92D CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 92-487

# PROHIBITING PIRACY OF SOUND RECORDINGS

SEPTEMBER 22, 1971.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany S. 646]

The Committee on the Judiciary, to whom we referred the bill (S. 646) to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

1. On page 2, line 17, strike out the letter P and insert in lieu thereof the letter P enclosed within a circle.

2. On page 5, strike out the sentence beginning on line 9 and ending on line 16 and insert in lieu thereof: "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 before January 1, 1975, 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."

### PURPOSE OF THE AMENDMENTS

Amendment No. 1 corrects a clerical error.

Amendment No. 2 limits the operative life of Section 1 of the bill to a period beginning with the effective date of the legislation and endng on December 31, 1974. Copyrights in sound recordings secured within that period will endure for 28 years from the date of first publication and will be entitled to renewal and extension in accordance with the provisions of Section 24 of title 17, United States Code. The purpose of the amendment is to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment. By January 1, 1975, more-

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over the protection of sound recordings will, it is hoped, be part of a copyright law revision.

## Purpose of the Amended Bill

Existing Federal copyright law (title 17, United States Code) protects the owners of copyright in musical works from unauthorized and uncompensated duplication but there is no Federal protection of sound recordings, as such. As a result, so-called "record pirates," if they satisfy the clam of the owner of the musical copyright, can and do engage in widespread unauthorized reproduction of phonograph records and tapes without violating Federal copyright law.

It is also true under exsting law that the protection given to owners of copyright in musical works with respect to recordings of their works is special and limited.

The purpose of S. 646 as amended is twofold. First, Section 1 of the bill creates a limited copyright in sound recordings, as such, making unlawful the unauthorized reproduction and sale of copyrighted sound recordings. By Committee Amendment No. 2, above, this right is applicable only to sound recordings fixed, published, and copyrighted on or after the effective date of the legislation and before January 1, 1975.

Second, Section 2 of the bill provides that persons engaging in the unauthorized use of copyrighted musical works in recordings shall be subject to all the provisions of title 17 dealing with infringement of copyrights and, in the case of willful infringement for profit, to criminal prosecution pursuant to Section 104.

## Reason for the Legislation

The attention of the Committee has been directed to the widespread unauthorized reproduction of phonograph records and tapes. While it is difficult to establish the exact volume or dollar value of current piracy activity, it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of $100 million. It has been estimated that legitimate prerecorded tape sales have an annual value of approximately $300 million. The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues.

If the unauthorized producers pay the statutory mechanical royalty required by the Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording. Eight States have enacted statutes intended to suppress record piracy, but in other jurisdictions the only remedy available to the legitimate producers is to seek relief in State courts on the theory of unfair competition. A number of suits have been filed in various States but even when a case is brought to a successful conclusion the remedies available are limited. In addition the jurisdiction of States to adopt legislation specifically aimed at the elimination of record and tape piracy has been challenged on the

theory that the copyright clause of the Federal Constitution has preempted the field even if Congress has not granted any copyright protection to sound recordings. While the committee expresses no opinion concerning this legal question, it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in connection with the efforts to combat piracy in State courts.

## Legislative Background

The creation of a limited copyright in sound recordings has been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law. The Library of Congress recommended the granting of such copyright protection in its recommendations for the general revision of the copyright law. Such a provision was included in H.R. 2512 of the 90th Congress as processed by this Committee and passed by the House of Representatives. This provision was also included in S. 597 on which the Senate Subcommittee on Copyrights held extensive hearings in 1967 but no further action was taken in the Senate on this legislation during the 90th Congress.

On December 10, 1969, the Senate Subcommittee on Copyrights reported S. 543 of the 91st Congress, for the general revision of the copyright law with an amendment in the nature of a substitute. This bill, as amended, established a copyright in sound recordings, but again no further action was taken. S. 543 as reported by the Subcommittee, in addition to creating a limited copyright in sound recordings, extended that protection to encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes. No such provision is included in S. 646.

S. 4592 of the 91st Congress, introduced on December 18, 1970, would have created a limited copyright in sound recordings. This bill was based on the provisions contained in S. 543, as approved by the Senate Subcommittee in the 91st Congress, but no action was taken on it. On February 8, 1971, Senator McClellan introduced S. 646, the subject measure, Section 1 of which is identical to S. 4592 of the 91st Congress, and on the same day he introduced S. 644, the copyright law revision bill of the 92d Congress, which also would create a limited copyright in sound recordings. S. 646 passed the Senate on April 9, 1971. Finally, on June 9 and 10, 1971, the Copyright Subcommitee of this Committee held public hearings on this legislation. Witnesses and contributors of written statements included supporters and opponents of the bill from the private sector, as well as representatives of the Departments of State, Justice and Commerce and the Copyright Office. These agencies all favor enactment.

The Committee notes that the United States recently participated in an international conference of government experts at which the draft of an international treaty to combat record piracy was prepared and that a diplomatic conference to sign a treaty on this subject will be held in Geneva during October 1971. Obviously, progress in domestic efforts to protect sound recordings will be helpful to the United States Delegation.

## Committee Views: General Revision

On the basis of this legislative history and the Subcommittee's hearings, and adopting portions of Senate Report No. 92–72 to accompany S. 646, the Committee sets forth its views as follows:

The Committee regrets that action on the bill for general revision of the copyright law has been delayed, and that the problem of record piracy has not been dealt with as part of a broad reform of the Federal copyright statute. We are persuaded that the problem is an immediate and urgent one, and that legislation to deal with it is needed now. The seriousness of the situation with respect to record piracy, both nationally and internationally, is unique, and our favorable action in this instance should not be interpreted as precedent for the enactment of separate legislation on other matters involved in copyright law revision. On the contrary, we would be opposed to any effort to convert the general revision program into a program for revising the statute on a piecemeal basis.

## Compulsory License No Solution

Senate Report No. 92–72, accompanying S. 646, noted that "[c]ertain of the manufacturers engaged in the unauthorized reproduction of records and tapes have proposed the inclusion in the legislation of provisions granting a compulsory license to reproduce records and tapes upon payment of a statutory royalty." This proposal was strongly reiterated during the hearings before our Subcommitee, the argument being that, as paraphrased in the Senate Report, "such a provision would be an appropriate adjunct to the compulsory license provided the record industry by the mechanical royalty contained in the Copyright Act." The Senate Committee rejected this proposal on the ground that the two situations are not parallel: the existing compulsory license merely provides access to the copyrighted musical composition, which is the "raw material" of a recording, and the performers, arrangers, and recording experts are needed to produce the finished creative work in the form of a distinctive sound recording. In the view of the Senate Committee, there is "no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists."

The Committee agrees that it is necessary, without delay, to establish Federal legislation prohibiting unauthorized manufacturers from reproduction and distribution of recorded performances. We are also persuaded that it would be wholly impracticable in this legislation, to set up the complicated procedural machinery that would be required for the fair administration of a compulsory license even if it were found to have some advantages from the viewpoint of the public. We believe that a strong case has been made for protection against the current practices of the so-called "record pirates," and that the case for a compulsory license has not been established. Any such compulsory license would necessarily extend to all record producers and to any of their recordings. It would have drastic effects upon the structure of the industry, even if some way could be found to establish a

fair royalty rate and assure a fair division and distribution of royalty receipts. It would enable the "pirates" to select those recordings that become hits, and thus to invade the producer's market for his profitable recordings, while leaving the producer to suffer the losses from his unsuccessful ones. At the same time, we recognize that in some cases the consuming public may be able to obtain selections, or collections of selections, not available from regular sources and at somewhat lower than prevailing prices. The Committee believes that Section 1 of S. 646 as limited by the Committee's amendment should be enacted in its present form. Certainly the entire question of compulsory licensing can be reexamined by the Committee when it again considers legislation for general revision of the copyright law.

## Sound Recordings as "Works"

The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "reproductions of sound recordings," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "sound recording."

The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.

## Treatment of Sounds Accompanying Motion Pictures

This legislation extends copyright protection to sound recordings which are defined as works "that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture." In excluding "the sounds accompanying a

motion picture" from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the Committee's opinion that soundtracks or audio tracks are an integral part of the "motion pictures" already accorded protection under subsections (1) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. This is true whatever the physical form of the reproduction, whether or not the reproduction also includes visual images, and whether the motion picture copyright owner had licensed use of the soundtrack on records.

Under the existing title 17, "motion pictures" represent a broad genus whose fundamental characteristic is a series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images. Under this concept the physical form in which the motion picture is fixed—film, tape, discs, and so forth—is irrelevant, and the same is true whether the images reproduced in the physical object can be made out with the naked eye or require optical, electronic, or other special equipment to be perceived. Thus, to take a specific example, if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained under section 1(a) of title 17 rather than under the provisions of this bill, and this would be true even if the television producer had licensed the release of a commercial phonograph record incorporating the same sounds.

## First Sale Doctrine

This legislation grants to the owners of the copyright in sound recordings the exclusive right to "reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending," reproductions of the copyrighted work. Section 1(a) of the present title 17 gives the copyright owner the exclusive right to "print, reprint, publish, copy, and vend" the copyrighted work. As a technical matter, this is broad enough to include rental, leasing, and lending, as well as sales and gifts. The right is subject to the "first sale doctrine," under which a copyright owner who unconditionally parts with a physical object embodying his work cannot restrain any later disposition of that physical object. However, in the case of a transaction such as a rental, lease, or loan, where the copyright owner delivers a physical object embodying his work only on certain stated conditions, distribution by any unauthorized means would violate his exclusive right to "publish."

## Implied Consent to Manufacturer Under Section 1(e)

Like derivative works specified in Section 7 of title 17, United States Code, sound recordings manufactured in reliance on Section 1(e) would be eligible for copyright, inasmuch as their manufacture in compliance with the compulsory license requirements of Section 1(e) would have the implied consent of the owner of the copyright in the musical work.

## New Rights No Limitation on Rights in Other Types of Works

S. 646 would add a new exclusive right with respect to sound recordings which, in addition to reproduction, would include public distribution "by sale or other transfer of ownership, or by rental, lease, or lending" of reproductions. The purpose of this language is to identify as clearly as possible the limited rights being accorded to sound recordings, and it should in no way be construed as limiting the exclusive rights of copyright owners in other types of works with respect to forms of distribution short of the outright sale of copies, or as restraining the lawful owner of a record from disposing of it as he sees fit.

## Library Uses

Many public libraries and some school and college libraries have long offered their patrons the service of lending sound recordings of music, dramatic readings, language instruction and similar works in the same manner in which they lend books, periodicals and other materials. Some of these nonprofit libraries may require the payment of a small sum for the use of relatively new recorded works which are, for a time, in heavy demand. It is not the intention that the limitations on lending or renting contained in proposed new Section 1(f) reach out to apply to these long-established practices by nonprofit libraries. When a library has acquired ownership of a lawful recording, the "first sale doctrine" referred to above leaves the library free to lend or otherwise dispose of that recording.

## Home Recording

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

## Remedies for Unauthorized Use of Copyrighted Music in Recording

Section 2 of the bill renders the remedies for unauthorized manufacture of records containing copyrighted music the same as those applicable to infringements generally, thus removing what the Librarian of Congress calls an "anachronistic and unfair limitation." Similar provisions are found in the revision bill (H.R. 2512) passed by the House in 1967. The Committee approved this section.

## Sectional Analysis

Section 1(a) of the bill adds a new subsection (f) to Section 1 of title 17 of the United States Code, adding to the enumerated exclusive

rights of copyright proprietors the right to reproduce the copyrighted work if it be a sound recording. It is provided that the right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to reproductions made by transmitting organizations exclusively for their own use.

### Public Television and Radio

In the latter connection, the last proviso of paragraph (a) of Section 1 of S. 646 excludes "reproductions made by transmitting organizations exclusively for their own use" from the protected rights of copyright proprietors of sound recordings. In the case of noncommercial public broadcasters, the proviso is not intended to be limited solely to reproductions made by the public networks and stations transmitting the same programs, but also extends to programs produced, duplicated, distributed and transmitted by or through more than one public broadcasting agency or entity so long as exclusively for educational use. In short, the copyright of sound recording does not restrict the use of public television or radio programs to any extent or in any way not provided in present copyright law.

Section 1(b) amends Section 5 of title 17 to add to the classification of works for copyright registration the category of "sound recordings."

Section 1(c) amends Section 19 of title 17 to specify the required form of the copyright notice, consisting of the letter P enclosed within a circle, on sound recordings.

Section 1(d) amends Section 20 of title 17 to specify the proper location of the notice of copyright as it pertains to a sound recording.

Section 1(e) amends Section 26 of title 17 to enumerate the various sections of title 17 concerning which the reproduction of a sound recording is "considered to be a copy thereof." The subsection also defines the terms "sound recordings" and "reproduction of sound recordings." Section 1(e) defines the word "copy" to include within its meaning a reproduction of a sound recording other than a fixation of sound accompanying a motion picture. This definition would apply only to a limited group of relevant sections of title 17 of the United States Code in which the word "copy" is mentioned, and these sections are enumerated in Section 1(e). Other sections of title 17, such as the criminal sanctions of Section 104, would apply to the infringement of copyrighted works protected by the bill, but these other sections are not enumerated in Section 1(e) because they do not mention the word "copy."

Section 2 of the bill amends Section 101 of title 17 to delete subsection (e) which relates to "Royalties for Use of Mechanical Reproduction of Musical works." The section substitutes a new subsection (e) providing that any person engaging in the unauthorized use of copyrighted music in the mechanical reproduction of musical works shall be subject to all of the provisions of title 17 dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to Section 104. The existing statutory provision in title 17 limits the remedy for such unauthorized use of musical works to the payment of a royalty of two cents on each part manufactured and a discretionary award of not more than six cents. Unlike

Section 1, the provisions of Section 2 of the bill are made effective immediately upon enactment of S. 646.

Section 3 of the bill as amended provides that the effective date of the legislation (other than Section 2) should be four months after enactment and that the copyright law as amended by Section 1 should apply only to sound recordings fixed, published, and copyrighted on and after the effective date of the Act and before January 1, 1975. The four-month period following enactment and preceding the effective date was requested by the Copyright Office in order to enable implementation of the Act. The purpose of the provision limiting the application of Section 1 to sound recordings copyrighted before January 1, 1975, is spelled out under PURPOSE OF THE AMENDMENTS above. As has been indicated, Section 2 of S. 646 is not subject to a terminal date and is made effective immediately upon enactment. This section amends Section 101(e) of title 17 to make criminal sanctions immediately available to prevent piracy of already existing recordings of copyrighted musical works where the pirate does not pay the statutory royalty to the holder of the musical copyright.

## Cost to the United States

At the hearings before the Subcommittee, the Assistant Register of Copyrights testified that administration of copyright in sound recordings could be accomplished for approximately $100,000 a year, and could be accomplished better for $125,000. This estimate was based on the assumption that there would be approximately 15,000 registrations a year. The Assistant Register added that if the registration fee continued at $6.00 as at present, there would automatically return to the Copyright Office approximately $90,000 in fees. The Committee accepts and adopts these estimates.

## Agency Views

Attached hereto and made part hereof are the reports of the Librarian of Congress and of the State, Justice, and Commerce Departments expressing support of S. 646:

The Librarian of Congress,
*Washington, D.C., May 25, 1971.*

Hon. Emanuel Celler,
*Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.*

Dear Mr. Celler: This is in response to your letter of May 4, 1971, requesting our comments on S. 646, a bill to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes. This bill was reported by the Senate Judiciary Committee on April 20, 1971 (S. Rep. No. 92–72), and was passed by the Senate on April 29, 1971.

I am fully and unqualifiedly in favor of the purpose the bill is intended to fulfill. The recent and very large increase in unauthorized duplication of commercial records has become a matter of public concern in this country and abroad. With the growing availability and

use of inexpensive cassette and cartridge tape players, this trend seems certain to continue unless effective legal means of combatting it can be found. Neither the present Federal copyright statute nor the common law or statutes of the various states are adequate for this purpose. The best solution, an amendment of the copyright law to provide limited protection against unauthorized duplication, is that embodied in S. 646.

We also support in general the language of the bill amending title 17 of the United States Code. This amendatory language draws heavily upon the language of the bill for general revision of the copyright law now pending in the Senate (S. 644). An earlier version of the general revision bill was reported favorably by your Committee in 1966 and 1967 (H.R. Rep. Nos. 2237 and 83) and was passed by the House of Representatives on April 11, 1967. The provisions of that bill dealing with unauthorized duplication of sound recordings were the same in substance as those of S. 646.

In favorably reporting S. 646, the Senate Judiciary Committee adopted certain amendments, all of which were incorporated in the bill as it passed the Senate, and all of which we favor. In particular, we strongly support the addition of a new section 2, removing an anachronistic and unfair limitation on the remedies available to owners of copyrighted musical compositions against record pirates. This new section 2 also is the same in substance as provisions included in the general revision bill passed by the House of Representatives on April 11, 1967.

We also endorse the interpretation of the bill, as stated in S. Rep. No. 92–72 that "this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17." Under this interpretation, any act that would be considered "fair use" of a recorded musical composition would be considered "fair use" of the recording itself, and thus outside the reach of copyright in the recording.

The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. As noted above, the revision bill now pending in the Senate has parallel provisions, and if general revision were on the threshold of enactment, S. 646 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 646 are badly needed now. Upon enactment of the revision bill they would, of course, be merged into the larger pattern of the revised statute as a whole.

I should also mention that the problem of record piracy is one of immediate concern internationally, and that a draft treaty closely corresponding to the content and purpose of S. 646 was adopted by a Committee of Governmental Experts on March 5, 1971. This draft convention will be the subject of an International Conference of States to be convened in Geneva in October of this year. Favorable action on the domestic bill will not only help our negotiators but also encourage

protection of our records against the growing menace of piracy in other countries.

For the foregoing reasons, I recommend that your Committee give S. 646 its favorable consideration.

Sincerely yours,

L. QUINCY MUMFORD,
*Librarian of Congress.*

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DEPARTMENT OF STATE,
*Washington, D.C., May 14, 1971.*

Hon. EMANUEL CELLER,
*Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.*

DEAR. MR. CHAIRMAN: This is in response to your request of May 4, 1971 for a report by the Department of State on S. 646, a Bill "To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes."

The Department of State fully endorses and supports this Bill.

The recent and growing increase in the unauthorized duplication of legitimate commercial recordings has become a matter of public concern both in this country and abroad. The widespread availability and use of phonograph record and tape-playing machines, particularly the comparatively inexpensive cassette or cartridge tape players, give added impetus to piracy of sound recordings. This trend is certain to continue and to grow unless effective legal methods to combat and reverse it are provided. At present, there is no Federal statute that expressly prohibits commercial traffic in unauthorized duplications of legitimate sound recordings. S. 646 would answer that need and would provide a satisfactory means of combating and curbing the unauthorized duplication and piracy of sound recordings.

The problem of unauthorized duplication of sound recordings is also one of immediate concern internationally. An international treaty which would include provisions that correspond closely to the content and purpose of S. 646 is presently under consideration. This treaty would give to producers of phonograms who are nationals of contracting states protection against the making, distribution, or importation of duplicates made without their consent where such acts are for the purpose of distribution to the public. The United States has played an active role in the development of the treaty, and if current plans remain unchanged the treaty will be adopted at a diplomatic conference to be held in Geneva in the fall of this year.

United States ratification of or adherence to the proposed treaty depends, of course, upon enactment of a domestic law such as S. 646. Accordingly, passage of the proposed legislation is necessary to give the Department of State an effective basis for continuing its efforts to secure international protection for American sound recordings.

For the foregoing reasons, the Department of State fully supports S. 646 and recommends its early enactment into public law.

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.

Sincerely,

DAVID M. ABSHIRE,
*Assistant Secretary for Congressional Relations.*

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OFFICE OF THE DEPUTY ATTORNEY GENERAL,
*Washington, D.C., June 29, 1971.*

Hon. EMANUEL CELLER,
*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 S. 646, a bill "to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes."

S. 646 incorporates many of the provisions embodied in the bill for general revision of the copyright law (S. 644) which in similar form has been under consideration by the Congress for some years. Action on this general bill has been delayed by concern with issues unrelated to the problem of piracy of sound recordings.

There has recently been a large increase in unauthorized duplication of sound recordings for profit. Under existing law sound recordings are not copyrightable, *Capitol Records, Inc.* v. *Mercury Record Corp.*, 221 F. 2d 657 (C.A. 2, 1955). Under state law the record industry had been able to fashion some protection, against competitors who commercially transcribe their recorded performances, based upon the misappropriation theory of *International News Service* v. *Associated Press*, 248 U.S. 215, 236 (1918). That decision found a quasi-property right in the dissemination of news that could be protected, under the law of unfair competition, against copying by a competitor. But the continued validity of *Associated Press* has been questioned in the light of later judicial developments.

In *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964)—both actions to enjoin imitation of unpatentable designs—the Supreme Court restricted the scope of state unfair competition remedies by limiting state regulation to labeling requirements to prevent "palming off." The Court in *Compco* held that:

> * * * when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. (376 U.S. at 237)

A Court of Appeals has held that *Sears* and *Compco* overruled *International News Service. Columbia Broadcasting System, Inc.* v. *De Costa*, 377 F. 2d 315, 318 (C.A. 1, 1967).

Under the bill, sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including sounds accompanying a motion picture." "Reproductions of sound recordings" are defined as material objects in which sounds other than those accompanying a motion picture are fixed and include the parts of instruments serving to reproduce mechanically the musical work, mechanical reproductions, and interchangeable parts, such as discs or tapes for use in mechanical music-producing machines. Copyright protection under the present Copyright Act (17 U.S.C. 1 *et seq.*) is extended prospectively to sound recordings. The exclusive right created thereby is limited to the duplication in tangible form of the specific recorded performance copyrighted: it does not include imitation or simulation of that performance. The rights conferred are limited in duration to twenty-eight years with the right of renewal and extension for an additional twenty-eight years. 17 U.S.C. § 24.

The bill does not apply retroactively and Section 3 expressly states that it should not be construed as affecting in any way any rights with respect to sound recordings fixed before the date of enactment. It thus does not deal with recorded performances already in existence. Instead it leaves to pending or future litigation the validity of state common law or statutes governing the unauthorized copying of existing recordings. The result of making this copyright authority prospective only is to create at least one ambiguity.

The bill would not directly grant any copyright protection to existing records since the new copyright in sound recordings would be applicable only to recordings made after four months after enactment of the bill. However, since the bill provides that the amendment to 17 U.S.C. 101(e) will take effect immediately upon enactment, criminal sanctions would seem to be available to prevent further piracy of existing recordings where copyrighted music was used and the pirate does not pay the statutory royalty to the holder of the musical copyright. Whether such criminal prosecution is possible depends on the interpretation of the clause in Section 3 of the bill at page 5, lines 13–16 which reads:

> * * * nothing in title 17 of the United States Code shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before that date.

It should be made clear either by amendment or committee reports whether the amendment to section 101(e) is intended to apply to the manufacture, use, or sale after enactment of the bill of pirate recordings of records made prior to enactment.

We believe that extending copyright to reproduction of sound recordings is the soundest, and in our interpretation of *Sears* and *Compco*, the only way in which sound recordings should be protected. Copyright protection is narrowly defined and limited in duration, whereas state remedies, whose validity is still in doubt, frequently create broad and unwarranted perpetual monopolies. Moreover, there is an immediate and urgent need for this protection.

Not only does the creative record industry have a legitimate interest in protecting its substantial investment in the production and promotion of recorded performances, but such protection would also pre-

serve employment opportunities for performers and encourage their future contributions to society's geneal fund of intellectual creations.

The competition provided by the pirate record industry does not promote any of the traditional benefits of competition. Although the pirate record companies may greatly undercut the prices charged by the creative industry, their ability to do so results in large part from the fact that they do not compensate the creative writers and artists involved. Such practices discourage the investment of money and talents in new performances and has the potential to gravely injure creative recording.

The bill limits the exclusive right of the ownership of a copyright in a sound recording "to the right to duplicate a sound recording *in a tangible form* that directly or indirectly recaptures the actual sounds fixed in the recording * * *." (Emphasis added.) It is clear from this language that the exclusive right accorded by this bill does not extend to the reproduction of the sounds themselves, as, for example, by playing a sound recording over the radio.

In the case of a recording of music which is itself copyrighted, the copyright granted to a sound recording by the bill would apparently be subject to 17 U.S.C. 7. Section 7 provides that versions of copyrighted works produced with the consent of the copyright owner shall be regarded as new works subject to copyright. This section, which would prevent persons from obtaining a copyright for an unauthorized sound recording, seemingly creates an issue as to whether a record manufacturer relying on the provisions of 17 U.S.C. 1(e) would be entitled to copyright his recording since he need not have the express consent of the copyright owner of the sheet music. This follows from the provision in section 1(e) that, when the owner of a musical copyright has permitted anyone to record his music, any other person may make similar use of the musical work upon payment of a royalty of two cents per recording. It is likely that a court would find acceptance of the royalty to imply consent, nevertheless we believe that this ambiguity should be removed. We suggest an amendment of 17 U.S.C. 7 as follows:

> Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the copyright proprietor of such works *or, in the case of sound recordings, manufactured in compliance with section 1, subsection (e), of this title*, or works republished with new matter, shall be regarded as new works subject to copyright * * *. (material in italics is new).

Criminal prosecution of tape and record pirates under existing copyright law is barred because (1) performers and recording companies are given no copyright in their sound recordings, and (2) criminal action for infringement of the copyright on the underlying musical composition is expressly prohibited by 17 U.S.C. 101(e). The bill would eliminate both bars by giving a limited copyright in sound recordings and amending 17 U.S.C. 101(e) to grant the copyright interest in the musical composition the protection of criminal sanctions against unauthorized recordings.

Subject to the suggestions made above, the Department of Justice recommends enactment of this legislation.

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

Sincerely,

RICHARD G. KLEINDIENST,
*Deputy Attorney General.*

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STATEMENT OF WILLIAM N. LETSON, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

SUBMITTED TO SUBCOMMITTEE NO. 3, HOUSE JUDICIARY COMMITTEE, JUNE 10, 1971

Mr. Chairman, I appreciate this opportunity to appear before your Subcommittee to express the support of the Department of Commerce for S. 646.

S. 646 would create for the first time a copyright in sound recordings. The copyright owner would have the exclusive right to reproduce copyrighted sound recordings and distribute reproductions to the public by sale or other transfer of ownership, or by rental, lease or lending, subject to certain limitations. The exclusive right to reproduce the sound recording would be limited to the right to duplicate the sound in a tangible form directly or indirectly recapturing the actual sounds fixed in the recording. The exclusive right would not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to reproductions made by transmitting organizations exclusively for their own use.

The bill would also amend section 101 of title 17 of the United States Code to substitute a new section (e) expanding the remedies that owners of copyrighted music have against the unauthorized use of their music in the mechanical reproduction of musical works.

In addition, the question has been raised in some recent cases as to whether the federal copyright law may preempt the right of the states to provide relief in this area. Although the Department of Commerce does not share the view of some that the Supreme Court intended in the *Sears* and *Compco* cases (*Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964)) to foreclose the right of the states to provide a remedy against tape and record piracy under the law of unfair competition, we believe amendment of the federal copyright law as proposed by S. 646 is the best way to provide the needed legal protection.

Although certain manufacturers have proposed inclusion in the legislation of provisions granting a compulsory license to reproduce sound recordings upon payment of a statutory royalty, no such provision is included in S. 646. We agree with the omission of a compulsory licensing provision. Sound recordings are finished products embodying the efforts of performers and recording companies. The granting of compulsory licenses with respect to sound recordings would be inequitable and would not eliminate the undesirable effects of tape and record piracy.

The Department of Commerce is also vitally interested in this bill from the international trade standpoint. Unauthorized reproduction abroad of sound recordings is resulting in losses to U.S. record menu-

facturers, not only in export sales, but in royalties. A proposed international "Convention for the Protection of Phonograms Against Unauthorized Duplication" designed to remedy the international piracy situation is scheduled for negotiation in Geneva, next October. Enactment of the bill would enhance the United States Delegation's negotiating position at this revision conference in efforts to achieve effective international protection for sound recordings.

Accordingly, the Department of Commerce favors enactment of S. 646.

## Changes in Existing Law

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## COPYRIGHTS

(Act of July 30, 1947, ch. 391 (62 Stat. 652; 17 U.S.C.))

**§ 1. Exclusive rights as to copyrighted works***

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * * * * * *

*(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.*

* * * * * * *

**§ 5. Classification of works for registration***

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

* * * * * * *

*The changes made in sections 1, 5, 19, 20, and 26 of title 17 apply only to sound recordings fixed, published, and copyrighted on and after the effective date of S. 646 and before Jan. 1, 1975.

(*n*) *Sound recordings.*

* * * * * * *

**§ 19. Notice; form***

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", * * *

*In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol P (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: Provided, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.*

**§ 20. Same; place of application of; one notice in each volume or number of newspaper or periodical***

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, *or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.* One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

* * * * * * *

**§ 26. Terms defined***

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

*For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. "Reproductions of sound recordings" are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the "parts of instruments serving to*

*The changes made in secs. 1, 5, 19, 20, and 26 of title 17 apply only to sound recordings fixed, published, and copyrighted on and after the effective date of S. 646 and before Jan. 1, 1975.

*reproduce mechanically the musical work," "mechanical reproductions," and "interchangeable parts, such as discs or tapes for use in mechanical music-producing machines" referred to in sections 1(e) and 101(e) of this title.*

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## Chapter 2.—INFRINGEMENT PROCEEDINGS

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### § 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—

To an injunction restrainting such infringement;

* * * * * * *

[(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as discs, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.]

*(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title*

*dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.*

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