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EXTENDING LIMITED COPYRIGHT IN SOUND RECORDINGS

GOVERNMENT DOCUMENTS

Storage DEC 9 1974

KANSAS STATE UNIVERSITY

HEARING

BEFORE THE

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

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 13364

TO AMEND TITLE 17 OF THE UNITED STATES CODE TO REMOVE THE EXPIRATION DATE PROVIDED IN PUBLIC LAW 92-140 WHICH AUTHORIZED THE CREATION OF A LIMITED COPYRIGHT IN SOUND RECORDINGS FOR THE PURPOSE OF PROTECTING AGAINST UNAUTHORIZED DUPLICATION AND PIRACY OF SOUND RECORDINGS; TO INCREASE THE CRIMINAL PENALTIES FOR PIRACY AND COUNTERFEITING OF SOUND RECORDINGS; AND FOR OTHER PURPOSES

JUNE 3, 1974

Serial No. 40



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WASHINGTON : 1974

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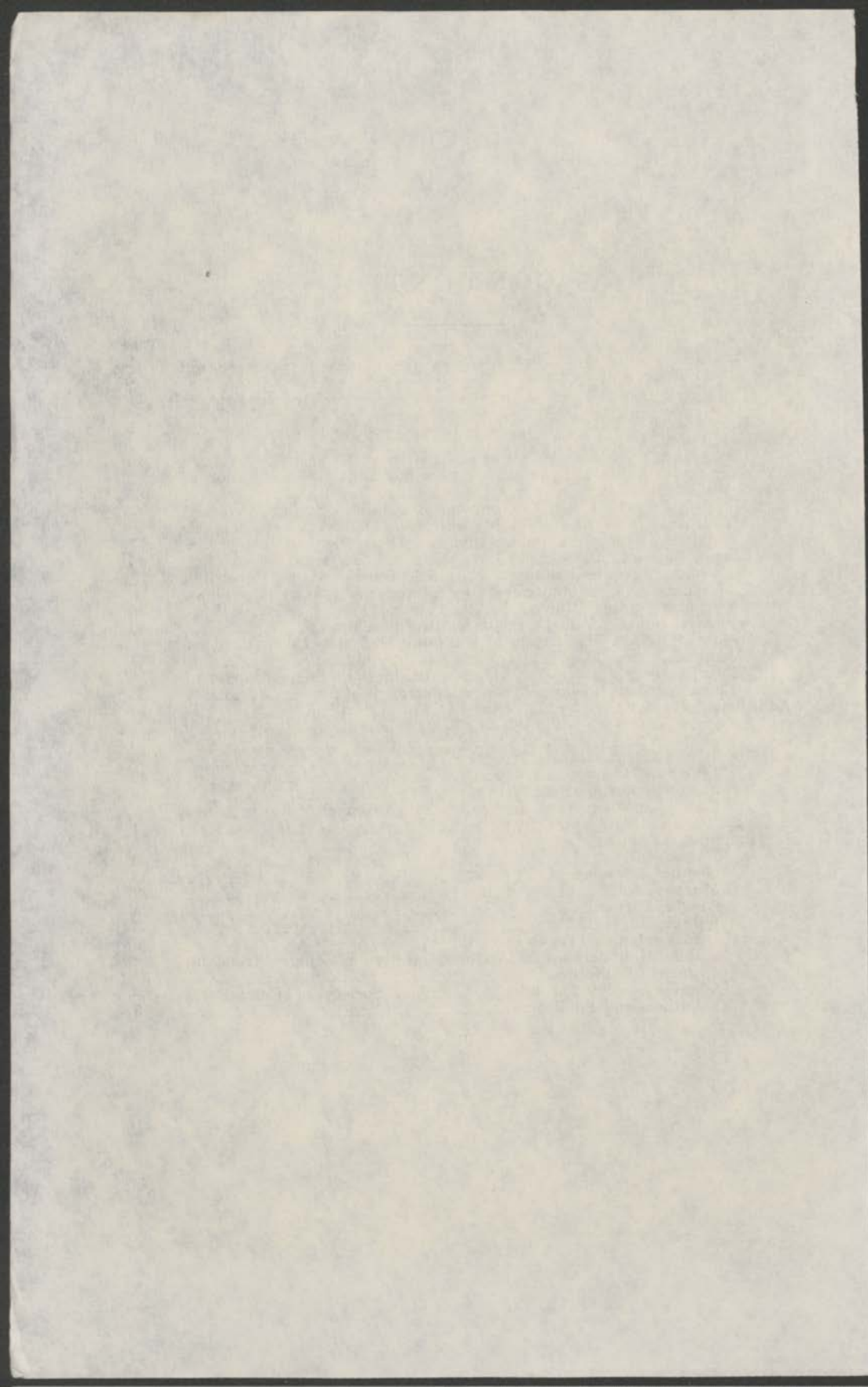
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BRUCE A. LEHMAN, *Counsel*

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EXTENDING LIMITED COPYRIGHT IN SOUND RECORDINGS

MONDAY, JUNE 3, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE OF THE
COMMITTEE OF THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., pursuant to notice, in room 2226, Rayburn House Office Building, the Honorable Robert M. Kastenmeier (chairman) presiding.

Present: Representatives Kastenmeier, Drinan, Owens, Mezvinsky, and Smith.

Also present: Herbert Fuchs, counsel and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order.

The subcommittee has met this morning to take evidence and hear testimony on my bill, H.R. 13364, to amend title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings and to increase the criminal penalties of piracy and counterfeiting of sound recordings and for other purposes. There are a number of identical or similar measures. Without objection these will be placed in the record at this point as follows: H.R. 13364, introduced by the Chair; H.R. 13857 and H.R. 13765, introduced by our subcommittee colleagues, Mr. Railsback and Mr. Danielson respectively; H.R. 13681, introduced by our full committee colleague, Mr. Waldie; and H.R. 14423, introduced by Mr. Fulton and cosponsored by others.

[H.R. 13364, 13857, 13765, 13681 and 14423 follow:]

93RD CONGRESS
2^D SESSION

H. R. 13364

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1974

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of sound recordings; and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 3 of Public Law 92-140, which amended
4 title 17 of the United States Code, is amended by striking
5 the words "and before January 1, 1975" from the second
6 sentence of section 3 of such law so that such sentence will
7 read in part as follows:

I

1 “SEC. 3. * * * The provisions of title 17, United States
2 Code, as amended by section 1 of this Act, shall apply only
3 to sound recordings fixed, published, and copyrighted on and
4 after the effective date of this Act, and nothing in title 17,
5 United States Code, as amended by section 1 of this Act,
6 shall be applied retroactively or be construed as affecting
7 in any way any rights with respect to sound recordings fixed
8 before the effective date of this Act.”.

9 SEC. 2. Section 104 of title 17 of the United States Code
10 is amended by adding the following provision: “*Provided,*
11 That any person who willfully and for profit shall infringe
12 any copyright provided by subsection 1 (f) of title 17 of the
13 United States Code as amended, or who should knowingly
14 and willfully aid or abet such infringement, shall be fined
15 not more than \$25,000 or imprisoned for not more than
16 three years, or both, for the first offense and shall be fined
17 not more than \$50,000 or imprisoned not more than seven
18 years, or both, for any subsequent offense.”.

19 SEC. 3. The provisions of section 2318 of title 18 of the
20 United States Code is amended to read as follows:

21 “§ 2318. Transportation, sale, or receipt of phonograph
22 records bearing forged or counterfeit labels

23 “Whoever knowingly and with fraudulent intent, trans-
24 ports, causes to be transported, receives, sells, or offers for
25 sale in interstate or foreign commerce any phonograph

1 record, disk, wire, tape, film, or other article on which
 2 sounds are recorded, to which or upon which is stamped,
 3 pasted, or affixed any forged or counterfeited label, know-
 4 ing the label to have been falsely made, forged, or counter-
 5 feited shall be fined not more than \$25,000 or imprisoned
 6 for not more than three years, or both, for the first such
 7 offense and shall be fined not more than \$50,000 or impris-
 8 oned not more than seven years, or both, for any subse-
 9 quent offense.”.

[H.R. 13857, 93d Cong., second sess.]

A BILL to amend title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of 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 3 of Public Law 92-140, which amended title 17 of the United States Code, is amended by striking the words “and before January 1, 1975” from the second sentence of section 3 of such law so that such sentence will read in part as follows:

“SEC. 3. * * * The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.”.

SEC. 2. Section 104 of title 17 of the United States Code is amended by adding the following provision: “*Provided*, That any person who willfully and for profit shall infringe any copyright provided by subsection 1(f) of title 17 of the United States Code as amended, or who should knowingly and willfully aid or abet such infringement, shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense.”.

SEC. 3. The provisions of section 2318 of title 18 of the United States Code is amended to read as follows:

“§ 2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels

“Whoever knowingly and with fraudulent intent transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense.”.

[H.R. 13765, 93d Cong., second sess.]

A BILL to extend the Act of October 15, 1971, providing for the creation of a limited copyright in 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 3 of the Act of October 15, 1971 (85 Stat. 392; Public Law 92-140) is amended by striking the words "and before January 1, 1975".

SEC. 2. Strike the period at the end of section 104, title 17 of the United States Code, and insert in lieu thereof the following: " : *Provided further*, That any person who willfully and for profit shall infringe any copyright provided by subsection 1(f) of title 17 of the United States Code, or who knowingly and willfully aids or abets such infringement, shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

SEC. 3. Section 2318, title 18 of the United States Code, is amended by striking "\$1,000 or imprisoned not more than one year, or both." and inserting in lieu thereof "\$25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

[H.R. 13681, 93d Cong., second sess.]

A BILL to amend title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of 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 3 of Public Law 92-140, which amended title 17 of the United States Code, is amended by striking the words "and before January 1, 1975" from the second sentence of section 3 of such law so that such sentence will read in part as follows:

"SEC. 3. * * * The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

SEC. 2. Section 104 of title 17 of the United States Code is amended by adding the following provision: "*Provided*, That any person who willfully and for profit shall infringe any copyright provided by subsection 1(f) of title 17 of the United States Code as amended, or who should knowingly and willfully aid or abet such infringement, shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

SEC. 3. The provisions of section 2318 of title 18 of the United States Code is amended to read as follows:

"§ 2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels

"Whoever knowingly and with fraudulent intent, transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

[H.R. 14423, 93d Cong., second sess.]

A BILL to amend title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in

sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of 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 3 of Public Law 92-140, which amended title 17 of the United States Code, is amended by striking the words "and before January 1, 1975" from the second sentence of section 3 of such law so that such sentence will read in part as follows:

"Sec. 3. * * * The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

Sec. 2. Section 104 of title 17 of the United States Code is amended by adding the following provision: "*Provided*, That any person who willfully and for profit shall infringe any copyright provided by subsection 1(f) of title 17 of the United States Code as amended, or who should knowingly and willfully aid or abet such infringement, shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

Sec. 3. The provisions of section 2318 of title 18 of the United States Code is amended to read as follows:

"§ 2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels

"Whoever knowingly and with fraudulent intent, transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited shall be fined not more than \$25,000 or imprisoned for not more than three years, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned not more than seven years, or both, for any subsequent offense."

Mr. KASTENMEIER. The purpose of the legislation is to eliminate the January 1, 1975 termination date from Public Law 92-140. That public law amended title 17 of the United States Code by extending copyright protection to sound recordings in order to prohibit their unauthorized duplication and piracy, by sale or by other distribution.

The protection accorded sound recordings was limited to recordings fixed, published, and copyrighted on or after February 15, 1972 and before January 1, 1975. Willful infringements for profit were made punishable by a fine of not less than \$100 or more than \$1,000 or by imprisonment of up to 1 year or both.

In addition to eliminating the termination date on the sale of sound recordings, the bill makes sharp increases in the penalties for infringing sound recordings willfully and for profit, and for knowingly and fraudulently transporting records carrying counterfeit labels. Whether the amount of these increases and penalties is justified and, if not, what changes should be made, will be considered at this hearing.

For our first witness this morning, we are pleased to greet the Honorable John L. Murphy, Chief of the Government Regulations Section at the Justice Department, whose statement is expected to deal, among other things, with the penalties provided by the bill. Mr. Murphy, you are welcome before this committee and you may proceed. Perhaps you would first like to identify your colleague.

TESTIMONY OF JOHN L. MURPHY, CHIEF, GOVERNMENT REGULATIONS SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROBERT P. WEIDNER, ATTORNEY, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. MURPHY. Good morning, Mr. Chairman. I am accompanied by Mr. Robert P. Weidner, an attorney on my staff who regularly engages in the supervision of copyright prosecutions.

I appreciate this opportunity to appear before your subcommittee to express the support of the Department of Justice for H.R. 13364 which would remove the expiration date provided in Public Law 92-140 which created copyright protection in sound recordings and to increase the criminal penalties for sound recording piracy and counterfeiting.

Since Public Law 92-140 became effective on February 15, 1972, the Government Regulations Section of the Criminal Division has been charged with responsibility for its enforcement. Immediately upon enactment of Public Law 92-140, we conferred with industry representatives to gain the intelligence information that had been developed relating to unauthorized duplication or piracy of sound recordings, and to acquire an intimate knowledge of the methods and techniques employed by the pirates. We established close liaison with the Federal Bureau of Investigation, which, of course, was charged with the investigation of these offenses. All of these efforts were designed to open channels of communication and to enhance the effectiveness of our enforcement efforts.

We developed a manual for the use of investigators and prosecutors which included a ready reference printout of currently popular recordings and their related copyright numbers for use in determining whether recordings offered for sale by pirates are protected by Federal copyright, and I might say that this supplement has been kept up to date from time to time to enable the agents of the FBI and other persons interested to determine whether pirate tapes are offered for sale by retail outlets.

Our first acquaintance with sound recording copyright violations was, to say the least, both astonishing and dismaying. The dimensions of the problem were obviously enormous. The ease of entry—minimal capital and little expertise is required—combined with the startling profit-to-cost ratio (it is estimated that the cost to a pirate of a tape album legitimately retailing for \$6 is probably not much in excess of \$0.50) provide an attraction for the marginally intellectual and skilled entrepreneur that is, to many novices, all but irresistible. The effects of piracy are debilitating; the pirate brings no creativity to his entry into this art form; indeed, he feeds as a parasite upon the creativity, the productivity, and the enterprise of others. He is anticompetitive for, to a substantial degree, he suppresses the creativity and initiative of both artists and producers as he feeds like a vulture upon their creations. He is really a thief of major stature, not unlike the gun wielding stickup man, the bomb carrying hijacker, and the pen wielding embezzler.

Yet, under present law, he is not dealt with in the same manner as those perhaps more forthright criminals since the penalty he faces is on the same order as that imposed for petty larceny. This mild sanction necessarily creates a psychological attitude on the part of prosecutors

and courts that mitigates the seriousness of the offense and militates against the imposition of sentences compatible with it. I should note here that the misdemeanor penalty presently provided relegates these crimes to the jurisdiction of magistrates who are, by reason of the fact that their jurisdiction is limited to minor offenses, attuned to imposing 20 or 30 day suspended sentences and fines of a few hundred dollars at most.

Increasing the penalty for sound recording piracy would create a substantial deterrent to many now engaged in this eroding enterprise. Many persons appear to gravitate to the piracy business in a rather casual, almost cavalier, manner. They respond to advertisements in publications offering sales opportunities and through word of mouth enticements assuring them of substantial profits with no experience required and little risk. Most, I am sure, are well aware of the illicit nature of their undertaking but are willing to assume the risk of what they consider the rather mild consequences of getting caught. Many of these types would be deterred from embarking on their illegal ventures if the penalty were to be increased to a felony stature and especially if they should face a monetary fine of a dimension that would take the profit out of the business; crimes motivated by monetary gain are perhaps most effectively suppressed by the likelihood that the violator if caught will be disgorged of the illgotten fruits of his crime. The pathological criminal type will hardly be deterred by any penalty. But if, as I suspect, the marginal operator—one who has not yet developed a truly criminal mentality—will be, our enforcement task will be substantially eased.

Moreover, if Congress expresses its concern about these offenses by increasing the penalty for their commission, courts will likely follow your lead and impose heavier sentences; prosecutors too will view these crimes in the aspect of a serious offense and there will be fewer declinations of prosecution.

Mr. Chairman, your subcommittee certainly needs no persuasion from me to conclude that the extension of the life of the antipiracy statute is a critical need. I only wish to remind you that the Department of Justice, and especially the Federal Bureau of Investigation which has performed admirably in the enforcement of the present act, have invested their energies and resources in both investigation and technical development that are now showing results in the form of prosecutable cases. These investments were made on the assumption based on the legislative history of Public Law 92-140, that its provisions would by now be encompassed in the general revision of copyright law. While that has not come to pass, the piracy problem deserves extended and careful attention. That purpose can only be achieved by the prompt enactment of H.R. 13364. Failure to pass this bill would result in a profligate waste of the resources of the Justice Department; it would give the pirates a field day—indeed a feast day—to poach upon the talents of America's artists as well as the capital investment, risks, and legitimate profits of the recording industry.

That concludes my statement, Mr. Chairman. I will be glad to respond to any questions you may have.

Mr. KASTENMEIER. Thank you, Mr. Murphy. Can you indicate to the committee where the terms of the bill came from? While they are in the bill I introduced, it is not a bill which I created. Was the Jus-

tice Department consulted about \$25,000 plus 3 years for a first offense and \$50,000 plus 7 years on subsequent offenses?

Mr. MURPHY. Yes, Mr. Chairman. They conform. Those penalties conform to S. 1400 penalties, which as you probably know, are graduated. First of all they are enumerated by letter, A, B, C, D, and E. A class E felony under S. 1400 carries a penalty of 3 years and a fine of \$25,000. A class D felony which is the next higher offense, carries a penalty of 7 years and \$50,000. And that I believe is the reason why these penalties are cast as they are, to have them coincide and conform to S. 1400.

Mr. KASTENMEIER. Would you restate that? A class E felony is 3 years did you say?

Mr. MURPHY. Yes, sir. I have S. 1400 here if I can find it now.

Section 2201 of S. 1400 specifies that in the case of a class E felony the fine shall be \$25,000. And section 2301 of the same bill specifies that in the case of a class E felony the imprisonment term shall be not more than 3 years. So in effect the bill would fit the penalties for copyright into S. 1400 very neatly.

I might say that there is also a provision in S. 1400 that does deal with copyright violations in another manner.

Mr. DRINAN. Excuse me, Mr. Chairman. What is S. 1400?

Mr. MURPHY. That is the general revision—

Mr. DRINAN. That is the administration bill?

Mr. MURPHY. Of the criminal code.

Mr. KASTENMEIER. That is one of three bills calling for the total reform of the Federal criminal statutes.

Mr. DRINAN. What is in Mr. Kastenmeier's omnibus bill? I would be more interested in that.

Mr. KASTENMEIER. There is also another bill, S. 1, as I recall it to reform the Federal criminal laws. I do not know that you have all of those several formulations of revision, but to pursue the matter further, the point is the Justice Department was consulted and the Justice Department recommended these penalties, is that correct?

Mr. MURPHY. I cannot say that, Mr. Chairman. I do know that, and I am not cognizant of who, in fact, drafted this bill, but the industry and the Justice Department worked together in enforcing the present act. And how it came about that the present bill contains penalties which fit very neatly into S. 1400 I do not know. I do not recall having been consulted myself. But, whoever drafted it and pursued it certainly seems to have been aware that S. 1400 has similar provisions for the grading of penalties. We of course, the Justice Department, undertook to comment upon the bill in its letter to the subcommittee and we took particular notice of that, not in the letter but in reviewing our position on the bill and we noted that it would be a coincidence of penalties between the bill and the revision of the criminal code as proposed in S. 1400.

Mr. KASTENMEIER. What is the experience of the Justice Department, the Federal Bureau of Investigation or the U.S. Attorneys, in enforcement of the existing law?

Mr. MURPHY. Well, first of all with respect to the FBI, they have been nothing less than magnificent in my opinion, in their efforts to suppress these violations. I requested the statistics from the Bureau for this purpose and I have them here.

Since the inception of the bill they have initiated 3,466 investigations since February 1972. They have terminated from the date until

the present 1,879 investigations and they have ongoing investigations as of the end of April of 1,587.

Mr. KASTENMEIER. Investigations for violation of the existing—

Mr. MURPHY. These are all the copyright violations, Mr. Chairman.

Mr. KASTENMEIER. All copyright violations?

Mr. MURPHY. But the copyright violations, other than sound recording violations, are relatively small in the area of 20 a year, something like that. So, the bulk of these investigations represents sound recording piracy investigations.

Mr. KASTENMEIER. That is interesting. I did not realize, and I suppose the Congress did not, that it was imposing that much of a burden on law enforcement at the time we wrote the bill.

Mr. MURPHY. No. I noted in the report that the cost was only estimated in terms of the cost to the copyright office. And I think it was stated in terms of \$100,000 or \$125,000 on its enactment and actually it was overlooked I suppose, but investigations do cost money as well. But, these investigations are fitted in, I think, to the normal investigative practices of the FBI. There has been some additional technical costs in terms of operation of the FBI laboratory which has also done a yeoman's work in developing techniques to identify tape recording piracy.

I might say that the Justice Department and the industry are together attacking the problem of reaching a simplified manner of identifying pirated copies. You see in a prosecution we must have technical, scientific evidence that the pirate copy and the legitimate copy are identical and that takes some doing in terms of technical expertise. We are approaching the problem together, and we think we have reached a solution that will reduce that cost and effort very substantially, and make our prosecutions much easier to pursue.

Mr. KASTENMEIER. You indicated you had a large number of investigations by the Bureau. How many prosecutions have you pursued since the inception of this bill and how many successfully or to what extent have they resulted in convictions?

Mr. MURPHY. First of all, with respect to convictions, I have a chart which I have prepared and I will be glad to supplement the record with it, which shows the number of prosecutions which have resulted in either pleas of guilty or convictions after trial and sentences that have been imposed, if any, have been imposed to date. And it shows that there have been 43 convictions so far and that is from an estimated total of prosecutions initiated and I do not have the exact figure on that but it is roughly 75 prosecutions initiated. So we have between 25 and 30 prosecutions pending.

[The chart referred to follows:]

Date	Name of defendant	District	Counts charged	Disposition	Sentence
1 Oct. 3, 1972	Walter R. Matthews	N.D. Ga.	1	Nolo contendere plea.	1 year (suspension), \$200 (suspension), 2 years probation.
2 May 17, 1973	Theodore R. Dienger	W.D. Okla.	1 16	Guilty plea, 1 count. Guilty plea, 4 counts.	6 months, \$1,000 fine. 1 year (suspension), \$4,000 fine (suspension), 3 years probation.
3 July 1973	Glenn Tharp	C.D. Calif.	12	Nolo contendere plea, 2 counts.	1 year each count (suspension).
4 Aug. 3, 1973	CopyRite Recordings ("Speedy" Newman)	New Mexico.	45	Guilty plea, 45 counts.	\$22,500 fine.
5 Oct. 1, 1973	Wilford A. Jordan	C.D. Calif.	15	Guilty plea, 1 count.	6 months (suspension), \$100 fine (suspension), 6 months probation (suspension).
6 Oct. 1, 1973	Webster Dauphinery	do	6	do	\$100 fine (suspension).
7 Nov. 5, 1973	P. M. Place Stores	S.D. Iowa	44	Nolo contendere plea, 18 counts.	\$1,800 fine.
8 Nov. 29, 1973	Robert E. Byers	E.D. Mich.	1	Guilty plea.	\$500 fine, 2 years probation.
9 Nov. 29, 1973	Teddy Lynn Holliday	do	1	do	Do.
10 Dec. 5, 1973	Theodore H. Willis	E.D. Va.	1	Nolo contendere plea.	30 days (suspension), \$1,000 fine.
11 Dec. 7, 1973	Robert Kit Shay	E.D. Mich.	1	Guilty plea.	2 years probation.
12 Dec. 14, 1973	Barry Smith	N.D. Ill.	1	do	2 years probation, \$100 fine.
13 Dec. 14, 1973	Ronald E. O'Connor	E.D. Mich.	1	do	2 years probation, \$250 fine.
14 Jan. 11, 1974	A. Joseph Loescy	C.D. Calif.	60	Guilty plea, 20 counts.	5 years probation (\$10,000 fine by State court).
15 Jan. 25, 1974	Marc W. Zlotogura (Juvenile)	W.D. Mich.	1	Nolo contendere plea.	9 months probation, \$100 fine.
16 Feb. 1974	Michael R. Thies	E.D. Mich.	1	Guilty plea.	2 years probation, \$750 fine.
17 Feb. 7, 1974	Leon R. Stanlee	N.D. Okla.	3	Guilty plea, 3 counts.	\$300 fine.
18 Feb. 11, 1974	Mackie, Inc.	S.D. W. Va.	43	Guilty plea, 4 counts.	\$800 fine.
19 Feb. 25, 1974	Heck's, Inc.	do	2	Nolo contendere plea, 2 counts.	\$100 fine, \$500 fine.
20 Feb. 28, 1974	Joseph J. Swiatek	N.D. Ill.	5	Guilty plea, 5 counts.	3 years probation, \$1,000 fine.
21 Mar. 6, 1974	Donald G. Crabtree	W.D. Okla.	5	do	1 year (suspension), 2 years probation, \$2,500 fine (\$2,000 suspension).
22 Mar. 12, 1974	Theodore M. Hooker	E.D. N.C.	3	Guilty plea, 3 counts.	6 months (suspension), 1 year probation, \$500 fine.
23 Mar. 18, 1974	Richard G. Standow	W.D. Wash.	10	Guilty plea, 10 counts.	20 days, \$2,000 fine.
24 Mar. 27, 1974	Donald E. Willis	W.D. Wis.	5	Guilty plea, 5 counts.	\$1,000.
25 Apr. 4, 1974	Dick Hardesty	do	5	do	\$250.
25 Apr. 4, 1974	James R. Horner	N.D. Ga.	2	Guilty plea, 2 counts.	(1) 1 year (suspension), 2 years probation, \$1,000 fine; (2) same.
26 Apr. 5, 1974	John J. Hydock	do	25	Guilty plea, 25 counts.	(1) 1 year (suspension), 1 year probation, \$250 fine; (2) same; (3 to 25) same, but no fine.
27 Apr. 5, 1974	Stephen A. Kuranoff	do	15	Guilty plea, 10 counts.	(1) 1 year (suspension), 2 years probation, \$250 fine; (2 to 10) same, but no fine.
28 Apr. 8, 1974	A. D. Govan	W. D. Ark.	3	Guilty plea, 3 counts.	No sentence as yet.
29 Apr. 12, 1974	Sidney Tuchman	S. D. Ind.	5	Nolo contendere plea, 5 counts.	Do.
30 Apr. 17, 1974	James K. Anglin	N.D. Ga.	6	Nolo contendere plea, 6 counts.	(1) 1 year (suspension), 1 year probation \$500 fine; (2 to 6) 1 year (suspension), 1 year probation.
31 Apr. 17, 1974	Horace U. Edwards	do	50	Guilty plea, 50 counts.	1 year (suspension), 2 years probation, \$1,000 fine.
32 Apr. 17, 1974	Jerry L. McCann	do	16	Nolo contendere, 16 counts.	(1) 1 year (suspension), \$500 fine; (2 to 16)—1 year (suspension).
33 Apr. 17, 1974	Charles M. Sharpe	do	25	Guilty plea, 25 counts.	(1)—1 year (suspension), 1 year probation; 2 same consec. w/ct. 1; (3 to 25)—same, conc. w/ct. 2.

Date	Name of defendant	District	Counts charged	Disposition	Sentence
34 Apr. 19, 1974	Larry Axtman	North Dakota	20	Guilty plea, 20 counts.	\$3,000 fine.
35 Apr. 19, 1974	Vernon Axtman	do	5	Guilty plea, 5 counts.	\$750 fine.
36 Apr. 19, 1974	Ronald Souther	do	20	Guilty plea, 20 counts.	\$3,000 fine.
37 Apr. 19, 1974	Northwestern Tapes, Inc.	do	20	do	\$6,000 fine.
38 Apr. 25, 1974	The Tape Shack	S.D. W. Va.	1	Jury trial, guilty verdict.	\$500 fine.
39 Apr. 29, 1974	Louis F. Sofka	M.D. Pa.	33	Guilty plea, 33 counts.	(1 to 6)—\$3,000 fine; (7 to 33)—1 year probation.
40 Apr. 30, 1974	James Svihovec	N. Dak.	1	Guilty plea.	\$150 fine.
41 May 1974	Harry N. Brown	S.D. Miss.	5	Nolo contendere plea, 5 counts.	\$1,000 fine.
42 May 3, 1974	Joseph Cawley	W.D. Wash.	51	Magistrate trial, guilty verdict on 51 counts.	Not sentenced as yet.
43 May 3, 1974	Darrell G. Malicoate	W.D. Okla.	8	Jury trial, guilty verdict on 7 counts.	2 years probation, \$5,000 fine.

Mr. KASTENMEIER. And what disposition was made, of the 43 convictions in terms of penalties?

Mr. MURPHY. Well they are listed in the chart that I will submit. They show, however, a dismaying lack of vigor in the imposition of sentences. They range from—well, first of all with respect to imprisonment, we have only had two sentences in which imprisonment was imposed at all. One was for 20 days and the other for 6 months. The fines, well, they ranged down to \$50 or \$100 and upwards to \$22,500. But by far the majority of them are in the several 100 or few 100 category. The prison sentences which are imposed other than the ones I have mentioned, which were actually time served, sentences usually carry a 1 year or less prison term but they are suspended and the defendant is usually placed on probation for a period of time from a couple of months to a year or two.

Mr. KASTENMEIER. Mr. Murphy, what leads you to believe that any increase in these penalties will still not result in suspended sentences?

Of course, I appreciate your strong statement that to some extent moralizes against the activity, but nonetheless there is a disposition to think of some of these people as illegitimate businessmen, if you will, and that sending them to prison, obviously, whether it is a magistrate or judge or even the U.S. Attorney, does it, does not seem to be in the books in the final analysis as an appropriate penalty. So, increasing the term in and of itself may not result in sending more people to prison, do you think?

Mr. MURPHY. I realize that the matter of increasing penalties for crimes is a most complex and highly controversial subject. I personally had experience years ago in contributing to the enactment of the Narcotic Control Act of 1956 which you may recall had minimum mandatory penalties of very substantial terms. And we found that the result was that we got more acquittals as a result of the fact that the court was faced with the dilemma having to send somebody away for a minimum of 5 years or acquit him because if he convicted him, if he allowed him to be convicted, he would be confronted with that rather difficult choice. So I am not suggesting that by raising the penalties we will put more people in prison. What I do believe is that

there are many people in this piracy business who are not actually hardened criminal types. They are really not criminal types at all. They have not developed the criminal mentality. They are in it for the money. Somebody has persuaded them that it is easy and it is easy to make a fast buck in this business and the risks are slight because look, it is only 1 year and you know, so the persuasion will go, that when you only have a 1-year penalty, courts are likely to impose much, much less than that. But, if you were confronted with the possibility of a very substantial prison term and a very substantial fine which would take the profit out of it I think that many people who are now entering this business would be dissuaded.

Mr. KASTENMEIER. The reason I mentioned moralizing is that much of what you have said about the debilitating effects, the failure to bring creativity into the art form, the feedings as parasites upon creativity, is almost precisely the same language used with reference to the CATV; that is to say, Communication Antenna Television, which relays, which in a sense steals the signal of a station which legitimately uses the artists and the art form and relays it, adding nothing to it, but merely relaying the same thing. While the Supreme Court and the courts have suggested that that is not a violation of present law it is, in effect, very much what we have here, save only that we have decided to distinguish by statute and say that this sort of piracy is illegal, and the other from of piracy is not illegal. But, the distinction really cannot be made in terms of morality.

Furthermore, I think there is a certain disposition not to punish forbidden publication by prison terms. I have in mind Ginsberg who did go to prison, but that we all know, was a highly unusual case involved in obscene literature. I suspect the courts will become reluctant to sent people to prison for what is in a sense a form of economic thievery. That is why I wonder whether in fact the increased penalty would serve the purpose which is intended, namely, to bring into conformity and deter those who might violate. But, for other forms of larceny, and we have plenty of larceny going on in this country, perhaps more burglary and larceny than ever before, I am not sure it is the Government's responsibility to increase penalties to a higher degree, to threaten people with longer prison terms because of our inability to distinguish forms of felonies, at least in these areas.

Rather we try to meet the problems in other ways and I do not know whether we have explored other ways of meeting this problem, discouraging or making unprofitable piracy. But, I have some reservations about making it 3 or 7 years or life imprisonment or even you know, a capital punishment, whether that in and of itself will solve the problem, or even is appropriate to the criminal statutes. I have some question about it.

Mr. MURPHY. Well, Mr. Chairman, may I just say that while I appreciate the views that you have just expressed, the fact is that this is a crime that is equivalent to grand larceny. It really cannot be regarded as a petty theft. When we walk into an establishment that is manufacturing pirate tapes and seize 50,000, 100,000 tapes, which is simply their current inventory and we determine as we did out in California where we seized the equipment and tapes from a pirate outfit there who was occupying five buildings to manufacture his tapes, his productivity was enormous and his sales were enormous. To impose for that kind of a violation the equivalent of what a person gets for a

sneak theft crime, a petty larceny offense, I think is disparate and I am simply urging that the nature of the crime be taken into account in determining what penalty should be imposed. And in doing so I can easily equate this crime with grand larceny, or that very serious crime of theft from an interstate shipment, something like that, and those crimes carry these kinds of penalties.

Mr. KASTENMEIER. Mr. Murphy, could you define grand larceny under present Federal law and indicate the penalties?

Mr. MURPHY. Of course, we do not have grand larceny. That is a State offense. But we do have theft from an interstate shipment which requires no minimum amount so long as the product or thing stolen is in interstate commerce. The National Stolen Property Act has a minimum of \$5,000 before it becomes a Federal offense. But, generally I made some effort to canvass the State laws on this thing and I contacted the Council of State Governments before my appearance here to determine if they knew what the differentiating point was between petty larceny and grand larceny. And years ago it used to be \$50 but of course with the inflationary developments it is somewhere now, varying upon which State you are talking about, between \$100 and \$500. So I think that it is rare that you would ever have a piracy case in which the value of the article stolen, in effect, is less than \$500.

Mr. KASTENMEIER. So that we may clearly have the views of the Justice Department on this, and the background, is it your statement or belief that the Justice Department was consulted, perhaps by representatives of industry, on the penalties, and that while this bill or the recommendations of this bill are not those of the Justice Department, the Justice Department does approve of the bill and the penalties set forth?

Mr. MURPHY. Oh, yes. Our letter clearly sets forth our support of these penalties.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from New York, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Murphy, in order for there to be a piracy under the present law and under the proposal, the recording or the piece of music or whatever might be pirated, must be under a copyright in order to make it a piracy, is that correct?

Mr. MURPHY. That is correct, and that copyright must have been secured after February 15, 1972, the date of 92-140.

Mr. SMITH. And I think you said that the present penalty structure and the ease of making piracy, enticed a lot of amateurs into this and that you felt that if the penalty structure were materially increased it would discourage a lot of the amateurs who are in the business?

Mr. MURPHY. I believe so. Yes, sir.

Mr. SMITH. And might even discourage some of the professionals in the business. Mr. Murphy, in investigations of piracy, how does the FBI or the Justice Department, get started? Is it usually from complaints of the copyright owner?

Mr. MURPHY. Yes, Mr. Smith. The National Association of Record Merchandisers has many sales persons and distributors, representatives out in the field and they canvass their areas and report back, and the Recording Industry Association of America cooperates with them. And there is a joint effort to detect and report in the form of complaints to the FBI all instances of record piracy that they perceive.

Now, obviously they perceive many, many thousands and that is the reason why there are so many investigations and so few prosecutions. Our policy from the inception of this act has been to focus upon the large distributors and the manufacturers of these articles. And while we investigate and interview everyone about whom a complaint is made, I am talking about the FBI now, of course, when I say we, and many retailers, upon being so interviewed, immediately give assurance that they are going out of the business, that they want no part of it when the FBI shows up and they have had it. Until that point they just apparently feel that they are sailing along free and easy. But, that deters many of them. And that is what leads me to conclude that many of these people would be further deterred by an increase in the possible penalty and particularly the fine because it is a monetary motive that attracts these people. They are people who have other jobs and work at this thing part time in many instances, milkmen, automobile mechanics, and whatever. And they are finding the pinch of inflation hurting them a little bit and they are looking for another means of acquiring some funds. And they have answered an ad offering them an opportunity to make a lot of money with little risk and little capital investment. So, I believe that the penalties being increased would have this effect, although I agree with the Chairman that there is little hope that courts would impose sentences of this magnitude except for the monstrous types that I have described such as the person out in California who was simply an arch criminal type in my judgment because he was obviously operating in the magnitude of millions of dollars. And that deserves serious treatment and we hope that the court will see it that way.

Now, we can build up the number of charges that we lodge against the pirate now in terms of multiplying the offenses. As you know, each pirate copy constitutes an offense. But, in the end the court—

Mr. SMITH. Each pirate copy that is sold?

Mr. MURPHY. Yes, sir.

Mr. SMITH. One tape or one record?

Mr. MURPHY. One sale.

Mr. SMITH. One sale. All right.

Mr. MURPHY. I personally believe each pirate copy could be made a separate count but we do not do that. We usually charge for each sale. But certainly it would have to be each copy of a different copyrighted recording. But it seems to me that we do not get much effect out of that because first of all we are before a magistrate which I have suggested regularly deals with petty offenses or minor offenses, and in some way fails to perceive the seriousness of this violation, or they are so oriented toward imposing minor penalties that it is difficult for them to change gears.

Mr. SMITH. Mr. Murphy, as I understand it, the present law that we are seeking to have continued requires for successful prosecution that a person not only willfully infringe a copyright, but that it shall be done for profit. In other words, you would prosecute someone who in his home made a tape of a musical piece over the air, a copyrighted piece for his own amusement?

Mr. MURPHY. No, Mr. Smith. That is specifically exempted in the statute itself. Home recordings from the radio for personal, private use are exempted under the present statute. They are not crimes at all.

Mr. SMITH. And I would take it though that if it were done with the intent to make a profit that it would be able to be prosecuted even though a profit was not made?

Mr. MURPHY. Yes, that is my belief. If we walked into a place and found 50,000 tapes duplicated without authority of the copyright owner, the inference is inescapable that this was a profitmaking venture. And the infringement—

Mr. SMITH. Not just for the good of mankind?

Mr. MURPHY. That is right. And the law defines infringement as the use as well as the manufacture. So, we usually have evidence of manufacturing and there are several states of the manufacturing process that do involve themselves in the violation. And use also is a word that we are focusing on in terms of prosecuting people who obviously are in the business for profit. But we may not have had an actual sale. This whole business has gone substantially underground since the enactment of 92-140.

Mr. SMITH. I notice that section 2318 of the proposed bill, and I suspect that it is already part of the law, makes it illegal and subject to penalty for anybody who knowingly and with fraudulent intent should transport or sell anything with counterfeit label on it. A counterfeit label now, is that a separate crime from the one of the original piracy?

Mr. MURPHY. Yes. That has been in the law for some time. That is section 2318 of title 18, and that is in the Federal criminal code and that is a separate offense. The counterfeiting violation usually arises in regard to a record rather than a tape, although it can arise either way. I think the industry would perhaps be better equipped to advise you on that. We have had few instances of counterfeiting brought to our attention and for very good reason.

Mr. SMITH. Are they usually sold under a separate label perhaps?

Mr. MURPHY. It is difficult to detect. The usual manner in which they profit from such a counterfeiting, is to sell those counterfeits back to a dealer, legitimate dealer, who returns it to the manufacturer, the legitimate manufacturer for credit, and thus the legitimate recording industry is paying the pirates for their records. But, counterfeiting requires a good deal more expertise than simple tape piracy. The counterfeiting of the label requires a skilled printing establishment with equipment and so on to duplicate four color printed labels and so on, and artists to duplicate them. And I think this is the reason, naturally, why the pirates have gone principally to the tape reproduction rather than records.

Mr. SMITH. Mr. Murphy, do you have any estimate of how many people might be involved in the piracy business?

Mr. MURPHY. It is sheer speculation, Mr. Smith, but it is many thousands, in my opinion, when you estimate that one pirate alone may employ as many as 50, 75, 100 people if he is large enough. And then you get the distribution angle, where salespersons are employed and then the people involved at the retail level, gas stations or whatever. And when you compute all of those cumulatively, you have many thousands of people involved.

Mr. SMITH. One other question, Mr. Murphy. I notice in your statement you mention the fact that many people appear to gravitate to the piracy business in a casual manner. They respond to advertisements

in publications offering sales opportunities and through word of mouth enticements assuring them of substantial profits with no experience requirements and little risk. What kinds of advertisements are these?

Mr. MURPHY. They are publications that are published in the trade and some outside of the trade. They are advertisements and we know this from interviewing many pirates upon detecting their violations and the interviews usually encompass how did you get into this or he volunteers that information and it is quite frequently in response to an ad that induces them to answer the ad to learn how to make money at home. And many of these pirates do operate—

Mr. SMITH. That is like selling the Saturday Evening Post or something?

Mr. MURPHY. Yes, like the Avon lady or something like that. But, when they get into it they respond by telephone or by letter and somebody contacts them and then the persuasion starts and the person is really hooked. His garage can be the scene of his operation.

Mr. SMITH. Well, what does the person who makes the inducement get out of this?

Does he get a commission?

Mr. MURPHY. He is usually the person who is—there are several levels of manufacture, but he may be actually the reproducer, he may be the person who goes out and buys the legitimate tape and then makes a master out of it and duplicates 15 or 30 or more at a single time and this takes approximately 4 or 5 minutes. Or he may be someone who buys what we call a pancake which is I believe 7,000 feet of reel tape, and he sells to winders, as they are called and stuffers, and these people are usually small people operating in their garage with very little equipment. They cut this tape into the desired lengths to fit into the usual 8-track cassette and they seal it and they wrap it and that is part of the operation. I mean they start off that way. I have seen many reports in which pirates have said that they began that way and then they decided well, why do I need the other fellow, I will buy my own equipment. By that time he has had a substantial profit out of his business and he cuts the other fellow out.

Mr. SMITH. Well, ordinarily when he answers one of these ads he becomes some kind of a subcontractor in one sense or another? He may be a distributor, maybe a small manufacturer, part of the operation?

Mr. MURPHY. That is correct.

Mr. SMITH. Until he buys his own equipment?

Mr. MURPHY. And that is not very long after he gets into the business either.

Mr. SMITH. Thank you very much, Mr. Murphy.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Murphy for your statement. I am reviewing here the report that we put out 3 years ago in the hearings that we conducted at that time and there are a lot of questions that are still unanswered, and that was one of the reasons why I had great misgivings about the bill that was reported out by this committee 3 years ago and I still have the same reservations. But I would like to know by what series of decisions the Department of Justice came to this strict enforcement of the law? I find it unbelievable really that—well, maybe not—I find it astonishing that the crimes against property that are here have received such attention from the Depart-

ment of Justice and you, sir, are the first witness from the Department of Justice to have such vigor about the enforcement of any of the laws and we have had all types of human rights, and we're the ones who are pushing them to investigate, and to enforce the law. And the statistics that you have given here are meaningless unless we get the background of this 3,466 investigations in a period of 2 years. Well, in the previous 2 years or previous 4 years, how many were there and who made the decision to give apparently top priority to the enforcement of this crime against property?

Mr. MURPHY. Well, Congressman Drinan, prior to the period from which these figures are collected there was no sound recording piracy law so there is nothing to compare them with. There were no such investigations.

Mr. DRINAN. These are all copyright violations, as you have said.

Mr. MURPHY. Yes.

Mr. DRINAN. I take it that it went from virtually zero to 3,400?

Mr. MURPHY. That is correct.

Mr. DRINAN. Who made that decision to enforce that law when there are so many other laws that are not enforced? Which Attorney General?

Mr. MURPHY. Well, I actually recommended it and Mr. Petersen, who is the Assistant Attorney General, concurred.

Mr. DRINAN. How many more people, both in the Department of Justice and the FBI were required for all of this work?

Mr. MURPHY. To concur in the policy decision?

Mr. DRINAN. No. No. How many FBI people and how many Department of justice people have worked on these investigations, prosecutions that before did not?

Mr. MURPHY. I have no way of knowing, sir. The investigations are conducted routinely by agents of the FBI and how many there have been involved I could not say.

Mr. DRINAN. You have to know because there are all of these investigations, initiated and terminated and on-going and you have some statistics, so there must be a group of people who do nothing else but enforce this law.

Mr. MURPHY. No, I would not say that. I do not know that the FBI has created a special force.

Mr. DRINAN. The Department of Justice has?

Mr. MURPHY. No, sir. This is fitted in—I head a section with 16 lawyers and we have been able to absorb this without increasing our complement.

Mr. DRINAN. Do you recall—

Mr. MURPHY. I must say that we work rather assiduously in doing so though. Mr. Weidner and a couple of his predecessors, who are now Assistant United States Attorneys, did magnificent work, in my opinion in developing the data and the instructions. We published a manual which simplifies the instruction process for the FBI and for the Assistant United States Attorney to prosecute these cases.

Mr. DRINAN. When you say the business has gone underground, what are the financial dimensions now compared to 2 or 3 years ago?

Mr. MURPHY. Oh, I would say that financially we have perhaps not made a substantial dent into the number of transactions that occur each day but I would have to couple that with the observation

that any new law requires a substantial period of time before the machinery for its enforcement gets under way.

Mr. DRINAN. You cannot have it both ways, Mr. Murphy. You have made a concession that you have not cut into the business and 3 years ago a report of the subcommittee said that the piracy is now in excess of 100 million. Have you or have you not cut into that?

Mr. MURPHY. I believe I have put out of business 200 or 300 pirates. Whether their places have been taken by other pirates I am not in a position to say. I rather suspect that we will not substantially cut down on the total volume of the piracies for another year or so. But, there will come a time when the peak, that I believe has been reached, will taper off, and we will be materially assisted in that reduction process, if we have a substantial penalty facing these people rather than the rather minor offense penalties.

Mr. DRINAN. Well, 2 or 3 years ago when we had hearings we had the representatives of the pirates here and they are very nice people and they are not as you characterize them. They had lawyers representing their industry which, according to them, operated legitimately under the *Sears, Roebuck* decision. What do you say about that?

Mr. MURPHY. Well, that has been rejected by several courts since then. The *Sears, Roebuck* decisions are just not applicable here. This is not imitation. This is not "similar" use. As a matter of fact, two circuit courts of the Federal System have held that even under the old law the pirates are in violation.

Mr. DRINAN. Under any interpretation of the law, is there a certain limited way by which so-called pirates can operate within the law?

Mr. MURPHY. When you say within the law, you mean the criminal law, not violating the criminal law?

Mr. DRINAN. Right.

Mr. MURPHY. If a pirate is operating in a State which does not have an antipiracy statute and he limits his productivity to pre-February 15, 1972 productions, I believe he would then only be liable for the civil penalties that the industry could seek from him.

Mr. DRINAN. I'm sorry?

Mr. MURPHY. But many States are enacting laws. Two years ago there were only a half a dozen States. Now I believe there are 26 or more States that have antipiracy laws so that the pre-February 15, 1972 productivity is not the answer.

Mr. DRINAN. Has your department or any department of the Federal Government done a study on the extent to which, if any, prices have gone up as a result of your drive against the pirates, the prices of records?

Mr. MURPHY. No, sir, we have not.

Mr. DRINAN. Why not? That was one of the predictions in the testimony 2 or 3 years ago. People said that the price of records will go up because the monopoly which they have will be reinforced by law. Where is the consumer division of the Justice Department or the Federal Trade Commission? I think this is a legitimate question. Have records gone up?

Mr. MURPHY. I doubt it but I do not have the facts upon which to predicate that statement.

But there are representatives of industry here which I am sure will respond to that question.

Mr. DRINAN. They are not going to tell me, sir, that they have gone up unreasonably or excessively. In the nature of things they are not going to, and I really think this law gave them almost an unlimited monopoly. It says the bill says, it is a limited copyright but actually it is unlimited. They can possess this for the life of the copyright.

Has the Justice Department taken any position on Senator Hart's position of 3 years ago? As you know, he dissented from this and he said that we have to have some alternative means and that is one of the many reasons why I think, as I recall it was that I suggested a time limit in this bill, the time limit that now the industry wants to terminate. I wanted to develop alternatives such as statutory requirements of licensing. Has the Department of Justice thought about those questions?

Mr. MURPHY. Well, we have not really included—

Mr. DRINAN. Why not? What about the consumer? What about the statutory requirement that people are, in fact, required to give out a statutory royalty, that is being done in other areas of the law, as you know, in this area of copyright. Why should we give a total monopoly to Columbia Records or their sister company?

Mr. MURPHY. Well, I suppose the same question could be asked as to why we give a monopoly to the publisher of a book. I think that there is the same kind of creativity, the artistry and the talents that are embodied in the tape or the record as in a publication of that kind.

Mr. DRINAN. But as you know this was designed originally for the authors and the composers in order to enhance and reward their creativity. And now the people who get the reward are the corporations. Why is not the Department of Justice thinking about this very fundamental question in the area of copyrights?

Mr. MURPHY. Congressman, I do not believe that the corporations get all of the profit by any means.

Mr. DRINAN. Just most of it, huh?

Mr. MURPHY. The artists, the producers and the musicians, there are many people involved here who are served and who receive a contribution from the ultimate price of the recording that is paid by the consumer.

I might say that in respect to your question about whether this bill is supported by people involved in the enforcement of the antitrust law, if that is where I think your focus was, the Antitrust Division has given its concurrence to our letter that was transmitted to the committee and is in support of this bill.

Mr. DRINAN. Do they have any facts to support that, to show that there is no further monopoly? That was one of the dangers pointed out by Senator Hart, and one of the dangers pointed out in our own report. We said we will go along with this thing and that we are not in a position now to oppose statutory licensing that would be required but here it is in the final sentence of our report:

Certainly the entire question of compulsory licensing can be reexamined by this committee when it again considers legislation of this copyright law.

We are not doing this. I just got notice on Thursday or Friday of this meeting, and we are not doing that. And now I think it is an essential thing to do in this thing. And it may be in the nature of the thing that we have to wait for the other body and so on but I think the

Department of Justice should respond at least to the basic difficulty that Senator Hart and others and I had with the enactment of this temporary license 2 or 3 years ago.

Mr. MURPHY. To respond to it very specifically, there is a very real distinction between the compulsory license that the present law, the law prior to 1972 afforded to anyone who wanted to use a musical composition. He has got to hire musicians and artists, and singers or whatever at great expense and risking that he may not have a hit on his hands and produce the thing. The pirate involves himself with none of those costs. He has none of those risks. So that the reason for the compulsory license provision in the copyright act does not extend to the piracy business whatever in my judgment.

Mr. DRINAN. You see the source of the argument, do you not? I quote Senator Hart:

I must reluctantly vote no. When we extend copyright protection for this purpose, it is a misuse of the copyright grant. It is the extension of a monopoly over the expression of ideas and it is doubtful that we will constitutionally remedy the provision or the problem of piracy without further thought and examination of alternatives available.

That is the argument, the argument that still troubles me. But, I guess the Department of Justice has not thought about that. You protect the industry, and you come on like gangbusters in pushing the law and enforcing the law. I suppose that is your duty. But, you also have a duty to look at the larger questions of justice.

Thank you very much.

Mr. KASTENMEIER. The gentleman from Iowa.

Mr. MEZVINSKY. Mr. Chairman, out of respect to the other witnesses that are here, I will say to Mr. Murphy that I appreciate his testimony and I will go over it as well as the point raised by the gentleman from Massachusetts, and I will defer any other comments until after the other witnesses.

Mr. KASTENMEIER. This subcommittee has a number of responsibilities. It is the Subcommittee on Courts, Civil Liberties and the Administration of Justice. If we are going to add a number of people to the prisons we have to look at a broader public interest in the legislation, broader than the economic interests which are narrowly represented by the bill itself. And, I must say in response to my friend from Massachusetts the Justice Department is correct. So long as the Congress enacts the bill consistent, incidentally, with the philosophy of the law which does grant a monopoly to created works, and so long as we provide penalties for it I do not really see that the Justice Department has a contrary responsibility. It is a philosophical question which probably the copyright office, possibly the Federal Trade Commission, and others might well consider. But, the enforcement division of the Justice Department I think probably is not charged with this sort of philosophic question of whether this limited monopoly that we have created—incidentally consistent with all our copyright law—should be changed or not. That is really not in your purview, Mr. Murphy. As to a number of other matters to which you have testified this morning, we appreciate your testimony.

Mr. MURPHY. Thank you, Mr. Chairman.

[The statement of Mr. Murphy follows:]

STATEMENT OF JOHN L. MURPHY, CHIEF, GOVERNMENT REGULATIONS SECTION
CRIMINAL DIVISION

Mr. Chairman, I appreciate this opportunity to appear before your subcommittee to express the support of the Department of Justice for H.R. 13364 which would remove the expiration date provided in Public Law 92-140 which created copyright protection in sound recordings and to increase the criminal penalties for sound recording piracy and counterfeiting.

Since Public Law 92-140 became effective on February 15, 1972, the Government Regulations Section of the Criminal Division has been charged with responsibility for its enforcement. Immediately upon enactment of Public Law 92-140, we conferred with industry representatives to gain the intelligence information that had been developed relating to unauthorized duplication or piracy of sound recordings, and to acquire an intimate knowledge of the methods and techniques employed by the pirates. We established close liaison with the Federal Bureau of Investigation. All of these efforts were designed to open channels of communication and to enhance the effectiveness of our enforcement efforts. We developed a manual for the use of investigators and prosecutors which included a ready reference printout of currently popular recordings and their related copyright numbers for use in determining whether recordings offered for sale by pirates are protected by federal copyright.

Our first acquaintance with sound recording copyright violations was, to say the least, both astonishing and dismaying. The dimensions of the problem were obviously enormous. The ease of entry—minimal capital and little expertise is required—combined with the startling profit-to-cost ratio (it is estimated that the cost to a pirate of a tape album legitimately retailing for \$6.00 is probably not much in excess of .50) provide an attraction for the marginally intellectual and skilled entrepreneur that is, to many novices, all but irresistible. The effects of piracy are debilitating: the pirate brings no creativity to his entry into this art form; indeed, he feeds as a parasite upon the creativity, the productivity, and the enterprise of others. He is anti-competitive for, to a substantial degree, he suppresses the creativity and the initiative of both artists and producers as he feeds like a vulture upon their creations. He is really a thief of major stature, not unlike the gun wielding stickup man, the bomb carrying hijacker, and the pen wielding embezzler. Yet, under present law, he is not dealt with in the same manner as those perhaps more forthright criminals since the penalty he faces is on the same order as that imposed for petty larceny. This mild sanction necessarily creates a psychological attitude on the part of prosecutors and courts that mitigates the seriousness of the offense and militates against the imposition of sentence compatible with it. I should note here that the misdemeanor penalty presently provided relegates these crimes to the jurisdiction of magistrates who are, by reason of the fact that their jurisdiction is limited to minor offenses, attuned to imposing 20 or 30 day suspended sentences and fines of a few hundred dollars at most.

Increasing the penalty for sound recording piracy would create a substantial deterrent to many now engaged in this eroding enterprise. Many persons appear to gravitate to the piracy business in a rather casual, almost cavalier, manner. They respond to advertisements in publications offering sales opportunities and through word of mouth enticements assuring them of substantial profits with no experience required and little risk. Most, I am sure, are well aware of the illicit nature of their undertaking but are willing to assume the risk of what they consider the rather mild consequences of getting caught. Many of these types would be deterred from embarking on their illegal ventures if the penalty were to be increased to felony stature and especially if they should face a monetary fine of a dimension that would take the profit out of the business; crimes motivated by monetary gain are perhaps most effectively suppressed by the likelihood that the violator if caught will be disgorged of the illgotten fruits of his crime. The pathological criminal type will hardly be deterred by any penalty. But if, as I suspect, the marginal operator—one who has not yet developed a truly criminal mentality—will be, our enforcement task will be substantially eased.

Moreover, if Congress expresses its concern about these offenses by increasing the penalty for their commission, courts will likely follow your lead and impose heavier sentences; prosecutors too will view these crimes in the aspect of a serious offense and there will be fewer declinations of prosecution.

Mr. Chairman, your subcommittee certainly needs no persuasion from me to conclude that the extension of the life of the anti-piracy statute is a critical

need. I only wish to remind you that the Department of Justice, and especially the Federal Bureau of Investigation which has performed admirably in the enforcement of the present act, have invested their energies and resources in both investigation and technical development that are now showing results in the form of prosecutable cases. These investments were made on the assumption, based on the legislative history of Public Law 92-140, that its provisions would by now be encompassed in the general revision of copyright law. While that has not come to pass, the piracy problem deserves extended and careful attention. That purpose can only be achieved by the prompt enactment of H.R. 13364. Failure to pass this bill would result in a profligate waste of the resources of the Justice Department; it would give the pirates a field day—indeed a feast day—to poach upon the talents of America's artists as well as the capital investment, risks, and legitimate profits of the recording industry.

Mr. KASTENMENER. I should say at this point that this particular hearing does bring back a number of people who are familiar to the subcommittee in the context of copyright law and I would like to say, before I introduce our next witness, that I observe in the audience the former Register of Copyrights George Cary, who along with his predecessor, Mr. Kaminstein, so ably and so long served the Copyright Office. He and many, many other faces in the audience are welcome ones to see again.

At this point I am most pleased personally, pleased to greet in her new capacity an old friend, who has served the Copyright Office and the Government for so long, so ably and in so many different capacities in the Copyright Office, for the first time in her new capacity as the Register of Copyrights, Ms. Barbara Ringer.

TESTIMONY OF MS. BARBARA RINGER, REGISTER OF COPYRIGHTS

Ms. RINGER. Thank you. Thank you very much, Mr. Chairman.

If I may, I should like to have my statement filed as a part of the record, and speak briefly to it and then answer any questions that the subcommittee has.

Mr. KASTENMEIER. Without objection, that will be done, although, indeed, your statement is brief, as I recall.

[The statement of Ms. Ringer follows:]

STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress.

The Copyright Office wholeheartedly endorses section 1 of H.R. 13364, which would amend the copyright law by removing the expiration date on securing copyright in sound recordings that was set by Public Law 92-140.

A little over two years ago Congress authorized a limited copyright in sound recordings to remedy the very serious and growing problem of record and tape piracy. The copyright was limited to protection against unauthorized duplication of the actual sounds fixed in an original sound recording, since it was the damage to the legitimate recording industry caused by exact duplication that required redress, and continues to require redress.

The sound recording copyright law was also limited in the sense that an expiration date of December 31, 1974 was established for the legislation, and it is because of this expiration date that H.R. 13364 has been introduced. In his report accompanying the 1971 sound recording legislation, Mr. Kastenmeier stated that the terminal date was set "to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment." (H.R. Report No. 487, 92d Cong., 1st Sess., 1971, page 1). The hope was also expressed that the sound recording provision would be made permanent by enactment of a general revision of the

copyright law. This hope has not been realized, and we all know the copyright revision bill, which certainly has our continued strong endorsement, is no longer a realistic hope for achieving permanent sound recording legislation by December 31 of this year. We must therefore turn to separate legislation in order to provide the deserved and needed benefits of the copyright system to authors of sound recordings. Section 1 of the bill achieves this result.

In addition to the justice of the case for permanent sound recording copyright legislation, let me mention one other consideration. The United States currently has an international obligation as a member of the 1971 Geneva Phonogram Convention to protect on a reciprocal basis the sound recordings of producers who are nationals of member countries against unauthorized duplication. This treaty obligation can be met without any doubts only by effective Federal legislation. State law is much too problematical for this purpose, and the United States traditionally has honored its international obligations in this field through Federal copyright legislation.

Sections 2 and 3 of the bill would increase the penalties for infringement of a sound recording copyright under title 17 of the Code, and for transportation, sale or receipt of recordings bearing forged or counterfeit labels under title 18 of the Code. I would agree that the penalties for deliberate, willful record piracy should be severe enough to act as an effective deterrent. However, the Copyright Office has no expertise in criminal law enforcement, and we therefore take no position as to the particular amendments in sections 2 and 3.

In conclusion I would add that, in our view, the experience of the last two years vindicates the claim by authors of sound recordings to Federal copyright protection. Both record producers and performers benefit from this legislation since their respective creative contributions, typically governed by contracts, are recognized and protected. There is no question in my mind that tape piracy is fundamentally anticompetitive. As I stated in my testimony before the predecessor of your Subcommittee in 1971, piracy tends to increase the price of legitimate recordings: this is because the record producers lose sales volume on their "hit records," which must return sufficient gross to cover losses on other recordings. No pirate duplicates a loser. The public pays for piracy in the end. The Copyright Office firmly believes that what the public pays for recorded music should go to creators rather than scavengers.

For these reasons, we support the enactment of H.R. 13364.

Ms. RINGER. When your subcommittee held hearings in June 1971, on the legislation which became Public Law 92-140, I was personally privileged to join with the then Register of Copyrights, Mr. Kaminstein, in representing the Copyright Office and in testifying in favor of this amendment. Our position was based on two fundamental points.

First, that sound recordings are in every way as fully creative and worthy of copyright protection as any other form of copyrightable work. We believe this very profoundly, Mr. Chairman. We simply see no distinction between the creative efforts that go into sound recordings and the worthiness of protection, and the creativity or social worth of, for example, motion pictures or the great mass of copyrightable work which can be called "derivative" in some sense or another.

The second fundamental point was that record and tape piracy, which at that time was assuming very large proportions, was a serious public problem, and that it had an anticompetitive effect in the general copyright field. We felt that it should be dealt with, if it was dealt with, under the Federal copyright statute, with its fair limitations and safeguards and its certainties, rather than being left to the rather amorphous and uncertain state of the statutory and common law of the 50 States.

Three years later our position on these principles remains exactly the same, just as strong as ever. We therefore fully support the basic purpose of your bill, H.R. 13364, which is to remove the expiration date on the securing of copyrights for sound recordings, thereby making the 1971 amendment permanent.

The legislation, as enacted, established the terminal date of December 31 of this year for the operative life of the amendment. And as explained in your report there were two reasons for setting this limit. One was to provide a period for further consideration of the various alternatives for solving problems in this area before resorting to permanent legislative enactment. The second was the hope, which still springs eternal, that in the meantime the protection of sound recordings would be enacted as part of the general revision of the copyright law.

In the intervening years several important things have happened and one important thing has not happened. I will mention three of the important things that have happened.

One is that the legislation was effective in combatting piracy. I was in Europe for a year and a half, and I saw it from the other end. I think what Mr. Murphy said was true, that the pirates were perhaps not altogether driven out of business but that they were driven out of a lot of U.S. outlets, and a great deal of their product was finding its way to foreign countries with results that were not good.

I do not see any signs of anticompetitive effects. There have been changes in the industry. I think everyone knows it. Some of them are not for the better, but I think they would have been worse if the act had not been on the books. The pirates are stubborn and what was said was true: that this kind of activity is very easy and very cheap, involves very little investment and in the overall scheme of things, very little risk. There is a lot of money to be made and there are a lot of loopholes in the law. I believe that the pirates are on the run, both in this country and abroad, and I think this legislation has contributed to that rather desirable effect.

I do not believe that the fears that were expressed, which were quite genuine, have been realized. If the legislation had not been passed I honestly believe that the situation in the industry, and in what the public pays and gets, would be worse.

As to the other important things that have happened, we have had a large number of court decisions, some involving State laws, and some involving construction of this law, and some dealing with the relationship between the two. And we have had a Supreme Court decision on this important question, which I think answers the question that Mr. Drinan asked, concerning the use of the *Sears* and *Compro* decisions as a basis for the activities of the so-called pirates. The Supreme Court specifically held in *Goldstein v. California*, that the *Sears* and *Compro* decisions were not applicable to this situation.

Second, we have had, as Mr. Murphy mentioned, 26 State statutes dealing with the rights in recordings made before February 15, 1972, and all of them are based on the premise that sound recordings are subject to State protection. These statutes have been upheld by some courts. I will not leave you with the impression that the law in this field is clear. It is not. It is still in an evolving state. I am almost sure some of these questions will eventually reach the Supreme Court again, but at this stage of the game we have a different juridical situation from that in 1971. It is much, clearer now as a legal conclusion that these works are creative, and that there are rights in them. The Supreme Court has actually held this.

The third thing which I consider very important is that, since

April, the United States is a party to an international convention directly on this point. After advice and consent, this treaty was accepted by the Senate and ratified by the United States. This is the Convention for the Protection of Producers for Phonograms against the Unauthorized Duplication of their Phonograms, which was adopted about the same time you were considering this bill in 1971. And it does impose a treaty obligation on the United States with respect to "phonograms" or sound recordings originating in other countries. In the preparatory work that led to that convention, there was absolutely no defense whatever of the activities of the so-called record pirates. Everyone accepted the principle that record piracy should be stopped, and the problems primarily involved resolving the interrelationship between this treaty and another convention—the Rome Convention on Neighboring Rights, which partially covers the same subject matter—and dealing with the question of whether developing countries were entitled to somewhat different treatment in this area from developed countries. I think that this convention, which now has 11 adherents, is a success, and I think it will grow.

What did not happen was the enactment of copyright law revision. There is current activity in the Senate, as I know you are well aware, and the general revision bill, has been reported from the Senate Judiciary Subcommittee to the full committee, with provisions paralleling those in your bill. But, there is no real possibility of an enactment of that revision legislation in this Congress, and the sound recording amendment is expiring at the end of this year. This would create an extremely difficult situation, leaving aside all of the arguments that can be put forward in favor of the legislation in and of itself. I believe that in the present situation, with our international obligations and the legal background that has emerged in the last 3 years, it would be very close to a disaster if this amendment were allowed to expire.

With respect to the criminal penalties, the Copyright Office prefers to take no position. We feel, and I personally feel, that it is unfortunate if you have rights under a law, Federal or otherwise, that cannot be effectively enforced. We believe that in some cases criminal penalties may be justified in cases of copyright infringement. And, of course, there are already criminal penalties under the present law that apply to this activity. We agree with the Justice Department to the extent of saying that, if the present penalties are totally ineffective they should be raised. But we just do not know whether they are or not, and for this reason, and not for any reasons or tactics or policy, we would prefer not to take a position on this issue.

In summary, Mr. Chairman, we believe that the past 3 years have demonstrated the need for this legislation on a permanent basis, and we urge your favorable consideration of H.R. 13364.

Thank you Mr. Chairman.

Mr. KASTENMEIER. Thank you, Ms. Ringer. That is very concise and comprehensive testimony.

You say that while the Senate has passed a copyright revision bill, out of its subcommittee, there is no possibility that it might become law in this session. Why do you say no possibility? On what do you base that?

Ms. RINGER. I am basing it on the realities of the situation, Mr. Chairman. Even if it were possible for the full Senate Judiciary Com-

mittee to act on the bill and for the bill to pass the Senate as a whole, it would then come before your committee. I cannot imagine that your subcommittee would not hold hearings, and that these would have to be extensive in length. You have never held hearings on several major provisions, including the one you mentioned, the subject of CATV. The CATV provisions as they now appear in the revision bill have never been considered by your subcommittee, and I think that you would necessarily have to have rather extended hearings on this and other subjects. It just does not seem to me a realistic possibility that this omnibus legislation could be enacted in 1974.

Mr. KASTENMEIER. Apart from what would be required of this subcommittee is it your estimate that the Senate presently intends to complete the action on the bill?

Ms. RINGER. Yes.

Mr. KASTENMEIER. This year?

Ms. RINGER. As far as intentions are concerned, certainly.

Mr. KASTENMEIER. Then I would hold out as a statement that there is a possibility of action, although perhaps remote. In the Senate bill as reported by the subcommittee, you indicate that its provisions parallel those in the bill or bills before this subcommittee. Are they precisely the same? Do they track absolutely in terms of penalty?

Ms. RINGER. They track absolutely in terms of the effect and the penalty. The language necessarily is different because the amendment that you are considering extending is an amendment of the 1909 law, which had some built-in awkwardness. I think that the revision bill is clearer in the sense of comprehensibility but I think that the substantive effect is exactly the same. And section 506 of the committee print of the Senate bill, the bill, as reported from the Senate Judiciary Subcommittee to the full committee, contains this provision concerning the \$25,000 fine or imprisonment of not more than 3 years and so forth, limited to "any person who infringes willfully and for purposes of commercial advantage or private financial gain the copy-right in a sound recording." In other words, the bills have exactly the same effect.

Mr. KASTENMEIER. Briefly two other questions. You indicate that we may not have seen the end of litigation in this field affecting tapes and the piracy question. What other issue may arise as you see it?

Ms. RINGER. The litigation that is still unsettled revolves around the entire relationship between Federal law and the State laws and the extent to which the State statutes or common law can go beyond the February 15, 1972 deadline and project in to the area that may or may not have been preempted by this law. The Supreme Court decision in the *Goldstein* case left this somewhat unclear and I think that there are conflicting decisions on this which will have to be resolved sooner or later.

Mr. KASTENMEIER. I think Mr. Drinan asked, whether there is any way in which a pirate might comply with the law to the extent that he might avoid certain penalties. Are not certain pirates making offers, tenders of royalty, to performing rights societies and others, and thereby attempting to avoid in part or in whole the consequences of so-called piracy?

Ms. RINGER. That is true. The one area in which I think there is probably some new activity is what used to be called the "mirror

record" situation, where one sets up a recording session with an arrangement and an orchestra and a performer, and deliberately imitates a particular recording as closely as possible. I think some of this activity is going on and if you call that record piracy I think that it probably is legal under Federal law as long as royalties are paid for the music, because this legislation certainly does not cover it. This is again an area in which the State law is fuzzy.

Mr. KASTENMEIER. It would be a limited piracy presumably, where it steals the arrangement and certain other elements that may be created?

Ms. RINGER. Yes, sir. That is right.

Mr. KASTENMEIER. Do you see any possible formulation in the future of a statutory license in this field?

Ms. RINGER. Actually I cannot see it. It seems to me that it is inconsistent with the basic purpose of this legislation. In Idaho one of the most recent pieces of State legislation that went through a State legislature had a compulsory license written into it and the Governor vetoed the legislation on the ground I just mentioned—that a compulsory license is an affirmative license to engage in these activities, and the thrust of the statute was to stop these activities.

I think it is simply a matter of what you want to do. In my opinion the basic purpose of this legislation is to enable the owners of copyrights in a sound recording to make the proper investment of effort and creativity in an original recording knowing that it will be protected against those that do not make this kind of investment. I believe that record piracy or whatever you call it costs the public more in the end. It is my belief, which is quite strong, that a compulsory license is inconsistent with the purpose of this legislation. A compulsory license is justifiable only where there exists or potentially will exist a clear cut monopoly situation that has to be combatted. This was the basis of the 1909 compulsory licensing but I do not see that factor in this case.

Mr. KASTENMEIER. Are you aware of efforts to roll back the February 15, 1972 date as a starting point for protection of the tapes?

Ms. RINGER. I was not aware of it.

Mr. KASTENMEIER. Is it your view that the present law on piracy of tapes and of counterfeit materials without increased penalties is inadequate for the purpose of protecting copyright owners?

Ms. RINGER. You are speaking of the laws that exist without the added penalties?

Mr. KASTENMEIER. Without the added penalties. The law as it exists today in other words.

Ms. RINGER. I am not sure it has been tested fully enough to say. I am sympathetic with the arguments made by the law enforcement officials that they do not find the present law effective. But, I cannot say whether this is true or not. I think this is for the Congress to decide this issue in the light of advice from the Justice Department.

Mr. KASTENMEIER. Although over the years is it not true that various copyright proprietors have indicated they have had difficulties in protecting their interests through civil remedies and otherwise?

Ms. RINGER. Yes. That is true.

Mr. KASTENMEIER. And sometimes the amounts involved are nominal?

Ms. RINGER. Yes, sir. There have been cases, for example, in the area of film bootlegging, where there have been constant complaints about the inadequacy of remedies. But the illegal practices have never reached the proportion that we have here. This is really infinitely more massive. It is quite possible that similar problems may arise in the future in areas other than record piracy, but I do not think we have ever had a situation of the scope and seriousness of this before.

Mr. KASTENMEIER. You certainly have never, from the report of Mr. Murphy, had anything comparable in terms of criminal investigation into a matter which arises under copyright law.

Ms. RINGER. This is certainly true.

Mr. KASTENMEIER. As you have had under this particular law. Thank you.

The gentleman from New York.

Mr. SMITH. Thank you, Mr. Chairman. Ms. Ringer, I want to join with the chairman in welcoming you back to this room where we sat about 8 years ago with Mr. Kaminstein and Mr. George Cary who I understand is here today. And I was a Johnny-come-lately to this subcommittee where I guess you have been working about 10 years on the copyright law, Mr. Chairman.

Mr. KASTENMEIER. Not me.

Mr. SMITH. Well, you and your predecessors, have been working on it about 10 years and I have always looked back on that experience as one of the high water marks of any legislator because we were trying to draw a law philosophically as to what should the law be and it was a really great experience. And so I am glad to welcome you back again this morning.

I only have one question, and that is this, and you may have touched on it a little bit with the chairman: with the law as we have it now, with the small penalty, and some dissatisfaction with the criminal provisions of it, would you comment for me on whether even with the small penalty, and perhaps the unsatisfactory working, if the pirate is identified, investigated, and convicted, what are the possibilities or the chances of the copyright owner getting substantial civil damages for the infringement of the copyright?

Ms. RINGER. The chances vary depending upon the ability to reach the defendant in a civil action.

Mr. SMITH. Who by that time probably has had a chance to hide his assets anyway?

Ms. RINGER. That is right. The experience that music publishers and other copyright owners have had in this area is instructive. Frequently these corporations are fictitious or collapsible and the individuals can vanish into the mist overnight.

At the same time, I am not going to deny or denigrate the effectiveness of civil remedies in copyright cases. I think civil remedies can be extremely effective in a great many situations, and I do not think that criminal remedies are by any means sufficient by themselves to make the owners of creative works whole in cases of infringement. On the other hand I am not sure that civil remedies are always sufficient by themselves. Such as they are, the criminal remedies for misdemeanors have been present in the copyright law for many years and have acted as an effective deterrent in some cases.

I will add this, Mr. Smith, I do feel that it is more important to

extend this legislation than to increase the penalties. And if it were a choice between the two, I would not want to run the risk of having the chaos that would arise if the present legislation expired at the end of this year.

Mr. SMITH. Thank you very much.

Mr. KASTENMEIER. The gentlemen from Massachusetts.

Mr. DRINAN. Thank you very much, Ms. Ringer. And I too, enjoy having you back with us.

In your stated testimony here today, you indicate that 3 years ago, in 1971, in the report we put in a terminal date of December 31, 1974 "to provide a period for further consideration of the various alternatives for solving the problems in this area before resorting to permanent legislative enactment." Do you think that we have done that?

Ms. RINGER. In a way, yes. I think you are now in the process of reevaluating, as you planned to do, what has happened in those 3 years. And in my opinion, when you take a look at the problem on the basis of the testimony here, you will find that the kind of dangers that were pointed to in hearings were not realized.

Mr. DRINAN. Suppose we propose a 3-year terminal date in this legislation rather than making it permanent? And I will tell you I am somewhat reluctant to make it permanent, because this area is growing, it is very explosive, it has worldwide implications. We can solve our problem and the problem of the industry by putting in a 3-year terminal date. And an added reason why I am somewhat reluctant to make it permanent is the proposal that may or may not materialize that copyright and patent jurisdiction will be transferred from the Judiciary to the Government Operations Committee. I have no idea whether that will happen but I do not want them to just inherit from us, from whatever evidence we have that is permanent. Now how do you feel about a 3-year extension?

Ms. RINGER. Not very enthusiastic. I simply feel that your subcommittee would go through the same process again in 3 years.

Mr. DRINAN. You do not want—after another couple of years you just want an excuse—

Ms. RINGER. I will say this. I understand your feelings of uncertainty. I am not sure that you feel that 3 years has been enough to see the results of this legislation fully. Personally I am convinced that permanent legislation would not have a pernicious effect on the industry or the public and that it is fully justified. In my opinion it is really an anachronism that you are removing. But I will answer you as I did Mr. Smith. I would prefer to see 3 years rather than nothing, because I do feel that we would bring a great deal of difficulty upon us if this were allowed to expire at the end of this year.

Mr. DRINAN. But you would concede that the various alternatives that we talked about 3 years ago, and for that reason we extended the law only for 2 or 3 years, that those various alternatives have not been explored or investigated by us?

Ms. RINGER. Yes, but as I mentioned I think that there have been changes which should be evaluated. I think the courts have spoken with a great deal more clarity than they had up to the time of the earlier hearings. I also think that the arguments of the so-called pirates at the previous hearings have more or less evaporated. I think

that what they said was going to happen did not happen, and in terms of their legal arguments the courts have spoken to the contrary.

Mr. DRINAN. But *Goldstein* could be wrong.

Ms. RINGER. Yes, but it was decided by the ultimate court of the land.

Mr. DRINAN. If you want the ultimate, which is to maximize the diffusion of music, if I take that as a starting point and we give some limited copyright, we would say that the ultimate objective of the first amendment is to maximize the availability of music and we give the author and the publisher some rights but not the rights that are proposed in this permanent extension of a blanket copyright.

Ms. RINGER. Yes, but I remind you, with deference, that the Constitution speaks of exclusive rights.

Mr. DRINAN. Of exclusive rights?

Ms. RINGER. Of exclusive rights, and this I think means that you start from that basis. Then, if you have to give a compulsory license, which in a way represents a trend in international copyright now, you do so, but only if the circumstances require it. You start from the idea of exclusive rights and then evaluate as to whether these are going to have damaging effects. If it seems clear that exclusive rights are too damaging, then you balance them through compulsory licensing or some alternative kind of regulation.

Mr. DRINAN. You mentioned finally that there are a lot of loopholes in the law as you put it. There is a store in Greater Boston, and I will not name it before the Department of Justice, that allows people to come in with all types of records being available, and you can buy your favorite cassette for 98 cents, and go into a lounge and put the cassette on and copy this and go make a \$6.95 record for 98 cents. I suppose that would be a loophole. But, good people, very fine people, feel that there is nothing wrong with this and you go and buy their cassette.

Ms. RINGER. Assuming that this is small scale and isolates, my own opinion is that legally there is nothing wrong with it and there is nothing you can do about it. This is my feeling.

Mr. DRINAN. You would not propose that we tighten up on this business?

Ms. RINGER. No, I would not.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The gentleman from Iowa, Mr. Mezvinsky.

Mr. MEZVINSKY. Yes. I have two points. One is, and I just want to touch on the last point, if we do not tighten up on that area, you have a mass market, do you not, where retailers could set this up? I mean, if you accept Mr. Drinan, Father Drinan's remarks, and I am not saying whether or not we should tighten up, but I am saying if that loophole does exist you have an opportunity for every retailer, whether it is Boston or whether it is Iowa City, Iowa, to get in the business of taking a cassette at 98 cents and taking every record at \$6.98 and allowing the public to have access to it. So I gather you are saying we should allow that loophole, and keep it going? Is that right?

Ms. RINGER. I do not really consider that the problem that we are addressing here. There are similarities between this and the photocopying situation, where you have one-for-one duplication of copyrighted material by individuals, by libraries, and by commercial outfits. I think that other countries have confronted the problem of one-

for-one on customized taping before we have had to. For example, in Germany, because the cost of records is so high, they have established what is known as a tax or a license fee on the tape recorder at the point of sale, to cover copyright royalties. There are other ways of meeting this sort of problem. But, so far at least, economics in this country are such that it is cheaper for the public to get their records by buying them on a unit basis rather than making them on a one-for-one basis. As long as that is the case I do not look on this as a major problem.

Mr. MEZVINSKY. OK. I just want to raise one point then in view of your testimony where you said, that if nothing happened, and we do not extend the law that it could have a disastrous consequence. And then you point out on page 3 which I thought was interesting, when we talked about the anticompetitive factor, you said "There is no question in my mind that tape piracy is fundamentally anticompetitive." Then are you saying that if we do not pass this law or extend it that, in fact, record prices would go up rather than down?

Ms. RINGER. Yes. But in saying that there would be disastrous effects I was thinking not so much of the immediate effect on the price of records and tapes. I am thinking of the fact that the pirates would presumably come out into the open again and that we would have a very difficult problem in meeting our international obligations under the Phonogram Treaty. There is also the fact that the legal situation, which has become somewhat clarified but remains fuzzy, would immediately become infinitely fuzzier because of legal and constitutional problems of preemption and the supremacy clause, involving questions of statutory of preemption and the *Goldstein* case. In other words, it would be arguable—I do not think correctly—that, because Congress had acted in the field, it had preempted State common law protection of records, and that if it failed to extend its action, the preemption would continue, and that the State laws, which are now effective in this area, would cease to be operative.

Mr. MEZVINSKY. I guess what you are saying is that piracy results in higher prices rather than—

Ms. RINGER. Yes. This is correct. This is my belief.

Mr. MEZVINSKY. OK. Mr. Chairman, I thank you and I will defer any further questions.

Mr. KASTENMEIER. Yes. I would like to thank the witness, but before I do I would observe in connection with the suggestion by the gentleman from Massachusetts that we might consider a 3-year additional extension term, that an alternative would be to make it permanent under this bill but the same question would be reachable on a revision in any event so that we would be able to readdress ourselves if we have the will to do it. It is a question of looking for alternatives. We could do so in the context of the total revision of the copyright, could we not?

Ms. RINGER. That is quite correct, Mr. Chairman.

Mr. KASTENMEIER. I would like to express my thanks to Ms. Ringer and her colleague.

The Chair would like to call Mr. Harvey J. Winter, Director of the Office of Business Practices in the Bureau of Economics and Business Affairs from the Department of State. Mr. Winter is a distinguished representative of the State Department who has been to many international conferences and represented the interests of this country in

copyright affairs in many years past. He is well known to this committee. You are most welcome, Mr. Winter.

TESTIMONY OF HARVEY J. WINTER, DIRECTOR, OFFICE OF BUSINESS PRACTICES, BUREAU OF ECONOMICS AND BUSINESS AFFAIRS, DEPARTMENT OF STATE

Mr. WINTER. Thank you, Mr. Chairman. I will be very brief and merely summarize my statement, which has been submitted for the record, Mr. Chairman.

[The statement of Mr. Winter follows:]

STATEMENT OF HARVEY J. WINTER, DIRECTOR, OFFICE OF BUSINESS PRACTICES, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE

Mr. Chairman, I am Harvey J. Winter, Director of the Office of Business Practices in the Bureau of Economic and Business Affairs, Department of State.

The Department of State appreciates very much having the opportunity to express its strong support for H.R. 13364. As you know, H.R. 13364 is a bill to amend Title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting recordings; to increase the criminal penalties for piracy and counterfeiting of sound recordings; and for other purposes.

With the enactment of Public Law 92-140 in 1971, Congress granted a limited copyright in sound recordings to protect against the unauthorized duplication and piracy of such recordings issued after February 15, 1972. This legislation, which amended the 1909 Copyright Law (Title 17, U.S.C.), was passed on an emergency basis because of the seriousness of the record piracy situation both nationally and internationally. At that time it was estimated that tapes valued at 200 million dollars, or one of every four tapes sold in the United States, was a pirated version. When Congress enacted this legislation in 1971, the House Judiciary Committee had limited the copyright protection so that it would apply only to records issued after February 15, 1972, and before December 31, 1974. The Report of the House Judiciary Committee explained that permanent copyright protection for sound recordings was contemplated and would be included in the general copyright revision legislation which all parties believed would be enacted by the end of 1974.

The Copyright Revision Bill contains the same provisions on piracy and counterfeiting of sound recordings as H.R. 13364. However, we understand there is a good possibility that this Bill will not be approved in this Congress. As a consequence, unless this Congress enacts specific legislation dealing with record piracy, copyright protection for recordings released after January 1, 1975, will lapse. Undoubtedly this would trigger a great increase in record piracy and present the United States record industry with all of the disastrous economic consequences confronting it prior to the enactment of Public Law 92-140. The most recent estimate for the last decade indicates an average of \$300 million worth of pirated records and tapes were being made and sold throughout the world each year.

An extremely important development regarding record piracy occurred on March 10, 1974 when the United States became the eighth State to become a member of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonogram Convention). Other States party to this Convention, which entered into force on April 18, 1973, are Fiji, Finland, France, Mexico, Sweden, United Kingdom, Argentina, Federal Republic of Germany, Australia, and Panama. The Phonogram Convention is designed specifically to deal with the serious worldwide problem of record piracy. The key provision of this treaty provides that contracting states will protect the nationals of other contracting states against the making or importation of duplicate recordings without the consent of the producer if the intent is to distribute them to the public. In view of the fact that the United States has the largest recording industry in the world, the effects of this record piracy are clearly more detrimental to the United States than any other country. Unauthorized copying and selling of legitimately produced records and tapes is a very serious problem

which drains millions of dollars every year from composers, authors, performing artists, and record producers in the United States and abroad. Further, this piracy is expected to continue to increase on a worldwide basis unless effective legal efforts are constantly pursued to combat it.

It is important to note that the proposed domestic legislation contained in H.R. 13364 is the implementing legislation for the Phonogram Convention. Consequently H.R. 13364 is most essential as regards the United States meeting its international commitments under this Convention. Enactment of this legislation is also very significant in terms of multilateral worldwide action against piracy of records and tapes. Therefore, the Department of State fully endorses the objectives of the proposed legislation because of its importance to the foreign relations of the United States.

In conclusion, may I again express the appreciation of the Department of State for being given the opportunity to present its views on this important bill.

Mr. WINTER. The Department of State, in cooperation with the Copyright Office, going back 3 or 4 years, supported very strongly the negotiation of a convention to deal with the critical problem of record piracy. The Convention for the Protection of Phonograms was negotiated in October of 1971. The Department of State testified before the Senate Foreign Relations Committee last fall in support of U.S. ratification of the Convention. The Senate unanimously approved this Convention, and it became operative for the United States in March of this year.

The implementing legislation was approved by this committee, in 1971, as you know, Mr. Chairman, and will expire in December of this year. As Ms. Ringer has stated, if the implementing legislation does expire, then we would be in the position of not fulfilling our obligations under the Phonogram Convention as of the end of 1974.

At the present time, as I have indicated in my prepared statement, Mr. Chairman, there are 11 countries that are parties to this Convention. There are a number of countries that are presently going through the parliamentary procedure for ratification and we would assume that an increasing number of countries will adhere to this Convention.

For the reason that I have mentioned here, primarily that this legislation is the implementing legislation for the Phonogram Convention, the Department of State fully endorses and strongly supports this legislation, Mr. Chairman.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Winter.

In terms of the question of enforcement of this legislation, do you, or on behalf of the State Department, have any position as to the penalties for violations, whether they ought to be increased or whether you are silent on the question, or whether it has any ramifications with respect to the U.S. participation in the Convention you alluded to?

Mr. WINTER. Mr. Chairman, the answer is that we have taken no position on the penalties. It would not affect our membership in the Convention one way or another, as long as we fulfill the basic obligations of the Convention. The penalties are left primarily to each national state.

Mr. KASTENMEIER. I yield to my friend from Massachusetts.

Mr. DRINAN. No. I have no questions. Thank you very much, sir.

Mr. KASTENMEIER. Thank you, Mr. Winter.

Mr. WINTER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. And without objection your statement will be received and made a part of the record.

In the interest of time, I would like to greet the next three witnesses and have them come up together and present their statements, and then we can cross-examine them. And first I would like to greet Mr. Stanley M. Gortikov, who is the president of the Recording Industry Association of America, also Mr. Charles Ruttenberg, counsel for the National Association of Record Merchandisers, as well as Mr. Hal Davis, president of the American Federation of Musicians.

Gentlemen, you are all most welcome, and I will call on Mr. Gortikov first, if I may, for a statement on the proposed legislation.

**TESTIMONY OF MR. STANLEY M. GORTIKOV, PRESIDENT,
RECORDING INDUSTRY ASSOCIATION OF AMERICA**

Mr. GORTIKOV. Thank you, Mr. Chairman, and members of the subcommittee. I am Stanley M. Gortikov, president of the Recording Industry Association of America, which comprises recording companies which create and market about 90 percent of the sound recordings sold in the United States. I have also firsthand knowledge of the commercial and creative aspects of the recording industry, having previously served as president of Capitol Records, which is a major U.S. recording company.

And I am submitting a written statement for the record, and I shall summarize that statement now in oral testimony.

Mr. KASTENMEIER. Without objection, your 19-page statement, with the 3-page addendum, will be received for the record and made a part of the record.

[The statement of Mr. Gortikov follows:]

STATEMENT OF STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., IN SUPPORT OF H.R. 13364 BEFORE SUBCOMMITTEE No. 3 OF THE HOUSE JUDICIARY COMMITTEE

My name is Stanley M. Gortikov. I am President of the Recording Industry Association of America, Inc., the national association which represents recording companies which create and market about 90 percent of the sound recordings sold in the United States. I have firsthand knowledge of the commercial and creative aspects of the recording industry, having previously served as President and Chief Executive Officer of Capitol Records, Inc., a major U.S. recording company.

RIAA's testimony today strongly supports the prompt passage of H.R. 13364, introduced by Congressman Kastenmeier, which continues copyright protection for sound recordings in order to shield the legitimate industry from record piracy. Similar bills to recognize this right have been introduced by Cong. Railsback (H.R. 13857), Cong. Danielson (H.R. 13765), Cong. Waldie (H.R. 13681), and Cong. Fulton and Kuykendall and 12 other sponsors (H.R. 14423). These bills also increase the penalties for record piracy and record counterfeiting. The step-up in piracy penalties has been proposed by the Justice Department; it is a change which we fully support.

The copyright protection of H.R. 13364 is unanimously endorsed by the Recording Industry Association of America and by the full range of legitimate industry interests and all concerned government agencies:

- The Copyright Office—to protect creative rights.
- The Justice Department—in support of appropriate anti-crime penalties.
- The State Department—to implement our international treaty obligations.
- The Commerce Department—in support of better business practices.
- The American Federation of Musicians—on behalf of the interests of performing and recording musicians.
- The American Federation of Television and Radio Artists—on behalf of the interests of performing and recording artists.

The AFL/CIO—to ensure that the working man is properly compensated for his efforts.

The National Association of Recording Merchandisers—on behalf of the interests of retailers and wholesalers of recordings.

A. *A Description of Record Piracy*

At the outset, let me briefly characterize the nature of record piracy and the dire threat it poses to the welfare—indeed to the survival—of the legitimate recording industry.

"Piracy" is the word used popularly and legislatively to describe the unauthorized duplication of sound recordings, chiefly tape cartridges. Piracy began mushrooming a few years ago when prerecorded tape cartridges were introduced into automobiles and then into homes. Pirates soon discovered they could cheaply copy and sell commercial recordings and thus gain huge illicit profits. About \$200 million annually is drained from legitimate businesses and creators by the pirates. At least one out of every four tapes is an illicit copy.

A typical pirate borrows or buys a regular commercial record album or tape in a regular retail store. He then purchases readily-available blank tape, blank plastic cartridge parts, and easy-to-operate portable duplicating equipment, the latter for as little as \$200. A pirate can be a smaller garage-type operator, or he can maintain large sophisticated factories, employing scores of employees around the clock. Most pirates sell on a cash-only basis. They mask their operations behind post office boxes and phone answering services, and move gypsy-like from place to place to avoid detection or may even be bold enough to sell franchises in their operations.

B. *The Destructive Effects of Record Piracy*

Pirates pay nothing to any recording artist, nothing to any musician, nothing to any record company, and rarely anything to music composers and publishers. That is how they are able to sell their product at such a low price—at half or a third of regular retail prices; they avoid the primary costs reflected in the prices of legitimate products. Who gets hurt by pirates?

1. *Recording artists* are victimized by pirates. Most artists, unfortunately, experience only brief recording and performing careers because of changing consumer tastes. Pirates hurt them at the peak of their relatively short careers while their hits are selling well.

2. *Musicians* get hurt too. They have a direct monetary stake in every record legitimately sold. Payments for musicians are made by record companies into special trust funds based on the number of records sold. Of course, pirate sales deprive musicians of this legitimate income. Every time a legitimate recording is sold, record companies also pay substantial sums into Music Performance Trust Funds—about \$8 million per year—which are used to finance free concerts for the general public, thus employing musicians. But whenever a pirate recording is sold, nothing is paid on behalf of those musicians.

3. *Record companies* take the risks and provide the investments in new recordings and in fresh talent development, seldom really knowing what consumers will buy. A record company may invest as much as \$50,000 to \$100,000 just to record a new album; it is seldom less than \$20,000. This is apart from the costs of advertising, promotion, manufacture, inventory, and marketing. Yet, over 75 percent of all recordings released lose money, never recovering enough to pay basic production, recording, talent, and promotion costs. Thus, a record company is dependent upon its relatively few hit records and artists to cover its costs, develop talent, and subsidize low-selling classical, ethnic, and jazz recordings, and hopefully make a profit. But the pirates copy only these hits—new hits and old hits—only the recordings with no risk.

4. *Music composers and publishers* are injured as well by denying them income and robbing their rights.

5. *Local retailers, wholesalers*—These are among the business enterprises most damaged. A legitimate retailer selling a Barbara Streisand tape cartridge for five or six dollars cannot compete with the pirate version for sale at only two dollars, because the latter bears none of the inescapable costs of creating and marketing legitimate products.

6. *Minorities* are taken advantage of. The music industry is one of the places blacks, Chicanos, and Latin Americans can "make it." Pirates can ruin their chances, wreck their opportunities. Ask Motown, one of the principal record companies featuring black artists, how badly pirates have damaged them.

7. *Consumers* will be victims, too. Apart from the sometimes-questionable quality of pirated tapes that the consumer buys, there is a long-term impact on the

consumer. Piracy will reduce the choice of records available; it cuts the opportunities for new artists to make recordings.

8. *Government*, too, is hurt. Piracy in many areas can attract unsavory elements, those of questionable ethics, because it is a largely cash business. Tax obligations have been evaded by pirates. Also, taxes paid by legitimate businesses are reduced, because sales are lost to the illicit operators.

C. *Emergency Congressional Legislation in 1971 to Curb Record Piracy*

As a means of curbing the deleterious impact of piracy on the legitimate recording industry, Congress determined that anti-piracy copyright protection was one of the essential provisions of the long-pending General Revision of the 1909 Copyright Law. However, in 1971, the piracy threat to the recording industry became so intense that Congress enacted special anti-piracy legislation for sound recordings, Pub. L. No. 92-140. In 1971, the House Judiciary Committee described the situation:

"The problem is an immediate and urgent one . . . the seriousness of the situation with respect to record piracy both nationally and internationally is unique. . . ." (House Report 91-487, 92d Congress, 1st Session.)

Public Law 92-140 provided:

(i) An anti-piracy copyright in those sound recordings "fixed" (recorded and released) between February 15, 1972 and December 31, 1974.

(ii) Misdemeanor criminal penalties for the piracy or unauthorized duplication and sale of such recordings.

H.R. 13364, considered here today, provides for anti-piracy protection for recordings issued after December 31, 1974; it also provides for felony penalties for record piracy and counterfeiting.

There was a reason in 1971 for Congress to set the December 31, 1974 expiration date for Pub. L. No. 92-140. Congress anticipated that by that date it would finally have acted definitively on the copyright revision bill. It appeared appropriate, then, to rely upon the omnibus bill to make the limited copyright permanent with appropriate criminal penalties.

D. *The Need for Immediate Action*

However, once again, it appears unlikely that general copyright revision will be passed by both houses of Congress this year, although the Senate Copyright Subcommittee has reported out the revision bill, S. 1361. Significantly, the bill before the Senate includes both anti-piracy protection for sound recordings and felony penalties for record piracy and counterfeiting. But because general revision in this Congress is so unlikely and because piracy poses a continuing threat to the legitimate recording industry, it is essential that H.R. 13364 be passed this year to provide protection for recordings released after December 31, 1974.

Moreover, passage of H.R. 13364 is essential to meet our international commitments. In 1973 the United States ratified the Geneva Convention, an international treaty which outlawed the piracy of sound recordings. This treaty required implementing legislation by signatory nations. Public Law 92-140 satisfied that obligation. The failure of Congress now to enact H.R. 13364 to continue domestic anti-piracy protection would constitute a renunciation by the U.S. of its solemn treaty obligations.

E. *The Continued Threat of Piracy*

Over two years have passed since the effective date of Public Law 92-140, February 15, 1972. Initial efforts at enforcement had to await communication by the Justice Department with U.S. Attorneys and FBI personnel on the nature of the product, the industry, and crime involved. Recent months have seen an acceleration of investigations and prosecution efforts in many areas. In other regions, however, we understand that, in view of the misdemeanor penalty, law enforcement officials have not viewed piracy with the special concern that it deserves.

It is impossible to measure precisely in quantitative terms the national level of piracy today. However, it can be positively affirmed that pirate products today are still manufactured and sold in massive quantities throughout the U.S.—almost one-fifth of a billion dollars of pirated goods a year. However, some changes in the character of piracy have taken place over the past two years:

1. The enactment of the federal anti-piracy law has caused more pirates to make and sell hit recordings of older catalog material recorded prior to February 15, 1972. Even this form of piracy, outlawed under many state laws though not a federal offense, has a damaging effect on companies and artists by eroding this vital source of income and career stability.

2. As this older catalog material ages still more, as its sales potential declines,

and as many pirates copy the same older titles, pirates will undoubtedly take greater risks and reinvolve themselves in the pirating of post-February 15, 1972 products. We are now witnessing the commencement of this ominous development.

3. As law enforcement intensifies in urban areas, pirates are spreading their marketing efforts more and more to suburban and rural areas with very strong sales results. Such areas are less thoroughly monitored by officials; potential retailers are less knowledgeable and sophisticated; and the crime rages unabated.

4. Pirates are becoming more aggressive and expansive in their methods of marketing. Increasingly, pirates employ mail order direct-to-consumer sales, TV advertised offers, large big-unit library sales, and wide varieties of retail outlets.

Piracy today is big, big business. One FBI official recently described it as "the world's biggest misdemeanor." This statement was made shortly after an FBI raid on one pirate who was caught with 100,000 post-February 15, 1972 tapes in inventory. He operated out of a five-building complex, utilizing a national network of distributors. He had 80 tape-duplicating machines, with annual sales and profits in the millions. Another large mid-west pirate bragged to a court that his annual sales exceeded \$10,000,000. Out of these huge pirate businesses, of course, nothing is paid to recording artists, nothing to musicians, nothing to record companies.

F. The Effect if Congress Should Fail To Continue Anti-Piracy Protection

Should Congress permit copyright protection to lapse for recordings released after December 31, 1974, this would trigger an unbridled increase in record piracy, with disastrous economic consequences for every legitimate recording company, artist, and musician. The sudden absence of such law would, once again, open the door for the wholesale piracy of legitimate recordings, as pirates would concentrate on the new hits of the post-January 1, 1975 period.

Apart from the direct impact of pirate activity, legitimate companies would be thrown into disarray, since the whole structure of traditional contractual arrangements would collapse. Picture, for example, what could happen to two record companies, RCA and Capitol. Elvis Presley is under exclusive contract with RCA Records. The Beatles are under exclusive contract with Capitol Records. If piracy were considered lawful, then RCA would be foolish ever to manufacture and sell the product of its own artist, Elvis Presley, and pay its contractual royalties to Presley. RCA could make much more profit by making and selling recordings of the Beatles—and thus pay no royalties to anybody. Conversely, Capitol Records need not make Beatle records and pay contractual royalties to the Beatles. But Capitol could profitably manufacture and sell Elvis Presley records for free.

Thus, no record company could ever afford to sign artists, guarantee them payments or advances or high royalties, as they do now. Only those record companies would survive which could pirate the most products and do so the fastest. Many small record companies now have only one or two artists. They would not survive under unbridled piracy unless they became pirates themselves.

For these reasons, we think it is clear beyond any doubt that Congress must grant copyright protection for records released after December 31, 1974, as Congressman Kastenmeier's bill provides.

G. The Penalties for Record Piracy and Counterfeiting Should Be Increased to a Felony Level

The crime of piracy in Public Law 92-140 constitutes a misdemeanor, punishable by imprisonment of up to one year and a fine up to \$1,000, or both, for each offense—a misdemeanor. H.R. 13364 would upgrade the penalty to a felony. It would provide for a fine up to \$25,000 or imprisonment up to three years, or both, for a first offense; and a fine up to \$50,000 or imprisonment up to seven years, or both, for a subsequent offense. These more severe penalties follow the recommendation of the Department of Justice in its proposed revisions of the U.S. Criminal Code (S. 1400). As the Department said:

"This provision . . . reflects the seriousness with which this Department sees the commission of offenses in involving the infringement of sound recording copyrights." See Department of Justice letter of April 20, 1973, reprinted in the *Congressional Record* of May 10, 1973, S. 8782

Cash-laden pirates scoff at misdemeanor penalties. The huge dollar yield of piracy is worth the minor risk of a "tap on the wrist" from a misdemeanor conviction. A pirate, for example, who might manufacture 10,000 units a week (and many do), grossing at least \$1.50 each or \$15,000 per week, can well afford a misdemeanor penalty; it is almost akin to buying a "license" to do business.

Because only a misdemeanor is involved, there seldom is any imprisonment of the pirate. The present sanction is a modest fine which can be paid from the roll

of bills in the pirate's pockets. We understand both from Justice Department and FBI officials that to impose felony penalties for piracy would substantially encourage greater interest and actions of federal law enforcement officials. It would attach a higher priority to the crime and would lead to more substantial penalties that would deter future participation in the crime of piracy.

The purpose of the law and the goal of the industry are to stamp out the crime of piracy. This can be achieved because there are only a finite number of pirates. But experience over the last few years indicates this cannot be attained by a misdemeanor penalty.

Furthermore, felony penalties should be extended for the counterfeiting provisions of 18 U.S.C. § 2318. Counterfeiting is one form of piracy. In a "conventional" pirated tape, for example, the music on the tape is a faithful copy of the original commercial version, but the package and graphics are usually unrelated in appearance to that original. However, in a counterfeit disk or tape, the package and graphics as well as the music are faithfully duplicated—including artist photos, color art, company labels, corporate logos and trademarks. A counterfeit is very difficult to distinguish from the original. Although counterfeiting is not currently a serious problem, the sanction for that crime should be increased to preclude pirates from shifting their method of operations away from piracy to counterfeiting.

Perhaps the more authoritative and compelling statement in support of a felony penalty comes from a law enforcement official in the field who is battling pirates every day. We have attached such a letter from an Assistant U.S. Attorney in Los Angeles who has had wide experience in piracy cases. He notes that in the last seventeen months, the FBI office in Los Angeles has seized 190,000 pirate tapes and duplicating equipment valued at more than \$400,000. His judgment is as follows:

"It has been the observation in the Los Angeles Area that the deterrent effect of the present statute is *de minimis* because of its misdemeanor penalties. This is obviously due to the fact that the potential profits to the tape pirate greatly outweigh the possible penalties that he could receive if convicted. (i.e. Very few convicted individuals receive incarceration for first offense misdemeanors and the fines can only be levied up to \$1,000 per count.) In several instances where a defendant has been placed under arrest and his tapes have been seized, he has gone back into the tape piracy business immediately after his conviction and even during the pending of the criminal proceedings.

"There are two additional detrimental effects of the statute being categorized as a misdemeanor. First among these is the fact that the courts tend to treat the offense as insignificant due to the fact that it is a misdemeanor. This affects sentencing which, to date, has uniformly been that of probation with regard to all tape pirate manufacturers and sellers. Second, is the fact that although the 'willfulness' requirement for a misdemeanor statute is lesser than that of a felony statute, as a practical matter courts and juries alike expect the Government to prove willfulness as if the offense were a felony. This requires a showing of bad purpose on the part of the defendant to disobey or disregard the law.

"For all the reasons above, and also the fact that the manufacture and sale of bootleg eight-track stereo tape sound recordings can and does deprive the recording industry of millions of dollars of income each year (See . . . letter dated March 23, 1973, from Senator John L. McClellan to the Attorney General, in which Senator McClellan states, 'The Congress was informed that tape pirates were selling more than \$200 million of pirated tapes each year, that one in four tapes were pirated tapes, and that each year these figures were growing'), it would appear both reasonable and necessary that the present misdemeanor statute be amended to a felony."

H. Conclusion

For these reasons we strongly support H.R. 13364 and its companion legislation. We urge prompt action by the Subcommittee in reporting out H.R. 13364 so that the Judiciary Committee and the full House can consider this essential legislation in the near future.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY,
CENTRAL DISTRICT OF CALIFORNIA,
Los Angeles, Calif., April 30, 1974.

Mr. STANLEY M. GORTIKOV,
President, Recording Industry Association of America, Inc., Los Angeles, Calif.

DEAR MR. GORTIKOV: Pursuant to your request, the information contained regarding the investigation of violations of Title 17, United States Code, Sections

1, 101(e), and 104, Infringement of Copyright of Sound Recordings, is furnished. I am pleased to inform you that I have received clearance from both the Federal Bureau of Investigation and the Department of Justice regarding furnishing you the following information, and you may utilize it in any fashion you deem appropriate, including presentation before Congressional Committees considering amending the criminal provisions of Title 17, United States Code.

The Los Angeles Office of the FBI has seized pursuant to search warrant or arrest since January, 1973, approximately 190,000 illegally duplicated pirated copies of legitimately copyrighted eight-track stereo tape sound recordings. In addition, since January, 1973, the Los Angeles Office of the FBI has seized pursuant to search warrant or arrest duplicating equipment valued in excess of \$400,000.

The tape pirate manufacturer's usual *modus operandi* or pattern of conduct is very clandestine in nature. For example, the typical tape pirate manufacturer operates from a nationwide mail order type business, with shifting locations, using fictitious business names and assumed personal names. Further, the typical tape pirate manufacturer camouflages his tapes with fictitious manufacturer's names. He makes representations on the labels, cardboard sleeves and promotional literature falsely indicating that the tapes comply with Federal law. The typical tape pirate also generally uses a telephone answering service as his purported base of operations. It is therefore extremely difficult to locate the manufacturing plant and various warehouses of the tape pirate manufacturer. Due to these deceptive practices, it is not uncommon for the complete investigation of a tape pirate manufacturer to take well over one year with many FBI agents working on various aspects of the case at different locations throughout the United States.

It has been the observation in the Los Angeles Area, that the deterrent effect of the present statute is *de minimis* because of its misdemeanor penalties. This is obviously due to the fact that the potential profits to the tape pirate greatly outweigh the possible penalties that he could receive if convicted. (I.e. Very few convicted individuals receive incarceration for first offense misdemeanors and the fines can only be levied up to \$1,000 per count.) In several instances where a defendant has been placed under arrest and his tapes have been seized, he has gone back into the tape piracy business immediately after his conviction and even during the pendency of the criminal proceedings.

There are two additional detrimental effects of the statute being categorized as a misdemeanor. First among these, is the fact that the courts tend to treat the offense as insignificant due to the fact that it is a misdemeanor. This affects sentencing which, to date, has uniformly been that of probation with regard to all tape pirate manufacturers and sellers. Second, is the fact that although the "willfulness" requirement for a misdemeanor statute is lesser than that of a felony statute, as a practical matter, courts and juries alike expect the Government to prove willfulness as if the offense were a felony. This requires a showing of bad purpose on the part of the defendant to disobey or disregard the law.

From a prosecutorial standpoint, trying a case under Title 17, United States Code, Sections 1, 101(e), and 104, is expensive and time consuming. First there is the requirement of proving that the bootleg eight-track stereo tape sound recordings are copies of the legitimate copyrighted sound recordings. This entails testimony regarding scientific tests conducted by experts, comparing the legitimate sound recording with the allegedly bootleg copy. There is also the requirement of proof that the sound recording infringed upon is copyrighted; the date of first publication; that when first publication occurred it was accompanied by requisite notice of copyright; and, that there was no license to the tape pirate to duplicate by the legitimate copyright owner. There is also the issue of chain of custody with reference to the "bootleg" sound recordings, and the legitimate tape recording used for comparison purposes.

It would appear that Title 17, United States Code, Section 101(d), which provides for the destruction of the bootleg tapes and the equipment used to manufacture them, is strictly a civil remedy. It would, therefore, appear necessary to notify the recording company at the culmination of a criminal proceeding to enable the recording company to subpoena the various tapes and equipment from the Government. The recording company could then file an appropriate civil action to allow for the destruction of the various tapes and duplicating equipment. This could entail a great deal of additional litigation after the criminal proceeding is completed. All of these problems connected with destruction of contraband and equipment could be alleviated by enabling Section 101(d) to clearly apply to criminal as well as civil proceedings. Thus, the Government

could destroy the contraband without the apparent necessity of notifying the victimized recording company.

For all the reasons above, and also the fact that the manufacture and sale of bootleg eight-track stereo tape sound recordings can and does deprive the recording industry of millions of dollars of income each year (See attached letter dated March 23, 1973, from Senator John L. McClellan to the Attorney General, in which Senator McClellan states, "The Congress was informed that tape pirates were selling more than \$200 million of pirated tapes each year, that one in four tapes were pirated tapes, and that each year these figures were growing."), it would appear both reasonable and necessary that the present misdemeanor statute be amended to a felony.

Very truly yours,

WILLIAM D. KELLER,
U.S. Attorney.
CHESTER L. BROWN,
Assistant U.S. Attorney.

Mr. GORTIKOV. The recording industry generally supports the passage of H.R. 13364, introduced by Congressman Kastenmeier, and similar bills introduced by Congressmen Railsback, Danielson and others.

In the process of piracy, the pirates pay absolutely nothing to any recording artist, nothing to any musicians, nothing to any record company, and rarely anything to any music company or music publisher or composer, and that, of course, is how they are able to sell the product at such a low price which is usually half or a third of the prevailing regular price of the commercial product. They avoid the cost factors that are borne within legitimate product prices.

The pirates copy, unfortunately, mostly only new hits, and by copying new hits rather than old hits they avoid all of the expenses in research and development, which comprise the principal costs to a legitimate recording company. In fact about 75 percent of all legitimate recordings that are made do not recover their basic costs, and it is that percentile of risk that is completely avoided by those engaged in piracy.

Over 2 years have passed since the effective date of Public Law 92-140, which was February 15, 1972, and this time period has seen an acceleration of Federal investigation and prosecution efforts in some areas. In other areas piracy enforcement suffers from the low priority that is accorded misdemeanors.

However, some changes in the character of piracy have taken place over these 2 years in which the law has been in effect.

One, the Federal antipiracy law has caused more pirates to make and sell hit recordings of older catalog material, that is, material recorded prior to the law's effective date of February 15, 1972.

And second, as this older catalog material ages still more, and its sales potential declines, pirates are prone to take greater risks and to reinvolve themselves in the pirating of the federally protected post-February 15, 1972, recordings.

And third, as law enforcement intensifies in urban areas, pirates are spreading their marketing efforts more and more to suburban and rural areas with very strong sales results.

And the fourth development is a very gradual increase in the incidence and awareness of counterfeit material, because counterfeit material defies detection. For example, I have in my hands here an example of a legitimate and a counterfeit recording in which the graphics are faithfully duplicated. Now, this defies identification, even by

sophisticated people in the industry. So, this is the kind of subterfuge that we feel will be increasingly resorted to if there are no protections from this law. This could be in respect both to tapes or discs. These happen to be long playing discs.

Mr. KASTENMEIER. Mr. Gortikov, does that qualify as a counterfeit?

Mr. GORTIKOV. That is a counterfeit, where the graphics, that is both the package and the actual label on the recording are faithfully reproduced, as well as the logos, artists' pictures, the descriptive materials; they are all faithfully reproduced so that the visual detection by either a lay person or a person in the industry is very difficult.

This is a pirate tape recording. For example, this is a pirate and a legitimate version of a tape cartridge and this happens to be a Dean Martin recording. And this is a case where the legitimate one bears the name and the likeness of the artist. This one has no picture of the artists at all. It is just a rather clumsy graphic depiction. Now, as for the recording, the sound is a faithful reproduction of the original as it is in here. But, the graphics, of course, are much cheaper and much more a simplistic version of the original. And the pirate can do this much more cheaply than he can if he tries to duplicate faithfully the graphics that are involved. But, a subsequent generation of piracy can be to increase the effort on counterfeits, which is another reason that we were seeking the higher penalties to deter that kind of resort.

Piracy, of course, today, is big, big business. One of the FBI officials recently described it as "the world's biggest misdemeanor," and this statement was made shortly after an FBI raid on one pirate who was caught with 100,000 post February 15, 1972 tapes in his inventory, and he operated out of a five-building complex and utilized a national network of distributors. He had 80 tape duplicating machines with annual sales and profits in the millions. And another large Midwest pirate bragged to a court that his annual sales exceeded \$10 million. But out of these huge pirate businesses, of course, nothing is paid to the recording artists, nothing is paid to musicians, nothing to record companies and it is all just a misdemeanor risk.

Now should Congress permit copyright protection to lapse for recordings released after December 31 of this year, this would trigger an unparalleled increase in record piracy with disastrous economic consequences for every legitimate recording company, artist, and musician. A sudden absence of such law would once again open the doors for the wholesale piracy of the legitimate recordings. The pirates would concentrate on the new hits of the post January 1, 1975, period. We would be right back where we were 2 years ago. Apart from the direct impact of pirate activities, legitimate companies would be thrown into disarray since the whole structure of the traditional contractual arrangements would flop. Hardly any record company could afford to sign artists, guarantee them payments or advances or high royalties as they do now. Those record companies would best survive which could pirate the most products and do so the fastest. The many small companies which now have only one or two artists, could not survive under unbridled piracy unless they became pirates themselves. For this reason we think that it is clear beyond any doubt that Congress must grant copyright production for records released after December 31, 1974, as H.R. 13364 would do. It would also upgrade the penalties for piracy, a change which our industry strongly endorses.

Cash laden pirates scoff at misdemeanor penalties because a misde-

meanor seldom involves any imprisonment for any pirates, and the present sanction is usually a modest fine; and the huge dollar yields of the pirates are worth the minor risk.

In addition to the testimony here today by the Justice Department, perhaps an even more authoritative and compelling statement for higher penalties comes from a law enforcement official in the field who is battling pirates every day. We have attached to our written presentation a letter from an assistant U.S. attorney in Los Angeles who has had wide experience in pirate cases. He notes that in the last 17 months the FBI office in Los Angeles alone has seized 190,000 pirate tapes and duplicating equipment valued at more than \$400,000.

His judgment, as contained in his letter says:

It has been the observation in the Los Angeles area that the deterrent effect of the present statute is de minimis because of its misdemeanor penalties. This is obviously due to the fact that the potential effects to the pirate greatly outweigh the possible penalties that he could receive if convicted. In several instances where a defendant has been placed and his tapes have been seized he has gone back into the tape piracy business immediately after his conviction and even during the pendency of the criminal proceedings.

For all of the reasons above, and also the fact that the manufacture and sale of bootleg eight-track stereo tapes and recordings can and does deprive the recording industry of millions of dollars of income each year, it would appear both reasonable and necessary that the present misdemeanor statute be amended to a felony.

Now, that is the plea of a working U.S. attorney who must implement the laws you enact. He asks for and he needs a tougher penalty in this law to accomplish the objective for which the law is written. The Recording Industry Association echoes that appeal.

We seek to correct the anomaly under which a common thief who steals a color television set can be exposed to a felony penalty, while a pirate who robs an legitimate industry of thousands and thousands of dollars of stolen tapes faces only a misdemeanor. We respectfully request, therefore, your passage of H.R. 13364.

Several questions were raised that I would like to address myself to in respect to various aspects of that matter.

Mr. KASTENMEIER. Mr. Gortikov, may I interrupt?

Off the record.

[Off the record discussion.]

Mr. KASTENMEIER. On the record. The Chair observes that there is a record vote on as a result of which the subcommittee will recess until 12:30.

[Short recess.]

Mr. KASTENMEIER. The subcommittee will reconvene on H.R. 13364 and other bills relating to the piracy of tapes. And the Chair would like to say that we will accept for the record the statement of Stanley Adams on behalf of ASCAP to be included in the appropriate place following the testimony of the witnesses before us.

When we recessed, Mr. Gortikov had concluded his statement and was about to make an observation based on the testimony I think that he had heard this morning by the Department of Justice and by others.

Mr. Gortikov.

Mr. GORTIKOV. Ok. Thank you. Recognizing the controversial nature of imposing added penalties, criminal sanctions, we do recognize that there are other alternatives to the specific proposal contained in the language of the proposed legislation. And one possibility in respect to

such criminal penalties would be that a first offense might continue to be a misdemeanor, even perhaps with added dollar penalties, whereas a second offense—that is the offender who really persists in engaging in the crime—a second offense might in turn be considered a felony. Or still another alternative might be for the retailer to be deemed exposed to a misdemeanor offense, whereas the distributor or the wholesaler—more prone to be involved in a more criminal aspects—might be involved in a felony penalty. So there is the retailer versus the wholesaler and manufacturer; and there is the first offense versus the second offense that do represent some alternatives that might be considered by the committee, in addition to the precise language which we now favor as written in the projected law.

Mr. KASTENMEIER. Would you state how that might apply again to the retailer, wholesaler, and manufacturer?

Mr. GORTIKOV. Yes. One alternative in terms of penalties might be for the offense of retailing a pirate product to be considered a misdemeanor, at least for the first offense.

Mr. KASTENMEIER. As opposed to either the wholesaling or the manufacture?

Mr. GORTIKOV. As opposed to wholesaling and manufacture. But, wholesaling and manufacture—which rarely are in the hands of an innocent operator and is a deliberate offense—that must be considered a felony penalty, and certainly this would get the operator who is heavily involved in any massive kind of piracy; but without risk to the “Momma and Papa” operator who might innocently be involved in retailing some tapes.

Mr. KASTENMEIER. Then, of course, Mr. Gortikov, I understand you prefer the formulation within the bill but should it come to the consideration of alternatives, you have been open minded enough to suggest one or two alternatives here.

One thing, it does appear to me that one thing useful further that you might do for the subcommittee file in this hearing is if you would define for legislative purposes in a letter perhaps to the committee the term retailer, wholesaling and manufacture.

Mr. GORTIKOV. All right.

Mr. KASTENMEIER. Suitable for the purposes of this legislation. That language will literally have to be created, thought through, created or invented for purposes of this legislation. I believe. Consequently, if you could give us the distinction and the definition for legislative purposes it might prove to be very useful. And I would ask you to do so.

Mr. GORTIKOV. Thank you. And we shall do it.

Some questions were understandably raised by Congressman Drinan in respect to the industry's custody of this particular law in respect to prices and profits throughout the 3-year span. In amplification of the concerns and the reservations that you had several years ago—first, in respect to profits in 1972 which was the first year in which this law prevailed—industry profits rose 26.6 percent higher than those profits which prevailed in 1971. 1971 was a particularly low year because industry profits had fallen 21.5 percent against the prior year of 1970.

However, in the most recent year, 1973, industry profits have fallen 43 percent below industry profits of 1972, and, of course, 1973 is the year in which even greater enforcement has been prevailing on this particular problem.

In respect to pricing over this period of time the average price of a single record, that is the 7-inch disc, has remained relatively constant during this period. I am talking now about the manufacturers' price. In 1972 the price on the single price record was 45.5 cents as an average. In 1973 it was 45.6 cents, and in February of 1974 it still remained at 46.5. In albums, however, there has been an average increase, though relatively slight. The manufacturers' average price of all LP's in December of 1972 was an average of \$2.50. Now, that is 10 months after the effective date of the law roughly. December of 1973 the average price was \$2.68. In other words, up from \$2.52 cents to \$2.68. And the average price at February of this year was \$2.79.

Now, I can conscientiously say that these price increases, slight though they were, are scarcely attributable to piracy. There have been astronomical increases in the price of vinyl, in the price of all printed and graphic materials in our industry, as well as in all others, and particularly the price of talent and the commitments to talent have been the major cause for prices going up. Also we have had a steady increase in the number of records—of individual recordings released—which fail to achieve a profit. Whereas in 1964, when our first economic data was presented to you, 61 percent of long-playing albums failed to recover their costs, that number is now 75 percent of recordings released. And again, realize that pirates have none of this type of risk, and they merely copy the hits.

In respect to the anticompetitive comments I do not know of any industry that has a greater ease of entry than our industry where competition is fierce for talent, for sales. This is not a monopolistic industry by any stretch of the imagination.

Mr. KASTENMEIER. What you are saying is that many of the pirates have the facilities and the resources at their command, if they could grab the talent they could go into the market themselves and compete?

Mr. GORTIKOV. Any pirate has an equal opportunity to any body else to enter the recording business providing he does not just copy the talent and the output of everyone else, but he in turn creates it himself.

Mr. KASTENMEIER. Mr. Gortikov, I am chagrined to say and to observe that there is another recorded vote on.

Mr. GORTIKOV. OK.

Mr. KASTENMEIER. That is why the gentleman from Massachusetts, Mr. Drinan, has just disappeared from the rostrum and why I must again.

Off the record.

[Off the record discussion.]

Mr. KASTENMEIER. We will recess, and this time we will recess even more briefly than the last time. It is now about 11 minutes to 1. I will try to reconvene this hearing on or before 1 o'clock and both you gentlemen will be recognized for brief statements.

Perhaps we can accomplish the end that way. Until that time the subcommittee stands in recess.

[Brief recess.]

Mr. KASTENMEIER. The subcommittee will come to order following that second recess and at this time have you any further comment, Mr. Gortikov, to make before I proceed?

Mr. GORTIKOV. There are further comments that I could make, but I think that I should defer the time in view of the other gentlemen.

Mr. KASTENMEIER. At this time then the Chair would like to recognize Mr. Ruttenberg.

TESTIMONY OF CHARLES RUTTENBERG, ESQ., COUNSEL, NATIONAL ASSOCIATION OF RECORDING MERCHANTISERS; ACCOMPANIED BY JAMES SCHWARTZ, PRESIDENT, SCHWARTZ BROTHERS, INC.

Mr. RUTTENBERG. Thank you, Mr. Chairman. I have a statement for the record, and I will truncate it somewhat in the presentation.

My name is Charles B. Ruttenberg. I am a member of the law firm of Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C. This statement is submitted on behalf of the National Association of Recording Merchandisers, Inc., for which we are legal counsel. The regular membership of the National Association of Recording Merchandisers includes approximately 135 distributors and merchandisers, including retailers, of sound recordings throughout the Nation. These members account for approximately 80 percent of the over-the-counter record and tape sales in the United States. In addition, the association has 146 associate members, consisting of manufacturers of recorded products, suppliers, operators of pressing plants, authorized duplicators, and publishers. Accompanying me today is Mr. James Schwartz, a former president and board member of the association, and president of Schwartz Brothers, Inc., distributors and retailers of sound recordings.

Mr. KASTENMEIER. Mr. Schwartz, are you in the audience?

Mr. RUTTENBERG. Mr. Schwartz is right here.

Mr. Chairman, the National Association of Recording Merchandisers fully supports H.R. 13364, and similar bills which would permanently establish a copyright for sound recordings within the framework of the Federal copyright law, and urges that this legislation be considered favorably by the subcommittee. You have already heard in some detail regarding the nature and scope of the activities being conducted by unauthorized duplicators, or, as we call them, pirates of legitimate sound recordings, and so I need not comment further on these aspects.

When representatives of the association testified in 1971 before Subcommittee No. 3 of the Committee on the Judiciary, they referred to the enormous amount of potential income from the sale of sound recordings being siphoned off by record pirates, including income due to artists, musicians and others who normally benefit from the sale of such recordings. The limited copyright for sound recordings provided by Public Law 92-140 on October 15, 1971, has been in effect since February 15, 1972, something over 2 years, and needless to say, additional time beyond that date was required to develop the forces needed to implement the law. In recent months, however, we have begun to see the enormous importance of that legislation to the legitimate sound recording industry, both here and abroad. I can say without qualification that if Public Law 92-140 had not been enacted, hundreds of legitimate distributors and retailers of sound recordings, mostly small businessmen, would have been driven from the record and tape business by other than the normal, vigorous competitive forces which are pres-

ent in the industry. Moreover, in our opinion, if the copyright in sound recordings provided by Public Law 92-140 is allowed to lapse, we will see the beginning of the end of the highly creative recorded music industry in the United States.

In preparing for these hearings, I reviewed in my mind what I consider to be the salutary effects of Public Law 92-140, as they relate to distributors and retailers. I have already alluded to the fact that such legislation has been fundamental to the preservation of the creativity and health of the recorded music industry. Additionally, when association representatives testified in 1971 they expressed concern about the fact that pirating activities were exerting a corrupting influence on businessmen who would prefer to conduct their activities in a legitimate manner but who, in order to survive, might have to deal in pirated product.

We now see a different trend. With few exceptions, distributors and retailers who handle legitimate product will not knowingly traffic in pirated materials. They are, in the main, small businessmen who are responsible members of their local communities. They are perfectly willing to, and do, vigorously compete with one another, but they have no desire to engage in illegal activities and will do everything in their power to avoid doing so.

Third, we see an overall increase in the sale of legitimate recordings throughout the Nation. Much of this increase is undoubtedly attributable to vigorous enforcement of the Federal copyright law, as well as to the enforcement of the laws in effect in over 20 States which apply to recordings fixed before February 15, 1972, and which are therefore not subject to Federal copyright.

Fourth, the existence of Federal copyright protection has led to the greater marketability of multiple versions of popular compositions, thereby providing additional products for sale by legitimate distributors and retailers of sound recordings. As long as it was relatively safe to pirate sound recordings, there was little opportunity for legitimate retailers and distributors to promote and sell recordings using lesser known performers and musicians, which, while budget priced, could not compete with the pirated versions of hit recordings. However, now that pirating is becoming less and less safe, new trends are evident. We are now seeing, therefore more companies producing their own recorded versions of hit songs, sometimes using lesser known artists and a lower level of promotion, which are marketed at very competitive prices.

In summary, enactment of Federal copyright legislation has enabled a vigorous and creative industry to survive and develop. It has enabled many small businessmen to remain in business. Musicians, composers and performers are receiving financial rewards to which they are justly entitled.

That is not to say that the problems of record piracy have been solved—far from it. Piracy is still rampant. But we can see patterns, and I can assure you that without extension of the present copyright on sound recordings, the industry will receive a blow from which it may not recover. Interestingly enough, in such circumstances the pirate will die along with his host—he needs new product on which to feed—and if that product dies, so does he.

Before closing, I want to express the association's appreciation for the outstanding assistance that the legitimate distributors and re-

tailers of sound recordings are receiving from the Department of Justice and the Federal Bureau of Investigation. They have truly taken on the responsibilities assigned to them and have performed them admirably. In this regard, as you, of course, know, H.R. 13364 would increase the penalties applicable to the willful infringement of sound recording copyrights for profit, and to the knowing and willful interstate shipment of recordings containing counterfeit labels. The Department of Justice feels that an increase in penalties for these offenses will aid enforcement efforts. We believe that the Department representatives are best qualified to address this issue, but needless to say, we urge that Federal enforcement authorities be given all the tools they need to, once and for all, break the back of record piracy—an activity which many judges have described in terms similar to those used in a recent opinion in the Circuit Court for Milwaukee County, Wis.:

The pirating of records is a shabby business that offends a person's sense of fair play. To exploit creative efforts, production costs and technical skill expended by another in the course of his making a livelihood without authority or without just compensation is morally reprehensible.

Thank you for giving us the opportunity to present this statement. We will be pleased to attempt to answer any questions you may have.

Mr. KASTENMEIER. Thank you, Mr. Ruttenberg.

Mr. RUTTENBERG. If I might add one thing, prior to my testimony the subcommittee was discussing pricing, and Mr. Gortikov subsequently referred to it. During the recess I was chatting about this subject with Mr. Schwartz. As you of course know, tapes are the main subject of record piracy and with respect to the retail prices of tape recordings we find that over the years since the initial legislation was enacted there has not been a significant variation in the retail prices of such recordings. It is a very competitive business.

Mr. KASTENMEIER. You indicate that you have as members of the National Association of Recording Merchandisers 135 distributors and merchandisers and 146 associate members.

Mr. RUTTENBERG. Yes.

Mr. KASTENMEIER. You indicate that 135 members account for approximately 80 percent of the over-the-counter record and tape sales. These are not people at the retail level. I would think there would be thousands and perhaps tens of thousands of retailers.

Mr. RUTTENBERG. The answer is that the distributors to the retail market account for about 80 percent. When I say over-the-counter, of course, you have such additional sales activities as record clubs, which are very substantial in the business, television promotion, sales of that sort. But, I am referring mainly to the funneling of the sound recordings from the distributors to the retailers and that is the 80 percent.

Mr. KASTENMEIER. Next the committee would like to hear from Mr. Hal Davis, who is the president of the American Federation of Musicians.

Mr. Davis. I note that your statement is short and you might deliver it if you wish.

TESTIMONY OF HAL DAVIS, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS

Mr. DAVIS. In order to save some time I would like permission to make some corrections in my prepared statement.

Mr. KASTENMEIER. Yes.

Mr. DAVIS. Third line on the first page, the figure 325 should be changed to 330,000.

On page 3, the second line, the figure 8 should be changed to 9. That is on page 3, Mr. Chairman.

Mr. KASTENMEIER. What line?

Mr. DAVIS. The second line.

Mr. KASTENMEIER. Should be—

Mr. DAVIS. 8 million should be changed to 9 million.

In the fifth line down, more than should be deleted and the word approximately put in and the figure 7 changed 8.

Mr. KASTENMEIER. I know that inflation is rising almost daily, but I did not know that your membership—

Mr. DAVIS. This is a typographical error, Mr. Chairman. I did not have time to proof this before it was submitted, and so I apologize.

Mr. Chairman, and members of the committee, I am here in strong support of H.R. 13364. Now, rather than read this prepared statement, I would just like to make a few brief observations.

[The statement of Mr. Davis follows:]

STATEMENT OF HAL C. DAVIS, PRESIDENT AMERICAN FEDERATION OF MUSICIANS
IN SUPPORT OF H.R. 13364 BEFORE SUBCOMMITTEE NO. 3 OF THE HOUSE JUDICIARY COMMITTEE

My name is Hal C. Davis, President of the American Federation of Musicians. I appear today on behalf of our 325,000 members to state our strong support for H.R. 13364, which has been introduced by Chairman Kastenmeier, and for the companion bills introduced by Congressmen Railsback and Danielson.

This legislation affords anti-piracy protection for sound recordings issued after December 31, 1974. It also provides for a needed increase in the penalties for piracy and counterfeiting of sound recordings.

The American Federation of Musicians (AFM) strongly supported emergency anti-piracy legislation enacted in 1971. We think it is just as essential today that Congress act promptly to continue this copyright protection. The piracy of sound recordings is an insidious, illegal practice which drastically curtails the income of musicians, artists, and record companies.

Pirates appropriate "hit" recordings and flood the market with duplicates. They pay nothing to the musician or performer whose artistry created this hit recording. Record piracy to be big business; last year it was estimated that over \$200 million of pirated tapes were sold in this country.

Record piracy has a devastating effect upon musicians. Millions of dollars of income are lost each year in the form of income not realized by those recording artists whose income for the sale of recorded work is substantially decreased by the unauthorized duplication of musical talent. We estimate that last year the musicians of the AFM and vocal artists of the American Federation of Television and Radio Artists lost nearly \$20 million of income as a result of record piracy. In addition, the Music Performance Trust Funds estimate that there has been a substantial loss each year of payments that would otherwise have been made by the record manufacturers; these are lost payments totalling in the millions of dollars, much of which would have been disbursed to AFM members performing free public concerts throughout the United States.

Moreover, piracy has deprived various trust funds maintained by AFM of

immense revenues. These trust funds are dependent upon royalties from the sale of legitimate recordings. Each time a legitimate recording is sold record companies pay a sum into the Music Performance Trust Fund. Last year \$8 million was paid into this fund. The fund was used last year to provide more than 57,000 free, live music concerts for the public throughout the country, for which musicians were paid more than \$7 million. These funds are the largest employers of musicians in the entire world. Thus, piracy concurrently deprives musicians of legitimate work and the public of free concerts.

Such piracy at the economic expense of others cannot be justified morally or legally. Exploiting the talents and efforts of our musical artists without their consent or without their remuneration is totally incompatible with the accepted norms of the American economic system. And most poignant of all is the insult accorded by the tape pirates to the musical integrity of the recording artists, whose ability to bring pleasure to the public is boundless, but whose capacity to secure fair compensation is extremely limited at best.

Thus, H.R. 13364 is justified by the strongest economic and legal considerations. To permit anti-piracy protection to lapse for recordings issued from 1975 on would encourage a new burst of piratic activity which could only be described as a disaster to the legitimate music industry.

Furthermore, we support the position of the Justice Department that stepped-up penalties for record piracy and counterfeiting are essential to stamp out, once and for all, this nefarious practice. We believe that the views of the Justice Department, which has now had two years experience in the vigorous enforcement of piracy laws should be given controlling weight. The increased penalties will constitute a strong deterrent, we believe, to those who would make piracy a "big business." Today there are reports of pirates selling \$10 million of illegal goods per year and of FBI raids seizing tens of thousands of illegal tapes. This illegal and immoral activity clearly deserves a felony sanction.

In conclusion, let me say that we appreciate the prompt hearings on this matter and we urge quick action by the Subcommittee so that the House can enact H.R. 13364 in short order.

Mr. DAVIS. This is my first opportunity to appear before your committee and I appreciate it greatly. Even though it came at a time when I must prepare to leave for the west coast for an international convention of my union and for extended negotiations with the motion picture industry, my interest today in this legislation is so great that I just set every thing aside to be here today.

I am here representing the creative, working people in this industry Mr. Chairman, and for the information of the committee members, it might be interesting for you to know that I have in my office in excess of 2,000 signed agreements covering the recording industry throughout the United States and Canada. This hardly comports with the suggestion that anti-piracy laws are designed to enlarge the profits of huge monopolistic companies.

Now, I have heard it said that some record pirates are engaged in a legitimate business which they should be able to pursue. They are represented by respectable counsel before this committee. Well, Mr. Chairman, I think we all know that murderers and thieves have often been represented by respectable counsel. To me a pirate is a pirate in anybody's language. To put it bluntly, a pirate is a person who steals a product made by my people and the other great artists, the vocalists. In my judgment he has no right to grow wealthy on the creative efforts of those gifted people. He flagrantly violates human and moral rights. This pirate could easily become legitimate by signing the applicable collective bargaining agreements, and pay prevailing wages and other benefits. The legitimate recording industry pays into two funds for every record or commercial recording sold. One is known as the special payments fund and the other is the music performance trust fund.

This September 1, out of the special payments, some \$8 million will be paid to all the musicians recently employed by the recording industry. This is in addition to the basic scale they received for making the records.

In addition, some \$9 million last fiscal year were spent by the trustee of the music performance trust fund. This provided free live concerts of various sizes and descriptions for the people of this country. Some took place in schools, some took place in veterans' hospitals, some took place at block parties, some took place in summer concert programs. And every act of piracy deprives both of these funds of the proper payments.

So, I strongly urge the committee to consider reporting out the legislation as proposed by Chairman Kastenmeier in this case.

Thank you, gentlemen.

Mr. KASTENMEIER. Thank you very much, Mr. Davis.

Mr. Gortikov, would you wish to add anything?

Mr. GORTIKOV. I wanted to make some brief comments in respect to the compulsory license aspects that were raised by Congressman Drinan.

A compulsory license, or the prospect of a compulsory license, has already been rejected. First of all, and most recently, it has been rejected by the Senate in its recent markup of S. 1361, the general copyright revision. And prior to that it was previously rejected by this body after hearings.

In addition to that, compulsory licenses—even the version of compulsory license that is implicit in the song itself—the compulsory license has been rejected by two courts, by two circuit courts, and no publisher in the judgment of those courts has to grant a compulsory license to a pirate. A pirate is specifically denied access to that compulsory license even for the use of a song, and that has been reaffirmed by the courts.

Certainly there is no relationship between the compulsory license available generally in the song and in the sound recording. The compulsory license sought by some pirates in sound recordings is nothing more than a license to steal because it represents no creative contribution. It is merely a copying of another's work.

To grant a compulsory license would not only favor the rapid growth of piracy itself among illegitimate operators, but it would throw the legitimate industry into consternation. For example, an artist who is under contract to RCA, such as Elvis Presley, if a compulsory license were available to the industry, RCA would never again make a record of its own contract artist, Elvis Presley, because every time it did, it would have to pay a royalty to Elvis Presley. Instead, every other recording company would pirate Elvis Presley and not pay any royalties to Elvis Presley, and RCA instead could attempt to survive by copying the product of all of its competitors. So, if this rampant condition were allowed to prevail under a compulsory license, who then would put up the development money to create talent in artists? It would be impossible. And so I offer these statements in amplification of our conviction behind the favorable consideration of this legislation.

Mr. KASTENMEIER. Even though the three organizations represented here may not always be in accord, on this question you are I take it?

Let me ask Mr. Ruttenberg and Mr. Davis, would you also be agreeable to an alternative in terms of penalties as suggested by Mr. Gortikov.

Mr. DAVIS. Yes; we would be agreeable.

Mr. RUTTENBERG. We would also, Mr. Chairman.

I might add to what Mr. Gortikov was saying, that about 25 or 26 States now have State legislation relating to pre-February 1972 recordings and in not one of those States has a compulsory licensing provision been included in the legislation. Also the courts to which Mr. Gortikov refers are the U.S. Courts of Appeals for the 9th and 10th circuits which cover a range of Federal courts in saying that the pirates are not entitled to the compulsory music license.

Mr. KASTENMEIER. Perhaps this question should better have been addressed to Mr. Murphy, but I will address it to you anyway, not having posed it to him. In cases, or in two cases where in A the penalty of incarceration was meted out, one for 6 months and the other for 20 days, I believe you are familiar with those cases?

Mr. GORTIKOV. I know of their existence, but I am not familiar with the details. There are individuals in the room who may be.

Mr. KASTENMEIER. I am curious to know whether it was a question of a repeated offense or whether this happened as the first offense in both cases wherein individuals were actually sent to jail or prison.

Mr. GORTIKOV. General counsel, of the recording industry, Mr. Ernest Meyers, is in the audience and perhaps he could answer that.

Mr. KASTENMEIER. Mr. Meyers, are you present?

Mr. MEYERS. Yes. I am afraid, Mr. Chairman, I cannot answer that.

Mr. KASTENMEIER. That is quite all right. That can better be posed to the Justice Department. The reason I ask it is to determine whether there is a distinction made by the courts or by U.S. attorneys with respect to first or multiple offenses, second or later offenses in terms of sentencings for those charged.

I will yield to the gentleman from New York, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Gentlemen, thank you for your testimony. Mr. Davis, I am sorry that Father Drinan could not have been here to hear you.

Mr. DAVIS. I am too.

Mr. SMITH. To hear your testimony because you brought out very well the human aspect of this thing that he was worried about this morning.

Mr. DAVIS. That is right.

Mr. SMITH. Mr. Ruttenberg, I asked Ms. Ringer this morning whether civil suits for damages for copyright infringement were effective, or how effective they were in stopping piracy.

Mr. RUTTENBERG. I do not think they are very effective, Mr. Smith. If you obtain an injunction or damages the judgment applies only to the particular plaintiff in the case, the record company specifically involved. The defendant in that case can then proceed to pirate the work of other record companies who might not have been involved in the litigation, or else move to another location or change his name, any one of a varied number of procedures which can be followed, after civil litigation, on the part of the pirate to avoid really being stopped in his tracks. I do not think it is terribly effective. The courts

have been almost unanimously in favor of supporting such suits but I think criminal legislation is necessary.

Mr. SMITH. Does your organization, the record manufacturers, or Mr. Gortikov of the recording industry, follow these individual piracy cases when the Justice Department files an information. For instance, somebody makes a complaint before the FBI gets into it and it becomes public knowledge, do your associations try to follow these individual complaints for the benefit of your members? Do you follow the individual pirates who have been caught or are being investigated?

Mr. GORTIKOV. Follow them in what sense?

Mr. SMITH. Well, for the purpose of disseminating information to your members, for instance, for the purpose of bringing civil suits for damages?

Mr. GORTIKOV. Yes, we do disseminate that information and there have been several such civil suits which have been instituted which have been in direct pursuit of what you have articulated; and the Recording Industry Association also brings to the attention of law enforcement agencies all piracy intelligence which we pick up from retailers, wholesalers, and manufacturers.

Mr. SMITH. Well, I think I asked Mr. Murphy this morning where they got most of their information to start and he said it was that kind of a complaint from your association or perhaps from individuals.

Mr. GORTIKOV. Individual companies and members.

Mr. RUTTENBERG. Generally members of our association who are located in the various States and who have information about pirating activities in their own locales which are damaging them severely as far as sales are concerned. Being locally based they are aware of what is going on.

Mr. SMITH. You may have answered a question before I was here but I was wondering is there any particular area of the country in which this piracy business goes on more than in other areas of the country.

Mr. GORTIKOV. There is more and more incidence in the nonurban areas just because the enforcement has not yet penetrated to a great extent in those areas. For example, on the highways in the more remote areas, many gas stations will have pirate tapes and likewise throughout the South and Midwest and smaller communities. The percentile of pirate products versus legitimate products is much higher than it might be in the city of Washington or the city of New York or Los Angeles and the pirates know this and exploit it.

Mr. SMITH. Senator Bass said hello this morning and said that he comes from Tennessee and Tennessee is a hotbed of this sort of thing with the country music as popular as it is and there is a lot of pirating going on there.

Mr. GORTIKOV. That is correct.

Mr. SMITH. No more questions, Mr. Chairman.

Mr. KASTENMEIER. Thank you.

The gentleman from Utah, Mr. Owens was here, and he has just left.

[The following statements of the Honorable Jerome R. Waldie and the American Society of Composers, Authors and Publishers were received for the record:]

STATEMENT OF CONGRESSMAN JEROME R. WALDIE ON SOUND RECORDING COPYRIGHT LEGISLATION TO THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMMITTEE

Mr. Chairman and Members of the Committee, I appreciate the opportunity to make this statement today on H.R. 13364, H.R. 13681, and similar bills which amend the copyright in sound recordings law and combat "record piracy."

The theft and rerecording of popular music has grown to become a \$200 million a year business. It is easy to rerecord music with new recording techniques either from legitimate production albums and tapes or from concerts, and then to resell it at a discount on unfamiliar labels. Because of the low price resulting from the avoidance of royalty payments, the records are popular even though they are not obtainable from the normal retail outlets utilized by the legitimate companies. This piracy constitutes a threat to the recording industry and its artists, and evidences a great need for copy right protection for sound recordings.

Section 1 of HR 13681 removes the expiration date on the privilege of securing a sound recording copyright included in P.L. 92-140. This expiration date can and should be removed, and can be done without harming the pending general copyright revision program.

Passage of this section of the bill will reinforce the Supreme Court decision upholding the right of a state to pass its own anti-piracy laws regarding sound recordings before 1972, decided on the grounds that Congressional inaction before 1972 did not preclude state action (*Goldstein v. California*, 412 US § 46 [1973].) The soon to expire sound recording copyright law covers recordings after 1972, and if allowed to expire, through 1974.

Section 1 will also afford uniform protection across all the states. Some states have their own laws, others do not. Uniformity in coverage is also needed to meet our treaty obligations assumed by our membership of the Phonogram Convention protection recording rights of member nations.

As I already noted, record and tape piracy continues at a high rate today, not only for pre-1972 recordings but also for newer releases in spite of our present laws. I believe the penalties for infringement of the law should be increased to act as a greater deterrent. Sections 2 and 3 of the bill increase the criminal penalties for violation of the copyright laws, and for the transportation, sale or receipt of phonograph records bearing forged or counterfeit labels. The new penalties would impose a fine of \$25,000 or imprisonment for not more than three years for a first offense. A subsequent conviction would result in a fine of \$50,000 and a prison term of up to seven years.

In conclusion, I would like to reiterate my support for the legislation being reviewed today, and command the Committee for its prompt and timely consideration of it.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

New York, N.Y., May 31, 1974.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I herewith submit a statement on behalf of ASCAP expressing support of H.R. 13364. We also urge enactment at this time of the definitive provisions for copyright duration embodied in the general revision bill.

I respectfully request that this statement be included in the record of hearings on H.R. 13364.

Sincerely,

STANLEY ADAMS,
President.

STATEMENT OF STANLEY ADAMS ON BEHALF OF AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

Mr. Chairman, and members of the Subcommittee, my name is Stanley Adams. I am President of the American Society of Composers, Authors and Publishers, on whose behalf I submit this statement. ASCAP is an unincorporated association founded in 1914, five years after the present copyright law was enacted. Its founders included, Victor Herbert, John Philip Sousa, and Irving Berlin, among others. Today the membership of ASCAP comprises over 16,000 writers and 6,000 publishers scattered throughout the United States. The association represents all segments in the repertory of American music including such composers as Harold Arlen, Burt Bacharach, Bela Bartok, Irving Berlin, Leonard Bernstein, George M. Cohan, Aaron Copland, John Denver, Bob Dylan, Duke Ellington, Dorothy Fields, George Gershwin, Morton Gould, Carole King, Henry Mancini, Rod McKuen, Cole Porter, Smokey Robinson, Richard Rodgers, Carly Simon and Stevie Wonder, to name only a few.

ASCAP supports the Bill, H.R. 13364, introduced by Chairman Kastenmeier to prevent the copyright in sound recordings enacted in 1971 from lapsing on December 31, 1974. The measure, and its companion bills, H.R. 13857 (Rep. Railsback) and H.R. 13765 (Rep. Danielson), introduced by members of the Subcommittee, we believe, represents sound public policy and is deserving of *permanent* rather than *temporary* enactment.

As members of the Subcommittee may know, the legislative history of the so-called "anti-piracy" legislation is traced to the general revision of copyright law which has been delayed for a number of years in the Senate. The general revision bill was the subject of extensive hearings and thorough deliberations before this Subcommittee in the 89th and 90th Congresses. Twenty-two days of public hearings were devoted to this issue. The record represents, to my mind, one of the most painstaking and complete legislative achievements.

In the 92d Congress the Senate, based on its judgment that record piracy was an immediate and urgent problem, "lifted" the provision for copyrighting records out of the general revision bill. It was concluded by the other body that the problem of record piracy was grave, both nationally and internationally, and that statutory protection was imperative. The House Committee thereafter processed the legislation, but as you know, limited its operative life to December 31, 1974, so that the subject could be treated in the context of enactment of the pending revision bills.

For the same reason temporary extension of existing copyrights have been enacted to prevent works from falling into the public domain pending enactment of the revision bill that would extend the terms of existing copyrights from 56 years to 75 years. The last extension is operative only until December 31, 1974, as in the case of copyright in records. Turning back to the record piracy bill, H.R. 13364, and companion bills, reflect the present judgment that the temporary protection against record piracies has been wise and effective; that such protection is fully consonant with international copyright arrangements and warranted by principles of fair dealing and equity and therefore merits permanent legislative safeguards.

We do not dispute the judgments made by Congress in 1971, when the temporary record copyright statute was passed, nor do we question the wisdom of enacting a permanent record copyright provision today. We do submit, however, that reasons equally if not more compelling warrant amending H.R. 13364 to place permanently in the federal copyright statute the *copyright term* proposed in the federal revision bill just as H.R. 13364 in its present form places permanently in the statute the record copyright provision of the bill that passed the House in 1967.

We believe that here too an imperative need exists to reform the term of copyright protection. Under the 1909 statute which is the prevailing law, copyright protection begins on the date of publication (or on the date of registration in the case of unpublished works) and continues for 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years. It is noteworthy that a very large majority of the countries of the world have adopted the principle that the term of copyright should equal the life of the author and 50 years after his death. Indeed, many nations have extended the term of copyright beyond "life-plus-50", for example—Spain, life

plus 80 years; Germany, life plus 70 years; Austria, life plus 70 years; France, life plus 64 years and 205 days;¹ Belgium, life plus 60 years; Brazil, life plus 60 years; and Italy, life plus 56 years.

In favorably reporting the general revision bill to the House in 1967, the Committee concluded that the need for a longer total term of copyright had been conclusively demonstrated. The Committee *Report* stated: "The committee was impressed by the arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity, that would result from adoption of a life-plus-50 term. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier." (H. Rep. No. 83; 90th Cong., 1st Sess., at p. 102).

Mr. Chairman, the basic reasons that warrant a reform of copyright term for new works to life-plus-50 (and for existing works to 75 years from the date of publication or registration) were thoroughly discussed in the House Judiciary Committee report which you submitted to the House in 1967. These reasons can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his or her works.
2. Technological advances and growth in communications media have substantially lengthened the commercial life of many works.
3. Although limitations on copyright term are obviously necessary, too short a term harms the author without conferring any corresponding benefit to the public.
4. With respect to new works, a system based on the life of the author would provide a simpler, more definite method of computing term than that obtaining for existing works based on the vague concept of "publication".
5. Life-plus-50 alleviates the need for a renewal system which, in a number of cases, has caused inadvertent and unjust loss of copyright.
6. A life-plus-50 term will bring American authors protection that conforms with the protection granted in majority of the countries of the world. Disparity in copyright term has provoked considerable resentment and some proposals for retaliatory legislation.

We believe there is an overriding need to reform the duration of copyright today—to take into account the continuing technological revolution in communications and more importantly, to recognize individual authorship as an indispensable resource.

Just as the Congress extracted copyright protection in sound recordings from the general revision bill, no valid reason remains for failing also to extract the revised copyright term contained in that bill. If "anti-piracy" is warranted by equities, by international practice and by the mandate of the Constitution—"To promote the Progress of Science and Useful Arts * * *" (Article I, Sec. 8, Cl. 8), then so too a new term of copyright protection is clearly warranted. The parallel is obvious. A copyright term is needed that is consistent with international copyright protection—one that serves to encourage and protect rather than hinder American authors.

Mr. Chairman and members of the Subcommittee, neither the copyright for sound recordings nor the duration of copyright protection are new expedients. Both principles were formulated in legislation embodying a general revision of copyright law first introduced in Congress almost a decade ago (H.R. 11947, 88th Cong. July 10, 1964). Both of these principles were approved by the House Judiciary Committee and passed by the House as part of the general revision bill of 1967 (H.R. 2512, 90th Cong.). Both principles would almost certainly have become enacted into law before now had they not been held up pending Senate action on general copyright revision. Should we therefore conclude that if we cannot dam the ocean, then we must permit the rivers to overflow?

In the many years devoted to reform of the federal copyright statute, the issue of duration of copyright has been thoroughly studied and analyzed. All views have been heard, deliberated upon and considered. The 1967 House Committee report carefully appraised and discussed the question of duration of copyright in this manner: "The committee is aware that [under life-plus-50, works] would be protected much longer Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case

¹ Representing life and 50 years plus the periods of World War I and World War II.

that has been made for the life-plus-50 system The committee believes that the advantages of a basic term of copyright enduring for the life of its author and for 50 years after his death outweigh any possible disadvantages." (at p. 103)

We understand that S. 1361, the general revision bill, has now been reported favorably by the Senate Copyright Subcommittee to the full Senate Judiciary Committee. The principles of anti-piracy" and "life-plus-50" are contained in that bill. The full Senate Judiciary Committee is scheduled to begin its consideration this week. It would now appear that general revision may finally be approved by the other body during this session of Congress. Mr. Chairman, in your announcement of the anti-piracy hearings you declared: "It now appears questionable whether copyright revision can be enacted by both Houses of Congress during the present year." For that reason you suggested that enactment of definitive record copyright legislation is needed. We respectfully submit that for that reason enactment of a definitive provision for copyright duration is likewise imperative this year.

The Society will be happy to submit a draft of the proposed amendment with respect to duration, conforming to the provision of the Revision bill, and to cooperate with the Committee in any way the Committee wishes.

Respectfully submitted,

STANLEY ADAMS,
President.

(The following agency reports were received:)

THE LIBRARIAN OF CONGRESS,
Washington, D.C., April 10, 1974.

HON. PETER W. RODINO, Jr.,
Chairman, House Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. RODINO: This is in response to your letter of March 14, 1974 requesting our views on H.R. 13364, a bill to amend title 17 of the U.S. Code to remove the expiration date set by Public Law 92-140, which authorized the creation of a limited copyright in sound recordings. The bill would also amend the criminal penalties in titles 17 and 18 of the U.S. Code for piracy and counterfeiting of sound recordings.

I am fully and unqualifiedly in favor of section 1 of the bill, which removes the expiration date on the privilege of securing copyright in sound recordings. An expiration date was included in Public Law 92-140 to avoid possible detriment to the program for a general revision of the copyright law and in the hope that the copyright revision bill would be enacted before January 1, 1975. Unfortunately, this hope has not materialized to date and prospects are dim for this session of Congress. The problem of record and tape piracy remains, and I am fully persuaded that the expiration date for securing sound recording copyrights should be removed and that this can be done without detriment to the general revision program.

In addition to the manifest need for copyright protection against record and tape piracy, there is a further reason why I strongly urge favorable consideration of section 1 of the bill. The United States is now a member of the Phonogram Convention and has a reciprocal treaty obligation to protect sound recordings of phonogram producers who are nationals of member countries against unauthorized duplication. Our treaty obligation can be satisfied clearly only by effective Federal legislation. Although several States have enacted laws against record and tape piracy, protection will vary and does not exist in many States.

Moreover, it is problematical whether such State laws, would survive elimination of Federal copyright protection. The Supreme Court in *Goldstein v. California*, 412 U.S. 546 (1973), upheld the validity of the California anti-piracy law in the case of sound recordings fixed before the effective date of Federal protection. February 15, 1972 on the ground that the Congressional inaction before Public Law 92-140 did not preclude State action. The result might be different if Congress were to withdraw Federal protection; in that event the States might be precluded by the preemption doctrine from re-asserting the power to protect post-1974 sound recordings.

Sections 2 and 3 of the bill would increase the criminal penalties for infringement of a sound recording copyright under title 17 of the Code, and for transportation, sale, or receipt of recordings bearing forged or counterfeit labels

under title 18 of the Code. These proposals are in response to the continued high incidence of record and tape piracy, and the difficulties law enforcement officials have encountered in enforcing titles 17 and 18. I have no question that deliberate and willful record and tape piracy should be dealt with as a crime, and that the penalties for it should be severe enough to act as an effective deterrent. However, since law enforcement is a field outside our expertise, I prefer to take no position on the specific proposals for an increase in criminal penalties.

Sincerely yours,

L. QUINCY MUMFORD,
Librarian of Congress.

DEPARTMENT OF STATE,
Washington, D.C., May 10, 1974.

HON. PETER W. RODINO, JR.,
*Chairman Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The Secretary has asked that I respond to your letter of March 22, 1974 requesting State Department views on H.R. 13364, a bill to amend Title 17 of the United States Code to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recording for the purpose of protecting against unauthorized duplication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of sound recordings; and for other purposes.

In 1971, in Public Law 92-140, Congress granted a limited copyright in sound recordings to protect against the unauthorized duplication and piracy of such recordings issued after February 15, 1972. This legislation, which amended the 1909 Copyright Law (Title 17, U.S.C.), was passed on an emergency basis because of the seriousness of the record piracy situation both nationally and internationally. It was estimated at that time that tapes valued at 200 million dollars, or one of every four tapes sold in the United States, was a pirated version. At the time Congress enacted this legislation, the House Judiciary Committee had limited the copyright protection so that it would apply only to records issued after February 15, 1972, and before December 31, 1974. The Committee Report explained that permanent copyright protection for sound recordings was contemplated and would be included in the general copyright revision legislation which all parties believed would be enacted by the end of 1974.

Although the Copyright Revision Bill contains the same provisions on piracy and counterfeiting of sound recordings as H.R. 13364, we understand there is a possibility it will not be approved in this Congress. Therefore, unless this Congress enacts specific legislation dealing with record piracy, copyright protection for recordings released after January 1, 1975, will lapse. This would most likely trigger a great increase in record piracy and present the record industry with all of the disastrous economic consequences confronting it prior to the enactment of Public Law 92-140. The most recent estimate for the last decade indicates an average of \$300 million worth of pirated records and tapes were being made and sold throughout the world each year.

Further, it is important to note that on March 10, 1974, the United States became the eighth State to become a member of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonogram Convention). The seven other States party to this Convention, which entered into force on April 18, 1973 are: Fiji, Finland, France, Mexico, Sweden, United Kingdom, and Argentina. This Convention is designed specifically to deal with the worldwide problem of record piracy. A key provision of this treaty provides that contracting states will protect the nationals of other contracting states against the making or importation of duplicate recordings without the consent of the producer if the intent is to distribute them to the public. Since the United States has the largest recording industry in the world, the effects of this record piracy are more detrimental to the United States than any other country. The unauthorized copying and selling of legitimately produced records and tapes is a serious problem which drains millions of dollars every year from composers, authors, performing artists, and record producers in the United and abroad. Additionally, this piracy is expected to

continue to increase on a worldwide basis unless effective legal efforts are constantly pursued to combat it. The proposed domestic legislation contained in H.R. 13364 is the implementing legislation for the Phonogram Convention and this is most essential in terms of the United States meeting its international commitments under this Convention. The enactment of this legislation is also very significant with respect to multilateral worldwide action against piracy of records and tapes. Therefore, the Department of State fully endorses the objectives of this proposed legislation in terms of its importance to the foreign relations of the United States.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this report.

We appreciate very much your interest in this important matter.

Sincerely yours,

LINWOOD HOLTON,
Assistant Secretary for Congressional Relations.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 13, 1974.

HON. PETER W. RODINO, Jr.,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 13364, a bill to remove the expiration date provided in Public Law 92-140 and to increase the criminal penalties for piracy and counterfeiting of sound recordings.

Public Law 92-140 amended Title 17 of the United States Code to provide Federal copyright protection to sound recordings for the purpose of thwarting the unauthorized duplication and piracy of sound recordings. Willful infringements for profit were made punishable by a fine of not less than \$100 or more than \$1,000 or by imprisonment for up to one year, or both, pursuant to Section 104 of Title 17, United States Code. P.L. 92-140 was limited in application to sound recordings fixed, published, and copyrighted on and after February 15, 1972, and January 1, 1975.

H.R. 13364 would remove the January 1, 1975, termination date from P.L. 92-140. The bill would also increase the penalties provided in Section 104 of Title 17 of the United States Code for the criminal infringement of a sound recording copyright to a maximum fine of \$25,000 or a maximum imprisonment for three years, or both, for the first offense and a maximum fine of \$50,000 or a maximum imprisonment for seven years, or both, for any subsequent offense. No minimum penalties are prescribed. The bill would not change the penal provisions of Section 104 as they pertain to infringements of copyrights other than copyrights of sound recordings.

The bill would also amend Section 2318 of Title 18 of the United States Code to include penal provisions identical to those mentioned above. Section 2318 prohibits the transportation, sale, or receipt of phonograph records, etc., bearing forged or counterfeit labels. This section presently prescribes a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

The Department of Justice recommends enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., May 29, 1974.

HON. PETER W. RODINO, Jr.,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Department of Commerce on H.R. 13364, a bill: "To amend title 17 of the

United States Code, to remove the expiration date provided in Public Law 92-140 which authorized the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized publication and piracy of sound recordings; to increase the criminal penalties for piracy and counterfeiting of sound recordings; and for the other purposes."

Public Law 92-140 amends title 17 of the United States Code to provide for a limited copyright in sound recordings. The copyright is limited to the right of the copyright owner to duplicate the sound recording in a tangible form directly or indirectly recapturing the actual sound fixed in the recording. Public Law 92-140 makes unauthorized duplication of sound recordings subject to all of the provisions of title 17, United States Code, dealing with infringement of copyrights and, in the case of willful infringement for profit, to criminal prosecution under section 104. The provisions of the Act apply only to sound recordings fixed, published and copyrighted on or after the effective date of the Act (February 15, 1972) and before January 1, 1975.

Section 104, title 17, U.S.C. provides that any person who willfully and for profit infringes a copyright shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$1000 or imprisonment of not more than 1 year, or both.

Section 2318 of title 18, U.S.C. provides that any person who knowingly and with fraudulent intent transports, receives or sells any sound recording which bears a counterfeit label shall be fined not more than \$1000 or imprisoned for not more than 1 year, or both.

H.R. 13364 would amend Public Law 92-140 by deleting the expiration date of January 1, 1975, thereby providing limited copyright protection for all sound recordings produced after February 15, 1972.

Section 2 of the bill would amend section 104 of title 17, U.S.C. to change the penalty for violation of the sound recording copyright from a misdemeanor to a felony. The proposed amendment provides that a willful violation for profit will be punishable by a fine of not more than \$25,000 or imprisonment for not more than 3 years, or both, for the first offense, and not more than \$50,000 or imprisonment for not more than 7 years, or both, for any subsequent offense.

Section 3 of H.R. 13364 would amend section 2318 of title 18, U.S.C. to provide increased penalties corresponding to those contained in section 2 of the bill for any person who knowingly and with fraudulent intent transports, receives or sells any sound recording which bears a counterfeit label.

We are of the opinion that the expiration date should be removed from Public Law 92-140. It appears that the date was placed in the Act with the expectation that a comprehensive copyright law revision would be enacted prior to the expiration date. However, this has not materialized, nor is it certain to do so before the end of 1974.

The same consideration that warranted enactment of Public Law 92-140 require its continuation. The first of these considerations is the dramatic increase in the piracy of sound recordings with the advent of cassette and cartridge tape players and the ease with which tapes used on these players can be reproduced. Published statistics indicate that pirated tapes have constituted a significant percentage of the sales of recorded tapes in the United States. Second the parties who make unauthorized duplications of sound recordings do not have to bear the expense of hiring performers or initially marketing the recordings nor bear the loss of unsuccessful recordings. Thus the recordings can be offered at a fraction of the cost at which the original recordings can be sold by legitimate recording companies. If protection is not provided, many established recording companies may be unable or unwilling to make the large investments required to provide recordings to the public in the quality and variety now available. Third, pirated recordings are often of inferior quality, thereby harming the consuming public. The Department of Commerce believes that continuation of the copyright protection in sound recordings is urgently needed for the protection of the industry and the consumer.

On January 1, 1974, the United States signed the "Geneva Convention of October 29, 1971, for the Protection of Producers of Phonograms Against Unauthorized Duplication" which was ratified with an effect as of March 10, 1974. Under Article 2 of this Convention the United States has agreed to protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producers and against the

importation of such duplicates, providing that any such making or importation is for the purpose of distribution to the public. Article 3 of this Convention provides that the means of implementation shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of copyright or other specific right; protection by means of the law relating to unfair competition; or, protection by means of penal sanctions.

Failure to remove the termination date in Public Law 92-140 would eliminate federal copyright protection for sound recordings fixed after December 31, 1974. Most states do not have laws protecting sound recordings. If the termination date is not removed the United States would have no means of implementing its agreement to protect the producers of phonograms and this could make it necessary for the United States to renounce the Treaty.

The Department of Commerce is not involved in the enforcement of Public Law 92-140 and does not have sufficient information to make an informed judgment on sections 2 and 3 of the bill. We defer to the views of the Department of Justice, the agency responsible for enforcement of that law.

The Department of Commerce favors the enactment of H.R. 13364 extending the applicability of Public Law 92-140. However, we defer to the views of the Department of Justice as to the merits of the increased penalties in sections 2 and 3.

We have been advised by the Office of Management and Budget that there would be no objection to the submission of our letter to the Congress from the standpoint of the Administration's program.

Sincerely,

KARL E. BAKKE,
General Counsel.

Mr. KASTENMEIER. This concludes hearings on this question.
The Chair would observe that—

Mr. SMITH. Mr. Chairman, could I ask one other question if I might interrupt?

Mr. KASTENMEIER. The gentleman from New York.

Mr. SMITH. Excuse me. This morning Ms. Ringer said that if it was a question of not having the present law continued or having one with the higher penalty than we have then she would have a continuation of the present law and would give up the higher penalties. Would you gentlemen feel the same way about it?

Mr. GORTIKOV. Yes, sir. But, in your absence I did propose a couple of additional alternatives in terms of alternative penalties. One would be that first offense would be a misdemeanor and second offense a felony. Or, second, that a pirate retailer be exposed to a misdemeanor offense, whereas a wholesaler or manufacturer would be exposed to a felony.

At the suggestion of Mr. Kastenmeier we are going to present precise language for these alternatives for your consideration.

Mr. SMITH. Well, there are some fall back positions then from the tough law that was proposed?

Mr. GORTIKOV. Yes.

Mr. SMITH. And the tough penalties.

Mr. GORTIKOV. The answer to your question is yes.

Mr. SMITH. You would rather have what we have now rather than no law at all?

Mr. GORTIKOV. That is correct.

Mr. RUTTENBERG. That would be our answer also.

Mr. SMITH. If you had your druthers though, you would like to have the tougher penalties?

Mr. GORTIKOV. Not like to have it, we feel that it is absolutely necessary.

Mr. SMITH. OK.

Mr. KASTENMEIER. The Chair would observe that at the time of our hearings on this subject in 1971 there were those who sought to be heard representing so-called pirates, and they were heard. But this has not been the case thus far this year. In conclusion, I would hazard the guess that the committee may well be inclined to extend this law and give it permanent status, subject of course to possible revisions in an omnibus revision bill. And the committee will probably reformulate the penalty structure somewhat. We would be inclined to upgrade substantially the maximum financial penalties and upgrade somewhat less the maximum imprisonment penalties.

In any event, I want to thank the witnesses who appeared here this morning, for concisely and clearly giving us the benefit of their views.

This concludes today's hearings on H.R. 13364 and matters relating to piracy of phonograms and tape recordings.

[Whereupon, at 1:30 p.m. the hearing was concluded.]



