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U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

June 23, 1982

TO: William P. Barr
Deputy Assistant Director
Office of Policy Development

FROM: Jonathan C. Rose
Assistant Attorney General

SUBJECT: Testimony on Betamax Legislation

Enclosed is a copy of my testimony on the so-called Betamax Legislation, which I am scheduled to deliver tomorrow. Please call me (at 633-3824), Tim Finn (633-4603), or Steve Brogan (633-4606) with your comments.

Enclosure

Testimony of

JONATHAN C. ROSE
Assistant Attorney General
Office of Legal Policy

Before the

Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary

Concerning

LEGISLATION ON COMPENSATION TO COPYRIGHT
OWNERS FOR HOME VIDEO AND
AUDIO RECORDING
UNITED STATES HOUSE OF REPRESENTATIVES

June 24, 1982

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to testify today on legislation relating to the important topic of compensation to copyright owners for noncommercial home taping of audio and video works. This subject is one of considerable interest and importance to the audio-visual entertainment industry and the consumers of its products. For the sake of organizational convenience, I will focus my remarks on one bill currently pending before this committee -- H.R. 5705.

I. Introduction

H.R. 5705 is one of a number of bills [1/] that have been introduced to reverse legislatively the decision of the Court of Appeals for the Ninth Circuit in Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981), cert. granted, ____ U.S. ____ (No. 811687, June 14, 1982) (hereinafter referred to as the Betamax decision or Betamax). In that case, in which the Supreme Court has recently granted certiorari, the Ninth Circuit held that home taping of video programs broadcast over television constitutes copyright infringement for which some tapers are liable as direct infringers, and retailers and manufacturers are liable as contributory infringers. All of the

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1/ These bills include H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, and H.R. 5488.

bills would partially overrule the decision of the Ninth Circuit either by declaring that home taping does not constitute copyright infringement or by absolving the home taper from direct liability for copyright infringement.

H.R. 5705 would absolve home tapers from liability for copyright infringement. However, the bill would compensate copyright owners for audio and video home taping. It would do so by making importers and manufacturers who distribute audio and video home recorders and blank tapes in the United States directly liable for copyright infringement. The bill would create a system under which a fee would be imposed on tapes and audio and video recorders. Such fees would be held in a fund from which royalties could be paid to copyright holders. The amount of the royalties and their method of distribution to copyright holders would be within the jurisdiction of the Copyright Royalty Tribunal. In addition, the bill would modify the so-called "first sale" doctrine of copyright law, codified in 17 U.S.C. § 109, so as to permit copyright owners to use the copyright laws to prevent unauthorized rental of copies of their copyrighted audio and video works.

II. History of the Law in This Area

Throughout American history the law has encouraged literary and artistic creativity by giving authors and artists an intellectual property right in the fruits of their labor.

The Founding Fathers recognized the importance of this right in framing the Copyright Clause of the Constitution, Article I, Section Eight, which authorizes Congress "[t]o promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." This constitutional grant of power formed the basis for congressional adoption of the copyright laws.

Supreme Court precedents clearly indicate that the Copyright Clause references to "authors" and "writings" are to be liberally construed. 2/ Congress has also adopted an expansive view of the copyright principle, by modifying the copyright laws over the years to embrace new forms of artistic creation which were undreamed of in the eighteenth century. Thus, Congress extended copyright protection to "motion pictures" in passing the copyright Act of 1909, 3/ and to sound recordings through the Sound Recording Amendment of 1971. 4/ Most recently, in enacting Section 102(a)(6) of the Copyright Act of 1976, 5/ Congress specifically included "audiovisual works" in general within the

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2/ See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884); Goldstein v. California, 412 U.S. 546 (1973).

3/ See 1 Nimmer on Copyright § 2.09[C] (1979).

4/ 17 U.S.C. § 102(7) (1980), discussed in 1 Nimmer on Copyright § 2.10 (1979).

5/ 17 U.S.C. § 102(a)(6) (1980).

ambit of the copyright laws. In sum, both judicial and legislative developments have favored the broad extension of the copyright mantle to protect "what the ingenuity of men should devise". 6/

This broad extension of copyright protection is based upon a recognition that inadequate financial incentives to create artistic works would exist if the artist's work could be freely copied. The Supreme Court has noted that underlying the copyright grant "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors." 7/ What justifies the copyright monopoly is "the general benefits derived by the public from the labor of authors." 8/ These "general benefits" are threatened when a copyright is infringed upon through the act of unauthorized copying. 9/

In short, the Congress and the courts have recognized the importance of vindicating copyright holders' interests. At the same time, however, they have not been unmindful of the

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6/ Reiss v. National Quotation Bureau, 276 Fed. 717 (S.D.N.Y. 1921) (Learned Hand, J.).

7/ Mazer v. Stein, 347 U.S. 201, 219 (1954).

8/ Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). Accord, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

9/ When copyright ownership has been established, a plaintiff need only prove copying in order to establish infringement by the defendant. 3 Nimmer on Copyright § 13.01 (1979).

public interest in reasonable limitations on the scope of copyright privileges. Accordingly, legislators and judges have attempted to weigh the copyright interest in spurring creative efforts against the public's interest in the widespread distribution of reproductions of artistic works. As the Supreme Court has stated,

> The limited scope of a copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. 10/

It follows that copyright legislation ideally should provide incentive for artistic creation in order to promote the widespread dissemination of copyrighted work without imposing unnecessary cost to the general public.

In short, the central thrust of the copyright law has been to encourage creativity for the public good by treating unauthorized copying of copyrighted works as infringement. By this logic, both audio and visual taping have the potential to diminish copyright values, much like other forms of copying.

10/ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

III. The Bill Appropriately Exempts Home Tapers From Copyright Liability

H.R. 5705 would exempt from copyright liability an individual who makes an audio or video home recording for the private use of members of the individual's immediate household. The collection of royalties directly from home tapers simply is not a viable method for compensating copyright owners. Because taping is done in the privacy of the home, it would be impractical, if not Orwellian, to attempt to detect which individuals tape at home and which works they tape. Moreover, even if such taping could be detected, it would be highly inefficient for copyright holders to negotiate with the millions of individuals who tape at home and to bring suit for injunctions or damages against those that refuse to pay an appropriate royalty. Therein lies the problem.

We have arrived at this point because technology has outrun the relevant legal concepts. The original concept of copyright was defined in an age when such inventions as photocopying machines and home audio and video recorders did not exist. The doctrine of copyright was originally developed to maintain for the creator of an artistic work -- the copyright owner -- the benefits of its reproduction. Now that technology has made possible the easy and swift reproduction of an artistic work in the privacy of one's own home, all sides to the present debate admit, as they must, that neither politics nor practicality suggest a lengthy debate over whether the home copier is or is

not liable for copyright infringement. One side of the legislative debate would simply declare that home copying -- audio or visual -- of art works is a non-infringing use and let the economic chips fall where they may. The other side claims that a cognizable interest is infringed by home taping -- though this taping should not itself be a violation -- and has developed a substitute for normal copyright remedies. That substitute is the compulsory licensing and royalty scheme embodied in H.R. 5705, which would be administered by the Copyright Tribunal.

IV. A Regulatory Solution Is Probably Necessary

H.R. 5705 in effect provides a regulatory solution to the development of the new technology I have described. H.R. 5705 would vest authority in the Copyright Royalty Tribunal to establish a fee to be imposed on manufacturers of tapes and recording devices and to distribute the fees collected to holders of copyrights. As a firm principle, the Justice Department believes Congress should not choose a regulatory approach to economic problems where a market approach is feasible. For this reason, we have opposed continued jurisdiction of the Copyright Royalty Tribunal over cable broadcasting. However, unlike the cable television, a market solution does not appear to be feasible for home recording.

A market solution must preserve the potential for copyright holders and potential infringers to engage in unencumbered negotiations in which the copyright holders retain the option to refuse to license their copyrights and to seek injunctions to bar copying. Maintenance of the right to seek an injunction, however, is not appropriate here. As I have already noted, it is necessary for practical reasons to absolve home tapers from liability and to rely instead upon payments from manufacturers of materials employed by home tapers. However, these manufacturers lack control over what works are taped by home tapers and therefore cannot prevent home taping of a work under which they have not been successful in obtaining a license. As a result, under a pure market solution where copyright owners can obtain injunctions, one copyright owner who refuses to license may be able to halt the sale of all home taping materials. This would deprive the public of the ability to record the works of all of those copyright holders that are willing to license.

To avoid this unacceptable situation, copyright holders must not be given the power to enjoin manufacturers. However, without the availability of an injunction, a marketplace solution is not possible. With the power to enjoin removed, the copyright owner has only one option, to seek royalties for copyright infringement. In effect, this amounts to a compulsory licensing system with the only unresolved issue being how disputes as to reasonable royalties should be resolved.

To the extent that a marketplace system is not possible, it seems appropriate to employ the Copyright Royalty Tribunal rather than the courts to enforce the compulsory licensing system. Courts are limited to the particular parties and issues before them; and this could result in a multitude of court cases, arguably inconsistent verdicts, and considerable uncertainty as to the amount of ultimate payments. Adjudication of this issue through the Copyright Royalty Tribunal would allow a single deliberative body to look at the entire problem and derive, as much as is possible, a uniform, internally consistent solution.

There are, however, a number of problems with locating this authority with the Copyright Royalty Tribunal.

V. Legislative Remedy

The scheme proposed by H.R. 5705 is at best an imprecise and imperfect substitute for the usual workings of the copyright system which under normal circumstances would be focused directly upon the potential copyright infringer. The effect of H.R. 5705 would be to impose a tax upon recording equipment and materials to be borne by the manufacturer and consumer-infringers and non-infringers alike. The Department, given its historic commitment to freedom in the marketplace, is reluctant to advocate a cumbersome, standardless regulatory substitute for normal copyright liability and damages.

There is, however, no possibility of providing substantial compensation to copyright holders for home recordings other than through a regulatory mechanism. The only real question, then, is the very practical problem of whether a regulatory tribunal can be designed to address the problem with sufficient precision. The public benefits from the protection of the copyright principle must outweigh the public costs which will inevitably attend such a difficult regulatory effort.

The problems inherent in such a regulatory substitute for the marketplace are substantial and should be carefully considered by Congress. It is very unclear to us how the appropriate "damages" incurred by copyright owners can be measured and allocated among the manufacturers. The problems involved in allocating the fees collected among the various copyright owners to assure that compensation is given to each to the extent that his works have been copied are also great. Unless these fees can be properly targeted among copyright owners the purpose of the copyright law -- to provide a market incentive for production -- will not be served by the regulatory mechanism. We are hesitant to recommend that these difficult problems be simply delegated to an administrative tribunal. If at all possible, we would prefer that Congress give the Copyright Tribunal detailed guidance on how fees can be measured, assessed, and distributed.

Moreover, we should note that the proposed regulatory solution would, of course, impose some costs on members of the

public who are wholly innocent of any infringing activities. Both audio and video equipment can be used for non-infringing purposes, such as home recordings. Since there is no practical way to single out infringing from non-infringing users for purposes of a general fee, the royalty system will inevitably impose what amounts to a tax on innocent activities.

In sum, as Congress is only too well aware, even the best-planned, best-intentioned regulatory regimes impose costs on society by functioning imperfectly. It can safely be predicted that the Copyright Royalty Tribunal's fee setting determinations will prove no exception to this rule.

Nevertheless, the public benefits of an imperfect regulatory solution can outweigh the inevitable costs where the value of copyrighted properties is being substantially eroded by uncompensated copying. There appears to be substantial evidence that this is the case for audio taping. Although the Department would like to examine the relevant industry data more fully, information supplied to us to date supports a finding of significant harm to the record industry. From 1971 to 1981, annual sales of blank audio cassette tapes reportedly increased dramatically from 125 million to 228 million units. In contrast, from 1978 to 1981, manufacturers' record and prerecorded tape shipments reportedly declined from $4.1 billion to $3.6 billion, unit sales reportedly declined from 726 million to 594 million, and the total number of new releases reportedly decreased by

nearly one-third. 11/ A number of studies show that many home tapers, if precluded from taping, would purchase a record or prerecorded tape. 12/ In short, the evidence suggests that, for many consumers, audio home taping has become an inexpensive alternative to the purchase of records and prerecorded tapes, and that the inability of audio copyright owners to collect royalties from home tapers has caused a significant decline in the value of copyrighted audio works.

The harm that has been suffered by video copyright holders as a result of video home recording seems to us, at this point, to be less clear, and still more difficult to quantify. Evidence to date is ambiguous as to whether VCRs have been used primarily to "time shift" -- that is, to facilitate one-time-only viewing of movies and programs that individuals cannot arrange to see at the time of broadcast. 13/ Because time-shifting results in larger audiences for programming, it could increase advertising revenues received by copyright holders, and thereby

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11/ See generally Statement of the Recording Industry Association of America, Inc. before the Senate Committee on the Judiciary, April 21, 1982 (with attached Appendices).

12/ See, e.g., Statement of Alan Greenspan re Amendment 1333 to S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess., April 21, 1982; Warner Communications, Inc., A Consumer Survey: Home Taping (March, 1982); Columbia Broadcasting System, Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales (Fall, 1980).

13/ See, e.g., Home Recording Rights Coalition, The Case for Home Recording Rights 34-47 (February, 1982); Home Recording Rights Coalition, Compendium of Arguments in Support of Legislation to Exempt from Copyright Infringement Home Recording of T.V. Programs for Private Viewing (May, 1982).

could raise the value of copyrighted works. To the extent, however, that video recorders are used by the consumer to edit out commercials through the "fast forward" devises available on some machines, advertising revenues and the value of the copyrighted works could be decreased. 14/ Moreover, video copyright holders are, of course, denied extra compensation from those commercial television viewers who engage in "librarying" -- the creation of permanent tapes of particular films which are stored and viewed repeatedly. Though librarying does not appear to be a widespread phenomenon at this time, it may become so.

Given the existence of demonstrated -- and perhaps very substantial -- harm to audio copyright holders, we believe that Congress should move forward expeditiously to establish a regulatory compensation scheme for audio taping, despite its inherent administrative difficulties.

While video copyright owners deserve the same protection for uncompensated injury, we believe that more concrete information concerning the extent of the harm suffered by video

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14/ Currently, both the Nielsen and Arbitron rating services take into account both live viewing and home taping when measuring audience size. It is our understanding that, at present, advertising rates generally include payment for the VCR audience and are not discounted as a result of VCR taping. Presumably, advertisers would not, however, be willing to pay for the VCR viewers to the extent the viewers tended to eliminate commercials by using "fast forward" buttons on their VCRs. We know of no reliable data indicating the frequency with which this occurs.

copyright owners will be required for either Congress or an administrative body to determine rationally the amount of any royalty that should be assessed. Since the problems presented by video taping are likely to increase dramatically in the years to come, as video recorders become more common, we believe that the unsettled issues of copyright loss should be given serious and expedited study by the Congress. The Justice Department would certainly be interested in assisting the Congress in this effort. Since the need for relief for video taping appears less compelling at this time than for audio taping, we suggest that the Congress may wish to delay authorization of royalty assessments in the video area until it can offer more definitive guidance on the manner of determining injury for video infringement.

VI. Congress Should Place Direct Liability On Audio Tape Manufacturers, But Not On Audio Recorder Manufacturers

At this point, the Department has concluded also that, in the audio area, royalties should only be assessed on audio tape manufacturers, and not the manufacturers of audio recorders.

The primary objective of any compensation scheme should be to have royalty payments ultimately made by home tapers in an amount proportional to the extent of their infringement. Satisfying this objective would enable the scheme to approximate the payments that would occur if a market solution were feasible.

Assessing royalties on audio tape manufacturers would result in these royalties ultimately being paid at least to some extent by the home tapers since the royalties presumably will be passed on, where possible, to home tapers through higher tape prices. A royalty on tapes should thus result in home tapers paying in amounts proportional to the amount of copyrighted works that they tape. The vast majority of audio tapes apparently are used only for "librarying," i.e., taping a copyrighted work and maintaining the taped work for repeated use. Therefore, the number of tapes that a home taper purchases seems to be the best meter of the amount of taping actually done. 15/

It would be inappropriate, however, also to charge a royalty for audio recorders because this would not result in a charge proportional to the amount of home taping actually being done. A single royalty on a recording machine would result in all recorder purchasers paying the same royalty regardless of the amount of home taping they do. Moreover, individuals who would tape only occasionally may be the individuals most likely to refrain from purchasing a recorder if the royalty results in a

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15/ Of course, as discussed above, a royalty on all audio tapes is not a perfect solution since consumers who purchase tapes for uses that do not involve the copying of copyrighted works could be forced to pay a premium price for tapes. This problem may be ameliorated somewhat by assuring that royalties are required only on tapes of a quality that are primarily used for the recording of music. In any event, so long as the vast majority of tapes are used for taping copyrighted works, a royalty payment on tape sales seems to be the most efficient means of compensating the copyright holder for home taping.

higher recorder price. Thus, higher recorder prices could eliminate a disproportionate number of occasional tapers from the market even though these tapers would have recorded copyrighted music only infrequently.

VII. Modifying the First Sale Doctrine

The "first sale" doctrine presently embodied in 17 U.S.C. § 109 immunizes a purchaser of a particular copy of a copyrighted work from copyright liability for any subsequent rental, lease or other disposal made of that copy. H.R. 5705 would modify the first sale doctrine by prohibiting the purchaser of a copyrighted phonorecord or copy of an audiovisual work from renting the purchased work for commercial purposes without the copyright owner's permission.

The Department supports the proposed modification of the first sale doctrine because the doctrine undermines basic notions of copyright exclusivity and, in addition, impedes the copyright holder's effort to distribute the copyrighted work in the most efficient way possible.

Commercial rental undermines the basic notion of exclusive rights in copyrighted works because consumers face a choice of renting the work or buying it. Hence, the commercial renter in essence competes with the copyright owner in the

distribution of the copyrighted work. While the copyright owner certainly will be able to extract a payment for the original sale to the commercial renter, subsequent rentals will benefit only the renter and will conflict with the copyright owner's efforts to sell or rent the work to others.

It should be stressed that the proposed modification will not necessarily eliminate commercial rentals of copyrighted audio and video works. Copyright owners have an incentive to maximize profits from their copyrights, and they could decide to do this through some combination of rentals and sales. The rentals can be performed by the copyright owners themselves or by independent commercial renters, so long as these renters pay a fair value to the copyright owner. Commercial renters will have an incentive to pay the copyright owner a fair price since, without authorization, they can be enjoined from renting the copyrighted works.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions you or the members of the Subcommittee may have.

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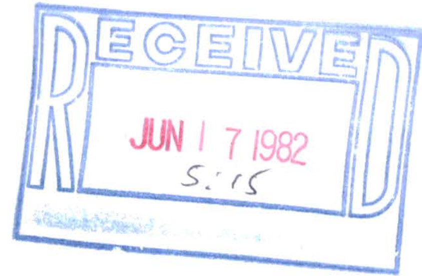

Statement of

Bernard J. Wunder, Jr.
Assistant Secretary for Communications and Information
U. S. Department of Commerce

Before the

Subcommittee on Courts, Civil Liberties, and
the Administration of Justice
Committee on the Judiciary
House of Representatives

on

Copyright Aspects of Video and
Audio Recording

(H.R. 4783, H.R. 4808, H.R. 5250, and H.R. 5705)

Thursday June 24, 1982

Thank you for giving me this chance to express the views of the Administration on the proposed legislation dealing with audio and video recording that the Subcommittee is considering.

Our position, briefly, is that the evidence produced to date does not support the public policy need for special legislation dealing with video recording. As explained more fully in my statement, we think that the evidence at present would only support a "Scotch verdict," namely, "not proven." We do not think that a special copyright royalty scheme should be legislated at this stage on the basis of, essentially, presumptive harm arguments. On the other hand, we are sympathetic to the concerns of the program producers. We do not want to get into the situation where genuine, severe injury is visited upon this important industry before remedial steps are taken. Accordingly, we believe that it would be appropriate at this stage for Congress to mandate a thorough study of the situation by as expert and impartial an agency as available. In our view, Congress should ask the Office of the Register of Copyrights to survey and analyze the situation thoroughly, to report back within a year, and then act on the basis of that information. With respect to audio recording, we think that the recording industry has made a reasonable prima facie case of publicly recognizable harm. The facts that we have reviewed do show that unauthorized recording of copyrighted music is exacerbating the other difficulties that this important industry

is experiencing. We do have some serious concerns, however, about the efficacy and the efficiency of the remedies that have been proposed in this respect. We do not like the concept of a special royalty assessment on recording devices or on tapes. Like the Subcommittee, however, I expect that we are somewhat at a loss to find a "less bad" alternative. In short, we believe that the recording industry has made a prima facie case that they are experiencing a publicly recognizable harm. While we believe that there should be a remedy, we are not certain exactly what that optimally should be.

General Background

In its 1981 Sony-Betamax decision, of course, the Ninth Circuit held, essentially, that the home videotaping of broadcasts: (a) did not fall within the traditional "fair use" exemption; (b) constituted a copyright infringement, accordingly; and (c) that the suppliers of video recorders (such as Sony) were thus liable, since their products were not a "staple of commerce," but rather devices "not suitable for substantial, noninfringing use." Universal City v. Sony Corp. of America, 659 F.2d 963, 973, 975 (9th Cir. 1981). The issue of home audio recording and its exemption under the 1976 copyright law, or the 1971 Sound Recordings Act, was not technically before the court, but the audio and video recording issues obviously have become intertwined. Last week, of course, the Supreme Court decided to review the Ninth Circuit's ruling. Whether home video

recording constitutes an infringement under current law, therefore, is a question that will have to await the Court's ruling. See Teleprompter Corp. v. CBS, 415 U.S. 394, 414-15 (1974); Fortnightly Corp. v. United Artists, 392 U.S. 390, 400 (1968).

A diversity of bills were introduced following the Sony-Betamax decision, and the Subcommittee is currently considering four of them. These bills basically fall into two categories. The first group of bills (H.R. 4783, H.R. 4804, and H.R. 5250) address solely the video recording issues. These bills, essentially, would create an explicit, statutory exemption from the copyright laws for home video recording. If any of these bills were enacted, home video recording would not constitute an infringement and, therefore, neither homeowners nor the suppliers of tapes and equipments would be liable to copyright law sanctions.

The second category of bill before the Subcommittee is typified by H.R. 5705. This bill is substantially more complicated. The bill would, first, explicitly exempt home, noncommercial video and audio recording. Second, however, the bill would require the suppliers of video and audio equipment and associated products, such as tapes, to obtain blanket licenses from copyright holders. The royalties that they would pay would be determined by the Copyright Royalty Tribunal. The bill would not afford the Tribunal much guidance in determining fees.

Presumably, however, the Tribunal would determine how much should be paid to fairly compensate copyright holders and to provide them with an adequate incentive to produce new product, and set the royalty payments accordingly. Cf. Amusement and Music Operators Assoc. v. Copyright Royalty Tribunal, ___F.2d ___(Civ. No. 80-2837, 7th Cir., April 16, 1982).

Position on Video Recording Legislation

Constitutionally, the fundamental purpose of the copyright laws is to afford artists and programmers generally with an adequate incentive to produce. Congress is obliged to promote development of new material in particular. Fairness is an important operational consideration. If programmers are not compensated fairly, they will, obviously, produce less. Fairness is also important to ensure the continued availability of not only human but financial capital necessary to produce more material. From a public policy standpoint, however, the key question is whether existing arrangements accord producers an adequate incentive to produce.

Existing copyright laws, of course, already afford the producers of video programming an incentive to produce. They have the right legally, for example, to market their products on an exclusive basis to theatres and to the broadcast television and pay cable television industries, for example.

There are at least four significant questions raised with respect to home video recording activities. The first question is whether there is any credible evidence showing concrete injury to copyright holders. The second is whether, even assuming the absence of evidence showing actual harm, Congress can legitimately proceed on a presumptive harm basis. The third question is whether this is the kind of situation that will tend to be "self-levelling," in other words, to resolve itself over time. And, finally, the fourth question is whether additional royalties are desirable in the public interest, in order to ensure an adequate supply of programs in the future. This last question is especially important. There is a tremendous diversity of new communications "hardware" now coming on-line: cable television, low power television, direct broadcast satellites, and so forth. Expanding the total supply of programming is thus critical if the public is to be afforded a genuine choice, and not just an echo.

We think, in respect of the first question, that the available data is at best inconclusive in showing actual harm. There are reportedly about 5 million video recorders currently in use. We have not yet seen, however, any clear and convincing data that shows the use of these devices has in fact adversely affected the program production business.

The absence of evidence showing actual injury to the programming business may be justifiable. Until recently, public

use of video recorders was not widespread. It could be that any harms will not materialize until some critical mass is achieved, or when programs that are now just being produced, or marketed to theatre or broadcast exhibitors ultimately are sold. Similarly, Congress might determine that the value of the program production business is such that it would be imprudent to await the appearance of any severe, concrete harms.

With respect to my second question, however, we are not yet persuaded that Congress could, or should, act on the basis of any assumed presumptive harms. To begin with, the available evidence indicates that video recorders are as presumptively beneficial as they are presumptively harmful. Testimony before the Senate Judiciary Committee last April, for example, suggested that as much as 80 percent of all home video taping is done to achieve time diversity, or so-called "time shift viewing." Other evidence suggests that about 77 percent of all home taping takes place when no television is being watched, or while a different program is being viewed. This evidence suggests, of course, that home video recording has the effect of expanding the viewership of broadcast programming, of, essentially, providing broadcasters (and advertisers) bonus audiences that they otherwise might not enjoy. To the extent that these additional viewers can be measured sufficiently accurately, presumably program producers will be able to increase prices to broadcasters commensurately.

Not only is there thus plausible evidence that video recording devices may yield some net benefit to program producers, but the overall trend from a technology standpoint appears to be towards increasing use of VCR and similar devices for what would constitute "significant noninfringing use." Such machines, for example, are increasingly used for general data storage and similar purposes by the growing number of home computer operators.

The short answer to the first two questions that I posed, in sum, is that we have not yet seen evidence of actual harm to the programming business. Nor are we yet persuaded that any sort of legitimate presumptive harm basis for special copyright legislation now exists.

There is also little more than opinion evidence now available concerning whether the potential problems video recording may cause the programming business will prove "self-levelling," or whether the marketplace will develop workable solutions without the need to resort to special copyright legislation. I have already alluded to one possible corrective development, namely, the possibility that programmers will be able to recoup any actual or opportunity costs incurred because of home taping in their negotiations with the broadcasting industry. At present, there is a dearth of objective analysis on

this point. Both the proponents and the opponents of home video taping copyright payments to date have focussed on the effects legislation in this area might have on their respective financial interests. Little work appears to have been undertaken to investigate the likelihood of the marketplace developing solutions in the absence of special legislation.

In our view, the most prudent thing for Congress to do at this juncture is to seek to develop more information , and information that is as objective as possibly obtainable. We believe that Congress could achieve a sounder basis for drawing reasonable conclusions about this complex situation by directing the Copyright Office, for example, promptly to undertake a searching and objective analysis, and to report back formally on its findings within one year.

We are not suggesting that Congress take no action in this area. The available evidence clearly shows that video cassette devices enjoy consumer acceptance similar to that accorded color television sets, when they were first placed on the market.

Color Television		Home Video Recorders	
Year	Unit Sales	Year	Unit Sales
1959	90,000	1976	30,000
1960	120,000	1977	160,000
1961	147,000	1978	401,930
1962	438,000	1979	475,196
1963	747,000	1980	804,663
1964	1,366,301	1981	1,360,988
1965	4,702,463	1982	N/A

Television Digest, vol. 22, no. 5, at p. 13 (June 2, 1982).

These figures suggest that any adverse or negative consequences of video recorder developments are likely to increase in significance. It is unlikely that home taping activities during the brief period of time within which an objective analysis would be undertaken would severely benefit or harm any of the competing commercial interests with a stake in this controversy. An objective analysis would provide Congress, however, with a sound basis for making judgments here, and we believe that such a study is clearly necessary.

Position on Audio Recording Legislation

In the case of audio recording, briefly, we think that a prima facie case of publicly recognizable harm has been made. While we agree with the recording industry on this point, however, we are frankly very queasy about the proposed remedy that H.R. 5705, for example, seeks to accomplish.

Record unit sales in recent years have stayed relatively flat (in the case of albums) or fallen steadily (in the case of singles), despite significant population increases. Total recording industry sales growth since 1976 appears overall to

have been very modest, with increases just tracking the annual rate of inflation. Sales overall seem to have stagnated at about $3.6 billion annually since 1979. */

A number of factors unquestionably have contributed to this situation. These factors include changes in demographics, increasing record production costs and thus prices, as well as the growing popularity of other entertainment media -- vide games, for example -- among groups that were major record buyers in the past. Significantly, however, the available evidence suggests a sharp reduction in the number of new albums produced annually as well. The Recording Industry Association has reported that new album production in 1981 was off about a third from 1978 levels; less new material appears to be produced. (RIAA Statement, April 21, 1982, at p. 22) Credible economic studies have also been produced showing, for example, that this industry with total annual sales in the $3.6 billion range is and has been incurring opportunity costs of $900 million or more annually due to lost sales because of home taping.

The balance of the evidence, we think, supports the view that home recording is substantially and adversely affecting the incentive and ability of the recording business to produce. The

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Sales	1976	1977	1978	1979	1980	1981
Albums	1663	2195	2473	2057	2200	
Tapes	829	1061	1398	1265	1232	
Singles	245	245	260	354	250	
Total	2737	3501	4131	3676	3682	3.6E

Electronics Industry Association (EIA) has done a commendable job endeavoring to defend its membership's interests. There is, nevertheless, reasonable basis for assuming that home recording has exacerbated the negative effects of other factors, and thus caused what should be publicly deemed significant harm.

Not only is there thus a showing of harm, but it is also significant that the problems caused by home taping are quite distinct from those posed by home video recording. An audio recording, first, does not usually lose its appeal as a consequence of repeated listening, at least not to the extent true of most video recordings. The typical reasons for home recording, moreover, differ from the reasons for recording television programs off-air. The predominant reasons for copying audio recordings seem to be a desire to "library" the work for future enjoyment, to "customize" the music, and to save money. Video recordings, however, are made not only to "library"; they are also made -- and some contend, primarily -- to facilitate time shift viewing. Third, the price of most blank video tapes is many times higher than that of blank audio tapes. And, while the computer use of video tapes seems to be on the increase, for example, it seems to be declining in the case of lower capacity and cheaper audio tapes. Finally, the marketing patterns of the industries involved are quite different. There are considerably more steps in the distribution hierarchy of video programs than there are for audio recordings. Therefore, the copyright owners of video programming would appear to have more revenue producing

opportunities available to them than the owners of audio recording rights. The present copyright system, in short, may afford video program producers much greater incentive to produce new programs than is true in the case of audio productions, because there are more stages of production involved.

For all of these reasons, we would prefer that the market rather than either the Congress or the Copyright Royalty Tribunal determine what constitutes a fair royalty fee. Representatives of copyright owners, record and tape producers and distributors, and manufacturers and retailers of recording devices and blank tape could enter into negotiations to reach a mutually satisfactory solution to the growing problem of uncompensated use of copyrighted audio products resulting from an increase in home taping.

The problems created by home audio taping of copyrighted works, however, are not new and require a prompt solution. We, therefore, tentatively support the thrust of proposals to create a compulsory license for home audio taping and to require manufacturers and distributors to pay a royalty at rates set by the Copyright Royalty Tribunal. Rather than leave the rates solely to the discretion of the Tribunal, however, we suggest that any such legislation contain upper bounds and lower thresholds within which rates must fall. In addition, to avoid the kind of problems copyright owners of secondary transmission by cable systems have experienced, we suggest that precise

criteria be included in the statute addressing the following key matters: (1) first, a method for determining who shall be required to pay such a copyright fee (as in video applications, some recording devices and tape are used for non-infringing purposes); (2) second, who shall be eligible to receive a share of the fees collected; (3) third, how and to whom the fees shall be paid; and (4) fourth, how they shall be divided and distributed.

The Administration believes that the marketplace could work at least as efficiently as the various proposed government administered systems, but recognizes that further delay in compensating copyright owners is just a further erosion of their rights under the Constitution.

Conclusion

In conclusion, while we are sympathetic to the concerns that video program producers have advanced, we do not believe that they have yet made an adequate public policy case. We support the concept of legislation exempting home video recording, but absent such a showing of actual harm to video program producers, we are opposed to expanding existing royalty arrangements. In the case of audio recording, we believe that the case has been adequately established. The record does show that home recording is exacerbating the effect of other adverse factors, and thus contributing not to greater, but lesser production. Although we

support continuing the present home recording exemption, we could reluctantly support legislation placing a royalty payment obligation on suppliers of audio recording equipment and blank tapes.

Department of Justice

Testimony of

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Before the

Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary

Concerning

LEGISLATION ON COMPENSATION TO COPYRIGHT
OWNERS FOR HOME VIDEO AND
AUDIO RECORDING
UNITED STATES HOUSE OF REPRESENTATIVES

June 24, 1982

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify today on legislation relating to the important topic of compensation to copyright owners for noncommercial home taping of audio and video works. This subject is one of considerable interest and importance to the audio-visual entertainment industry and the consumers of its products. For the sake of organizational convenience, I will focus my remarks principally on one bill currently pending before this Subcommittee -- H.R. 5705.

I. Introduction

H.R. 5705 is one of a number of bills 1/ that have been introduced to reverse legislatively the decision of the Court of Appeals for the Ninth Circuit in Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981), cert. granted, ____ U.S. ____ (No. 811687, June 14, 1982). In that case, in which the Supreme Court has recently granted certiorari, the Ninth Circuit held that home taping of video programs broadcast over television constitutes copyright infringement for which some tapers are liable as direct infringers, and retailers and manufacturers are liable as contributory infringers. All of

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1/ These bills include H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, and H.R. 5488.

the bills would partially overrule the decision of the Ninth Circuit either by declaring that home taping does not constitute copyright infringement or by absolving the home taper from direct liability for copyright infringement.

H.R. 5705 would absolve home tapers from liability for copyright infringement. However, the bill would compensate copyright owners for audio and video home taping. It would do so by making importers and manufacturers who distribute audio and video home recorders and blank tapes in the United States directly liable for copyright infringement. The bill would create a system under which a fee would be imposed on tapes and audio and video recorders. Such fees would be held in a fund from which royalties could be paid to copyright holders. The amount of the royalties and their method of distribution to copyright holders would be within the jurisdiction of the Copyright Royalty Tribunal. In addition, the bill would modify the so-called "first sale" doctrine of copyright law, codified in 17 U.S.C. § 109, so as to permit copyright owners to use the copyright laws to prevent unauthorized rental of copies of their copyrighted audio and video works.

II. The General Principles of Copyright

Throughout American history the law has encouraged literary and artistic creativity by giving authors and artists an intellectual property right in the fruits of their labor.

The Founding Fathers recognized the importance of this right in framing the Copyright Clause of the Constitution, Article I, Section Eight, which authorizes Congress "[t]o promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." This constitutional grant of power formed the basis for congressional adoption of the copyright laws.

Supreme Court precedents clearly indicate that the Copyright Clause references to "authors" and "writings" are to be liberally construed. [2/] Congress has also adopted an expansive view of the copyright principle, by modifying the copyright laws over the years to embrace new forms of artistic creation which were undreamed of in the eighteenth century. Thus, Congress extended copyright protection to "motion pictures" in passing the copyright Act of 1909, [3/] and to sound recordings through the Sound Recording Amendment of 1971. [4/] Most recently, in enacting Section 102(a)(6) of the Copyright Act of 1976, [5/] Congress specifically included "audiovisual works" in general within the

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2/ See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884); Goldstein v. California, 412 U.S. 546 (1973).

3/ See 1 Nimmer on Copyright § 2.09[C] (1979).

4/ 17 U.S.C. § 102(7) (1980), discussed in 1 Nimmer on Copyright § 2.10 (1979).

5/ 17 U.S.C. § 102(a)(6) (1980).

ambit of the copyright laws. In sum, both judicial and legislative developments have favored the broad extension of the copyright mantle to protect "what the ingenuity of men should devise". 6/

This broad extension of copyright protection is based upon a recognition that inadequate financial incentives to create artistic works would exist if the artist's work could be freely copied. The Supreme Court has noted that underlying the copyright grant "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors." 7/ What justifies the copyright monopoly is "the general benefits derived by the public from the labor of authors." 8/ These "general benefits" are threatened when a copyright is infringed upon through the act of unauthorized copying. 9/

The Congress and the courts have recognized the importance of vindicating copyright holders' interests. At the same time, however, they have not been unmindful of the

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6/ Reiss v. National Quotation Bureau, 276 Fed. 717 (S.D.N.Y. 1921) (Learned Hand, J.).

7/ Mazer v. Stein, 347 U.S. 201, 219 (1954).

8/ Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). Accord, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

9/ When copyright ownership has been established, a plaintiff need only prove copying in order to establish infringement by the defendant. 3 Nimmer on Copyright § 13.01 (1979).

public interest in reasonable limitations on the scope of copyright privileges. Accordingly, legislators and judges have attempted to weigh the copyright interest in spurring creative efforts against the public's interest in the widespread distribution of reproductions of artistic works. As the Supreme Court has stated,

> The limited scope of a copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. 10/

It follows that copyright legislation ideally should provide incentive for artistic creation in order to promote the widespread dissemination of copyrighted work without imposing unnecessary cost to the general public.

In sum, the central thrust of the copyright law has been to encourage creativity for the public good by treating unauthorized copying of copyrighted works as infringement. By this logic, both audio and visual taping have the potential to diminish copyright values, much like other forms of copying.

10/ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

III. The Impracticality of Applying Copyright Liability to Home Tapers

H.R. 5705 and the other bills before this Committee would exempt from copyright liability an individual who makes an audio or video home recording for the private use of members of the individual's immediate household. The collection of royalties directly from home tapers simply is not a viable method for compensating copyright owners. Because taping is done in the privacy of the home, it would be impractical, if not Orwellian, to attempt to detect which individuals tape at home and which works they tape. Moreover, even if such taping could be detected, it would be highly inefficient for copyright holders to negotiate with the millions of individuals who tape at home and to bring suit for injunctions or damages against those that refuse to pay an appropriate royalty. Therein lies our current problem.

We have arrived at this point because technology has outrun the relevant legal concepts. The original concept of copyright was defined in an age when such inventions as photocopying machines and home audio and video recorders did not exist. The doctrine of copyright was originally developed to maintain for the creator of an artistic work -- the copyright owner -- the benefits of its reproduction. Now that technology has made possible the easy and swift reproduction of an artistic work in the privacy of one's own home, all sides to the present debate admit, as they must, that neither politics nor practicality suggest a lengthy debate over whether the home copier is or is

not liable for copyright infringement. One side of the legislative debate would simply declare that home copying -- audio or visual -- of art works is a non-infringing use and let the economic chips fall where they may. The other side claims that a cognizable interest is infringed by home taping -- though this taping should not itself be a violation -- and has developed a substitute for normal copyright remedies. That substitute is the compulsory licensing and royalty scheme embodied in H.R. 5705, which would be administered by the Copyright Tribunal.

IV. The Pros and Cons of a Regulatory Solution

H.R. 5705 in effect provides a regulatory solution to the development of the new technology I have described. H.R. 5705 would vest authority in the Copyright Royalty Tribunal to establish a fee to be imposed on manufacturers of tapes and recording devices and to distribute the fees collected to holders of copyrights. As a firm principle, the Justice Department believes Congress should not choose a regulatory approach to economic problems where a market approach is feasible. For this reason, we have opposed continued jurisdiction of the Copyright Royalty Tribunal over cable broadcasting. However, unlike cable television, a market solution appears to be less feasible for home recording.

A market solution must preserve the potential for copyright holders and potential infringers to engage in unencumbered negotiations in which the copyright holders retain the option to refuse to license their copyrights and to seek injunctions to bar copying. Maintenance of the right to seek an injunction, however, does not appear appropriate here. As I have already noted, it is necessary for practical reasons to absolve home tapers from liability and to rely instead upon payments from manufacturers of materials employed by home tapers. However, these manufacturers lack control over what works are taped by home tapers and therefore cannot prevent home taping of a work under which they have not been successful in obtaining a license. As a result, under a pure market solution where copyright owners can obtain injunctions, one copyright owner who refuses to license may be able to halt the sale of all home taping materials. This would deprive the public of the ability to record the works of all of those copyright holders that are willing to license.

To avoid this unacceptable situation, copyright holders must not be given the power to enjoin manufacturers. However, without the availability of an injunction, a marketplace solution becomes difficult. With the power to enjoin removed, the copyright owner has only one option, to seek royalties for copyright infringement. In effect, this amounts to a compulsory licensing system with the only unresolved issue being how disputes as to reasonable royalties should be resolved.

To the extent that a marketplace system is not possible, it seems appropriate to employ the Copyright Royalty Tribunal rather than the courts to enforce the compulsory licensing system. Courts are limited to the particular parties and issues before them; and this could result in a multitude of court cases, arguably inconsistent verdicts, and considerable uncertainty as to the amount of ultimate payments. Adjudication of this issue through the Copyright Royalty Tribunal would allow a single deliberative body to look at the entire problem and derive, as much as is possible, a uniform, internally consistent solution.

There are, however, a number of problems with locating this authority in any administrative agency and specifically with the Copyright Royalty Tribunal. The fundamental problem would be whether a regulatory tribunal could be designed to address the issues that will arise with sufficient precision, such that the public benefits from the protection of the copyright principle will outweigh the public costs which will inevitably attend such a difficult regulatory effort.

The scheme proposed by H.R. 5705 is at best an imprecise and imperfect substitute for the usual workings of the copyright system which under normal circumstances would be focused directly upon the potential copyright infringer. The effect of H.R. 5705 would be to impose a tax upon recording equipment and materials to be borne by the manufacturer and consumer-infringers and non-infringers alike. The Department,

given its historic commitment to freedom in the marketplace, is reluctant to advocate a cumbersome, standardless regulatory substitute for normal copyright liability and damages.

The problems inherent in such a regulatory substitute for the marketplace are substantial and should be carefully considered by Congress. It is very unclear to us how the appropriate "damages" incurred by copyright owners can be measured and allocated among the manufacturers. Moreover, the problems involved in allocating the fees collected among the various copyright owners to assure that compensation is given to each to the extent that his works have been copied are also great. Unless these fees can be properly targeted among copyright owners, the purpose of the copyright law -- to provide a market incentive for production -- will not be served by the regulatory mechanism. Even if regulations is shown to be necessary, we would be hesitant to recommend that these difficult problems be simply delegated to an administrative tribunal. If such a delegation is made, we would prefer that Congress give the Copyright Tribunal the maximum possible guidance on how fees can be measured, assessed, and distributed.

Moreover, we should note that the proposed regulatory solution would, of course, impose some costs on members of the public who are wholly innocent of any infringing activities. Both audio and video equipment can be used for non-infringing purposes, such as home recordings. Since we are aware of no

practical way to single out infringing from non-infringing users for purposes of a general fee, the royalty system will inevitably impose what amounts to a tax on innocent activities.

In sum, as Congress is only too well aware, even the best-planned, best-intentioned regulatory regimes impose costs on society by functioning imperfectly. It can safely be predicted that the Copyright Royalty Tribunal's fee setting determinations will prove no exception to this rule.

Nevertheless, the public benefits of an imperfect regulatory solution may outweigh the inevitable costs where the value of copyrighted properties is being substantially eroded by uncompensated copying. There appears to be evidence that this may be the case for audio taping. Although the Department would like to examine the relevant industry data more fully, information supplied to us to date supports a conclusion that the record industry is being significantly harmed by audio taping. From 1971 to 1981, annual sales of blank audio cassette tapes reportedly increased dramatically from 125 million to 228 million units. In contrast, from 1978 to 1981, manufacturers' record and prerecorded tape shipments reportedly declined from $4.1 billion to $3.6 billion, unit sales reportedly declined from 726 million to 594 million, and the total number of new releases reportedly

decreased by nearly one-third. 11/ A number of studies show that many home tapers, if precluded from taping, would purchase a record or prerecorded tape. 12/ In short, the evidence suggests that, for many consumers, audio home taping has become an inexpensive alternative to the purchase of records and prerecorded tapes, and that the inability of audio copyright owners to collect royalties from home tapers has caused a significant decline in the value of copyrighted audio works.

The harm that has been suffered by video copyright holders as a result of video home recording seems to us, at this point, to be less clear, and still more difficult to quantify. Evidence to date is ambiguous as to whether VCRs have been used primarily to "time shift" -- that is, to facilitate one-time-only viewing of movies and programs that individuals cannot arrange to

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11/ *See generally* Statement of the Recording Industry Association of America, Inc. before the Senate Committee on the Judiciary, April 21, 1982 (with attached Appendices).

12/ *See, e.g.*, Statement of Alan Greenspan *re* Amendment 1333 to S. 1758 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess., April 21, 1982; Warner Communications, Inc., *A Consumer Survey: Home Taping* (March, 1982); Columbia Broadcasting System, *Blank Tape Buyers: Their Attitudes and Impact on Pre-Recorded Music Sales* (Fall, 1980).

see at the time of broadcast. 13/ Because time-shifting results in larger audiences for programming, it could increase advertising revenues received by copyright holders, and thereby could raise the value of copyrighted works. To the extent, however, that video recorders are used by the consumer to edit out commercials through the "fast forward" devices available on some machines, advertising revenues and the value of the copyrighted works could be decreased. 14/ Moreover, video copyright holders are, of course, denied extra compensation from those commercial television viewers who engage in "librarying" -- the creation of permanent tapes of particular films which are stored and viewed repeatedly. Though librarying does not appear to be a widespread phenomenon at this time, it may become so.

13/ See, e.g., Home Recording Rights Coalition, The Case for Home Recording Rights 34-47 (February, 1982); Home Recording Rights Coalition, Compendium of Arguments in Support of Legislation to Exempt from Copyright Infringement Home Recording of T.V. Programs for Private Viewing (May, 1982).

14/ Currently, both the Nielsen and Arbitron rating services take into account both live viewing and home taping when measuring audience size. It is our understanding that, at present, advertising rates generally include payment for the VCR audience and are not discounted as a result of VCR taping. Presumably, advertisers would not, however, be willing to pay for the VCR viewers to the extent the viewers tended to eliminate commercials by using "fast forward" buttons on their VCRs. We know of no reliable data indicating the frequency with which this occurs.

We believe that copyright owners deserve compensation for financial injuries to their property rights suffered as a result of unlawful copying. Nevertheless, it is clear that more concrete information concerning the extent of the harm suffered by copyright owners may be required for either Congress or an administrative body to determine rationally the amount of any royalty that should be assessed. As we have noted, we believe that Congress should itself establish the standards and mechanisms for determining and allocating copyright loss, so far as practicably possible. We are presently, however, unable to suggest what these should be. Yet, we cannot at this time endorse the simple delegation of these difficult problems to the Copyright Tribunal. Since the problems presented by video and audio taping are likely to increase dramatically in the years to come, particularly as video recorders become more common, we believe that the unsettled issues of copyright loss should be given serious and expedited study by the Congress. The Justice Department would certainly be interested in assisting the Congress in this effort.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions you or the members of the Subcommittee may have.