, *Fair Use and the New Act*, 22 N.Y.L.S.L. REV. 497 (1977) (Copyright Symposium—Part II).
39. *Id.* § 108(a).
40. *Id.* § 108(c).

The library or archive, however, cannot engage in systematic reproductions or distribution[41] and must prominently display a warning of copyright in accordance with the requirements which the Register of Copyrights shall prescribe by regulation.[42]

Paralleling the requirement of a report dealing with a performance right in sound recordings,[43] the Register of Copyrights is required to submit to the Congress five years from January 1, 1978, and at five-year intervals thereafter, a report setting forth the extent to which the permissible reproduction by libraries and archives has "achieved the intended statutory balancing of the rights of creators, and the needs of users."[44]

(7) *Limitation on Exclusive Right of Sale.* The owner of a particular phonorecord lawfully made is "entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that phonorecord."[45] This privilege does not extend "to any person who has acquired possession of the . . . phonorecord from the copyright owner by rental, lease, loan, or otherwise, without acquiring ownership of it."[46]

Requirements for Copyright Protection

One seeking complete protection of a phonorecord under the New Act must comply with three requirements:

(1) *Produce phonorecords containing the copyright notice.*[47] This means the applicant must reproduce the sound recording in phonorecords (*i.e.*, records or tapes), taking care to see that all copies bear notice of copyright in the required form and position. The copyright notice consists of the symbol "℗", the year date of first publication of the sound recording and the name of the copyright owner of the sound recording. (For example, ℗ 1978 Roe Records, Inc.) The notice of copyright must be placed on the phonorecord's surface, label, or container, so as to give reasonable notice of the claim of copyright.[48]

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41. *Id.* § 108(g)(2).
42. *Id.* § 108(e)(2).
43. See note 28 *supra* and accompanying text.
44. Pub. L. No. 94-553, § 108(i). For a criticism of this provision, *see* Grossman, *Cycles in Copyright*, 22 N.Y.L.S.L. REV. 653 (1977) (Copyright Symposium—Part II).
45. Pub. L. No. 94-553, § 109(a).
46. *Id.* § 109(c).
47. *Id.* § 402(a).
48. *Id.* § 402(c).

(2) *Publish the sound recording with copyright notice.* As previously noted, publication means the sale, placing on sale, or public distribution of copies of the sound recording. Consequently, a limited release of promotional copies (for example, copies to disc jockeys) should not constitute publication in the copyright sense.

It should be noted that unpublished sound recordings are subject to protection under the New Act and the rights inherent in such recordings are governed exclusively by the New Act.[49] The owner of the unpublished work may obtain registration of the copyright claim by depositing one complete phonorecord of the unpublished work and by filing the appropriate registration form and fee.[50]

(3) *Register the claim to copyright.* After publication, the appropriate Copyright Office form, together with the required fee and two reproductions of the sound recording must be sent to the Register of Copyrights.[51] Failure to register does not result in the loss of the copyright but registration is a condition precedent to the institution of an infringement action.[52] Subject to certain exceptions, the remedies of statutory damages and attorney's fees will not be available for infringements occurring before registration.[53]

If copies of the sound recording are published without the required notice, or with a defective notice, the right to secure statutory copyright for that sound recording is not lost, provided that at least one of three conditions has been met: (a) the notice has been omitted from a relatively small number of phonorecords distributed to the public; (b) registration of the sound recording has been made before or is made within five years after the publication without notice and a reasonable effort is made to add the notice to all phonorecords that are distributed to the public after the omission has been discovered; or (c) the notice has been omitted in violation of an express written agreement.[54]

If a person can prove that he was misled by the omission of the notice and thereby innocently infringed the copyright, he will incur no civil liability for any infringing acts committed before he

49. This is different from the situation under the 1909 Act, which provided no protection for unpublished works of any kind. These works were protected, if at all, by state law.

50. Pub. L. No. 94-553, §408(a),(b)(1).

51. *Id.* § 409; *see also id.* § 407.

52. *Id.* § 411(a).

53. *Id.* § 412.

54. *Id.* §405(a).

received actual notice of registration of the work.[55] However, the court will have discretion in allowing or disallowing recovery of any part of the profits attributable to the infringement, and may enjoin further infringements or require the infringer to pay the copyright owner a reasonable license fee in an amount fixed by the court.[56]

Duration

In a work made for hire (defined as work prepared by an employee in the scope of his employment),[57] the copyright for a sound recording fixed after January 1, 1978, "endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first."[58] The law does not fix the authorship, or the resulting ownership, of sound recordings made for hire, but leaves those matters to individual bargaining between record producers and performers. In all other instances, the term of copyright endures for the life of a natural record producer (as distinguished from a corporate record producer) and for fifty years thereafter.[59]

In the case of subsisting sound recording copyrights in their first term on January 1, 1978, the copyright will endure for twenty-eight years from the date it was originally secured and may thereafter be renewed for a further term of forty-seven years.[60]

With respect to sound recordings fixed before February 15, 1972, rights or remedies under the common law or statutes of any state shall not be annulled or limited by the New Act until February 15, 2047. Thereafter, such laws shall be preempted by the New Act.[61]

Foreign Sound Recordings

Foreign sound recordings are entitled to protection in the United States if the owner of the original sound recording is a na-

55. *Id.*

56. *Id.* § 405(b). This section, limiting remedies available to the copyright owner against the innocent infringer, is applicable regardless of the number of copies from which notice is omitted. HOUSE REPORT at 148.

57. Pub. L. No. 94-553, § 101.

58. *Id.* § 302(c). The federal copyright term of 100 years from creation does not begin to run until the work is actually fixed in a copy or phonorecord, but a work in unfixed form is protected by common law. HOUSE REPORT at 136.

59. *Id.* § 302(a).

60. *Id.* § 304(a). Section 304(a) is subject to three provisos dealing with the duration of posthumous cyclopedic or composite works and providing for the termination of copyright if the renewal application is in default.

61. *Id.* § 301(c).

tional of one of the countries whose nationals have been designated by a Presidential proclamation to receive such protection.[62] Thus far, 37 countries have been so designated. The notable exception is Japan. The national laws of these 37 countries provide for reciprocal protection of United States recordings.[63] In addition, it is the intention of the New Act to protect foreign copyright proprietors against laws and decrees in their countries purporting to divest them of their rights under the United States copyright law. Thus, despite any such involuntary transfer, they would be able to continue to exercise their rights under the United States copyright law.[64]

Infringing Imports

An ancillary aspect of the treatment of foreign sound recordings under the New Act is the treatment of infringing imports. Two separate situations are covered by the New Act. One is the importation of phonorecords made without the authority of the copyright owner. The other is the unauthorized importation of phonorecords that were lawfully made abroad. Both importations constitute infringing acts. The United States Customs Service is now authorized to prohibit the importation of phonorecords unlawfully produced abroad.[65] Where the phonorecords were lawfully made abroad, the following situations are excepted from the category of unauthorized importation: importation under the authority or for the use of a Federal, state, or local governmental body;[66] importation of no more than one phonorecord for the private use of the importer or traveler;[67] and importation of not more than five phonorecords by nonprofit organizations operated for scholarly, educational or religious purposes, provided such importation is not part of an activity consisting of systematic reproduction and distribution.[68]

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62. *Id.* § 104(b)(1). Also protected by the Act are foreign sound recordings if the author is a stateless person, a citizen or a "domiciliary of a foreign nation that is a party to a copyright treaty to which the United States is also a party." *Id.* If the foreign nation in which the work is first published is a party to the Universal Copyright Convention, the work will enjoy United States copyright protection. *Id.* § 104(b)(2).

63. Meyers, *Sound Recording Copyright* in 2 PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN COPYRIGHT LAW 117 (1975).

64. *Id.* § 201(e).

65. *Id.* § 602(b).

66. *Id.* § 602(a)(1).

67. *Id.* § 602(a)(2). This personal use exception is limited to phonorecords that are carried in the travelers' personal baggage.

68. Pub. L. No. 94-553, § 602(a)(3).

The Statutory License

Beginning on January 1, 1978, the mechanical royalty for each work embodied in a phonorecord will be 2-3/4 cents or 1/2 cent per minute of playing time or fraction thereof, whichever amount is larger. The mechanical royalty will be payable for every phonorecord "made and distributed."[69] The 1909 Act differs in that it computes royalties based "on each such part manufactured."[70] The New Act merely codifies the working arrangement in negotiated licenses today and reflects the belief that it is inequitable to require a compulsory licensee to pay fees on records from which he gains no economic benefit.[71] A phonorecord is considered "distributed" if "the person exercising the compulsory license has voluntarily and permanently parted with its possession." No royalties are mandated on phonorecords which are returned for credit or exchange.[72]

Royalty payments under the statutory license are to be made on a monthly basis. Statements accompanying the monthly payments are to be made under oath, and cumulative annual statements are to be certified by a certified public accountant. The Register of Copyrights is given the authority to develop regulations regarding the form and content of the monthly and annual statements, the manner of certifying the number of records made, and the certification of the number of records distributed.[73]

> A person may obtain a [statutory] license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use. A person may not obtain a [statutory] license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the

69. *Id.* § 115(c)(2).
70. 17 U.S.C. § 1(e) (1970).
71. HOUSE REPORT at 110.
72. Pub. L. No. 94-553, § 115(c)(2).
73. *Id.* § 115(c)(3).

copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.[74]

Copyright Royalty Tribunal

The New Act creates a Copyright Royalty Tribunal,[75] a permanent, five-member body whose members are appointed by the President and confirmed by the Senate.[76] The Tribunal will be subject to the provisions of the Administrative Procedure Act.[77] It will review the reasonableness of the mechanical royalty rate in 1980, in 1987, and every ten years thereafter.[78]

In setting rates, the Commission is to attempt to achieve certain statutory objectives.[79] Final decisions of the Tribunal are appealable to the United States Court of Appeals on the basis of the record before the Tribunal.[80]

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74. *Id.* § 115(a)(1). In essence section 1(e) of the 1909 Act provides that whenever the owner of a musical copyright has used or permitted the use of the copyrighted work to be recorded, "any other person may make similar use of the copyright work" upon the payment of the statutory royalty. For several years, a controversy existed over whether the musical composition copyright owner could enjoin a "pirate" who made an unauthorized reproduction of a record or tape. The "pirate" contended that since he was making a "similar use" of the musical composition, he could not be enjoined as an infringer of the musical composition. In other words, the unauthorized duplicator contended that the compulsory license provisions of the Copyright Law were available to a duplicator of sound recordings fixed prior to February 15, 1972, provided only that the duplicator made the statutory royalty payment to the owner of the musical composition copyright.

This contention has been rejected by the Third, Fifth, Ninth and Tenth Circuits which have held that tape "pirates" cannot avail themselves of the compulsory licensing provisions of 17 U.S.C. § 1(e) (1970), as piracy or duplication does not constitute a "similar use" of the composition. Consequently their activities constitute infringement of the composition copyright even where the statutory two-cent fee is tendered. *See* Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975), *cert. denied*, 423 U.S. 841 (1975); Jondora Music Publishing Co. v. Melody Recordings, Inc., 506 F.2d 392 (3d Cir. 1974), *cert. denied*, 421 U.S. 1012 (1975); Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972), *cert. denied sub nom.* Rosner v. Duchess Music Corp., 409 U.S. 847 (1972).

75. Pub. L. No. 94-553, § 801(a) [hereinafter referred to as the Tribunal].

76. *Id.* § 802(a).

77. *Id.* § 803(a).

78. *Id.* § 804(a).

79. *Id.* § 801(b)(2). The rates are to be adjusted to take into account inflation or deflation.

80. *Id.* § 810.

Statutory Damages for Infringement

A copyright infringer is liable for either statutory damages or the copyright owner's actual damages and any additional profits attributable to the infringement that are not taken into account in computing the owner's actual damages.[81] The statutory damages range from not less than two hundred-fifty dollars to not more than ten thousand dollars for each infringement. In a case where the court finds that the infringement was committed willfully, it has the discretion to increase the award of statutory damages to not more than fifty thousand dollars.[82] Additionally, the court may allow recovery of costs and the award of a reasonable attorney's fee.[83] In a criminal proceeding, the court may order the impoundment and destruction of all phonorecords found to have been made or used in violation of the copyright owner's exclusive rights and of all plates, molds, matrices, masters, tapes, or other articles by means of which the infringing phonorecords may be reproduced.[84] If the infringer is convicted in a criminal proceeding, destruction of the infringing equipment is mandatory.[85]

Criminal Penalties

In addition to the civil remedies enumerated above, the New Act specifies criminal penalties for copyright infringement: (a) for a first offense, a fine of up to twenty-five thousand dollars, or imprisonment for up to one year, or both; and (b) for a subsequent offense, a fine of up to fifty thousand dollars or imprisonment for up to two years, or both.[86] All unauthorized duplications of sound recordings are appropriate subjects of criminal prosecution, regardless of the date of the duplication, if the underlying musical composition is copyrighted. Those duplications pertaining to sound recordings first fixed and published on or after February 15, 1972, are subject to prosecution under the 1971 sound recording amendment[87] and the New Act; those pertaining to sound recordings fixed prior to that date are subject to prosecution under the

81. *Id.* § 504(a).
82. *Id.* § 504(c).
83. *Id.* § 505.
84. *Id.* § 503.
85. *Id.* § 506(b).
86. *Id.* § 506(a).
87. 17 U.S.C. §§ 1(f), 5(n) (Supp. II, 1972), *amending* 17 U.S.C. §§ 1, 5 (1970).

1971 amendment for infringement of the underlying musical composition copyright.[88]

These statutory penalties have been applied by the courts to myriad fact situations. In fact, prior to the enactment of the sound recording amendment, the proprietors of copyright on musical compositions had been uniformly successful in enjoining retail outlets and recording studios from participating in the duplication or sale of a sound recording embodying an unlicensed copyrighted musical composition. This was evidenced by cases holding that a retailer of records containing an infringing musical composition was an infringer and thus liable for damages.[89] In addition, officers and directors of a corporation had been held liable individually if they personally participated in the acts constituting the infringement.[90]

Following the enactment of the sound recording amendment, numerous courts, in unreported cases following the rationale of these decisions, have held a variety of practices to constitute infringement of the copyright in the sound recording. Illustrative are those reported cases involving the so-called "make-a-tape" machine installed in retail outlets where consumers purchase blank tape, select a prerecorded tape from the store's inventory and for a small fee use a machine which duplicates the prerecorded tape. The courts have held that regardless of the precise role played by the retailer in the operation of the machine, this process clearly evidences his commercial exploitation in derogation of the sound recording copyright owner's right of exclusive reproduction.[91]

Transition Period to January 1, 1978

Following the enactment of the New Act, the Copyright Office announced that it would prepare regulations in accordance with the

88. 17 U.S.C. § 101(e) (Supp. II, 1972), *amending* 17 U.S.C. § 101(e) (1970).

89. Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957). In F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952), the defendant retailer was liable for selling copies made by another not a party to the action. A store owner is also liable for the sale of infringing musical recordings in its store by a music department concessionaire. In Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963), the store owner was the beneficiary of the exploitation by receiving a percentage of the profits.

90. H.M. Kolbe Co. v. Shaff, 240 F. Supp. 588 (S.D.N.Y.), *aff'd* 352 F.2d 285 (2d Cir. 1965). *See also* Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., 453 F.2d 552 (2d Cir. 1972); Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263 (2d Cir. 1959).

91. Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821, 823 (E.D.N.Y. 1973).

New Act and would also revise its application forms, instructions and other printed matter to meet the requirements of the New Act.

CONCLUSION

The New Act firmly establishes copyright protection in sound recordings. Although this had been provided by the sound recording amendment of 1971, that provision was a mere appendage to the 1909 Act. The New Act integrates the sound recording provisions, provides a greater degree of protection than existed previously and does not disturb decisional law favorable to the protection of sound recordings. As a result, an artist's creative work as embodied in a sound recording is now more secure than ever before.