The following excerpt is taken from Volume 42, No. 59 of the Federal Register for Monday, March 27, 1978 (pp. 12763-8).

LIBRARY OF CONGRESS
Copyright Office
(Docket No. 877-6-D)

PERFORMANCE RIGHTS IN SOUND RECORDINGS

Addenda to Report

On Tuesday, March 21, 1978, the Federal Register published a notice that addenda to the January 3, 1978 Report of the Register of Copyrights were transmitted to Congress and are available for public inspection (43 FR 11773). The following is the Register's Statement referred to in the previous notice at 43 FR 11774, preceded by that Statement's letter of transmittal.

(17 U.S.C. 114)


BARBARA RINGER,
Register of Copyrights.

DANIEL J. BOORSTIN,
Librarian of Congress.

Dear Mr. President,

Dear Mr. Secretary:

On January 3, 1978, the Copyright Office submitted to Congress a Report on Performance Rights in Sound Recordings, pursuant to section 114(d) of the 1976 Copyright Act, Pub. L. 94-553. At that time, I indicated the intention to submit four additional documents as addenda to the December 1977 report. This is to inform you that these documents have been submitted. They include: (1) A Statement by the Register of Copyrights summarizing the position of the Copyright Office on the relevant issues, along with legislative recommendations; (2) an independently prepared historical analysis of labor union involvement in performance rights in sound recordings; (3) reply comments of the independent economic consultant who prepared the economic study included in the original Report of January 3, 1978, and submitted in response to comments on that study; and (4) a bibliography of works dealing with performance rights in sound recordings.

With the submission to Congress of the addenda described above, the Copyright Office believes it has fulfilled its responsibilities under section 114(d). The Copyright Office has requested that further assistance from other departments and agencies be forthcoming. If further assistance is received, the Copyright Office will undertake the preparations necessary to do so.

Sincerely yours,

DAVID J. BOORSTIN
Registrer of Copyrights.

Barbara Ringer
Register of Copyrights.

ADDENDUM TO THE REPORT OF THE REGISTER OF COPYRIGHTS ON PERFORMANCE RIGHTS IN SOUND RECORDINGS

Statement of the Register of Copyrights concerning Summary of Conclusions and Specific Legislative Recommendations

INTRODUCTION

The Congressional mandate to the Register of Copyrights contained in section 114(d) of the new copyright statute reads as follows:

"On January 3, 1978, the Register of Copyrights, after consulting with representatives of creators of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether section 114(d) should be amended to provide for performance royalty owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations."

On January 3, 1978, I submitted to Congress our basic documentary report, consisting of some 2,600 pages, including appendices. The basic report includes analyses of the constitutional and legal issues presented by the report is prepared to furnish whatever further sound recordings, the legislative history of past proposals to create these rights under Federal Copyright law, and testimony and written comments representing current views on the subject in this country. The basic report seeks to review and analyze for the existing systems for the protection of performance rights in sound recordings, and the existing structure for international protection in this field, including the Rome Convention for the Protection of Performers, Producers of Performances and Broadcasting Organizations. The basic report also includes an "economic impact analysis" of the proposals for the new royalty. A separate report, prepared by an independent economic consultant under contract with the Copyright Office, accompanies this report.

After reviewing all of the material in the basic report, together with additional supplementary materials, I have prepared this statement in an effort to summarize the conclusions I have drawn from our research and analysis and to present specific recommendations for legislation. With the presentation of this statement, the Copyright Office believes that it has discharged all of its responsibilities under section 114(d).

It was understandable that enactment of section 114(d) was greeted with raised eyebrows and cynical smiles. Some of those who supported performance rights in sound recordings viewed it as a temporary move, aimed at dousing the issue and delaying Congress' obligation to come to grips with the problem. Others, opponents of the principle of royalties for performance of sound recordings, expected the legislation in the context of the full-scale study of the problem to be made by an official who had, in testimony before both Houses of Congress, expressed a personal commitment to that principle. The Copyright Register's Report could either be looked on as a time-consuming nuisance that had to be gotten out of the way, or it could be induced to look at the problem again, or as something that could be dismissed as worthless because the views of the official responsible for the study had already fixed his conclusion.

Neither the idea nor the drafting of section 114(d) was the work of the Copyright Office. When approached with the proposed compromise that subsection (d) of the responsibility and the short deadline imposed by the new subsection with two thoughts in mind:

First, we agreed with those who felt that any full-scale effort to enact this performance royalty legislation to the bill for general revision of the copyright law could seriously impede the progress for enactment of omnibus revision. Keeping the subject of performance royalty alive but splintering it later on could lead the Congress to consider the twin dangers of lack of time to complete work on the bill for general revision, and concerted opposition to the bill as a whole.

Second, we also agreed that, with a problem as important and hotly contested as this one, Congress should have a full record and more thorough research and analysis on which to base its consideration of proposed legislation. Although the deadline for the report (January 3, 1978) coincided with the date on which the Copyright Office was required to implement the whole new copyright statute, it felt that it would be possible for us to complete both jobs on time.

Three further addenda are being submitted to Congress concurrently with this statement: (1) a report, prepared by an independent legal consultant, of the history of labor union involvement in the issue of performance royalties over the past thirty years; (2) a supplementary report by the independent economic consultant on the economic effects of my conclusions and recommendations will not undermine the usefulness of the body of information brought together in the basic report.

BASIC ISSUES AND CONCLUSIONS

The following is an effort to present, in outline form, the basic issues of public policy, constitutional law, economics, and Federal statutory law raised by proposals
for performing rights in sound recordings, together with a bare statement of the conclusion I have reached on each of them, and a highly condensed discussion of the reasons behind each conclusion.

1. The Fundamental Public Policy Issue
   a. Issue: Should performers, or record producers, have any rights under Federal law with respect to public performances of sound recordings to which they have contributed?
      
      Conclusion: Yes.
      
      Discussion: The Copyright Office supports the principle of copyright protection for the public performances of sound recordings. The lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts. Professor Gorman's fascinating study shows that, in several important respects, employment resulting from the use of recorded rather than live performances, the lack of copyright protection in sound recordings may in some ways have made the problem worse. It is too late to repair past wrongs, but this discussion is meant to be permissive without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition on the public interest. The notion that some economic burden on the users of recordings for public performance is heavily outweighed, not by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a right in infringement. If the result is either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance and sale in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

   b. Issue: Is there a need for a new right for performers in sound recordings, for example, to control the reproduction of sound recordings?
      
      Conclusion: Yes.
      
      Discussion: These are actually disguised economic arguments, not constitutional objections. Congressional authority to grant copyright protection in sound recordings has been conditioned on any finding of need, or of the likelihood that productivity or creativity will increase. The established standard is that Congress has complete discretion to grant or withhold protection for the writings of authors, and that the courts will not look for the clearest or most direct formulation to determine whether or not it will actually provide incentives for creation and dissemination. It is perfectly appropriate to argue that a particular group of creators is adequately compensated through the exercise of certain rights under copyright law, and therefore Congress should not grant them additional rights. It is not appropriate to argue that a Federal statute granting these rights could be attacked on the constitutional ground of any economic burden on the creators of sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a right in infringement. If the result is either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance and sale in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

2. Constitutional Issues
   a. Issue: Do sound recordings, etc., the "writings of an author" within the meaning of the Constitution?
      
      Conclusion: Yes.
      
      Discussion: Arguments that sound recordings are not "writings" and that performers and record producers are not "authors" have been inconsistent. The courts have consistently upheld the constitutional eligibility of sound recordings for protection under the copyright statute. Passage of the 1971 Sound Recording Act placed a legislative declaration of this principle, which was reaffirmed in the Copyright Act of 1978.

   b. Issue: Can sound recordings be "the writings of an author" for purposes of protection against unauthorized duplication (piracy or counterfeiting), but not for purposes of protection against unauthorized public performance?
      
      Conclusion: No.
      
      Discussion: Either a work is the "writing of an author" or it is not. If it is, the Constitution empowers Congress to grant it any protection that is considered justified. There is no basis, in logic or precedent, for suggesting that a work is a "writing" for some purposes and a "performance" for others. g. Issue: Would Federal legislation to protect sound recordings against unauthorized public performance be unconstitutional? (1) If the Copyright Act did not contain an affirmative showing of a "need" on the part of the intended beneficiaries and hence no basis for asserting Congressional authority to "promote the progress of science and useful arts"; or (2) if there has been an affirmative showing that compensation to the intended beneficiaries is "adequate" without protection of performing rights?
      
      Conclusion: No.
      
      Discussion: These are actually disguised economic arguments, not constitutional objections. Congressional authority to grant copyright protection has never been conditioned on any finding of need, or of the likelihood that productivity or creativity will increase. The established standard is that Congress has complete discretion to grant or withhold protection for the writings of authors, and that the courts will not look for the clearest or most direct formulation to determine whether or not it will actually provide incentives for creation and dissemination. It is perfectly appropriate to argue that a particular group of creators is adequately compensated through the exercise of certain rights under copyright law, and therefore Congress should not grant them additional rights. It is not appropriate to argue that a Federal statute granting these rights could be attacked on the constitutional ground of any economic burden on the creators of sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a right in infringement. If the result is either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance and sale in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

   c. Issue: Would the imposition of a performance royalty be an unwarranted windfall for performers and record producers?
      
      Conclusion: No.
      
      Discussion: As for performers, the independent producers, as opposed to those subsidized by the Copyright Office, are not entitled to some reward for the performers and record producers. The Copyright Office indicates that only a small proportion of performers participating in the production of sound recordings receive royalties from the sale of records and that, even if they do, royalties represent a very small proportion of their annual earnings. While the statistics collected with respect to record producers is less conclusive, the economic analysis concludes that the amount generally received by the record companies would be less than one-half of one percent of their estimated net sales.

3. Economic Issues
   a. Issue: Do the benefits accruing to performers and record producers from the "free airplay" of sound recordings represent adequate compensation in the form of increased record sales, increased attendance at live performances, and increased popularity of individual artists?
      
      Conclusion: No, on balance and on consideration of all performers and record producers affected.
      
      Discussion: This is the strongest argument put forward by broadcasters and other users. There is no question that broadcasting and jukebox performances give some recordings the kind of exposure that benefits their producers, individual performers through increased sales and popularity. The benefits are hit-or-miss and, if realized, are the result of those that are outside the legal control of the creators of the works being exploited. They are of direct commercial advantage to the user, and that may damage other creators and other possibilities for benefit through increased sales, no matter how significant it may be temporarily for some "hit records." Could hardly justify the outright denial of any performing rights to any sound recordings. That denial is inconsistent with the underlying philosophy of the copyright law, that of securing the benefits of creativity to the public by the encouragement of individual effort through private gain (see Mazer v. Stein, 347 U.S. 201). b. Issue: Would the imposition of performance royalties represent a financial burden on broadcasters so severe that stations would be forced to curtail or abandon certain kinds of programming (public service, classical, etc.) in favor of high-income product, economy programming, as commanded by the Copyright Office? A few stations may in some ways have made the problem worse. It is too late to repair past wrongs, but this discussion is meant to be permissive without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition on the public interest. The notion that some economic burden on the users of recordings for public performance is heavily outweighed, not by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performances. In all other areas the unauthorized use of a creative work is considered a right in infringement. If the result is either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance and sale in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

   c. Issue: Should the benefits of protection be distributed equally to all copyright owners?
      
      Conclusion: Yes.
      
      Discussion: The best approach to this problem is to be a form of compensatory licensing, as procedurally simple as possible. Discussion: No one is arguing for exclusive rights, and it would be unwise to do so. The Sherman Bill represents a good starting point for the development of legislative legislation. g. Issue: Who should be the beneficiaries of protection?
Conclusion. There are several possibilities: allow performers and record producers both the uncopyrightable authority to sound recordings, they should both benefit. Discussion. Special considerations that should be included include the fact that many performers on records are "employees for hire," the unequal bargaining powers in some cases, and the status of arrangers.

**d. Issue:** How should the rates be set?

**Conclusion:** Congress should establish an initial schedule, which the Copyright Royalty Tribunal should be mandatory after a period of time sufficient to permit the development of a functioning collection and distribution system.

**LEGISLATIVE RECOMMENDATIONS**

Section 114(d) asks the Register of Copyrights, among other things, to set forth "recommendations as to whether this section should be amended to provide for performance of uncopyrightable owners of copyright material by performance rights in such material," and to describe "specific legislation as to recommendations, if any." Based on the conclusions outlined above, my general recommendation is that section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the text of this right be extended both to performers, employees, distributors, and to record producers as joint authors of sound recordings.

Specific legislative recommendations are embodied in the following draft bill, which is essentially a revision of the Danielson Bill (S.R. 963, 95th Cong., 1st Sess. 1977).

**DRAFT BILL**

A Bill to amend the copyright law, title 17 of the United States Code, to create public performance rights with respect to sound recordings, and for other purposes.

**Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.**

**SECTION 1. This Act may be cited as "The Sound Recording Performance Rights Amendment of 1978."**

**SECTION 2. Section 101 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by deleting the reference to "perform" and inserting the following:**

"To perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. In the case of a motion picture or other audiovisual work, to perform the work means to show the work in any sequence or to make the sounds accompanying it audible. In the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists."

**SECTION 3. Section 106 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by deleting clause (4) and inserting the following:**

"(4) the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly; and"

**SECTION 4. Section 110 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:**

(a) In clause (2) insert the words "or of a sound recording" between the words "performance" of a nondramatic literary or musical work," and "or display of a work."

(b) In clause (3), insert the words "or of a sound recording," between the words "of religious nature," and the words "or display of a work."

(c) In clause (4), insert the words "or of a sound recording" between the words "literary works of this clause" and "otherwise than in a transmission."

(d) In clause (5), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a government body."

(e) In clause (7), insert the words "or of a sound recording" between the words "nondramatic musical work" and "by a vending establishment."

(f) In clause (8), insert the words "or of a sound recording embodying a performance of a nondramatic literary work," between the words "or pandora work," and "by or in the course of a transmission;" and

(g) In clause (9), insert the words "of a sound recording embodying a performance of a nondramatic musical work that has been published," between the words "date of the performance," and the words "by or in the course of a transmission."

**SECTION 5. Section 111 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended by inserting, in the second sentence of subsection (d)(5)(A), between the words "provisions of the antitrust laws," and "for purposes of this clause," the words "and subject to the provisions of section 114(c)."

**SECTION 6. Section 112 of title 17 of the United States Code, as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended as follows:**

(a) In subsection (a), delete the words "or under the license of the owner of copyright in a sound recording specified by section 114(a)," and insert in their place, "or under a compulsory license granted by the Copyright Office with the provisions of section 114(c)."

(b) In subsection (b), delete the reference to "section 114(a)" and insert "section 114(b)(3)."

**SECTION 7. Section 114 of title 17 of the United States Code as amended by Public Law 94-553 (90 Stat. 2541) is hereby amended in its entirety to read as follows:**

"114 Scope of exclusive rights in sound recordings.

(a) LIMITATIONS ON EXCLUSIVE RIGHTS.—In addition to the limitations on exclusive rights provided by sections 107 through 112 and sections 118 through 118, and in addition to the compulsory licensing provisions of subsection (c) and the exemptions of subsection (d) of this section, the exclusive rights of the owner of copyright in a sound recording under clauses (1) through (4) of section 106 are further limited as follows:

(1) The exclusive right under clause (1) of section 106 is limited to the right to duplicate all or any part of the sound recording in the case of a phonorecord, or of copies of motion pictures and other audiovisual works, that directly or indirectly reapprehend the actual sound recorded in the recording.

(2) The exclusive right under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.

(3) The exclusive right under clause (4) of section 106 is limited to the right to perform publicly the actual sounds fixed in the recording.

(4) The exclusive rights under clauses (1) through (4) of section 106 do not extend to the making, duplication, reproduction, distribution, or performance of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(5) The exclusive rights under clauses (1) through (4) of section 106 do not apply to sound recordings performed on public television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined in subsection 118-3) provided that those programs are not commercially distributed by or through public broadcasting entities to the general public.

(b) RIGHTS IN SOUND RECORDING DISTINCT FROM RIGHTS IN WORKS.—Subject to the limitations on exclusive rights provided by sections 107 through 112 and sections 118 through 118, and in addition to the other limitations on exclusive rights provided by this section, the exclusive right provided by clause (4) of section 106, to perform a sound recording publicly, is subject to compulsory licensing under the conditions specified by this subsection.

(2) When phonorecords of a sound recording have been distributed for public consumption in the United States or elsewhere under the authority of the copyright owner, any other person under the authority of the copyright owner, any other person may, under the provisions of this subsection, obtain a compulsory license to perform that sound recording publicly.

(3) Any person who wishes to obtain a compulsory license under this subsection shall file the following requirements:

(A) On or before the 15th day, or at least thirty days before the public performance, if it occurs later, such person shall record in the Copyright Office a notice stating an intention to obtain a compulsory license under this subsection. Such notice shall be filed in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation, and shall contain the name and address of the compulsory licensee and any other information that such regulations may require. Such regulations shall also prescribe requirements for bringing the information in the statement up to date at regular intervals.

(B) The compulsory licensee shall deposit with the Register of Copyrights an annual royalty fee for all public performances during the period covered by the statement, based on the royalty provisions of clauses (7) or (8) of this subsection. After consulta...
tion with the Copyright Royalty Tribunal, the Register of Copyrights shall prescribe regulations prescribing the time limits and requirements for the statement of account and fees deposited under clause (B) of this subsection (c)(3) during the twelve-month period of which claims have been filed under clause (i) of this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, divide such fees among owners of performers, performers entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of title 28, conduct a proceeding to determine the distribution of royalty fees.

(13) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute amounts that are not in controversy.

(14) The royalties available for distribution by the Copyright Royalty Tribunal shall be divided between the owners of copyright as defined in subsection (e), and the performers, as also defined in said subsection, but in no case shall the proportionate share of the performer be more than forty percent of the amount to be distributed. With respect to the various performers who contributed to the works fixed in a particular sound recording, a proportionate share of the royalties payable with respect to that sound recording shall be divided among them on a per capita basis, subject to the nature, value, or length of their respective contributions. With respect to a particular sound recording, neither a performer nor a copyright owner shall be entitled to transfer his right to the royalties provided in this subsection to the copyright owners, and no such purported transfer shall be given effect by the Copyright Royalty Tribunal.

(d) EXCEPTIONS FROM LIABILITY AND COM PULSORY LICENSING.—In addition to users exempted from liability by other sections of this title or by other provisions of this section, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance or to the compulsory licensing requirements of this section, is exempted from liability for infringement and from the compulsory licensing requirements of this section during the applicable annual period, if during such period—

(1) In the case of a radio broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a television broadcast station licensed by the Federal Communications Commission, its gross receipts from advertising sponsors were less than $1,000,000; or

(3) In the case of any other transmitters of performances of copyrighted sound recordings, its gross receipts from advertising sponsors were less than $500,000 during the applicable period.

(2) "Performers" are instrumental musicians, singers, conductors, actors, narrators, etc.
The draft bill was submitted to the Congress for consideration. It sought to address the issue of copyright infringement, particularly in the context of broadcast and cable television. The bill was designed to provide remedies for owners of copyrighted works who found their creations being used without permission.

Section 7 of the draft bill, titled "Royal Royalties," proposed a system of royalties to be paid to copyright holders for the use of their works on broadcast and cable television. The bill aimed to balance the interests of both performers and record producers, ensuring that creators were compensated for their efforts.

Section 8 addressed the issue of "Substitution of Negotiated Licenses." It outlined a process where the Copyright Royalty Tribunal would set new rates if no agreement could be reached through negotiations.

Section 9, "Distribution of Royalties," emphasized the importance of fair payment to all involved parties. It sought to establish a framework that would ensure the financial stability of the music industry.

Finally, Section 12, "Other Recommendations," called for further action to protect the rights of copyright holders, particularly in the realm of new technologies and distribution methods.