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## Unauthorized Duplication of Sound Recordings: Transnational Problem in Search of a Solution

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# NOTE

## UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS: TRANSNATIONAL PROBLEM IN SEARCH OF A SOLUTION\*

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### I. INTRODUCTION

Recent estimates place the global recording industry's losses to

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\* This Note was completed on May 1, 1980. The author would like to inform the readers that because of the rapid developments in this field some of the material may be outdated.

pirates, counterfeiters, and bootleggers at \$1.5 billion annually,<sup>1</sup> and losses due to home taping at over \$2 billion annually.<sup>2</sup> Even in a thriving industry, these losses are staggering. The purpose of this Note is to survey the scope of the problem of unauthorized duplication of sound recordings and to examine international and national efforts by governments and the recording industry to eradicate this problem.

It is useful to divide unauthorized duplications of sound recordings into four categories. Record and tape *piracy* is defined as "the unauthorized duplication for commercial purposes of sound recordings which are then sold in pirate packaging."<sup>3</sup> Pirate packaging is not intended to simulate genuine packaging. In other words, pirates do not conceal the fact that their product is unauthorized. When the label, packaging, and trademark of the legitimate recording are also duplicated, the product is *counterfeit*.<sup>4</sup> The term *bootlegging* is used to describe the unauthorized practice of recording live performances for commercial purposes.<sup>5</sup> *Home taping* refers to the practice of recording for personal use from radio or television broadcasts or directly from other recordings. Thus, home taping is distinguished from piracy, counterfeiting, and bootlegging because the intended use is personal rather than commercial. In much of the literature there is a confusing use of these terms. Although the label *piracy* can correctly be used as a collective reference to piracy, bootlegging, and counter-

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1. INTERNATIONAL FEDERATION OF PRODUCERS OF PHONOGRAMS AND VIDEOGRAMS (IFPI), *Piracy—The Crime that Affects You*, at 1 [hereinafter cited as IFPI] (unpublished report prepared for Billboard Magazine's International Music Industry Conference held April 23-26, 1980, in Washington, D.C.).

2. BILLBOARD, July 21, 1979, at 27, 41. This estimate was made by Allan Hely, managing director of Festival Records in Australia.

3. Yarnell, *Recording Piracy Is Everybody's Burden: An Examination of Its Causes, Effects and Remedies*, 20 BULL. COPYRIGHT SOC'Y 234 (1973). Yarnell is the special counsel on piracy to the Recording Industry Association of America (RIAA). In the words of IFPI Anti-Piracy Fund Coordinator Gerry Oord, "Piracy is too glamorous a word for what they are doing." RECORD WORLD, June 2, 1979, at 6.

4. Yarnell, *supra* note 3. Sometimes a logo or trademark may be omitted or some other slight variation made. Often, however, the quality of the counterfeit graphics and recording is of such close similarity that forensics experts are required to determine whether the article is counterfeit.

5. BILLBOARD, July 29, 1978, at 3, 66. Bootleg recordings are frequently issued in disc form and their quality is generally quite inferior to authorized recordings.

feiting, for the sake of clarity this paper will use *piracy* only in the strict sense of the above definition.<sup>6</sup>

## II. PIRACY, COUNTERFEITING, AND BOOTLEGGING

### A. General Overview

#### 1. Causes and Effects

The primary and most obvious harm caused by unauthorized commercial duplications is the loss of \$1.5 billion in revenues each year by the worldwide recording industry. These losses are especially harmful when the industry is caught in a general economic downturn, as it presently is. Pirates, counterfeiters, and bootleggers may be characterized as illegal (or in some countries, legal but unfair) economic competitors of the legitimate recording industry. The illicit producer enjoys a thriving market<sup>7</sup> for his product because its retail price<sup>8</sup> is usually much cheaper than that of the legitimate product.<sup>9</sup> This is possible because counterfeiters and pirates do not assume the same risks that the legitimate record company does.<sup>10</sup> They also enjoy a much lower over-

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6. It should be noted that statistics and estimates concerning unauthorized sound recordings can never be completely accurate. This is because they are often based on pirate books, which are notoriously inaccurate. Although the figures cited in this Note are the best estimates that experts in this field can make, interested parties may sometimes be suspected of exaggerating to their own advantage. IFPI, *Extent of Piracy of Sound Recordings Worldwide in 1978*, at 1 (this document is available from the Anti-Piracy Department, IFPI Secretariat, 123 Pall Mall, London SW1Y5EA); *accord*, Remarks of Richard Asher, deputy president of CBS Records Division and a vice-president of IFPI, at a seminar at Belmont College—Nashville, Tennessee, Mar. 19, 1980.

7. For example, the Singapore Phonogram Association (SPA) estimates that 70% to 80% of consumers knowingly purchase illicit products. *BILLBOARD*, Mar. 17, 1979, at SA-9, SA-14.

8. The lower prices of illegitimate products are especially important in the tropics (where tapes wear out faster) and in markets where lower incomes prevail.

9. For example, in Japan, Thailand, Taiwan, Singapore, Malaysia, Macao, Kuwait, Saudi Arabia, Greece, Italy, the United States, and Canada the pirate products typically cost less than half the price of the genuine product. IFPI, *supra* note 7, at 4.

10. A record company must pay the costs of promotion, advertising, marketing, and packaging. It must also make contributions to the Music Performance Trust Fund and Special Payments Fund, and pay royalties to artists, songwriters, and publishers. In addition, the record company usually pays the recording costs (which include studio costs, payments to studio musicians and singers, and

head. With the introduction of eight-track<sup>11</sup> and cassette recording into the music industry, illicit producers have been able to take advantage of sophisticated tape duplicating units which are less expensive and more mobile than traditional record pressing equipment. Consequently, small scale illicit tape operations are fairly common, though effective law enforcement techniques against them are not. The recording industry's early reluctance<sup>12</sup> to exploit the cassette market gave the first pirates an opportunity to establish their operations and meet consumer demand. Likewise, the present reluctance of record companies to exploit the demand in less developed countries for local language products<sup>13</sup> has allowed illicit producers to corner the market.

The money that recording thieves save consumers can smother the legitimate local recording industry. It is more difficult to develop local recording artists and songwriters when they are not fully remunerated for their efforts.<sup>14</sup> Furthermore, international and even local artists are less interested in touring in these mar-

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contributions to the Musicians' Union and Health and Welfare Fund) until the recording has sold enough copies for the artist to earn sufficient royalties to cover these costs. These expenses for all records must be recouped from the sales of hit records, since the majority of records lose money. The unauthorized duplicator, on the other hand, is able to sit back and choose only the hit recordings, thus eliminating the expensive risk that is a normal part of the business for the legitimate record company.

11. A market for the eight-track tape never developed outside North America. Ironically, the two most pirated and counterfeited albums, the movie soundtracks of *Grease* and *Saturday Night Fever* (both on RSO Records) are distributed by a subsidiary (Polygram) of the cassette's inventor, Philips.

12. BILLBOARD, June 3, 1978, at 77, 89. The industry's slowness was partially due to commitment to the eight-track tape by United States companies. In 1967 eight-tracks constituted over 90% of the tape market (measured by retail list price value of manufacturers' shipments). In 1973, 91 million eight-tracks were sold compared to 15 million cassettes. By 1978, 133.6 million eight-tracks were sold compared to 61.3 million cassettes. In 1979, eight-track sales dropped to 102.3 million while cassette sales continued to increase to 78.5 million. Press release, News from RIAA, Apr. 7, 1980 [hereinafter cited as *RIAA Press Release*]. There have been predictions for years that the eight-track tape configuration will eventually be defeated by the cassette.

13. Besides supplying music to consumers that record companies were not reaching, it has been suggested that a benefit of bootleg recordings is their archival function in recording live performances that otherwise would be lost to future generations. Tow, *Record Piracy*, 222 COPYRIGHT L. SYMP. (ASCAP) 243, 265 (1977).

14. BILLBOARD, Mar. 17, 1979, at SA-10, SA-24.

kets because pirates partially consume the benefit of the resulting record sales.<sup>15</sup> On the other hand, curbing illicit competition boosts legitimate companies and the development of their artists.<sup>16</sup> The cultural benefit of a strong local industry is often cited by the recording industry when it seeks government cooperation in passing or enforcing protective legislation.<sup>17</sup> Lost tax revenues<sup>18</sup> and the growing role of organized crime,<sup>19</sup> however, are additional factors that encourage governmental action against illicit recording activities.<sup>20</sup>

## 2. Solutions

The best solution to music theft is the enactment and active enforcement of protective legislation. There is presently a worldwide trend towards (1) revising or amending national and international copyright statutes so that producers of sound recordings and performers are granted more rights in their sound recordings and performances, and (2) toughening criminal penalties for infringement. In addition to strong copyright legislation, or in lieu of it, application of laws prohibiting the possession, sale, or interstate transportation of stolen property,<sup>21</sup> consumer protection laws,<sup>22</sup> and unfair competition laws,<sup>23</sup> has also been helpful.

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15. *Id.* at 61, 65.

16. BILLBOARD, Mar. 15, 1980, at 18; BILLBOARD, Mar. 17, 1978, at 59, 65.

17. *See, e.g.*, BILLBOARD, Feb. 24, 1979, at 1, 74.

18. *See* text at note 98, *infra*.

19. One member of organized crime, Tommy (Ryan) Eboli, was under intensive federal and local investigation for record piracy at the time of his gangland assassination. Yarnell, *supra* note 3, at 234-35. British police have become more active in fighting illicit recordings because of growing evidence of the role of organized crime syndicates. BILLBOARD, Mar. 22, 1980, at UK-8.

20. Some governments, however, may have some interest in a well developed illicit recording industry. In Singapore, for example, hundreds of jobs, substantial tax revenues, and a significant slice of the nation's export trade derive from the manufacture of private and counterfeit cassettes. These social and economic effects would be lost if illicit activities were eliminated.

21. In 1979 a Florida state court and a Chicago federal court convicted defendants under stolen property laws for their unauthorized recording activities. *See* note 184, *infra*. Such laws have been used in Netherlands and Italy. IFPI, *supra* note 1, at 4.

22. In the United States there is consumer protection legislation in 26 states that makes it a crime to release a recording without including the name and address of the manufacturer. BILLBOARD, July 21, 1979, at 27, 41.

23. Such laws are used in France, Monaco, Panama, Egypt, and in the

Music theft can further be reduced by employing stricter security measures within the recording industry itself. Strict security procedures within the recording company can prevent master tapes, labels, and album jackets from falling into counterfeiters' hands.<sup>24</sup> Such procedures can be imposed also on those who manufacture records and tapes and print album graphics for record companies—in order to prevent them from making extras for counterfeiters.<sup>25</sup> More caution is being taken to limit radio broadcasters' access to unreleased albums so pirates and counterfeiters will not be able to record them off-air and beat the legitimate releases.<sup>26</sup>

Record companies have begun searching in addition for some type of coding system that will help them identify counterfeit product. This is because quality of some counterfeits is so high that consumers, retailers, and even the record companies are hard-pressed to detect the forgeries. Some record companies have already started to use invisible codes to identify and thus prevent the return of counterfeit products.<sup>27</sup>

### 3. Legal Rights of Parties Against Unauthorized Duplications

In each case it is important to determine which party or parties are protected by copyright statutes or other laws and thus have legal remedies against illicit reproductions. The owner of the copyright in the music embodied on the sound recording (generally the publisher, the songwriter, or both) has the right to enforce his copyright against the unauthorized use of the song. The publisher or the songwriter thus has a cause of action to recover lost royalties from pirates, counterfeiters, and bootleggers. If a copyright statute or other laws<sup>28</sup> grant the producer of a sound recording

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United States.

24. RECORD WORLD, Oct. 27, 1979, at 3, 24.

25. *Id.*

26. Such pre-release leaks to radio recently happened with Fleetwood Mac's *Tusk* and the Bee Gees' *Spirits Having Flown*. This is not a new development, but record companies are becoming more active in opposing such radio practices. RECORD WORLD, Oct. 27, 1979, at 3, 24.

27. RSO Records, which has been particularly hard hit by counterfeiters, reports that it is using a chemical treatment process that is invisible to the naked eye to identify its legitimate product. FBI and RIAA investigators estimate that RSO lost between \$30-\$50 million in 1978-79 to counterfeiters. BILLBOARD, Mar. 29, 1980, at 15.

28. See notes 21-23 and accompanying text, *supra*.

(generally the record company)<sup>29</sup> a right against its unauthorized duplication, then the producer will have a cause of action under those laws against pirates and counterfeiters. Where a nation's copyright statute, treaty status, or other law grants performers a right against the unauthorized recording and reproduction of their performances, the performer will have a cause of action against the bootlegger, and perhaps against pirates and counterfeiters. Additionally, the state may prosecute offenders if the statute provides criminal penalties for copyright infringement.

A nation's copyright statute protects the above parties only if they meet the criteria for its application, which are generally designed to afford protection to persons or works with some connection to the nation. For example, a copyright statute may grant protection on the basis of some or all of the following: the writer, producer, or performer is (1) a citizen, (2) a national, or (3) a permanent resident of the nation, or (4) when the sound recording was first published or first fixed<sup>30</sup> in the nation. A country's copyright protection may be extended to persons and works of foreign nations by unilateral or bilateral action or by any one of several international conventions. A country may join the International Union for the Protection of Literary and Artistic Works (Berne Union)<sup>31</sup> and the Universal Copyright Convention (UCC)<sup>32</sup> if its

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29. In Portugal, it is the songwriters who own the copyright in sound recordings. Portugal Decree—Law No. 46980, May 2, 1966, art. 4, § 1 *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, Supp. 1968 [hereinafter cited as CLTW].

30. Copyright protection is granted to sound recordings fixed in any tangible medium of expression. General Revision of the United States Copyright Law, Pub. L. No. 94-553, § 102(a)(7), 90 Stat. 2541 (codified as 17 U.S.C. app. § 102(a)(7)). "Sound recordings" are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audio visual work, regardless of the nature of the material objects, such as disks, tapes, or other phono records, in which they are embodied." 17 U.S.C. § 101. A sound recording "is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration . . . ." *Id.*

31. There were 71 signatories as of March 1, 1980. There have been several revisions of the Berne Union. It was founded by the Berne Convention (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967), and Paris (1971). Thus it is necessary to determine which draft a nation adheres.

32. Seventy-three nations, including the United States were signatories as of



copyright law is consistent with the requirements of those conventions. Neither of these conventions, however, protects the "neighboring rights"<sup>33</sup> of performers or phonogram producers. The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention)<sup>34</sup> was founded to protect these rights. Article VII grants performers the right to prohibit the broadcasting, fixation, and reproduction (of an unauthorized fixation) of live performances.<sup>35</sup> In addition, producers of phonograms are granted "the right to authorize or prohibit the direct or indirect reproduction of their phonograms."<sup>36</sup>

Because piracy and counterfeiting were such serious worldwide problems to the producers of phonograms, a convention specifically addressed to their needs was drafted in 1971. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Phonograms Convention)<sup>37</sup> requires members to protect producers of phono-

March 1, 1980. There are two texts: the original (1952) and the Paris revision (1971).

33. "Neighboring rights" are the rights of performers, producers of phonograms, and broadcasters. Their rights adjoin copyright but in a strict sense are not the rights of copyright. Iijima, *Musical Copyrights in Japan*, 23 BULL. COPYRIGHT Soc'y 371, 377 n.29 (1976).

34. Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, May 18, 1964 [1964] No. 7247, 496 U.N.T.S. 43. This Note is concerned with the rights of performers and phonogram producers only. Broadcasters' rights will not be discussed. There were 23 contracting states as of March 1, 1980. Listed in the chronological order of the deposit of their instrument of ratification or accession, they are: The Congo, Sweden, Niger, United Kingdom, Ecuador, Mexico, Czechoslovakia, Denmark, Brazil, the Federal Republic of Germany, Paraguay, Costa Rica, Fiji, Austria, Chile, Italy, Luxembourg, Colombia, Guatemala, Uruguay, Norway, El Salvador, and Ireland.

35. *Id.* at 48-50.

36. *Id.*, art. 10 at 50. Both the Rome Convention and the Phonograms Convention, *infra* note 42, defined "phonogram" as "any exclusively aural fixation of sounds of a performance or of other sounds." The two conventions also define "producer of phonograms" as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds." Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, May 18, 1964, art. 3 at 46 [1964] No. 7247, 496 U.N.T.S. 43; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, art. 1 at 325, 25 U.S.T. 323, T.I.A.S. No. 7808.

37. [1974] 25 U.S.T. 323. As of March 1, 1979 there were 32 signatories. Listed in the chronological order of the deposit of their instrument of ratification or accession, they are Fiji, France, United Kingdom (the Convention is also

grams who are nationals of other signatory nations from mass production, importation, and public distribution of unauthorized duplications.<sup>38</sup> The impact of the Convention is diminished, however, by article 7(4), which provides that members may opt to provide protection solely on the basis of the place of the phonogram's first fixation rather than protecting nationals of other contracting nations. Sweden, Finland and Italy, for example, have all opted out under article 7(4).

The following example illustrates some of the problems connected with enforcing the Rome and Phonograms Conventions.<sup>39</sup> Bob Dylan performed a concert in Italy, and his performance was taped and copies were made without his authorization.<sup>40</sup> Some of the bootlegged copies were then exported to Finland and offered for sale. Finland's statutory protection of performers against the unauthorized recording of their performances<sup>41</sup> did not apply because the performance did not occur in Finland.<sup>42</sup> Neither was the distribution of this foreign bootleg illegal because Finland had not signed the Rome Convention. Thus, Finland had no law compelling it to grant the same protection to performances rendered in other signatory nations as to performances given in Finland.<sup>43</sup>

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applicable to the following territories: Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Isle of Man, Hong Kong, Montserrat, Saint Lucia and the Seychelles), Finland, Sweden, Argentina, Mexico, United States of America, Federal Republic of Germany, Australia, Panama, Spain, Ecuador, Monaco, India, Hungary, Brazil, Luxembourg, Kenya, New Zealand, Guatemala, Denmark, Chile, Italy, Holy See, Zaire, Egypt, Israel, Norway, Japan, El Salvador and Paraguay.

38. *Id.* art. 2.

39. See BILLBOARD, Feb. 9, 1980, at 53.

40. In Italy bootlegging is not per se prohibited. Rather, the performer is given the right to equitable remuneration for the bootlegging. Gaz. Uff., Law No. 633 of Apr. 22, 1941, art. 80 (*as amended* up to May 5, 1976) reprinted in CLTW, Supp. 1977, *supra* note 29 (1956). Ironically, because Italy is a signatory to the Rome Convention and because performers' rights under the Convention include the right to prohibit copies, which the Italian copyright statute does not, foreign artists receive greater protection in Italy than do Italian performers. See BILLBOARD, Feb. 2, 1980, at 3, 46.

41. Suomen Asetuskokoelma, Law No. 404 of July 8, 1961, art. 45 (*as amended* July 31, 1974), reprinted in CLTW, Supp. 1975-76, *supra* note 29.

42. "The provisions of Article 45 shall apply to performances . . . which take place in Finland." *Id.* art. 64.

43. Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organizations, May 18, 1964, arts. 2(1)(a) and 4(a) [1964] No. 7247, 496 U.N.T.S. 43, *supra* note 34, at 44, 46.

If Finland had been a member of the Rome Convention, the Italian bootlegs would have been illicit in Finland.

B. *Territorial Survey of the Status of Unauthorized Duplications*

1. Australia

Illicit activity in Australia's \$200 million record market is now fairly well controlled, with levels estimated at under 5% since 1978.<sup>44</sup> Before the industry's fight began in the mid-1970's, music thieves consumed up to 50% of the market<sup>45</sup> and their cassettes were sold openly in record shops.<sup>46</sup> The Australian Record Industry Association (ARIA), which spent over \$300,000 to fight piracy between 1975 and 1978, spearheaded an industry-wide enforcement campaign with the cooperation of customs, police, and the courts.<sup>47</sup> Supreme Court injunctions preventing retailers from selling illicit products and successful investigations and prosecutions against music thieves<sup>48</sup> have been based on the 1968 Copyright Act's protection of phonograms.<sup>49</sup> An amendment to the Copyright Act is now being reviewed by the Australian Parliament. If enacted, this bill will stiffen the lenient criminal penalties now in force.<sup>50</sup> It is hoped that the spectacular raids last summer of a long-standing bootleg album operation and of a large East Coast pirate cassette ring (the largest seizure of product and equipment in Australia) will spur enactment of the amendment,<sup>51</sup> which is expected to be passed later this year.<sup>52</sup> A concern is mounting that the rampant piracy and counterfeiting in Southeast Asia may spread to Australia or at least to its traditional ex-

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44. IFPI, *supra* note 6, at 3.

45. BILLBOARD, July 21, 1979, at 27, 41.

46. BILLBOARD, Mar. 17, 1979, at 59.

47. *Id.*

48. *Id.*

49. Copyright Act of June 27, 1968, art. 85, *reprinted in* CLTW, Supp. 1978, *supra* note 29.

50. The current criminal penalties in force in Australia provide for a mere \$10.00 (Australian) fine per infringing copy, with a maximum fine of \$200 for a first offense. Repeating offenders are subject to the same fine structure or a maximum prison sentence of two months. Infringing copies are destroyed. *Id.* at art. 133.

51. BILLBOARD, Sept. 1, 1979, at 1, 54.

52. IFPI, *supra* note 1, at 2.

port markets.<sup>53</sup>

Piracy apparently accounts for less than 5% of the New Zealand market,<sup>54</sup> which totalled \$46 million in 1979.<sup>55</sup> As in Australia, the main threat to the New Zealand market lies in increasing pirate export activity from Singapore and other Southeast Asian markets. This kind of pirate activity has been very costly to New Zealand's export markets.<sup>56</sup>

## 2. Europe

The Belgian record industry organized a conference on February 14, 1980 to emphasize the urgency of the music theft problem.<sup>57</sup> The conference urged both ratification of the Geneva and Rome Conventions, strengthening the penalties provided in the 1866 Copyright Act,<sup>58</sup> and, to deter counterfeiters, greater use of the law against false representation of economic goods.<sup>59</sup> The problem in Belgium, however, is not serious. Estimates have placed illicit recordings at 2% to 3% of the album market, 5% to 6% of the singles market, and 8% of the cassette market.<sup>60</sup>

The illegal reproduction of sound recordings in France has traditionally been about 5% of the total market<sup>61</sup> and only recently has the industry considered this an important problem. The major threat to the French recording industry is counterfeit products, and it appears that many of these products are actually manufactured in France.<sup>62</sup> The industry organization, Syndicat de l'Édition Phonographique et Audio-Visuelle (SNEPA), recently waged a publicity campaign to increase public awareness.<sup>63</sup> The industry's threat is apparently being heeded. Shortly after the warning was issued the largest French retailing outlet unknowingly offered a pirate Jimi Hendrix album for sale. Within a few hours after this was discovered the albums, which had been im-

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53. BILLBOARD, *supra* note 45, at 41.

54. IFPI, *supra* note 6, at 3.

55. BILLBOARD, Mar. 15, 1980, at A-12.

56. IFPI, *supra* note 1, at 2.

57. BILLBOARD, Mar. 1, 1980, at 51.

58. Law on Copyright of March 22, 1886, *as amended* up to March 11, 1958, CLTW, Supp. 1959, *supra* note 29.

59. BILLBOARD, March 1, 1980, at 51.

60. *Id.*

61. IFPI, *supra* note 6, at 2; BILLBOARD, Oct. 21, 1978, at 1, 76.

62. IFPI, *supra* note 1, at 3.

63. *Id.*

ported from the United States, were taken off the racks.<sup>64</sup> Because the French Copyright Act<sup>65</sup> does not provide protection to producers of phonograms, most legal action is instituted under the unfair competition law<sup>66</sup> and other laws relating to trademarks and consumer protection.<sup>67</sup>

In the Federal Republic of Germany, illegal recordings<sup>68</sup> constitute between 5% and 10% of the market for sound recordings, but that amounts to losses of over \$50 million to the recording industry each year<sup>69</sup> (the total market value in both 1978 and 1979 exceeded \$1 billion).<sup>70</sup> As in France, there is apparently very little piracy and bootlegging activity in Germany: most of the infringing copies are counterfeit.<sup>71</sup> In November 1978, however, the largest counterfeiting ring in Germany was cracked,<sup>72</sup> and in 1979 more than 100,000 illegal recordings were seized in other raids.<sup>73</sup>

According to the IFPI, very little counterfeiting and bootlegging occurs in Greece. Pirated recordings, however, corner about 80% of the total market, with losses to the recording industry estimated at about \$10 million a year.<sup>74</sup> Many of the pirated cassettes are supplied from Arab countries.<sup>75</sup> Police, who claim that pirates guarantee retailers that confiscated cassettes will be replaced immediately, reportedly raided a single store three times in one day and seized 4,000 pirated cassettes each time.<sup>76</sup> In another noteworthy effort, police raided a monastery and seized 205 high-speed cassette duplication units in addition to 32,000 cas-

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64. BILLBOARD, Apr. 7, 1979, at 88.

65. Law No. 57-296 on Literary and Artistic Property, of Mar. 11, 1957, CLTW, Supp. 1958, *supra* note 29.

66. C.cir., art. 1382.

67. IFPI, *supra* note 1, at 3.

68. Art. 85 prohibits the unauthorized duplication of sound recordings. B6BII, art. 85. Act dealing with Copyright and Related Rights of Sept. 9, 1965, as amended on Aug. 17, 1973, reprinted in CLTW, Supp. 1973, *supra* note 29.

69. IFPI, *supra* note 1, at 3; BILLBOARD, Oct. 21, 1978, at 1, 76.

70. BILLBOARD, Mar. 29, 1980, at 106.

71. IFPI, *supra* note 6, at 2.

72. This ring was headed by former record company executive Leif Kraul. The plant used to press illegal recordings could manufacture as many as three million records a year. RECORD WORLD, Dec. 2, 1978, at 51; BILLBOARD, Nov. 25, 1978, at 92.

73. IFPI, *supra* note 1, at 3.

74. BILLBOARD, June 2, 1979, at 60.

75. BILLBOARD, July 21, 1979, at 27.

76. BILLBOARD, Nov. 10, 1979, at 66.

settes.<sup>77</sup> Unfortunately, the penalties under the present Copyright Act<sup>78</sup> are inadequate to combat piracy, and the government seems reluctant to pass amendments providing higher penalties and rights for phonogram producers.<sup>79</sup> Although the legislation is several years overdue,<sup>80</sup> it is hoped that Greece's recent entry into the European Economic Community will prompt the government to bring the statute up to prevailing European standards.<sup>81</sup>

In Italy it is estimated that piracy, counterfeiting, and bootlegging operations control over 50% of the total market.<sup>82</sup> The Italian copyright society, SIAE, has estimated that over \$10 million per year is lost to the pirates, and more than \$12 million to the counterfeiter.<sup>83</sup> Furthermore, counterfeiting activity seems to be increasing because the rate of return is higher.<sup>84</sup> The SIAE, the AFI (representing the recording companies), and the police have teamed up to investigate illegal recordings, and in 1979 over 510,000 illegal recordings were seized in more than 550 raids.<sup>85</sup> The judicial system is encountering some difficulty handling the resulting case load. By early 1980, there were more than 900 cases pending hearings.<sup>86</sup> Nevertheless, the copyright statute does not provide prison sentences for criminal copyright infringement, and the fines are meager.<sup>87</sup> An amendment to the Copyright Act that contained dramatically higher fines and prison sentences was proposed in 1978.<sup>88</sup> It had not been enacted by the time the government changed, and therefore must be re-introduced. In the meantime, prison terms have been handed out under laws prohibiting the receipt of stolen property.<sup>89</sup> And most prosecutions are being brought for the sale of industrial products with false mark-

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77. BILLBOARD, June 2, 1979, at 60.

78. Article 16 of the Law on Literary Property of June 29, 1920, last amended in 1944, CLTW, *supra* note 29 (1956).

79. BILLBOARD, June 2, 1979, at 60.

80. IFPI, *supra* note 1, at 4.

81. BILLBOARD, June 2, 1979, at 60.

82. IFPI, *supra* note 6, at 5; BILLBOARD, Feb. 2, 1980, at 3, 46.

83. BILLBOARD, Aug. 12, 1978, at 70.

84. *Id.*

85. IFPI, *supra* note 1, at 4.

86. *Id.*

87. Law No. 623 of Apr. 22, 1941, on Copyright, as amended on May 5, 1976, CLTW, *supra* note 29 (1956). Art. 171-73 provide for fines of 20,000 lire to 800,000 lire.

88. BILLBOARD, June 23, 1979, at 1, 10.

89. IFPI, *supra* note 1, at 4.

ings and violation of the author's rights.<sup>90</sup>

The Netherlands, despite relatively slack legislation and enforcement, suffers only about 5% loss (about \$15 million annually) to illicit recordings.<sup>91</sup> Bootleg recordings, first introduced in Holland about ten years ago, and pirate cassettes, imported from Singapore, are currently the major problems.<sup>92</sup> Legislation is being drafted to supplement the copyright provisions<sup>93</sup> by granting greater rights to authors and phonogram producers, and by requiring infringing parties to divest their profits.<sup>94</sup> Current criminal penalties for copyright infringement have little deterrent effect and the courts have been quite lenient.<sup>95</sup> As an alternative, charges for the sale of stolen goods are now being prosecuted.<sup>96</sup>

Traditionally, 80% to 85% of the Portuguese market has been illicit, but concerted action by the recording industry and the government has begun to reduce this figure.<sup>97</sup> The government has taken positive steps toward solving this problem in order to try to recoup the estimated \$2.5 million lost in taxes each year.<sup>98</sup> A new copyright act has been approved by the Cabinet, and enactment is expected soon.<sup>99</sup> The existing copyright statute grants no rights to artists or to producers of phonograms—songwriters are the owners of copyright in sound recordings.<sup>100</sup> Judicial action, prompted by a new campaign of the IFPI and the Portuguese copyright society (SPA), has resulted in the first (albeit mild) prison sentences for illicit sound recording activity.<sup>101</sup> As a

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90. *Id.*

91. BILLBOARD, Mar. 1, 1980, at 51.

92. IFPI, *supra* note 1, at 4; BILLBOARD, Feb. 2, 1980, at 3.

93. Law concerning the New Regulation of Copyright, of Sept. 23, 1912, as amended up to Oct. 27, 1972, CLTW, Supp. 1973, *supra* note 29.

94. BILLBOARD, Feb. 2, 1980, at 3, 46.

95. BILLBOARD, Mar. 1, 1980, at 61. For example, a local record dealer, Robert Saget, was recently convicted of selling illegal recordings. Despite the fact that this was Saget's second conviction, his penalty was a \$500 fine and a two year suspension. In another action, a wholesaler who allegedly sold some 30,000 counterfeit cassettes to a United Kingdom importer was fined only about \$2000.00. BILLBOARD, Feb. 2, 1980, at 48.

96. IFPI, *supra* note 1, at 4.

97. BILLBOARD, Oct. 27, 1979, at BT-7; BILLBOARD, July 1, 1978, at 80.

98. *Id.*

99. IFPI, *supra* note 1, at 4; BILLBOARD, July 1, 1978, at 80.

100. Portugal Decree—Law, *supra* note 29.

101. IFPI, *supra* note 1, at 4. One defendant received a two-month sentence and the other a three-month sentence. Both were ordered to make financial res-

result of these enforcement efforts, legitimate cassette sales in Portugal have improved substantially.<sup>102</sup>

Thus far, the Scandinavian nations have had relatively little trouble with unauthorized sound recordings. The level has remained at or below 5%.<sup>103</sup> TEOSTO, the Finnish Copyright Bureau, recently reported, however, that illicit producers are increasing their market share in Finland.<sup>104</sup> The Finnish and Swedish courts' response to this problem was swift. In the first arrest of its kind in Finland, a man was brought to trial for copying and selling cassettes in his home. First, the defendant's equipment was confiscated. Second, he was ordered to pay a fine for copyright breach. Last, he was required to pay TEOSTO, the Finnish branch of the IFPI, and several musicians for lost royalties.<sup>105</sup> In the first Swedish bootlegging prosecution, the defendant was saddled with a four-month prison sentence and an order to pay 122,000 Swedish kroners in costs and damages.<sup>106</sup>

The unauthorized duplication of sound recordings in Spain currently accounts for about 10% to 25% of the entire market.<sup>107</sup> As in Portugal, the campaign against illicit recordings began recently. One convicted cassette pirate, however, was sentenced to six years in jail for fraud (and received lighter sentences for infringement of authors' rights and falsification of trades). The pirate was also ordered to pay the record companies and the copyright society two million pesetas for lost royalties.<sup>108</sup>

In the United Kingdom, piracy, counterfeiting, and bootlegging of sound recordings account for less than 5%<sup>109</sup> of the total market—the lowest level in the world,<sup>110</sup> according to the Anti-Piracy Division of the British Phonographic Industry (BPI), which has led the recording industry fight. With piracy dying and bootlegging “virtually dead,” the trend of illicit recording in the United Kingdom is toward the more profitable and less easily detectable

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titution. BILLBOARD, Sept. 22, 1979, at 59.

102. *Id.*

103. IFPI, *supra* note 6, at 2.

104. BILLBOARD, June 9, 1979, at 91.

105. BILLBOARD, Nov. 17, 1979, at 70; BILLBOARD, Jan. 6, 1979, at 67.

106. IFPI, *supra* note 1, at 5.

107. IFPI, *supra* note 6, at 2.

108. BILLBOARD, Oct. 21, 1978, at 76.

109. IFPI, *supra* note 1, at 5.

110. BILLBOARD, Mar. 22, 1980, at UK-8.



counterfeit product.<sup>111</sup> In fact, the quality of counterfeits has improved so much that record companies have been discovering counterfeits among products returned to them as defective.<sup>112</sup> These counterfeit recordings, it has been estimated, cost the industry over \$2 million per year.<sup>113</sup>

Notwithstanding such successful counterfeit efforts, most of the publicity from recent BPI investigations has centered around bootlegging. What was believed to have been England's largest bootlegging ring was broken in 1979 when about forty BPI investigators staged raids in four cities as part of an undercover operation code-named "Moonbeam."<sup>114</sup> Several defendants were permanently enjoined from further bootlegging activity and consented to the payment of damages and costs.<sup>115</sup> Information discovered in these raids is still being investigated.<sup>116</sup> Although most illicit recordings in the United Kingdom are believed to have been imported,<sup>117</sup> the first bootleg factory in England, discovered through BPI undercover work, was raided in early 1980.<sup>118</sup>

The BPI's investigatory work has been boosted by recent court decisions awarding damages to the BPI for the costs of their investigations. The first such award came in the "Moonbeam cases" in late 1979.<sup>119</sup> This is a particularly important development to the British recording industry because the BPI strongly prefers to bring civil actions on behalf of artists and record companies rather than to seek criminal prosecutions. The civil action is superior for the following three reasons: (1) there is less delay in going before the court (the BPI can get court hearings within twenty-four hours of obtaining evidence), (2) the civil proceeding

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111. BILLBOARD, July 29, 1978, at 3, 66. This portion of the article was an interview with Bill Hood, chief anti-piracy investigator at the BPI.

112. BILLBOARD, Aug. 26, 1978, at 94.

113. *Id.*

114. BILLBOARD, Sept. 8, 1979, at 1, 54.

115. *Id.*

116. Interview with Bill Hood, Chief Investigator of the BPI Anti-Piracy Division (Apr. 8, 1980).

117. Singapore is a recurring source of counterfeit recordings. BILLBOARD, July 21, 1979, at 27; BILLBOARD, July 29, 1978, at 3, 66. Recently, though, counterfeit product has been traced to Holland, BILLBOARD, Feb. 2, 1980, at 48, and the United States and Canada, BILLBOARD, Mar. 22, 1980, at UK-8 (mail-order bootleg album operation).

118. BILLBOARD, Jan. 26, 1980, at 61.

119. BILLBOARD, Mar. 22, 1980, at UK-8.

creates greater publicity, and (3) damages awarded go to the anti-piracy fund of the BPI rather than to the Crown.<sup>120</sup> Another important factor in the development of the successful BPI program has been the use of *Anton Piller* orders. The *Anton Piller* doctrine developed out of a trade secrets case, *Anton Piller K.G. v. Manufacturing Processes, Ltd.*<sup>121</sup> In this case a German manufacturer of electrical equipment strongly suspected that its licensee was preparing to sell trade secrets to competitors. Given these circumstances, the court of appeals granted an ex parte order allowing the plaintiff to enter and inspect defendant's premises, without notice and to remove all items relating to the trade secrets. The first application of *Anton Piller* orders to piracy and counterfeiting of sound recordings occurred in *EMI, Ltd. v. Pandit*.<sup>122</sup> Here the court granted an ex parte order allowing the plaintiff to inspect a suspected pirate's premises, without notice, and to remove any infringing recordings.<sup>123</sup> The use of *Anton Piller* orders to expose illicit recording operations was further expanded in *EMI, Ltd. v. Sarwar and Haidar*.<sup>124</sup> In this proceeding, plaintiff was granted the right to demand from the defendant immediate disclosure of the source of supply of infringing items.<sup>125</sup> Finally, in *Ex Parte Island Records, Ltd.*<sup>126</sup> the court of appeals approved the use of *Anton Piller* orders against bootleg opera-

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120. Interview with Bill Hood, *supra* note 115.

121. [1976] 1 All. E.R. 779. The trial court had refused the order, finding prima facie evidence but stating that the risk that the defendant might destroy evidence is one that must be taken in civil cases. *Id.* at 782.

122. [1975] 1 All E.R. 418.

123. The rules allow the court to order the preservation of property or its inspection while in the possession of a party. Application of such an order, however, must be made by summons or notice. *Id.* at 421-22. The court stated that such an order could properly be granted only in "exceptional circumstances" for the purpose of invoking the rule. The plaintiff, however, must indemnify the defendant for any wrongful injury that results from the order. *Id.* at 424.

124. [1977] F.S.R. 146.

125. Interview with Hugh Laddie (Apr. 17, 1980). Mr. Laddie has litigated several cases involving *Anton Piller* orders including *EMI, Ltd. v. Pandit*, [1975] 1 All E.R. 418; the *Anton Piller* case, [1976] 1 All E.R. 779; and *Ex Parte Island Records, Ltd.*, [1978] 3 All E.R. 824 (the court acknowledged Mr. Laddie for pioneering the use of the *Anton Piller* order).

126. [1978] 3 All E.R. 824. Several unreported cases had previously granted *Anton Piller* orders for bootlegging but had been refused in *Musical Performers Protection Assoc., Ltd. v. British Int'l Pictures, Ltd.*, [1930] 46 T.L.R. 485, and in *Apple Corps., Ltd. v. Lingasong, Ltd.*, [1977] F.S.R. 345. *Ex Parte Island Records, Ltd.*, [1978] 3 All. E.R. at 828.

tions. Prior to the *Island Records* holding, the sole statutory remedy against bootlegging abuses had been criminal prosecution by the Crown.<sup>127</sup> The dissent in *Island Records* contended that, by implying a civil cause of action from the criminal statute and by giving the plaintiffs stronger powers of search and seizure than the Crown would have given in the criminal action, the court was indirectly and improperly stiffening the criminal statute.<sup>128</sup>

Initially, *Anton Piller* orders were being granted in *ex parte*, *in camera*, hearings so that the defendant would not have an opportunity to destroy or remove incriminating evidence. An unrestricted *Anton Piller* order granted the plaintiff the power to enter and inspect the defendant's premises and documents and to seize any infringing product. Further, the order commanded the defendant to disclose his sources of supply of infringing items and to refrain from discussing the investigation with anyone other than his solicitor.<sup>129</sup> On refusing to comply with any part of the full *Anton Piller* order the defendant could be brought before the court for contempt proceedings. The order was distinguished from true search and seizure power because, despite the threat of contempt proceedings, the defendant technically had the right to refuse to obey.<sup>130</sup> Although the orders were justified because of the great risk that defendants would destroy or remove their illegal goods and warn other potential defendants, the courts were clearly troubled not only by the broad powers being granted to plaintiffs in civil cases but also by the secrecy of the proceedings. In some cases, for example, the BPI would negotiate a settlement before coming to trial, with "no publicity" a term of the agreement so that other suspects could be investigated without warning.<sup>131</sup> In this situation, the *in camera* proceedings in which the *Anton Piller* order was granted never even came to the public's attention.

In *Rank Film Distributing v. Video Information Center*, decided in January 1980, the court of appeals responded to these judicial concerns by limiting the scope of the *Anton Piller* or-

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127. Performers Protection Acts 1958, 1963, 1972, CLTW, Supp. 1973, *supra* note 29, at Item 7A.

128. *Ex parte Island Records, Ltd.*, [1978] 3 All E.R. at 834 (opinion of Shaw, L.J.).

129. Interview with Bill Hood, *supra* note 116.

130. *Anton Piller, K.G. v. Manufacturing Processes, Ltd.*, [1976] 1 All E.R. at 784.

131. BILLBOARD, June 10, 1978, at 68.

ders.<sup>132</sup> The defendants, who were admitted film pirates, contended that they were guilty of criminal fraud, criminal copyright, and civil copyright infringements. Thus, the defendants claimed that the *Anton Piller* order violated their right against self-incrimination in criminal proceedings. The court held that if the defendant clearly has a defense of self-incrimination he cannot be forced to disclose the sources of the articles in his possession or to deliver his internal documents to the plaintiff. On the other hand, the court ruled that plaintiffs still could get an order to enter the premises and remove infringing items. This decision would seem to prohibit the use of full *Anton Piller* orders in actions against record piracy, bootlegging, and counterfeiting, because each involves criminal penalties.

By contrast, in *Re Ocli*, a subsequent case involving the infringement of copyright and misuse of trade secrets, the court of appeals granted a full *Anton Piller* order. The order was granted because (1) the prospects of defendant's prosecution were slight and (2) even if he were prosecuted, it would be under a statute for which there was no privilege against self-incrimination. Following *Re Ocli*, several lower courts have granted full *Anton Piller* orders when it was established that a criminal prosecution will never be brought against the particular offender. The present confusion surrounding *Anton Piller* orders may be cleared up when the *Rank Film Distributors* case is appealed to the House of Lords.<sup>133</sup>

Efforts to prevent illicit recording in the United Kingdom should be further strengthened when the Copyright Act<sup>134</sup> is revised. A Commission to Consider the Law on Copyright and Design was created to study the Copyright Act and to recommend changes. That Committee concluded in the 1977 Whitford Report,<sup>135</sup> that stiffer penalties for criminal copyright infringement should be required.<sup>136</sup> The Report also recommends that mere

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132. The following information regarding *Anton Piller* orders was received in the interview with Hugh Laddie, *supra* note 125.

133. Mr. Laddie is preparing the appeal.

134. Copyright Act of 1956, *as amended* to February 17, 1971, CLTW, Supp. 1972, *supra* note 29.

135. COMMISSION TO CONSIDER THE LAW ON COPYRIGHT AND DESIGN, REPORT, No. 6732 (1977).

136. Dworkin, *The Whitford Committee Report on Copyright and Designs Law*, 40 MOD. L. REV. 685, 693 (1977); *see de Freitas, Letter from the United Kingdom*, 15 COPYRIGHT 170 (1979).

possession of illicit goods in the course of trade should constitute an offense, and that the prosecutor's burden of proving the defendant's guilty knowledge should be lifted. Thus, under the Whitford Report, the defendant would have the burden of proving that he had no actual or constructive knowledge that he was dealing in infringing copies.<sup>137</sup>

### 3. Middle East

Statutory protection in the Middle East is sparse, and unauthorized sound recordings dominate the markets. Egypt,<sup>138</sup> Lebanon,<sup>139</sup> and Syria<sup>140</sup> are the only Arab nations that provide protection against the unauthorized reproduction of sound recordings,<sup>141</sup> although Israel<sup>142</sup> and Turkey<sup>143</sup> also provide such protection. The situation in Iran is, of course, uncertain.<sup>144</sup> Even in those countries in which the law is clear, however, enforcement is virtually non-existent. According to 1978 figures, illicit recordings constitute over 90% of the market in Turkey, Iran, Morocco, Libya, and Algeria; over 75% of the market in Egypt and Lebanon; and over half the market in Israel and Tunisia.<sup>145</sup> Clearly, the Middle East is a thriving international market-place for illicit recordings. Pirate product from the area is exported to France, Italy, and Greece,<sup>146</sup> and it has been estimated that Singapore exports as

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137. Dworkin, *supra* note 135, at 693.

138. The unfair competition law is used to protect phonogram producers. There is no such protection under the Law Relating to the Protection of Copyright (No. 354) (June 24, 1954), CLTW, Supp. 1971.

139. Art. 145, Decree No. 2385 of Jan. 17, 1924, on Copyright, *as amended* on Jan. 31, 1946, CLTW, Supp. 1958, *supra* note 29.

140. Art. 145, Decree No. 2385 of Jan. 17, 1924, *as amended* on Sept. 22, 1926, CLTW, Supp. 1962, *supra* note 29.

141. IFPI, *supra* note 1, at 5.

142. Art. 19, United Kingdom Copyright Act of 1911 *as modified* by Ordinance of 1924 and *as amended* on July 26, 1971, CLTW, Supp. 1974, *supra* note 29.

143. Art. 84, Law on Artistic and Intellectual Works, of Dec. 10, 1951 CLTW, Supp. 1956, *supra* note 29.

144. The right against unauthorized reproductions of sound recordings was granted to copyright owners under art. 3, of the Copyright Law of Dec. 11, 1969 *reprinted in* CLTW, Supp. 1978, *supra* note 29.

145. IFPI, *Extent of Piracy of Sound Recordings Worldwide in 1978*, *supra* note 6, at 2.

146. Hennessey, *IMIC '79 Report: Music Thievery a Sizzling Topic; Cite Some Progress*, BILLBOARD, July 21, 1979, at 27.

much as one million cassettes to the Middle East every month.<sup>147</sup> This statement is bolstered by the record. The Singapore Department of Trade statistics show that, in one six-month period, Saudi Arabia alone imported 2.7 million cassettes.<sup>148</sup> And, of the total of 6.5 million cassettes exported by Singapore during that six-month period, legitimate interests claimed to have supplied "only small quantities." The remainder are reportedly pirate and counterfeit copies.<sup>149</sup> In an effort to improve their situations, Egypt and Tunisia have approached the IFPI for help.<sup>150</sup> Egypt is also pondering legislation that will require licenses to buy and sell cassettes and to own tape duplication equipment. Furthermore, government authorization may soon be required in order for a licensee to import blank cassettes and export prerecorded cassettes. Proposed penalties for violation of these laws include imprisonment.<sup>151</sup>

#### 4. Far East

The recent clean-up in Hong Kong epitomizes the dramatic success against piracy that is possible when the recording industry and the government work together. In the early 1970's pirate cassettes outnumbered legitimate cassettes in Hong Kong by about fifty to one.<sup>152</sup> In 1972, new copyright legislation<sup>153</sup> became effective and soon afterwards the government's efforts to end piracy began to produce results. Between 1974 and 1978, 200 retailers and 46 manufacturers were investigated by the Customs and Excise Service's Copyright Protection Unit. As a result, 42 pirate tape manufacturing plants were raided,<sup>154</sup> more than 300 arrests were made, and over 500,000 pirate cassettes were

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147. *Piracy in Singapore: A Very Informed Source*, BILLBOARD, Mar. 17, 1979, at SA-24.

148. *Id.* at SA-14.

149. *Id.*

150. BILLBOARD, July 21, 1979, at 27.

151. IFPI, *supra* note 1, at 5.

152. BILLBOARD, Mar. 17, 1979, at 60. Pirates concentrated on cassettes because they are much cheaper to manufacture than records. *Id.* at SA-3, SA-28.

153. Copyright (Hong Kong) Order 1972 (effective December 12, 1972) (applied the British Copyright Act of 1956, [*supra*, note 134] and the Performers Protection Acts of 1958 and 1963, [*supra*, note 127] to Hong Kong, with several minor alterations.)

154. BILLBOARD, Mar. 17, 1979, at SA-3, SA-28.

seized.<sup>155</sup> In an effort to eliminate the pirate trade of street vendors, the Copyright Protection Unit was increased from 7 to 41 in early 1978. By 1979 pirate cassettes constituted less than 5% of the market in Hong Kong.<sup>156</sup>

As a result of the harsh crackdown on cassette piracy, small numbers of counterfeit products have surfaced.<sup>157</sup> Also, some pirates have apparently moved their operations to other southeast Asian sites, while others have formed legitimate record companies.<sup>158</sup> The net benefit of concerted action in Hong Kong is indicated by the substantial increase in legitimate sales, with different companies reporting estimates of 30% to 100% growth.<sup>159</sup>

The Singapore Phonogram Association (SPA) estimates that over 70% of the local market is pirate and counterfeit.<sup>160</sup> Since the crackdown in Hong Kong, Singapore has become a major source of illicit cassettes.<sup>161</sup> Illicit exports increased by over 200% in 1978 to more than ten million units.<sup>162</sup> Illicit cassettes from Singapore have been found in Fiji, Japan,<sup>163</sup> Norway, the United States, New Zealand,<sup>164</sup> Great Britain, Germany,<sup>165</sup> and the Middle East.<sup>166</sup> The government has been accused of ignoring the thriving illicit business, and recent court decisions have crippled the SPA's efforts.<sup>167</sup> The copyright statute<sup>168</sup> was interpreted in late 1978 by the Chief Justice of a High Court as requiring "ex-

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155. *Id.* at 60.

156. BILLBOARD, May 5, 1979, at 67.

157. BILLBOARD, Mar. 17, 1979, at SA-3, SA-28.

158. *Id.* at SA-28.

159. Exact figures are difficult to come by due to the local penchant for secrecy in business affairs. Indeed, it has been difficult even to compile accurate record charts because companies are reluctant to report sales figures. *Id.* at SA-8.

160. *Id.* at SA-9.

161. BILLBOARD, July 21, 1979, at 27; BILLBOARD, June 23, 1979, at 6, 10.

162. BILLBOARD, Mar. 17, 1979, at 92; *see* BILLBOARD, Mar. 15, 1980, at A-18.

163. BILLBOARD, Jan. 26, 1980, at 1, 54, 58.

164. BILLBOARD, Mar. 17, 1979, at 59.

165. BILLBOARD, June 23, 1979, at 1, 10.

166. BILLBOARD, Mar. 17, 1979, at SA-10.

167. *See* text at part II.A.1. and notes 7-19, *supra*.

168. United Kingdom Copyright Act of 1911 and Copyright (Gramophone Records and Government Broadcasting) Act of 1968, CLTW, *supra* note 29 (1969 Supp.). "Every person who makes, reproduces, imports for sale, sells, exposes, or offers for sale, or has in his possession for sale any pirate copies of any gramophone record shall be guilty of an offense." Quoted in BILLBOARD, Aug. 26, 1978, at 3, 96.

act" copies of the entire recording for a finding of copyright infringement.<sup>169</sup> An appeal was denied,<sup>170</sup> and the ruling still stands. The decision apparently allows pirates to escape the copyright statute by making small changes such as compiling songs from different albums or even changing the order of songs on an album.<sup>171</sup> In a more recent case, a trial court fined a retailer \$900 on six charges under the Copyright Act. On appeal the defendant contended that the prosecution had done nothing more than prove that the songs on the legitimate records were also on the pirate cassettes. The appeals court reversed, stating that merely listening to the records was an insufficient test as to whether they were exact copies.<sup>172</sup> Rather, some sort of scientific evidence apparently is required. Ironically, these interpretations of the copyright statute seem to protect the pirates against the copyright owners.

Despite these rulings the SPA is continuing its fight. Regrettably, the penalties against those convicted are small, and thus ineffective.<sup>173</sup> As an alternative, the SPA is considering the possibility of bringing legal actions under laws relating to theft and consumer protection.<sup>174</sup>

On the other hand, the pirates are organizing to protect themselves. More than fifty pirates reportedly have donated \$30,000 to a legal fund and hired an attorney. Cooperation with Malasian pirates and counterfeiters has also been pledged.<sup>175</sup>

## 5. United States

Growing sales of illicit sound recordings cost the music industry in the United States about \$350 million per year<sup>176</sup> and constitute over 25% of the market.<sup>177</sup> Statutory protection of sound recordings divides them into the following two categories: those re-

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169. *Id.*

170. BILLBOARD, Oct. 28, 1978, at 94.

171. BILLBOARD, Aug. 26, 1978, at 3, 96.

172. BILLBOARD, Dec. 22, 1979, at 66.

173. One pirate was fined about \$285 for two charges of pirating tapes. BILLBOARD, Feb. 16, 1980, at 80. Another pirate was fined about \$150 for each of six counts. BILLBOARD, July 28, 1979, at 49.

174. IFPI, *supra* note 1, at 6.

175. BILLBOARD, Dec. 15, 1979, at 38.

176. BILLBOARD, July 21, 1979, at 27. The estimate was made by the FBI.

177. IFPI, *Extent of Piracy of Sound Recordings Worldwide in 1978*, at 2.



corded<sup>178</sup> after February 15, 1972, which are protected by the federal copyright statute (Copyright Act),<sup>179</sup> and those recorded before that date, which are not so protected.<sup>180</sup> The vast amount of music recorded before February 15, 1972, is protected by state anti-piracy legislation,<sup>181</sup> but the application of such state legislation to recordings fixed after that date is expressly pre-empted by the Copyright Act.<sup>182</sup> In addition to prosecutions for criminal copyright infringement,<sup>183</sup> a wide variety of criminal actions against pirates and counterfeiters has been brought. Music thieves are regularly charged with wire fraud, mail fraud, and racketeering. Prosecution for the possession of stolen property is possible if the state statute includes intangible property within the scope of its protection. Prosecution of stolen property is particularly effective because stiffer penalties may result.<sup>184</sup> Actions under state con-

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178. See note 30, *supra*.

179. 17 U.S.C. app. (1976).

180. The Sound Recording Act of 1971, Pub. L. No. 92-140, gave sound recordings federal statutory copyright protection for the first time. The Act was passed for the express purpose of fighting piracy. 117 CONG. REC. 12764 (1971); H.R. REP. No. 487, 92d Cong., 2d Sess. 1, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 1566. This Act expired on December 31, 1974, and was renewed by the Sound Recording Act of 1975, Pub. L. No. 93-573.

181. State anti-piracy legislation for sound recordings fixed after Feb. 15, 1972 is pre-empted by the federal statute. 17 U.S.C. app. § 301. All fifty states, except Vermont, now have anti-piracy statutes. For a discussion of those statutes and their constitutionality under § 301's pre-emption, see *State Anti-Sound Piracy Laws and a Proposed Model Statute: A Time to Consolidate the Victories Against Sound Pirates*, 8 PERFORMING ARTS REV. 1 (1978); for a more dated but very useful chart of then-existing state anti-piracy statutes, see 23 BULL. COPYRIGHT Soc'y 321 (1976); the IFPI has compiled a more up-to-date summary of the state statutes.

182. 17 U.S.C. app. § 301.

183. 17 U.S.C. § 506 (1979) provides a maximum penalty of a \$2,500 fine and/or one year for a first offense and \$10,000 and/or one year for any subsequent offenses. Jules Yarnell notes that because the offense is a misdemeanor it is harder to get law enforcement officers and prosecutors involved in these cases. BILLBOARD, June 23, 1979, at 1, 10.

184. In November, 1979 a Florida State Circuit Court sentenced one pirate to five years in prison (a maximum sentence of fifteen years was possible) for possessing 1,600 pirate tapes with the intent to sell them. RECORD WORLD, Dec. 1, 1979, at 36; BILLBOARD, Nov. 10, 1979, at 15; RECORD WORLD, Nov. 10, 1979, at 4, 46. Compare this sentence with the federal statute's maximum prison term of one year, *supra* note 183, and with the Florida state anti-piracy statute's maximum prison sentence of sixty days, FLA. STAT. ANN. § 543.041 (1972 West). A Chicago federal jury also recently convicted two defendants of one count of il-

sumer protection laws are also possible in twenty-six states.<sup>185</sup> State prosecutions under stolen property laws, consumer protection laws, and other laws not related to copyright, are not preempted by the Copyright Act and thus can be brought irrespective of the date of the recording. It is uncertain whether state misappropriation and unfair competition laws, once the backbone of anti-pirate action, have been pre-empted.<sup>186</sup>

Although substantial pirate, and some bootlegging, activity continues, dealers are encountering increasing risks in handling this easily recognized product. Consequently, pirated recordings are now frequently found in flea markets and other unorthodox locations.<sup>187</sup> As the fight against piracy and bootlegging intensifies,<sup>188</sup> music thieves are turning more towards counterfeit production, and record dealers are handling this product with varying degrees of knowledge. Industry and FBI investigators reportedly find counterfeit product in every retail outlet they inspect.<sup>189</sup> Industry representatives argue that the offering of products at lower prices by sources outside normal distribution channels is a sure warning to wholesalers and retailers.<sup>190</sup> In many cases, however, this is the only warning dealers get, because the quality of some counterfeit product is so high that even the record companies cannot distinguish them from genuine goods.<sup>191</sup> Indeed, some counterfeiters have even duplicated the slight variations in legitimate products that result from using different printing and pressing plants to manufacture the same album.<sup>192</sup> Record companies, on the other

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licit interstate commerce. *BILLBOARD*, Jan. 20, 1979.

185. *See* note 22, *supra*.

186. A detailed analysis of misappropriation and unfair competition doctrines and their possible pre-emption under 17 U.S.C. § 301 (1979) is beyond the scope of this paper.

187. In the autumn of 1979 the FBI seized 1,600 eight-track tapes from a Lexington, Kentucky flea market, *RECORD WORLD*, Oct. 20, 1979, at 65, and 3,800 tapes from a New York flea market, *RECORD WORLD*, Dec. 29, 1979, at 118.

188. Jules Yarnell estimated the costs of piracy and bootlegging in 1979 at \$100 million to \$150 million annually, down from nearly \$400 million annually. *BILLBOARD*, Nov. 3, 1979, at 1, 15. Meanwhile, counterfeiting has boomed to about \$400 million per year according to Yarnell. *RECORD WORLD*, Nov. 3, 1979, at 3, 57. Note the discrepancy in these figures and the FBI's estimates, see text at note 176, *supra*.

189. *Id.*

190. *BILLBOARD*, July 21, 1979, at 27, 41.

191. *RECORD WORLD*, Nov. 3, 1979, at 57.

192. *RECORD WORLD*, Feb. 16, 1980, at 8.

hand, have been working to develop coding systems<sup>193</sup> that would enable them to detect counterfeits in stores and in shipments of returns.<sup>194</sup> At present, record companies often give credit for the return of counterfeit product, thus, in effect, buying counterfeits of their own recordings. Furthermore, the scope of this problem has only recently been uncovered. In January 1980, Polygram Distribution discovered \$400,000 worth of allegedly counterfeit albums in a shipment of returns from Sam Goody, a retail chain in the northeast owned by Pickwick International.<sup>195</sup> By the end of February, a federal grand jury had indicted the Sam Goody chain, its president, and a vice president on sixteen counts of racketeering, interstate transportation of stolen property, and the unauthorized distribution of copyrighted sound recordings.<sup>196</sup>

Law enforcement agencies have become very active against music thieves. FBI investigations, often beginning at the retail level, led to 112 convictions in 1978.<sup>197</sup> In March 1979, over 350 investigations were already in progress.<sup>198</sup> "Operation Mod Sound" and "Operation Turntable," two FBI undercover investigations, recently exposed two of the largest counterfeit and pirate rings in the country.<sup>199</sup> Information gathered in the "Mod Sound" opera-

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193. See note 27, *supra*.

194. Record company policy in the United States has been to accept the unlimited returns of unsold product. Credit is given for these returns. Several companies, spurred by recent poor economic conditions, have instituted limits on returns. See text at notes 112-13, *supra* for England's counterfeit returns problem.

195. BILLBOARD, Feb. 9, 1980, at 1, 55. Polygram did not discover the counterfeits until it received a Justice Department subpoena for particular products returned by the Goody chain. RECORD WORLD, Feb. 16, 1980, at 8. The investigation of the Sam Goody chain reportedly drew heavily on information received in the Mod Sound investigation, *infra* note 199. RECORD WORLD, Mar. 8, 1980, at 3, 59.

196. *Id.* If convicted of all counts, Sam Levy, the president, and Sam Stolon, the indicted vice president, face up to sixty-two years in prison and fines of up to \$355,000.

197. Statement of Julian Perez of the FBI, BILLBOARD, Mar. 31, 1979, at 3, 135.

198. *Id.*

199. "Operation Mod Sound" was a twenty month investigation of the FBI and the Brooklyn Organized Crime Strike Force that culminated in the December 6, 1978, raids of nineteen sites in five states (New York, New Jersey, North Carolina, Connecticut and Georgia). The raids allegedly wiped out between one-third to one-half of the piracy and counterfeiting in the nation. BILLBOARD, Dec. 16, 1978, at 1, 72. N.Y. Times, Dec. 7, 1978, at A-1, C-22. "Operation Turntable"

tion also led to the Sam Goody indictment as well as the indictment of some counterfeiters in England.<sup>200</sup>

The music industry in the United States is also contributing to the enforcement effort. The National Music Publishers Association (NMPA)<sup>201</sup> and the National Association of Record Manufacturers (NARM)<sup>202</sup> have each donated to the RIAA's million dollar anti-piracy budget.<sup>203</sup> NARM and RIAA are jointly operating a toll free number so retailers and the public can report any suspected illicit recordings.<sup>204</sup> NARM also conducts shopping reports, another method of discovering illicit products.<sup>205</sup> Finally, the New York local of the American Federation of Musicians (AFM) has volunteered its membership as lookouts against piracy.<sup>206</sup>

### III. HOME TAPING

#### A. Introduction

While the recording industry has been fighting piracy, bootlegging, and counterfeiting for several years, only recently has it begun to focus attention on the home taping problem. The current concern<sup>207</sup> arises in response to a combination of the following factors: (1) the fight against unauthorized commercial duplications is more under control now, especially in developed markets where taping equipment is more commonly owned, (2) pre-

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involved FBI raids in South Carolina, Maine, and Florida on April 18, 1979. \$40,000 worth of "pancakes" (large reels of tape from which eight-tracks or cassettes are processed), two tape master units, and twenty-seven tons of miscellaneous equipment, were seized at a South Carolina factory for allegedly illegal product. *BILLBOARD*, May 26, 1979, at 16.

200. See note 117, *supra*.

201. *BILLBOARD*, Nov. 25, 1978, at 98.

202. *RECORD WORLD*, Jan. 26, 1980, at 3.

203. *BILLBOARD*, June 23, 1979, at 1, 10.

204. The number is 800-223-2328.

205. The reports were instituted several years ago when twenty to thirty reports concerning illegal product were being received each month from NARM members. Very few reports are made anymore. *BILLBOARD*, Nov. 3, 1979, at 15.

206. *BILLBOARD*, Apr. 21, 1979, at 6.

207. *RECORD WORLD*, Oct. 27, 1979, at 3. Evidencing record industry concern, in an address to the National Association of Broadcasters radio convention, Bob Sherwood, President of Phonogram/Mercury, referred to home taping as "the single biggest problem facing our industry." *Id.* And, in an open letter to broadcasters, Joe Smith, Chairman of Electra/Asylum, recently wrote that home taping "can be the most dangerous threat thus far to our well-being." *Id.*

corded music sales and profits have been slumping since the end of 1978, or at least growing more slowly than in previous years, (3) tape hardware sales (i.e., cassette, reel to reel, and eight-track recording and playback units) and blank tape sales are growing very rapidly, and (4) technological developments in the tape industry have enabled more consumers to approximate the quality of prerecorded products by taping at home. The revenues lost from home taping damage a wide range of parties, including record companies, distributors, retailers, recording artists, songwriters, musicians, those who receive commission on record sales (e.g., artists' personal managers, business managers, and attorneys), and government.

### B. *Extent of Loss Caused by Home Taping*

Although there is no reliable data on the extent of loss caused by home taping, available statistics support the view that substantial losses are occurring. The RIAA and the NMPA recently commissioned a survey (the Roper Survey)<sup>208</sup> to determine the impact of private taping on record sales. It concluded that 22% of the population in the United States<sup>209</sup> has taped music at home during the past year.<sup>210</sup> The survey analyzed lost sales of prerecorded music two ways. The first method computed the number of recordings reportedly home taped and concluded that 22% of potential unit sales<sup>211</sup> of complete albums and 48% of potential unit sales of singles, or 29% of all potential unit sales were lost by

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208. The Roper Organization Inc., *A Study on Tape Recording Practices among the General Public*, conducted for the National Music Publishers Association and the Recording Industry Association of America (June, 1979) [hereinafter cited as the Roper Survey]. The survey results, not released until December, 1979, were delayed until the Copyright Royalty Tribunal survey results were released. See note 219, *infra*.

209. See *id.* at 13-15 for details as to the sample and other survey methodology.

210. *Id.* at 5. The study shows that more children (age ten to seventeen) (32%) tape than do adults (21%), that more men (27%) tape than women (18%) and that those with higher family incomes tape more than those with lower family incomes (11% of those with family incomes under \$7,000, 19% with income between \$7,000 and \$14,999, 27% with incomes between \$15,000 and \$24,999, and 28% with incomes over \$25,000, tape music).

211. Potential unit sales are the total number of purchases reported by the respondents plus the number of music recordings respondents did not purchase because of home taping. *Id.* at 9, 10.

the recording industry because of home taping.<sup>212</sup> The report analyzing the survey data, however, reported these figures may have exaggerated actual losses.<sup>213</sup> The second method of computing losses was based on reported tapings from borrowed recordings. This procedure revealed that 14% of potential unit sales<sup>214</sup> of singles and albums were lost to home taping.<sup>215</sup> The study concluded that 14% is "closer to the mark" than 29%, and that even 14% may overstate the loss.<sup>216</sup> But in an industry where the 1979 gross shipments of singles and albums (in all configurations) exceeded \$3.6 billion,<sup>217</sup> even lower percentages of loss would translate into a significant loss of revenue. The survey also indicated that 74% of the respondents are presently taping the same amount of music, or more, that they have in previous years.<sup>218</sup>

The Home Taping Commission of the Copyright Royalty Tribunal also commissioned a survey (CRT Survey)<sup>219</sup> as part of its preliminary phase of studying the issue. A national sample of households "with at least one piece of equipment capable of play-

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212. *Id.* at 8, 9.

213. *Id.* at 9. For example, these figures show that tapers would have bought 90% of everything they taped from sources other than their own collection of recordings.

214. Here the potential unit sales are the total number of purchases reported plus the reported number of recordings made from borrowed recordings. *Id.* at 10.

215. *Id.* at 9, 10.

216. *Id.* at 10.

217. RIAA Press Release, *supra* note 12. This figure is based on the volume of manufacturers' shipments and the suggested retail list price. Actual retail sales figures are lower because of the return of unsold recordings to manufacturers. *See* note 194, *supra*.

218. 38% of the subjects reported taping more music now than a year ago, 36% reported the same amounts, and 24% reported taping less. Roper Survey, *supra* note 208, at 10.

219. William R. Hamilton and Staff, *A Survey of Households with Tape Playback Equipment*, prepared for the Copyright Royalty Tribunal (Sept., 1979) [hereinafter cited as CRT Survey]. The Copyright Royalty Tribunal was created by the Copyright Act, 17 U.S.C. § 801. The Tribunal created the Committee on Home Taping on Aug. 24, 1978, for the purpose of conducting a "full study and examination of all aspects of the taping problem, such study to take into account the interest and concerns of consumers, manufacturers of home taping equipment, creative artists, and owners and producers of copyrighted materials." *Report of the Committee on Home Taping* (Nov., 1979), at 1 [hereinafter cited as Committee Report] (this report concerning the CRT Survey results was released with the survey results and is available from the Copyright Royalty Tribunal).

ing back magnetic tape either in the home or in the car"<sup>220</sup> was surveyed in August and September of 1979. In 57% of the households, no one taped music during the past year. In those households in which taping occurred, 19% taped less than two hours per month, 16% taped between three and ten hours per month, and 7% taped over ten hours per month.<sup>221</sup> The survey concluded that substantial revenues were lost to home taping because 70% of the music tapers "would have purchased the last record or prerecorded tape they taped if they had been unable to tape it."<sup>222</sup>

A 1977 British survey concluded that approximately thirteen million persons in the United Kingdom practice home taping.<sup>223</sup> The loss to the recording industry was estimated at \$150 million in retail sales,<sup>224</sup> or roughly 25% of the \$600 million of total retail sales in the United Kingdom in 1977.<sup>225</sup> Recording industry estimates for 1979, however, indicate a loss of \$300 million, a figure in excess of 30% of the total retail business in the industry.<sup>226</sup> These reports of increasing home taping accompany a recording industry sales slump. In 1979, for example, sales of albums in all configurations declined more than 9.5 million units. In contrast, prerecorded cassette sales increased by nearly 3 million units.<sup>227</sup>

A sampling of survey results and estimates in other territories mirrors the substantial impact of home taping. For example, 63.9% of Japanese tape hardware users record off the air and from prerecorded albums.<sup>228</sup> Estimates in Australia have placed losses due to home taping at \$24 million per year or \$50 million per year,<sup>229</sup> depending on the source. Mexico and Uruguay have reported losses of 33% and 80% of their retail markets respec-

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220. CRT Survey, *supra* note 219, at 1. Thus, not all of the households have the capability of recording music. 45% of the eight-track players and 93% of the cassette players in the study had recording capability. *Id.* at 3.

221. *Id.* at 5 (Table 3).

222. Committee Report, *supra* note 219, at 3.

223. BILLBOARD, Mar. 31, 1979, at 1,144.

224. *Id.*

225. *Id.*

226. BILLBOARD, Jan. 26, 1980, at 1, 54, 58.

227. BILLBOARD, Mar. 1, 1980, at 1, 50.

228. BILLBOARD, Jan. 6, 1979, at 1, 36. This survey was conducted by the Electronic Industries Association of Japan, an association representing the tape hardware industry, not the recording industry.

229. BILLBOARD, Mar. 15, 1980, at A-1, A-8, A-10.

tively.<sup>230</sup> In Sweden, the State Council for Culture reported that the stagnation in record sales in 1977 and 1978 was largely caused by increased home taping.<sup>231</sup> Finally, in West Germany, a 1977 survey found that twice as many hours of music were taped at home as were bought in prerecorded form.<sup>232</sup>

In addition, the Roper Survey found that "69% of all blank tapes bought or received as gifts in the past twelve months were used to record music."<sup>233</sup> Similarly, in West Germany it is estimated that 65% of all blank tapes are used to record off-air.<sup>234</sup> Thus, it is not surprising that the recording industry eyes the continued boom in blank tape sales<sup>235</sup> as another index of increasing home taping. In the United States, 1979 estimates placed sales of blank cassettes at around 300 million units—an increase of about 25 million units for the second year in a row.<sup>236</sup> Furthermore, sales of premium quality cassettes, which are most suitable for recording music, are growing at the fastest rate.<sup>237</sup> Figures in other territories vary with the source, but blank cassette sales throughout the world seem to follow the United States trend.<sup>238</sup> For example, a survey of global audio cassette sales conducted by BASF<sup>239</sup> estimated that one billion cassettes were sold worldwide in 1977.<sup>240</sup> Of these, 720 million were blank and 280 million were prerecorded. Furthermore, the volume of blank sales<sup>241</sup> is increas-

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230. BILLBOARD, Apr. 21, 1979, at 3.

231. BILLBOARD, Apr. 7, 1979, at 1, 87.

232. BILLBOARD, June 16, 1979, at 70.

233. Roper Survey, *supra* note 208, at 11.

234. BILLBOARD, Dec. 22, 1979, at 70.

235. In the United States, figures for total audiotape sales generally include eight-track, cassette, and sometimes reel to reel sales. Foreign figures generally refer only to cassette sales as the other configurations have never become very popular outside of North America.

236. BILLBOARD, Jan. 5, 1980, at 34.

237. BILLBOARD, Aug. 26, 1978, at 62; *see* BILLBOARD, Jan. 5, 1980, at 34.

238. *See* BILLBOARD, Oct. 27, 1979, at BT-1-BT-17; BILLBOARD, Jan. 27, 1979, at 6; BILLBOARD, Dec. 2, 1978, at 60; BILLBOARD, Aug. 5, 1978, at 64, 74. *But see* BILLBOARD, July 14, 1979, at 42.

239. BASF, a West German corporation, is one of the world's leading tape manufacturers.

240. BILLBOARD, July 29, 1978, at 1, 52.

241. Of course, not all of these blank tapes are being used for the home taping of prerecorded music. Cassettes are commonly used by businesses, courts, religious and educational institutions, among others. In addition, large numbers of blank cassettes are also used by the illicit recording industry; *i.e.* pirates, counterfeiters, and bootleggers.



ing more rapidly than is the volume of prerecorded sales.<sup>242</sup>

Tape manufacturers, whose point of view and figures are as slanted as those of the recording industry, acknowledge the existence of the home taping problem but contend that home taping stimulates rather than harms purchases of prerecorded music.<sup>243</sup> Some support for this position can be gleaned from the results of the CRT and Roper Studies. The CRT Survey shows that "40% of the music tapers say their purchases of prerecorded music have increased since they began taping music, and 40% said they have declined."<sup>244</sup> Further, there is some indication that frequent tapers spend more on prerecorded music.<sup>245</sup> The Roper Survey implies that there is even a stronger correlation between home taping and purchases of prerecorded music. It made the following findings: (1) twice as many tapers as nontapers bought disc albums in the last year; (2) almost twice as many tapers as nontapers bought singles and prerecorded eight-track tapes in the last year; and (3) four times as many tapers as nontapers made purchases of prerecorded cassettes in the last year.<sup>246</sup> These stud-

242. *Id.* The following chart shows the ratio of blank tape sales to prerecorded sales in 1976 and 1977 as reported in the BASF survey:

PRERECORDED BLANK SALES RATIOS

1977 Blank:Prerec.		1976 Blank:Prerec.
85:15	U.S./Canada	83:17
68:32	Europe	71:29
65:35	Asia	67:33
75:25	Latin America	80:20
40:60	Africa	50:50
70:30	Other	75:25
72:28	Worldwide	75:25

243. For example, it was suggested by Robert Kaplan, a representative of the French tape manufacturing industry, that a record may be too expensive for a single teenager to buy. But if he or she antes up with a few friends, the group can buy it together so they all can copy it. Thus, instead of losing two record sales, the recording industry has sold one record instead of none. *BILLBOARD*, Apr. 19, 1980, at 80.

244. CRT Survey, *supra* note 219, at 8.

245. *Id.*

246. Roper Survey, *supra* note 208, at 7. *BILLBOARD*, Apr. 19, 1980, at 80; *BILLBOARD*, Oct. 27, 1979, at BT-1. Henry Pattinson, chairman of the European Tape Industry Association at the time, was quoted as saying, "The British Phonographic Industry has said that \$135 million is lost each year through home taping. Now that figure is absolutely hypothetical. It is money that was never spent and there is no way of knowing if it ever would have been." *BILLBOARD*,

ies, of course, identify only correlations and not causes.

Representatives of tape manufacturers argue that their industry's growth has been a convenient scapegoat for, rather than cause of, poor sales in the recording industry.<sup>247</sup> Nevertheless, in 1978 the United States recording industry suffered a decline of fifty million units in album shipments and thirty-one million units in prerecorded eight-track tape shipments. Despite increased sales of singles, and a seventeen million unit increase in prerecorded cassette shipments, total industry shipments dropped in retail list price value by \$455 million—the first such decline since 1960.<sup>248</sup> The sales slump has also been felt in the major record markets of West Germany,<sup>249</sup> France,<sup>250</sup> the United Kingdom,<sup>251</sup> Scandinavia,<sup>252</sup> Japan,<sup>253</sup> and Australia.<sup>254</sup>

In summary, the part that home taping has played in the record industry slump is unclear. What is clear is that the slump has caused the recording industry to feel the effects of home taping more acutely than ever before, and the industry is now looking much harder for causes and solutions.

### C. *Reasons for Increasing Home Taping*

There are several factors that encourage home taping. Many people simply tape for personal convenience. Over 50% of the tapers who responded to the CRT Survey cited the convenience of assembling singles and songs from different albums on one tape.<sup>255</sup>

Tape manufacturers claim that the growing number of tape players in automobiles and the practice of taping from one's own collection for the car's player have absorbed much of their in-

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Aug. 5, 1978, at 64, 74.

247. As one tape manufacturing executive curtly put it: "When the record business caught a cold and we didn't get pneumonia, the inference was that we had done it." Statement of Al Pepper, Memorex audio division marketing manager. *BILLBOARD*, Nov. 10, 1979, at 3, 88.

248. RIAA Press Release, *supra* note 12.

249. *BILLBOARD*, Mar. 29, 1980, at 106; *BILLBOARD*, Mar. 22, 1980, at 68.

250. *BILLBOARD*, Jan. 26, 1980, at 56.

251. *BILLBOARD*, Mar. 1, 1980, at 1; *BILLBOARD*, Feb. 16, 1980, at 80.

252. *BILLBOARD*, Apr. 7, 1979, at 1, 87; *BILLBOARD*, June 17, 1978, at 88.

253. *BILLBOARD*, Jan. 6, 1979, at 1, 36, 66.

254. *BILLBOARD*, Mar. 15, 1980, at A-1; *BILLBOARD*, Mar. 17, 1979, at SA-4.

255. Committee Report, *supra* note 219, at 3.

creased sales.<sup>256</sup> The first claim is consistent with recent estimates for the United States that 7.5 million automobile tape units were sold in 1979<sup>257</sup> and that 40 million cars now have tape players.<sup>258</sup> The second claim comports with the Roper Survey's finding that the largest source of taping was the taper's own collection.<sup>259</sup> The Roper Survey also found that 30% of tapings were made from radio.<sup>260</sup> In addition, a United Kingdom survey indicated that 40% of tapings were from radio or television,<sup>261</sup> while in West Germany it appears that 65% of blank cassettes are used to tape off-air.<sup>262</sup> This data backs recording industry contentions that the practice of airing albums without interruption, especially by FM rock music stations, is turning radio into an important source of recorded music.<sup>263</sup> Although the airing of full albums is not a new practice among FM rock stations, the number of these stations has increased in recent years.<sup>264</sup> Furthermore, the CRT Survey showed that rock music was "by far the most common type of music taped."<sup>265</sup> Some stations have further fanned the fire created by this issue by announcing in advance the time that albums will be aired,<sup>266</sup> and by encouraging listeners to cue up their recorders.<sup>267</sup> A Los Angeles station, KRTH-FM, took the unprecedented step last year of advertising the scheduling of uninter-

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256. See BILLBOARD, Apr. 19, 1980, at 80 (French tape manufacturing industry); BILLBOARD, Jan. 5, 1980, at 34, 43; BILLBOARD, Nov. 10, 1979, at 3, 88 (United States tape industry); BILLBOARD, July 14, 1979, at 42, 82 (England).

257. BILLBOARD, Oct. 27, 1979, at BT-1, BT-2.

258. BILLBOARD, June 9, 1979, at 60, 71. The CRT Survey found that 30% of the households had a car with an eight-track player and 22% had a car with a cassette player (some households had both types of players in their cars). CRT Survey, *supra* note 219, at 3.

259. Roper Survey, *supra* note 208, at 6. 37% of all items taped were from the taper's own collection, with 24% from borrowed recordings, 30% from radio programs, and 10% from live concerts.

260. Roper Survey, *supra* note 208, at 6.

261. BILLBOARD, Aug. 4, 1979, at 29.

262. BILLBOARD, Dec. 22, 1979, at 70.

263. BILLBOARD, Nov. 3, 1979, at 3, 30; RECORD WORLD, Oct. 27, 1979, at 3, 24.

264. RECORD WORLD, Oct. 20, 1979, at 3, 22.

265. CRT Survey, *supra* note 219, at 6. 60% of those who taped rock, 23% taped country, 23% taped disco, 21% taped jazz and easy listening, 19% taped classical and 14% taped soul.

266. RECORD WORLD, Nov. 3, 1979, at 6, 57; RECORD WORLD, Oct. 20, 1979, at 3, 22.

267. RECORD WORLD, Nov. 3, 1979, at 6, 57.

rupted albums in a full page newspaper advertisement.<sup>268</sup> Negative reaction from record companies was swift,<sup>269</sup> and the RKO radio chain (of which KRTH-FM is a member) changed its policy in a spirit of cooperation. The RKO chain no longer airs uninterrupted albums and has urged other radio broadcasters to follow suit.<sup>270</sup>

While pointing a finger at blank tape manufacturers and at radio practices, the recording industry should be examining some of its own practices as well. The inconsistent quality of some pre-recorded music is undoubtedly a cause of some off-air taping.<sup>271</sup> Retailers are split on the issue. Some cite low levels of returns of defective prerecorded cassettes, while others complain that pre-recorded eight-track and cassette quality has never been satisfactory and can be matched by taping off the air.<sup>272</sup>

Less than 20% of the tapers who responded to the CRT Survey reported they were motivated primarily by saving money.<sup>273</sup> However, given present economic conditions, and higher prices for prerecorded music than for premium quality blank tapes, these financial considerations become more important. Indeed, record companies are responding to this problem by striving to keep prices down.<sup>274</sup>

An ironic note to the stand-off between blank tape manufacturers and record companies is the practice of some Canadian retail record chains (owned by the Capitol and CBS record companies) of cooperating with manufacturers in promotion of blank tape sales.<sup>275</sup> Another peculiar twist is the increasing use by tape manufacturers of recording artists to endorse blank tape.<sup>276</sup>

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268. *Id.*

269. *Id.* See BILLBOARD, Nov. 3, 1979, at 3, 30, for the text of a RIAA statement to radio broadcasters which was signed by executives from most major record companies.

270. *Id.*

271. BILLBOARD, Oct. 27, 1979, at BT-1; RECORD WORLD, Oct. 20, 1979, at 3; BILLBOARD, Aug. 4, 1979, at 1, 29.

272. RECORD WORLD, Feb. 16, 1980 at 3, 62.

273. CRT Survey, *supra* note 219, at 3.

274. Record labels are now striving to keep prices down by offering new artists' albums and established artists' catalogue (*i.e.*, non-current) albums at lower prices. See BILLBOARD, Apr. 19, 1980, at 3.

275. BILLBOARD, Feb. 16, 1980, at 84.

276. BILLBOARD, Nov. 10, 1979, at 3, 88. "Is it live, or is it Memorex?" Ella Fitzgerald, Melissa Manchester, Chuck Mangione, and Nelson Riddle have all advertised for Memorex tape. Ray Charles has endorsed 3M/Scotch tape. Stevie

### D. Legal Status of Home Taping

While the scope of home taping is certainly substantial enough to warrant recording industry concern, there is little legal action that can be taken. In many nations home taping is expressly legal and, where it is illegal, the practical difficulties of stopping it through lawsuits or prosecutions are obvious—especially if individual privacy is to be respected. Of the countries surveyed in this Note, the reproduction of sound recordings for private, non-profit use is expressly permitted on the face of copyright statutes in Austria,<sup>277</sup> Denmark,<sup>278</sup> Egypt,<sup>279</sup> Finland,<sup>280</sup> West Germany,<sup>281</sup> Hungary,<sup>282</sup> Japan,<sup>283</sup> Liechtenstein,<sup>284</sup> Netherlands,<sup>285</sup> Norway,<sup>286</sup> the Philippines,<sup>287</sup> the Republic of South Africa,<sup>288</sup> Sweden,<sup>289</sup>

Wonder has plugged TDK tape, and the Bee Gees, Blondie, Atlanta Rhythm Section, Blue Oyster Cult, and Alicia Bridges have all done commercials for Ampex tape.

277. Arts. 69(3), 76(4), Federal Act on Copyright in Works of Literature and Arts and on Related Rights, Apr. 9, 1936, as amended on Dec. 29, 1972, reprinted in CLTW, Supp. 1973, *supra* note 29.

278. Art. 11, Law No. 158 on Copyright in Literary and Artistic Works, as amended June 8, 1977 (Act No. 246), reprinted in CLTW, Supp. 1978, *supra* note 29.

279. Art. 12, Law Relating to the Protection of Copyright No. 354 of June 24, 1954 reprinted in CLTW, Supp. 1971, *supra* note 29.

280. Art. 11, Law No. 404 Relating to Copyright in Literary and Artistic Works of July 8, 1961, as amended on Aug. 23, 1971, reprinted in CLTW, Supp. 1972, *supra* note 29.

281. Art. 53(1), Copyright Statute of September 9, 1965, as amended on Aug. 24, 1973, B6BII, art. 53(1) reprinted in CLTW, Supp. 1974, *supra* note 29.

282. Art. 18(1), Copyright Act of Jan. 1, 1970, as amended on Jan. 1, 1979, reprinted in CLTW Supp. 1978, *supra* note 29.

283. Art. 30, Copyright Law, Law No. 48 of May 6, 1970, as amended on May 18, 1978, reprinted in CLTW Supp. 1978, *supra* note 29.

284. Art. 22, Law Concerning Copyright in Literary and Artistic Works as amended on Aug. 8, 1959, reprinted in CLTW, Supp. 1960, *supra* note 29.

285. Art. 16(b), Law Concerning the New Regulation of Copyright, of September 23, 1912, as amended on Oct. 27, 1972, reprinted in CLTW, Supp. 1973, *supra* note 29.

286. Art. 11, Act Relating to Property Rights in Literary, Scientific, or Artistic Works, of May 12, 1961, reprinted in CLTW, Supp. 1962, *supra* note 29.

287. Art. II, 10(2), Decree No. 49 on the Protection of Intellectual Property of November 14, 1972, reprinted in CLTW, Supp. 1973, *supra* note 29.

288. Art. 7(1)(a), Act to Consolidate and Amend the Law Relating to Copyright and Matters Incidental Thereto, of May 19, 1965, reprinted in CLTW, Supp. 1965, *supra* note 29.

289. Art. 11, Law No. 729 on Copyright in Literary and Artistic Works of

Switzerland,<sup>290</sup> and Turkey.<sup>291</sup>

In the United States the legality of home taping is uncertain because the matter has not been specifically addressed by either the legislators or the courts. The issue boils down to whether home taping is a "fair use"<sup>292</sup> and thus not an infringement of the exclusive right to reproduce phonorecords that is granted to the copyright owner of sound recordings by the Copyright Act.<sup>293</sup> Congress did not define fair use when it included this judicial doctrine in the Copyright Act. Rather, four non-inclusive factors were listed without any indication of the relative weight to be assigned to each.<sup>294</sup> It appears that Congress intended to give the courts wide latitude in adapting the doctrine to particular situations.<sup>295</sup> While neither the Copyright Act nor its legislative history<sup>296</sup> explicitly mentions home taping, the legislative history of the Sound Recording Act<sup>297</sup> leaves little doubt as to legislative intent:

Specifically, it is not the intention of the committee to restrain the home recording, from broadcast or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past twenty years.<sup>298</sup>

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December 30, 1960, as amended on Apr. 22, 1976, reprinted in CLTW, Supp. 1978, *supra* note 29.

290. Art. 22, Federal Law Concerning Copyright in Literary and Artistic Works of December 7, 1922, as amended on June 24, 1955, reprinted in CLTW, *supra* note 29.

291. Art. 38, Law on Artistic and Intellectual Works, of December 10, 1951, reprinted in CLTW, *supra* note 29.

292. Copyright Act, 17 U.S.C. § 107 (1976).

293. *Id.* § 106(1).

294. *Id.* § 107. The factors to be considered include: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for or value of the copyrighted work. See 3 M. NIMMER, ON COPYRIGHT, § 13.05(a) (1978).

295. H.R. REP. No. 1476, 94th Cong., 1st Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 56, 59.

296. See Note, *Home Videorecording: Fair Use or Infringement?*, 52 S. CAL. L. REV. 573, at note 137, 600-01 (1979).

297. See note 180, *supra*.

298. H.R. REP. No. 487, 92d Cong., 2d Sess. 1, reprinted in [1971] U.S. CODE

The Sound Recording Act's general language was influenced by earlier drafts of the Copyright Act<sup>299</sup> and its provisions were later included in the Copyright Act. Thus, a strong argument can be made that home taping should be considered a fair use of copyrighted sound recordings.

A California district court recently held, in *Universal City Studios, Inc. v. Sony Corporation of America*<sup>300</sup> (the *Betamax* case), that home video taping was a fair use. The court found that the noncommercial home-use taping of material that was broadcast free of charge over the public airwaves did not reduce the market for the copyright owners' works and thus was a fair use.<sup>301</sup>

This decision indicated, however, that sound recordings can be distinguished from the video recordings in several ways. First, commercial sound recordings are sold directly to the public and home taping can alleviate the need to buy the recordings. By contrast, television producers are compensated by the television networks that broadcast their shows "free" to the public, and home taping merely affects viewer patterns and ratings for returns.<sup>302</sup> Second, the *Betamax* court's analysis is based entirely on the effects of taping off public airwaves, but the primary source of home radio taping is other recordings.<sup>303</sup> Though off-air taping of sound recordings can be compared to the video recording of television shows, an important distinction is that producers of phonograms are not compensated by radio (and thus rely entirely on record sales for remuneration) because the Copyright Act does not grant them performing rights in their sound recordings.<sup>304</sup> Thus, record companies, unlike motion picture companies, cannot stop radio stations from broadcasting their recordings. Off-air taping of sound recordings is different from off-air video recording in other important respects as well. For example, in discussing the criteria of fair use,<sup>305</sup> the *Betamax* court characterized home

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CONG. & AD. NEWS 1566, 1572.

299. Though the act was originally intended to be a part of the new Copyright Act, it was enacted before the new Act because of the urgency of the piracy problem. S. REP. No. 72, 92d Cong., 1st Sess. 7, 8 (1971).

300. 480 F. Supp. 429 (C.D. Cal. 1979).

301. *Id.* at 456.

302. Movies broadcast over television are an exception to this proposition, as some movies are now offered to the public in prerecorded form.

303. See text at note 259, *supra*.

304. 17 U.S.C. §§ 106(4), 114(a).

305. See note 292, *supra*.

video recording as a "noncommercial home use." The court also found that the purpose of the duplication was to increase the taper's limited access to material which the plaintiffs chose to broadcast into their homes.<sup>306</sup> Although taping a song does increase listener access (especially when the song is no longer programmed on the radio) there is a large difference in scale between home audio and home video taping. While a television show or movie is typically broadcast only once or twice a year, popular sound recordings are broadcast frequently (and are readily accessible at record stores).<sup>307</sup> Whether this distinction based on accessibility will be embraced by the courts after *Betamax* is unclear. This is because the *Betamax* court rejected as too speculative, plaintiff's allegations of harm and plaintiff's assumption that the widespread marketing of video recorders would encourage many of the seventy-five million households with televisions to purchase these products and build up a library of taped shows.<sup>308</sup> Though this assumption may still be speculative in the relatively new and expensive video market<sup>309</sup> it is already reality in the audio market.

Distinguishing home audio recordings from home video taping in order to avoid rulings of what constitutes fair use would seem to be an academic exercise. The legal, economic, social, and political ramifications of a holding that home taping is a copyright violation would make courts reluctant to reach this conclusion. As the *Betamax* court stated, these factors are better suited to the legislative process.<sup>310</sup> Nevertheless, the legislative history of the Copyright Act on the issue of home audio taping will make a finding of fair use very easy and convenient for a court that considers the issue.

Unlike the United States, home taping is considered to be an infringement of copyright in several countries. In Belgium<sup>311</sup> and

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306. *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 454 (C.D. Cal. 1979).

307. For example, some songs achieve a million performances.

308. *Id.* at 451.

309. *Betamax* recorders cost over \$800 and videotape for the *Betamax* costs about \$20.

310. *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 469 (C.D. Cal. 1979).

311. Law on Copyright of March 22, 1886, as amended up to March 11, 1958, CLTW, *supra* note 29, (1959 Supp.).



Luxembourg,<sup>312</sup> home taping is illegal because it is not included in the exclusive list of private use reproductions that are expected from copyright infringement.<sup>313</sup> In Italy, the copyright statute allows reproductions of single works or portions thereof for the personal use of readers, "when made by hand or by means of reproduction unsuitable for circulating or disseminating the work in public."<sup>314</sup> Prevailing legal theory requires a strict reading of this language which should prevent its extension to sound recordings.<sup>315</sup> In the United Kingdom, the copyright statute allows private reproduction of sound recordings and other copyrighted work solely for the purpose of research and private study.<sup>316</sup> Home taping, however, does not fit into these categories and is considered a violation of copyright.<sup>317</sup> Furthermore, a criminal statute, the Performers Protection Act, prohibits unauthorized taping of performances of musical works for commercial use.<sup>318</sup> In a recent case of first impression, the BPI sought an injunction against a home tapper who had compiled a library of 450 recordings and traded them with other home tappers. Citing substantial harm to the copyright owners if a bootlegger ever acquired possession of the high quality tapes, the BPI seized the tapes and sought an injunction preventing further taping and trading of the tapes.<sup>319</sup> The court granted the injunction against tape trading, but refused to enjoin the practice of taping for private use only.<sup>320</sup>

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312. Law on Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, of September 23, 1975, CLTW, *supra* note 29 (1972 Supp.).

313. A. DIETZ, *supra* note 285, at 118.

314. Art. 68, Law No. 633 of Apr. 22, 1941 on Copyright, *as amended* up to May 5, 1976, CLTW, *supra* note 29 (1956).

315. A. DIETZ, *supra* note 285, at 118.

316. Art. 6(1), Copyright Act of 1956, *as amended* on Feb. 17, 1971, CLTW, *supra* note 29 (1972 Supp.). Art. 14(4)(b) allows taping of radio and television broadcasts for private purposes. This provision does not supersede the copyright protection given to sound recordings and songs that are broadcast. Thus, it is limited in scope to the broadcast of live performances or uncopyrighted performances.

317. A. DIETZ, *supra* note 285, at 118; interview with Hugh Laddie, *supra* note 125.

318. Art. 1, Performers Protection Act, *supra* note 127. There is a defense, however, if the recording is used for private use only. *Id.*

319. BILLBOARD, Apr. 5, 1980, at 6.

320. Interview with Hugh Laddie, *supra* note 125.

### E. *Solutions to the Home Taping Problem*

Since it is extremely difficult to enforce a copyright provision against home taping, the recording industry views a levy as the fairest and most practical solution to the home taping problem. The West German Copyright Act of 1965, which allows copying sound recordings for personal use, is unique in granting copyright owners a right to be compensated from tape equipment manufacturers for home taping.<sup>321</sup> A proposal that the statute also include a levy on blank tape sales, however, was rejected as unnecessary to copyright protection and impractical because of the difficulty in distinguishing blank tape use for dictating machines (which are exempt from the hardware levy) and use for recording copyrighted works.<sup>322</sup> At present, the levy on taping equipment is collected by the Central Body for Private Recording Rights (ZTU), which is comprised of three organizations: (1) GEMA, which represents and distributes proceeds to composers, authors, and publishers, (2) GVL, which represents performers and record companies, and (3) WORT, which represents print authors.<sup>323</sup> The levy, which cannot exceed 5% of the manufacturer's proceeds,<sup>324</sup> is now considered totally inadequate by the recipients.<sup>325</sup> The value of the levy has declined with reduced hardware prices and inflation,<sup>326</sup> and it is estimated that the typical compensation for home taping is one-thirtieth of the compensation received from sales of prerecorded music.<sup>327</sup> The inequity has been highlighted further by the disparity in trends between hardware and blank

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321. Arts. 53(1), 53(5), Copyright Act of Sept. 9, 1965, *as amended* on Mar. 2, 1974, ILO/UNESCO/BIRPI, LAWS AND TREATIES OF THE WORLD ON THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS (1969).

322. BILLBOARD, Dec. 22, 1979, at 70; BILLBOARD, Mar. 19, 1977, at 1, 61. Recently it has been estimated that 83% of all home taping is of prerecorded music, RECORD WORLD, Feb. 2, 1980, at 45, 46, while .1% is for dictation purposes, BILLBOARD, Feb. 2, 1980, at 46.

323. BILLBOARD, Dec. 22, 1979, at 70. Since Jan. 1, 1977, GEMA and GVL each receive and distribute 42% of the net funds and WORT receives 16%.

324. Art. 53(5), Copyright Act of Sept. 9, 1965, *as amended* on Mar. 2, 1974, ILO/UNESCO/BIRPI, LAWS AND TREATIES OF THE WORLD ON THE PROTECTION OF PERFORMERS, PRODUCERS AND PHONOGRAMS AND BROADCASTING ORGANIZATIONS (1969).

325. BILLBOARD, Dec. 22, 1979, at 70.

326. *Id.*

327. *Id.*

cassette sales: the latter have boomed while the former have remained more or less static.<sup>328</sup> In response to the outcry for a blank tape levy, the government held hearings on the matter in 1979.<sup>329</sup> In these hearings, the tape manufacturers, led by BASF and AGFA, contended that a blank tape levy on top of the equipment levy would amount to double taxation.<sup>330</sup> They also claimed that the proposed tax would unfairly burden legitimate domestic tape manufacturers because the levy could be easily circumvented by "gray market" importation.<sup>331</sup> The draft of the bill is scheduled to reach the Cabinet in the spring of 1980 and to be voted on sometime late in 1980.<sup>332</sup>

Although no other nation has yet followed Germany's lead, the concept of a levy on blank cassette and hardware sales has been widely discussed. An international conference reported in September of 1978 that a levy on blank cassettes and hardware was the best way to compensate authors, composers, performers, and record companies from losses caused by home taping.<sup>333</sup> In late 1979, the report's conclusion was endorsed by the Rome Convention's Intergovernmental Committee.<sup>334</sup> In 1977, three Japanese recording industry associations petitioned the government for a levy on tape hardware manufacturers with the proceeds going to performers, songwriters, and record companies.<sup>335</sup> A 1978 Austrian draft statute calling for a 10% levy on the price of blank audio and video cassettes was still pending at the end of 1979,<sup>336</sup> reportedly slowed down by opposition from the ruling Socialist party.<sup>337</sup> After provisions for taxing hardware were dropped, the French government recently instructed the Minister of Cultural Affairs to draft a bill for a royalty on blank cassettes.<sup>338</sup> Likewise,

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328. *Id.*

329. RECORD WORLD, May 26, 1979, at 3, 59. On May 10, 1979 hearings were conducted by officials of the Federal Ministry of Justice.

330. *Id.*

331. *Id.*

332. *Id.*

333. BILLBOARD, Oct. 7, 1978, at 1, 71.

334. BILLBOARD, Dec. 22, 1979, at 70.

335. 14 COPYRIGHT 260, 261 (1977); BILLBOARD, Mar. 19, 1977, at 1, 60.

336. BILLBOARD, Dec. 22, 1979, at 70; BILLBOARD, Sept. 23, 1978, at 3, 19.

337. BILLBOARD, Nov. 17, 1979, at 64; BILLBOARD, Aug. 25, 1979, at 56.

338. Heavy opposition from French tape manufacturers indicates, however, that they will not act as tax collectors. BILLBOARD, Apr. 19, 1980, at 80. The association of tape manufacturers is Syndicate des Industries Electroniques de Reproduction et d'Enregistrement (SIERE).

the Swedish State Council of Culture has proposed a levy on wholesalers for blank audio tape sales.<sup>339</sup> Under this arrangement, proceeds from the tax would go to the State Institute for National Concerts in order to finance recordings of local repertoire.<sup>340</sup> The Swedish proposal, however, has been criticized by the IFPI for failing to compensate lost income of copyright holders and artists.<sup>341</sup>

Although a licensing system for home taping is in place in the United Kingdom, it is virtually useless because it requires only voluntary compliance. Tapers must pay a token fee (approximately \$3.50) for the license which is administered by the Mechanical Copyright Protection Society.<sup>342</sup> Even though there are about eight million homes that have taping equipment, only 6,000 licenses were issued in 1978.<sup>343</sup> Not surprisingly, there is a current drive to increase the fee to about \$17 and to publicize the license requirement.<sup>344</sup> Since the delivery of the Whitford Report in 1977, though, the music publishers, BPI, and the musicians union have led a strong drive for a levy on the sale of tapes and equipment.<sup>345</sup> The Whitford Report concluded, among other things, that most home recording is of copyrighted materials; that home taping will continue to increase in the future; and that effective policing of home taping is impossible.<sup>346</sup> The Whitford Report recommended a levy on the sale of taping equipment but rejected a levy on blank tape sales.<sup>347</sup> The first step in legislation, a government green paper, is likely to be issued by the end of 1980.<sup>348</sup> Meanwhile, opposition from blank tape and equipment manufacturers is becoming more intense.<sup>349</sup>

In the United States, the first step taken by the government to study the problem was the CRT Survey. The Survey concluded that even though the frequency of music taping is "rather low," it

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339. BILLBOARD, Apr. 7, 1979, at 1, 87.

340. *Id.*

341. *Id.*

342. BILLBOARD, Sept. 8, 1979, at 42.

343. *Id.*

344. *Id.*

345. Whitford Report, *supra* note 135.

346. Dworkin, *supra* note 136; de Freitas, *supra* note 136.

347. *Id.*

348. BILLBOARD, Feb. 16, 1980, at 80.

349. BILLBOARD, Oct. 27, 1979, at BT-2.

has a substantial impact on prerecorded music purchases.<sup>350</sup> When the subjects were polled indirectly about a levy, 25% responded that composers, writers, artists, and record companies should be compensated for all copies of their works. On the other hand, 57% asserted that compensation should be given only for sales of prerecorded music.<sup>351</sup> The Home Taping Committee's report concluded that the 25% in favor of compensation for home taping obviously would have been larger if the copyright infringement issue had been explained or if industry efforts to develop "spoilers" had been discussed.<sup>352</sup>

A simple panacea to the home taping problem would be the successful development of a "spoiler"—an inaudible signal that could be incorporated in prerecorded music to thwart its ability to be copied. Although the RIAA recently has invited universities and researchers to join the search for a spoiler, indicating that rewards for success could be considerable,<sup>353</sup> industry hopes for success are not high. Years of laboratory research in the United Kingdom have failed to yield a workable spoiler signal.<sup>354</sup> And, it should be noted, even if a spoiler is discovered, it is feared that development of a technological "antidote" would soon follow.<sup>355</sup> Thus, the recording industry places little faith in the likelihood of a technological solution to this technological problem.

#### IV. SUMMARY

There has been a rising consciousness regarding the protection of rights in sound recordings in the last several years. Many nations now adhere to the recent international conventions and many have attempted to revise and amend their copyright statutes and other laws in order to strengthen the rights of performers and phonogram producers. Piracy and bootlegging are easily detected and can survive only where there is no effective legislation or serious enforcement effort. That these forms of music theft can be reduced to manageable levels has been demonstrated both in the United Kingdom and Hong Kong. More than legisla-

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350. Committee Report, *supra* note 219, at 3.

351. CRT Survey, *supra* note 219, at 10.

352. Committee Report, *supra* note 219, at 3. For more information on spoilers, see text at notes 353-55, *infra*.

353. BILLBOARD, Mar. 29, 1980, at 1, 28.

354. BILLBOARD, Feb. 2, 1980, at 46; BILLBOARD, Jan. 5, 1980, at 3, 66.

355. *Id.*

tion and enforcement, however, is required to control counterfeiting. A means of quick and easy detection must be developed in order to ensure that retailers do not knowingly or inadvertently deal in counterfeit products.

Legislation is the most likely solution to the home taping problem. The experience of the Federal Republic of Germany indicates that a levy on blank tape in addition to, or instead of, a levy on taping equipment, is required in order to approach fair compensation for lost revenues. In most nations the movement to rectify the losses caused by home taping is a recent one and, invariably, must contend with powerful lobbying efforts by taping equipment and blank tape manufacturers.

The emergence of bootlegging, piracy, counterfeiting, and home taping on a worldwide level was made possible by the development of cassette tape technology. Without cassette (or another equally popular tape configuration) and substantial investment in expensive and bulky record pressing equipment, commercial illicit sound recordings would not be feasible, and home taping would no longer be practical. It has been said that "the blank tape threatens the very existence of musicmakers,"<sup>356</sup> and that the music recording business is "the only industry to have developed [its] own self-destruct system."<sup>357</sup> These words, of course, overstate the present threat to the recording industry at the same time that they understate the industry's present vitality. Nevertheless, unauthorized duplication of sound recordings is a billion dollar problem which neither the music industry nor the world's governments have been able to resolve.

*Vassilios C. Gatzimos*

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356. BILLBOARD, Aug. 26, 1978, at 1, 94. The statement is that of the director of the GVL in West Germany.

357. BILLBOARD, Mar. 15, 1980, at A-8, A-10. The statement is that of Paul Turner, the head of the Australian operation of Warner/Elektra/Asylum.

