

Life as Art: How Technology and the Infusion of Music into Daily Life Spurred the Sound Recordings Act of 1971

James H. Napper, III*

| | | |
|------|---|-----|
| I. | INTRODUCTION | 162 |
| II. | MUSICAL INFUSION | 163 |
| | A. <i>Historical Look at Demand for Popular Music</i> | 163 |
| | B. <i>Music as an Integral Part of Daily Life in the United States and Western Civilization</i> | 164 |
| III. | HISTORY OF COPYRIGHT LAW IN THE UNITED STATES..... | 166 |
| | A. <i>Chronological Overview of Copyright Law</i> | 166 |
| | B. <i>Understanding Copyright Law as It Relates to Music</i> | 167 |
| IV. | A LOOK INTO THE HISTORY OF PROTECTION FOR SOUND RECORDINGS..... | 169 |
| | A. <i>The General Revision of Copyright</i> | 169 |
| | B. <i>Proposals for Sound Recording Protection Leading up to the Sound Recordings Act</i> | 169 |
| | C. <i>Case History of Common Law Suits for Unauthorized Duplication</i> | 172 |
| V. | SOUND RECORDINGS ACT OF 1971 | 174 |
| | A. <i>Purpose of the Act</i> | 174 |
| | B. <i>Reasons for the Act</i> | 174 |
| | C. <i>The Key Players in the Debate</i> | 175 |
| | D. <i>The Fight: A Look into the Arguments of Both Sides</i> | 176 |
| | 1. Arguments for the Passage of Copyright Protection for Sound Recordings..... | 176 |
| | 2. Arguments of the Opposition to Protection for Sound Recordings | 180 |
| VI. | CONCLUSION | 183 |

* © 2009 James H. Napper, III. LL.M. 2009, Intellectual Property Law, The George Washington University Law School; J.D. 2007, Southern University Law Center. Professional Musician and Songwriter. A special thanks to Erick S. Lee for his help and support, as well as the Volume 12 JTIP staff.

I. INTRODUCTION

With the growth of the global technological market, technological advances have created a worldwide expectation of instant gratification. Many of us are accustomed to immediate access to information and media. The demand for recorded music is no exception, and a virtually unlimited amount of music is available to the public at the click of a mouse. Obviously, this has become a major concern in the global market, with so many options available for obtaining recorded music, some legal and some not.

This substantial change in the market and the widespread availability of music is the result of great advances in technology. For those of us who came of age in this digital era, it is difficult to imagine the cassette tape as a great technological innovation. However, the advent of the cassette tape and its widespread availability made it possible to reproduce sound recordings at a cost substantially less than the original production cost.¹ This advancement in cost-effective reproduction of sound recordings led to a dramatic increase in the practice of “off-the-air taping and pirating of sound recordings.”² The rapid rise in the unauthorized duplication of sound recordings prompted the passage of the Sound Recordings Act of 1971, which granted a limited copyright in sound recordings.³

This Article will provide a historical perspective of music in popular culture and discuss how technological advancements have stimulated substantive changes in copyright law in response to such changes. Particular emphasis will be placed on the long overdue implementation of copyright protection for sound recordings in the United States, and a look into the impetus for the passage of such protection for sound recordings.

Part II will look into the infusion of music into everyday life of today’s global population. The historical growth of demand for popular music in the United States and Western Civilization will be considered, as well as how music has set itself apart as an area of particular importance in our society. Part III will provide a glimpse into the origination and growth of copyright law in the United States. It will focus on copyright of musical works, illustrating the distinction between

1. *Prohibiting Piracy of Sound Recordings: Hearing on S.646 and H.R. 6927 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 4 (1971) [hereinafter *Prohibiting Piracy*] (statement of Hon. Emanuel Celler).

2. *Id.*

3. H.R. REP. NO. 92-487, at 3 (1971). Senate Bill 646, which passed and became Public Law 92-140, is now known as the Sound Recordings Act of 1971.

copyrights for musical compositions and sound recordings. This Part will also discuss how some genres of music are particularly dependent on sound recordings due to the nature of the genre. Part IV will take a detailed look at the history of protection for sound recordings in the United States. Part V will provide an in-depth look at the Sound Recordings Act of 1971, while discussing the following areas of interest: (1) what the Act provided, (2) the climate that spurred the passage of the legislation despite the upcoming general revision of copyright, (3) a consideration of the key players for both sides of the debate, and (4) the arguments both for and against the passage of the Sound Recordings Act of 1971. Part VI will contain a brief conclusion on why the legislation was passed.

II. MUSICAL INFUSION

A. *Historical Look at Demand for Popular Music*

The history and development of the legal system regarding music copyright is both fascinating and complex. The public consumption of music has not always existed in the manner we currently enjoy it today. The public's demand of music has evolved over time and changed drastically as technological advances have altered the landscape of our society. In the early 1800s, the principle mode of musical entertainment took place in a parlor setting with families gathered around the instrument of choice listening to the family musician perform the popular compositions of the time.⁴ As a result, the popular music of the day was primarily consumed through the sale of printed sheet music.⁵

It was also during this time that music received its first copyright protection through the first general revision of copyright law.⁶ This new protection provided the owner of a musical composition with the same rights as the copyright owner of a book.⁷ Copyright holders had the exclusive rights of reprinting, publishing, and vending such works.⁸

4. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. TECH. L. REV. 407 (2004), available at <http://www.mttr.org/volten/Keyes.pdf>.

5. *Id.* (citing DAVID EWEN, PANORAMA OF AMERICAN POPULAR MUSIC: THE STORY OF OUR NATIONAL BALLADS AND FOLK SONGS, THE SONGS OF TIN PAN ALLEY, BROADWAY AND HOLLYWOOD, NEW ORLEANS JAZZ, SWING, AND SYMPHONIC JAZZ (1957)).

6. United States Copyright Office: A Brief Introduction and History, Act of Feb. 3, 1831, ch. XVI, § 4 [hereinafter Copyright Circular], <http://www.copyright.gov/circs/circ1a.html> (last visited June 29, 2009).

7. *Id.*

8. *Id.*

During this time that the demand for music was growing exponentially, the format of music being demanded was changing as well.⁹ The American public's desire for music was no longer limited to the sale of printed sheet music; attendance at live musical performances was increasing in record numbers.¹⁰ As a result, copyright holders of musical works began to realize the potential revenue available for public performances of their works, and in 1897, copyright law was amended to give the copyright holder the exclusive right to publicly perform the work for profit.¹¹

As noted earlier in this Article, the driving force behind the change of public consumption of popular music in the United States has been and continues to be technological advances. During the end of the nineteenth century and the beginning of the twentieth century, several technological advances changed the landscape of the music business and public consumption of musical works in the United States. The most significant advancements were the invention of the phonograph by Thomas Edison and the gramophone by Emile Berliner, both of which provided the opportunity to record and reproduce sound recordings.¹²

With the widespread popularity of recorded music, not only had the demand for music grown, but the demand shifted from published sheet music to recorded music.¹³ Out of this shift came the next major technological advancement, that was possibly the most momentous in spurring the passage of copyright protection for sound recordings: the cassette tape.

With the perfection of the tape cartridge in 1967, the use of cassettes tapes exploded in the United States and internationally.¹⁴ A key result of the advent of cassette tapes, more specifically the 8-track tape cassette, was an expanded use of recorded music outside of radio broadcasts.

B. Music as an Integral Part of Daily Life in the United States and Western Civilization

Many of us are not cognizant of the impact music has on our daily lives. When one stops to ponder this concept, he will see that music is

9. Keyes, *supra* note 4, at 413.

10. *Id.*

11. *Id.* at 413; Copyright Circular, *supra* note 6.

12. Mary Bellis, Emile Berliner—The History of the Gramophone, <http://www.inventors.about.com/od/gstartinventions/a/gramophone.htm> (last visited Oct. 15, 2009).

13. Keyes, *supra* note 4, at 417.

14. *Prohibiting Piracy*, *supra* note 1, at 80 (statement of Charles A. Schafer, President, Custom Recording Co.).

present in almost every aspect of daily life in the United States, and most other Western countries. Many people wake up to an alarm clock, which is often tuned to a radio station blaring music that jolts us back to consciousness to start the day. Many of us listen to music while preparing for the day, driving in our cars, or riding public transportation to get to our respective places of business. When walking the streets of major cities today, you will often notice many people wearing earphones listening to music as they make their way to their destination. Additionally, beyond music's use as a distraction from the daily grind, music also permeates almost every location possible. Consider the elevator of a corporate building, the airport, a department store, or even the bathroom of major commercial locations; almost all of these locations have some music playing in the background.

But beyond music's presence in just about every facet of daily life in America, it presents us with something special that stimulates and soothes the very essence of the human spirit. It provides motivation, relief, sadness, recollection, and often creates a connection between individuals. Music, this author would argue, has a more profound impact on society on a personal level than any other form of copyright.

First, we must acknowledge how music has become totally enmeshed in the daily lives of Americans. The musical experience in the United States has changed drastically from the early 1800s to today. Music has become so prevalent that it is now impossible to avoid and has pervaded every possible facet of daily life. As such, music is an essential part of life in the United States as it "informs a culture, affects how individuals behave, and necessarily motivates them to respond."¹⁵

Second, we must consider what makes music so important in society and what separates it from other forms of copyright. Something about music sets it apart and affords it a special place in our society with great social implications. Music "speaks to us in mysterious and profound ways and invokes within us numerous physiological and emotional responses."¹⁶ J. Michael Keyes notes that many scientists have been able to demonstrate music's ability to physically affect humans in magnificent ways including: increasing brain activity, boosting productivity, and reducing muscle tension and blood pressure.¹⁷

Lastly, music has a powerful emotional effect on humans, invoking a variety of responses. Music "inspires, consoles, motivates, awakens and energizes us," and unlike other forms of art, music "can make us

15. Keyes, *supra* note 4, at 425.

16. *Id.* at 421.

17. *Id.* at 422.

weep or give us intense pleasure.”¹⁸ There is no doubt that all forms of artistic expression can pull at the heart-strings and invoke emotional responses, but music draws out the most dynamic of human emotion.

III. HISTORY OF COPYRIGHT LAW IN THE UNITED STATES

The purpose of copyright law, as derived within the United States Constitution, is “[t]o promote the Progress of Science and useful Arts” by reserving to authors certain exclusive rights in their works. Congress has sought to provide authors with an incentive to create while avoiding the creation of monopolies.¹⁹

A. Chronological Overview of Copyright Law

Beginning with the adoption of the U.S. Constitution, the government has placed a priority on artists’ rights to share their creations as they see fit. Article I of the Constitution grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁰

In 1790, the first Copyright Act was adopted by Congress.²¹ This Act granted very little protection to items besides books, maps, and charts.²²

Between the first decade of copyright protection and today’s current protection, there have been many changes and evolutions in copyright law. Following the initial grant of copyright protection in 1790, the first revision of copyright came some forty-one years later in 1831.²³ Under the revision of 1831, musical works were granted protection for the first time in U.S. history.²⁴ It granted protection from the unauthorized printing and vending of musical compositions.²⁵ It is important to note here that under copyright law in the United States there are two separate and distinct copyrights for musical works: one for the musical composition and one for the sound recording.²⁶ This distinction will be discussed in greater detail later in this Article.

18. *Id.* at 422-23.

19. Jenna Hentoff, *Compulsory Licensing of Musical Works in the Digital Age: Why the Current Process Is Ineffective & How Congress Is Attempting To Fix It*, 8 J. HIGH TECH. L. 113, 115 (2008).

20. Emily D. Harwood, *Staying Afloat in the Internet Stream: How To Keep Web Radio from Drowning in Digital Copyright Royalties*, 56 FED. COMM. L.J. 673, 676 (2004).

21. *Id.*

22. Copyright Circular, *supra* note 6.

23. *Id.*

24. *Id.*

25. *Id.*

26. 17 U.S.C. § 102(a)(2), (7) (1990).

By the late 1800s, music publishers and composers began to realize that others were frequently performing their works publicly. Realizing that these public performances could provide another revenue source, they lobbied for copyright protection. In 1897, Congress added a right of public performance to copyright law.²⁷

The third general revision of copyright occurred in 1909, when Congress provided eligibility to opened unpublished works for copyright registration.²⁸

Congress finally passed Public Law 92-140 in 1971, extending copyright protection to sound recordings.²⁹ This is also known as the Sound Recordings Act of 1971.

B. Understanding Copyright Law as It Relates to Music

Perhaps the most important facet of copyright law relating to music is that a sound recording actually holds two separate and distinct copyrights.³⁰ One copyright covers the underlying musical composition, while a separate copyright protects the sound recording itself.³¹ The musical composition consists of the musical notes and lyrics written by an author.³² Sound recordings are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form.³³

This structure creates a number of strange situations under copyright law. Often a sound recording may actually serve as the medium of first fixation of a musical composition.³⁴ Consider the example of a sound recording of a jazz performance. Jazz music is often based off of improvisation, known as interpolation; for this reason, jazz performances often involve spontaneous musical compositions. Therefore, a recording of an improvisational jazz composition would meet the threshold for fixation under federal copyright protection.³⁵ The musical composition now has federal copyright protection regardless of the fact that it may never be reduced to sheet music.³⁶

27. Copyright Circular, *supra* note 6.

28. *Id.*

29. H.R. REP. No. 92-487, at 3 (1971).

30. 17 U.S.C. § 102(a)(2), (7).

31. *Id.*

32. Harwood, *supra* note 20, at 676.

33. 17 U.S.C. § 101.

34. JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT CASES AND MATERIALS 269 (7th ed. 2006).

35. *Id.*

36. *Id.*

One should also consider that the aggregate sounds that make a sound recording a work with significant authorship may create additional confusion. If an artist were to take a musical composition that is now in the public domain and make a sound recording of the work, no copyright will vest in the musical work because it is already in the public domain. However, because of the authorship manifested in the playing and recording of the musical composition, copyright protection will vest in the new sound recording.

Something of tremendous importance regarding the issue of distinct copyrights is that a large amount of music comes from musical borrowing. Musical borrowing refers to the practice throughout the history of music and today where artists will take musical material from another and then transform that into something original. This type of musical borrowing dates back to Gregorian chants, and includes such examples as African-American spirituals adapted from Irish and Scotch Hymnody, Bach borrowing from Remken, Vivaldi, and Telemann, and Beethoven borrowing from Bach.³⁷

The concepts of musical borrowing and separate copyrights for musical compositions and sound recordings are especially important in certain genres of music, such as jazz and blues. Such genres rely heavily on musical borrowing, and thus from a copyright standpoint, sound recordings are more important to them.

Consider jazz music, which was born in New Orleans. This genre of music developed around the turn of the twentieth century and still remains very popular today. In jazz music, one of the fundamental elements is interpolation. Interpolation is the process of taking a preexisting musical work and then improvising it to create a new work. As David Ewen noted:

In New Orleans, Jazz was a performing as well as a creative art. . . . These New Orleans musicians further opened new horizons for their music through their fabled gift of improvisation. One man would provocatively throw out an idea; it would be seized and embellished by another. The two would join forces, each proceeding in his own direction without losing sight of the other. . . . [T]he musical imagination would be given full freedom of movement.³⁸

The ability and freedom to improvise is what has allowed jazz and blues music to flourish and remain relevant today.

37. Keyes, *supra* note 4, at 427.

38. EWEN, *supra* note 5, at 147.

IV. A LOOK INTO THE HISTORY OF PROTECTION FOR SOUND RECORDINGS

A. *The General Revision of Copyright*

The United States Congress passed a general revision of copyright law known as The Copyright Act of 1976 on October 19, 1976.³⁹ The Act made many changes to the copyright law and repealed the Sound Recordings Act of 1971, but only did so by incorporating the same laws into the revision.⁴⁰ The general revision was spurred by the United States joining the Universal Copyright Convention, and the resulting need to adapt its standards for compliance.⁴¹ The proposals for the general revision go at least as far back as 1965, when the House Committee held hearings on the matter. From the earliest discussions held, provisions for protection of copyright similar to those in the Sound Recordings Act of 1971 were proposed.⁴²

The first proposals for protection of sound recordings within the general revision of copyright were widely accepted, and the bill containing them was passed in the House on April 11, 1967.⁴³ However, the progress for the general revision became bogged down because of issues unrelated to sound recordings. The principal reason the legislation stalled was because of the rise of new technology surrounding cable television in the United States, which created both confusion and instability regarding how the United States should regulate cable television.⁴⁴

B. *Proposals for Sound Recording Protection Leading up to the Sound Recordings Act*

Though initially the passage of copyright protection for sound recordings was intended to be included with the general revision of copyright law, the stalling of the general revision led to separate legislative bills proposing such protection prior to the passage of the general revision. However, even before this time there were several proposals for copyright protection of sound recordings.

The first bill introduced to Congress specifically to address copyrights in sound recordings was the Perkins Bill, introduced on

39. Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2541 (1976).

40. *Id.*

41. *Id.*

42. *Prohibiting Piracy*, *supra* note 1, at 10-11 (statement of Barbara Ringer).

43. *Id.* at 11.

44. *Id.*

January 2, 1925.⁴⁵ It was a general revision bill introduced in the 69th Congress, but ultimately no action was taken on the proposal.

The following year, Representative Vestal introduced a general revision bill of his own.⁴⁶ Hearings were held in April of 1926, but there was almost no discussion of the sound recording provisions.⁴⁷ The bill was reintroduced by Representative Vestal again in the 70th Congress and again in the 71st, but no further action was taken on either of these versions.⁴⁸

In May of 1930, Representative Vestal introduced a new version of his bill.⁴⁹ However, the bill that ultimately passed the House contained no provisions providing for sound recording copyrightability. The bill was then referred to the Senate, where it never reached the Senate floor.

Representative Sirovich proposed three new general revision bills in 1932. Each bill gave the owner of copyright in sound recordings rights against broadcasting, but no further action was taken on the bills.⁵⁰

Representative Sirovich subsequently introduced further amended and revised versions of the bills the following month. He introduced one more version of this bill on June 2, 1932, but no action was taken on any of these versions of the bill.⁵¹

On January 27, 1936, the Daly bill was introduced.⁵² This was the most comprehensive revision proposal before Congress.⁵³ In response, Representative Sirovich introduced a new general revision bill in February of 1936.⁵⁴ Both bills were criticized as being too vague, and neither was ever reported.⁵⁵

45. H.R. REP. NO. 68-11258, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 84 (Dec. 1, 1924).

46. H.R. REP. NO. 69-10434, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 393 (Dec. 7, 1925).

47. Barbara Ringer, *Study No. 26: The Unauthorized Duplication of Sound Recordings*, in STUDIES ON COPYRIGHT BY THE COPYRIGHT SOCIETY OF USA 22 (1957).

48. H.R. REP. NO. 70-8912, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 227 (Dec. 5, 1927).

49. H.R. REP. NO. 71-12549, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 590 (Dec. 2, 1929).

50. H.R. REP. NO. 72-10364, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 533 (Dec. 7, 1931); H.R. REP. NO. 72-10740, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 581 (Dec. 7, 1931); H.R. REP. NO. 72-10976, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 643 (Dec. 7, 1931).

51. Ringer, *supra* note 47, at 26-27.

52. H.R. REP. NO. 74-10632, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 91 (Jan. 3, 1936).

53. Ringer, *supra* note 47.

54. H.R. REP. NO. 74-11420, J. for House Representatives U.S. (Wash. Gov't Printing Off.) 177 (Jan. 3, 1936).

55. Ringer, *supra* note 47, at 29.

During the following session of Congress, Representative Daly introduced a modified version of his bill.⁵⁶ This bill was introduced in the Senate as the Guffy Bill in April of 1937; however, no action was ever taken on the measure.⁵⁷

Representative Daly again submitted his revised bill in January 1939, but no action was taken on this bill.⁵⁸ He then submitted a new version of the bill in March 1939.⁵⁹ Again, this proposal saw no further action.⁶⁰ In 1939, Representatives Schulte and McGranery both introduced bills intended to stop the recapture of live broadcasts.⁶¹ No further action was taken on either bill.

Between 1942 and 1951, there were six bills introduced that were virtually identical, and they were referred to as the “acoustic recording bills.”⁶² The bills were meant to provide for a copyright in acoustic recordings. None of the bills saw any legislative action.

Over the following sixteen years, there was not much progress in the efforts to secure copyright protection for sound recordings until 1967 when Congress began preparing for a large general revision of the copyright laws. After the Library of Congress recommended that protection for sound recordings be included in the general revision, H.R. 2512 was passed by the House.⁶³ After the passage of H.R. 2512, a similar measure, S. 597, was presented to the Senate Subcommittee on Copyrights.⁶⁴ Extensive hearings were held but no further action was taken.

In December of 1969, S. 535 was reported by the Senate Subcommittee on Copyrights as a substitute.⁶⁵ The bill extended copyright protection to sound recordings, but also extended protection to encompass a performance right so that record companies and artists would be compensated when their records were performed.⁶⁶ Yet again, no further action was taken.⁶⁷

56. H.R. 5275, 75th Cong. (1937).

57. S. 2240, 75th Cong. (1937).

58. Ringer, *supra* note 47, at 32.

59. H.R. REP. No. 76-4871 (1939).

60. Ringer, *supra* note 47, at 32.

61. H.R. REP. No. 76-5791 (1939); H.R. REP. No. 76-6695 (1939).

62. Ringer, *supra* note 47, at 152.

63. H.R. REP. No. 92-487, at 3 (1971).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Following S. 535, S. 4592 was introduced based on the same provisions as S.535 in 1970, but no action was taken on the bill.⁶⁸ Finally, in February of 1971 Senator McClellan introduced S. 646, the subject of this Article that later became known as the Sound Recordings Act of 1971.⁶⁹

C. Case History of Common Law Suits for Unauthorized Duplication

Prior to the implementation of federal copyright protection for sound recordings, those fighting unauthorized duplication were forced to sue under state common law, often under a theory of unfair competition.

The foremost case on the subject is *International News Service v. Associated Press*.⁷⁰ In that case, the Associated Press sought to enjoin other newspapers from copying news bulletins from tickers and early editions of their papers.⁷¹ The news stories gathered and run by Associated Press publications were then published in later editions of non-Associated Press newspapers.⁷² The United States Supreme Court, in an attempt to extend protections of unfair competition, did away with the normal requirements of fraud, misrepresentation, or passing off of the copied material as the defendant's own material. The Court held that when a defendant appropriated the uncopyrighted material of a competitor, that defendant was guilty of unfair competition on a free rider or misappropriation theory.⁷³

This theory of misappropriation set out in *Associated Press* was then applied to entertainment cases, most notably in *Waring v. WDAS Broadcasting Station, Inc.*, and *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*⁷⁴ The *Waring* case dealt with the unauthorized broadcasting of phonograph records that contained the performances of the plaintiff's orchestra. Though this case was brought primarily under a theory of common law copyright, the court made unfair competition an alternative basis for its judgment under the authority of *Associated Press*.⁷⁵ The court ruled that despite the absence of fraud, deception, or passing off, the misappropriation of the plaintiff's

68. *Id.*

69. *Id.*

70. 248 U.S. 215 (1918).

71. *Id.* at 231.

72. *Id.* at 230-31.

73. *Id.* at 241-43.

74. *Waring v. WDAS Broad. Station, Inc.*, 194 A. 631, 638-40 (Pa. 1937); *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 491-92 (N.Y. 1950).

75. *Waring*, 194 A. at 638-40.

“musical genius and artistry” was enough to amount to unfair competition.⁷⁶

In *Metropolitan Opera*, an opera company, a recording company holding a license from the opera company, and a broadcaster sued to enjoin the sale of unauthorized records made from the broadcasts of the opera.⁷⁷ The court awarded recovery to all three plaintiffs while extending the limitations on unfair competition even further.⁷⁸ The decision held that neither passing off nor direct competition is required to establish unfair competition in a recording situation.⁷⁹ However, in its finding of unfair competition, the court found that both passing off and direct competition were present in this case.⁸⁰ In the years leading up to the passage of the Sound Recordings Act of 1971, there were several cases involving unauthorized duplication by tape companies.

In 1964 the court decided *Capitol Records v. Greatest Records*.⁸¹ In that case, Capitol Records sued to enjoin the defendant from manufacturing, selling, and distributing copies of its records.⁸² The court held in favor of Capitol, stating that it was entitled to protection against unauthorized appropriation, reproduction, or duplication of the actual performances contained in its records.⁸³

In the case of *Capitol Records v. Spies*, the plaintiff record company sought an injunction against the defendant for allegedly pirating performances of its recordings.⁸⁴ The court found that the defendant’s actions of purchasing a copy in a retail store and subsequently copying and selling the tapes amounted to an appropriation of the plaintiff’s property.⁸⁵ The fact that the duplicated copies contained a disclaimer stating that no relationship existed between the plaintiff and defendant was not enough to overcome the conclusion of misappropriation under unfair competition.⁸⁶

Finally, right before the passage of the Sound Recordings Act of 1971, the case of *Liberty U/A, Inc. v. Eastern Tape Corp.* was decided.⁸⁷ This case also involved a plaintiff seeking to enjoin the defendant from

76. *Id.* at 640.

77. 101 N.Y.S.2d at 486-87.

78. *Id.* at 499-500.

79. *Id.* at 491-92.

80. *Id.* at 499-500.

81. 252 N.Y.S.2d 553 (N.Y. 1964).

82. *Id.* at 553.

83. *Id.* at 556-57.

84. 264 N.E.2d 874, 874 (Ill. App. Ct. 1970).

85. *Id.*

86. *Id.* at 875-77.

87. 180 S.E.2d 414 (N.C. Ct. App. 1971).

duplicating and selling its recordings.⁸⁸ The court held that the defendant, in appropriating the performances contained in the plaintiff's records and selling unauthorized tapes of such performances, engaged in unfair competition and was enjoined.⁸⁹

V. SOUND RECORDINGS ACT OF 1971

A. *Purpose of the Act*

The Sound Recordings Act was passed in 1971 by Congress through Public Law 92-140.⁹⁰ The Act was passed as an amendment to the existing copyright law to create a limited copyright in sound recordings.⁹¹ The purpose of this new legislation was to protect the owners of copyright in sound recordings from unauthorized and uncompensated duplication.⁹²

B. *Reasons for the Act*

At the time of the Act's passage, there was existing federal protection for musical compositions but no corresponding federal protection for sound recordings. The lack of federal protection, coupled with the perfection of the tape cartridge, created an illogical situation where record pirates could reproduce unauthorized copies of phonographs and tapes without violating federal copyright laws.⁹³ If unauthorized producers paid the statutory royalty required under the law for the use of the copyrighted musical composition, there was no corresponding federal remedy available to right holders for unauthorized reproduction of a recording.⁹⁴ The only remedy available to the owners of sound recordings was under a state law theory of unfair competition against these pirates, who only chose proven hits and had no costs associated with the initial production and marketing of such hits.⁹⁵ Additionally, the Act sought to remedy the pirating of tapes and the subsequent deprivation of performing artist royalties, contributions to pension funds, and state and federal tax revenues.⁹⁶ Finally, the ever-increasing problem of tape piracy had become a global problem, and the

88. *Id.*

89. *Id.* at 418.

90. H.R. REP. NO. 92-487, at 3 (1971).

91. *Id.*

92. *Id.* at 2.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

United States, concerned about protection for its recording industry abroad, pursued the passage of an international treaty for the extension of copyright protection to sound recordings.⁹⁷ It was a widely held belief that without passage of such protection at home, the legitimacy of the United States to promulgate and participate in an international treaty would weaken.⁹⁸

C. *The Key Players in the Debate*

On June 9th and 10th, hearings were held before the Committee on the Judiciary for the House of Representatives over S. 646 and H.R. 6927, which would later become the Sound Recordings Act of 1971. During these two days of hearings, both those supporting and those opposing the legislation made their cases before the Committee.⁹⁹

The proponents of the Act included some of the heaviest hitters in the industry, and it also had the support of almost every significant government agency.¹⁰⁰ Those opposing the legislation were primarily counsel representing the interest of record pirate companies, who claimed they were legitimate competitors.¹⁰¹

97. *Id.* at 3.

98. *Id.* at 3-4.

99. *Prohibiting Piracy*, *supra* note 1 (statement of Emanuel Celler).

100. Those in favor of the legislation included:

1. Honorable Emanuel Celler, The Representative from New York and Chairman of House Judiciary Committee.
2. Honorable Richard H. Fulton, The Representative from Tennessee.
3. Bruce C. Ladd, Deputy Assistant Secretary for Commercial Affairs and Business Activities, Department of State.
4. Abraham L. Kaminstein, Register of Copyrights.
5. Barbara A. Ringer, Assistant Register of Copyrights.
6. Three members of the Recording Association of America.
7. Quincy Mumford, Librarian of Congress.
8. Jack Grossman, President of the National Association of Record Merchandisers.
9. Leonard Feist, on behalf of the National Music Publishers Association.
10. Albert Berman, on behalf of the Harry Fox Agency.
11. Department of State.
12. Richard G. Kleindienst, Deputy, Office of Attorney General.

Id.

101. Those opposing the legislation included:

1. Thomas H. Truitt, on behalf of G & G Sales, Eastern Tape Corp, and Custom Recording Co.
2. Alton Murchinson, on behalf of G & G Sales, Eastern Tape Corp, and Custom Recording Co.
3. Francis Pinkney, on behalf of G & G Sales, Eastern Tape Corp, and Custom Recording Co.

D. The Fight: A Look into the Arguments of Both Sides

1. Arguments for the Passage of Copyright Protection for Sound Recordings

Prior to the advent of the phonograph, a musical selection once rendered by an artist was lost forever, as far as that particular rendition was concerned. It could not be captured and played back again by any mechanical contrivance then known. Thus, the property right of the artists, pertaining as it did to an intangible musical interpretation, was in no danger of being violated. During all this time the right was always present, yet because of the impossibility of violating it, it was not necessary to assert it.¹⁰²

"A musical composition in itself is an incomplete work; the written page evidences only one of the creative arts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound."¹⁰³

These two quotes form the fundamental basis for the arguments of the proponents of the Act. They stand for the proposition that sound recordings are writings entitled to federal copyright protection. The supporters of this legislation made four central arguments in favor of federal copyright protection for sound recordings: (1) rapid growth in tape piracy threatened the record business as a whole; (2) existing protection under state laws were inadequate to protect the investment by music companies and deter pirates; (3) international concerns about piracy necessitated the passage of an international treaty on the subject, and without federal protection, the United States could not be a participant in such a treaty; and (4) the vast differences in investment required by the record companies as compared to the investment required by pirates was a simple injustice.

The primary concern for the supporters of copyright protection for sound recordings was the rapid growth of piracy and the threat to the recording industry in the United States. Consider the above statement by Barbara Ringer, Assistant Register of Copyrights, who stressed that anyone working in the field of copyright could not fail to recognize the

-
4. Arthur Leeds, on behalf of G & G Sales, Eastern Tape Corp, Custom Recording Co, and Tape Industries Association of America.
 5. Charles A. Schafer, President, Custom Recording Company.
 6. Honorable Phillip A. Hart, The Senator from Arkansas.

Id.

102. *Prohibiting Piracy*, *supra* note 1, at 11-12 (statement of Barbara Ringer (quoting J. Leibell of the S.D.N.Y.)).

103. *Id.* at 15 (quoting *Waring v. WDAS Broad. Station, Inc.*, 194 A. at 631, 635 (Pa. 1937)).

massive growth in the practice of piracy over the previous five years.¹⁰⁴ She attributed the rapid growth to the ease of tape duplication, the large growth of the tape cassette market, and a lack of clarity between state common law and the federal copyright law.¹⁰⁵ David Abshire, Assistant Secretary for Congressional Relations of the State Department, commented that the large increase in unauthorized duplication of commercial recordings was a matter of public concern in both the United States and abroad.¹⁰⁶ He cited the widespread availability and use of tape playing machines as “added impetus to piracy of sound recordings.”¹⁰⁷ Jack Grossman of the National Association of Record Merchandisers went so far as to state that the only logical conclusion of these pirating activities would be the ultimate destruction of the tape recording industry.¹⁰⁸

The effect of pirated tapes on the recording industry’s revenue was quite substantial, and many felt it was jeopardizing the entire music business.¹⁰⁹ The impact was noted by several parties supporting the legislation, and many gave alarming figures for the amount of money being diverted away from the “legitimate” record producers.¹¹⁰ Stanley Gortikov, making a statement on behalf of the Recording Industry Association of America, estimated that \$100 to \$150 million in sales per year was “stolen” from the recording industry by unauthorized duplicators, both large and small.¹¹¹ He went on to estimate that more than one-fourth of tape sales were stolen by those who copy and sell the recordings without authorization.¹¹² Considering the economic conditions in 1971, these figures were alarming.

In addition to the concerns of lost revenue for the record industry, the negative impact on artists’ royalties, trust funds, and state and federal tax revenue was a major consideration in support of the legislation. Stanley Gortikov argued that the widespread proliferation of tape piracy was robbing legitimate manufacturers, publishers, distributors, and musicians of the fruits of their labor.¹¹³ He also noted that in addition to the royalties lost by artists from legitimate sales of albums, federal, state,

104. *Id.* at 12.

105. *Id.*

106. *Id.* at 32 (statement of David M. Abshire).

107. *Id.*

108. *Id.* at 41 (statement of Jack Grossman).

109. *Id.* at 6 (statement of Hon. Richard H. Fulton).

110. *Id.* at 25 (statement of Stanley M. Gortikov).

111. *Id.*

112. *Id.*

113. *Id.*

and local tax authorities were cheated of tax revenue they would normally receive from the sales of albums.¹¹⁴

As these statements illustrate, the proponents of the legislation were primarily focused on the emergence of tape recording and the resulting piracy. Backed by statistical evidence, they argued fervently about the negative and irreversible damage they perceived as a threat to the very existence of the U.S. record industry.¹¹⁵

The next major concern for those who supported the legislation was the absence of federal protection for sound recordings, which forced parties to rely on state unfair competition laws for remedies against pirates. Many felt the state law remedies were insufficient and that uniform protection could only be provided by federal legislation.¹¹⁶

Stanley Gortikov pointed out that with fifty different states, each with their own distinct theory of unfair competition, there was no way for the record industry to receive effective relief from state courts for the “theft of its property.”¹¹⁷ Even if a record company were able to enjoin a pirate in one state, the pirate could simply move to another state and renew his operations.¹¹⁸ Additionally, a pirate enjoined by one record company could simply begin pirating records by another record company.¹¹⁹ The Librarian of Congress, in his letter to the Chairman of the committee, also addressed this problem, stating that the only solution was an amendment to the federal copyright law to provide limited protection against such unauthorized duplication.¹²⁰ The supporters of the legislation argued zealously that state law protection was insufficient and that there was an immediate need for federal protection.

The problem of unauthorized duplication of sound recordings was not just limited to the United States, but rather had become an international problem. Concerned with protection of its recording industry both at home and abroad, the United States pushed for an international treaty for copyright protection of sound recordings.¹²¹ Barbara Ringer discussed the push for an international treaty and the United States’ need for the passage of the Act to be part of such a treaty. She argued that the United States lacked credibility in the international discussion because of a discrepancy between what the United States said

114. *Id.* at 28.

115. *Id.* at 6 (statement of Hon. Richard H. Fulton).

116. *Id.* at 6.

117. *Id.* at 25, 29 (statement of Stanley Gortikov).

118. *Id.*

119. *Id.*

120. *Id.* at 30 (statement of Quincy Mumford).

121. H.R. REP. No. 92-487, at 3 (1971).

and what it actually did.¹²² She believed that if the United States showed “real action” on the issue, it would help their position dramatically at upcoming diplomatic conferences.¹²³ David Abshire also addressed the issue of international concern, when he noted that the problem of piracy of sound recordings was of “immediate concern” both internationally and regarding the United States’ role as a leader in developing an international treaty for copyright protection of sound recordings.¹²⁴ There was a tremendous feeling that the impending international treaty was of major significance and that the United States’ position would be undermined without similar protection.

The final argument made by those supporting the legislation was simple injustice with respect to the large investments made by the recording industry in recording hit songs, compared to the lack of investment made by pirates copying such songs. In discussing this problem, Stanley Gortikov outlined how the pirate operations worked. A tape pirate would take a conventional commercial record or tape cartridge, then using inexpensive equipment would copy the recording onto blank tape cassettes and sell the copies at a lower cost to consumers, thus stealing both the product and the customers of the record manufacturers.¹²⁵ Mr. Gortikov went on to explain that the duplicator made no payments to the record company, artists, or publishers, but rather appropriated the creative and commercial property of others for his own gain.¹²⁶ He illustrated the disparity between investments made by the record companies and pirates by stating that pirates had only two requirements for success. First, pirates needed the artists and record companies to invest in producing hit songs. Second, they needed a legal environment that was devoid of effective legal deterrents, such as the United States.¹²⁷ The record company was required to invest substantial money to make a hit, while a tape pirate merely skimmed the biggest hits offered by the record companies and artists.¹²⁸ Albert Berman, of the Harry Fox Agency, stated that exploiting the talents and efforts of musical artists without their consent and without any remuneration to them could only be classified as “a vicious unprincipled act,” and that such profiting at the expense of others could not be justified either

122. *Prohibiting Privacy*, *supra* note 1, at 13 (statement of Barbara Ringer).

123. *Id.*

124. *Id.* at 32 (statement of David Abshire).

125. *Id.* at 25 (statement of Stanley Gortikov).

126. *Id.*

127. *Id.*

128. *Id.*

morally or legally.¹²⁹ He further stated that it should be obvious that a major purpose of federal copyright law was to afford some protection from those seeking a free ride on the talents and abilities of others.¹³⁰

2. Arguments of the Opposition to Protection for Sound Recordings

We believe that any examination of the proposed legislation will show that consumer interests will not be served by its passage and that in fact, passage of S. 646 in its existing form will further insure monopoly power and market penetration to the record industry at the expense of the consuming public.¹³¹

Mr. President, the Founding Fathers authorized Congress to exercise legislative power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This grant of and limit upon the power of Congress has given rise to copyright protection, a power to impose a “tax on readers for the purpose of giving a bounty to writers”.... The bill pending before the Senate, S. 646, is sound in purpose, troublesome in design, and vague in reach.¹³²

The opposition’s argument is summarized by these two statements. The parties who opposed this legislation believed that the bill would not fulfill its intended purpose and would only secure more power for the large record companies. The main arguments made by those opposing the legislation were: (1) the passage of this legislation would create a monopoly over recorded music by the large record companies, driving up costs and depriving the consuming public superior products; (2) that a large portion of the unauthorized duplicators are legitimate businesses paying royalties and providing necessary competition, and a compulsory licensing system is needed; and (3) the proposed legislation goes beyond the scope of protection granted by the Constitution in providing protection for record companies and risk capital.

The first argument put forward by the Act’s opponents was that the legislation would create monopoly power on the part of the record companies, who would then become the sole holders of the rights to sound recordings and subsequently charge whatever price they selected for sound recordings, driving up the cost to consumers. Thomas Truit, who represented several of the tape duplicator companies, suggested that the proposed legislation would protect the record company rather than

129. *Id.* at 58 (statement of Albert Berman).

130. *Id.*

131. *Id.* at 68 (statement of Thomas H. Truit).

132. *Id.* at 74 (written statement of the Hon. Philip A. Hart).

the performer, and that from a public interest standpoint, it was doubtful whether more power should be placed in the hands of the powerful record company conglomerates.¹³³ Truit contended that the underlying reason for the record companies support of the legislation was to crush the competition of legitimate tape companies producing a quality product at a lower cost.¹³⁴

Charles A. Schafer pointed out that the creation of this monopoly would reward the investment of the record companies, but deprive the artists of protection.¹³⁵ He also suggested that this legislation would allow the record companies to drive up the costs of sound recordings and deprive the public of legitimate quality alternatives.¹³⁶ Mr. Schafer contended that the consumer interest would be in danger and that if the record companies expanded their monopolies further, the public would face exorbitant prices and often be required to pay for eleven songs it did not want in order to get the one song it actually did want.¹³⁷ He asserted that expanding the monopoly power of the record industry would drive legitimate companies out of business and damage the consuming public.¹³⁸ Additionally, several law firms representing interested parties commented on how the passage of the legislation would harm consumer interest because it would allow record manufacturers to refuse to make tapes of certain records, thus depriving the consumers of the music they desire.¹³⁹

The next argument posed by the opposition was that these tape duplicators were legitimate business operations and a compulsory license was needed to implement the legislation. Thomas Truit argued that tape duplicators used the best equipment available and also arranged, mixed, changed the format of, and produced a product superior in quality to that of the record companies.¹⁴⁰ Arthur Leads, testifying on behalf of tape manufacturers, also spoke on this point during the Committee's questioning. He focused on what he considered to be a problem of the tape mix, arguing that most albums produced by the record companies contain only one or two hit songs and the remaining songs were only used to fill the rest of the album.¹⁴¹ He asserted that the only way to get

133. *Id.* at 68 (statement of Thomas Truit).

134. *Id.*

135. *Id.* at 81 (statement of Charles A. Schafer).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 82 (comments by Rowley & Scott et al.).

140. *Id.* at 68 (statement of Thomas Truit).

141. *Id.* at 83 (statement of Arthur Leeds).

around such a problem was to purchase a duplicated tape and that for this reason, tape duplicators represented a legitimate submarket which the record companies did not support.¹⁴²

The focus of this argument seemed to center primarily on the need for a compulsory licensing structure so that duplicators could pay a predetermined royalty rate and produce their product. They argued that without a compulsory license, they would not be able to successfully negotiate with the record companies and would be put out of business, while illegal tape pirates would still thrive. Thomas Truit argued that the proposed legislation failed to consider that “legitimate” duplicators were ready and willing to pay a reasonable price directly to the company for each use.¹⁴³ However, if the legislation was passed without a compulsory license fee, the record companies would simply charge a rate so elevated that the tape duplicators would not be able to remain in business.¹⁴⁴ In essence, the law firms representing the tape companies argued that any legislation lacking a provision for a compulsory license would provide the record companies with an absolute monopoly that would result in both the destruction of the “legitimate” tape businesses and a substantial economic hardship on the purchasing public.¹⁴⁵

The statements made by those opposing S. 646 in its unamended form clearly espoused that without a compulsory license they would no longer be able to operate. They argued that the record companies would be unwilling to negotiate with them, and as a result they would go out of business, and subsequently the public would be deprived of the variations their products were able to offer.

Thomas Truit argued that S. 646 was deceptive and misleading because it purported to establish a limited copyright and a means to combat piracy, but in fact would not accomplish either.¹⁴⁶ He asserted that instead of granting a limited copyright, what S. 646 would actually confer was “more extensive than the conventional copyright protection which inures to composers and authors.”¹⁴⁷ He further noted that the creations of composers and authors “cannot be monopolized by a single recording company, but are subject to a compulsory licensing provision.”¹⁴⁸

142. *Id.*

143. *Id.* at 68 (statement of Thomas Truit).

144. *Id.*

145. *Id.* at 83 (comments by Rowley & Scott et al.).

146. *Id.* at 68 (statement of Thomas Truit).

147. *Id.* at 69.

148. *Id.*

Congressman Phillip Hart also discussed this issue in his written statement addressed to the Committee. He declared that neither patent nor copyright protection granted by the Constitution was meant to protect the separate interest of an entrepreneur's investment of risk capital, but rather such protection was limited to authors and inventors for the purpose of promoting disclosure of inventions and the publication of writings.¹⁴⁹ He contended that such usage of copyright law to protect investment of risk capital by nonauthors was beyond the scope of the constitutional grant, and thus was a misuse of the copyright grant.¹⁵⁰

The opposition's overall argument and plea to the Committee can best be summarized by the following statement of Thomas Truit:

I would like to say in winding up my general comments that all we are trying to do is compete in what we regard to be an honorable and traditional way that businessmen do business. . . . Again, all we want to do is be in business and compete. We believe that the existing legislation will create unnecessary and additional power in the record companies and that it will not provide the kind of relief that the record industry says that it will provide.¹⁵¹

VI. CONCLUSION

Several factors led to the extension of copyright protection to sound recordings through the passage of the Sound Recordings Act of 1971. While the pending international treaty was an important consideration, the primary reason for the passage of this legislation was twofold. First, the advent of practical cassette tape technology led to uncomplicated duplication of record music and widespread unauthorized duplication of sound recordings. With the large growth of the tape duplication industry, Congress determined that there was a significant need to protect the investment of record companies. Second, when the passage of the general revision of copyright stalled because of complications surrounding regulation of cable television, many in Congress believed it had to extend federal copyright protection to sound recordings immediately to protect the record industry. Therefore, the passage of copyright protection for sound recordings was spurred by the technological advance of tape technology and the stalling of the general revision of copyright.

The passage of the Sound Recordings Act of 1971 has had a dramatic impact on the recording industry. No longer are composers the

149. *Id.*

150. *Id.*

151. *Id.* at 92.

only copyright holders in a sound recording. Now, performers and record companies also have a vested interest in each sound recording as a copyrightable work. As such, record companies have continued a relentless pursuit of those who pirate their recordings. Today, as in 1971, advances in technology have changed the way we consume music and presented new challenges in protecting sound recordings from piracy, but one constant remains: music's central role in our daily lives.