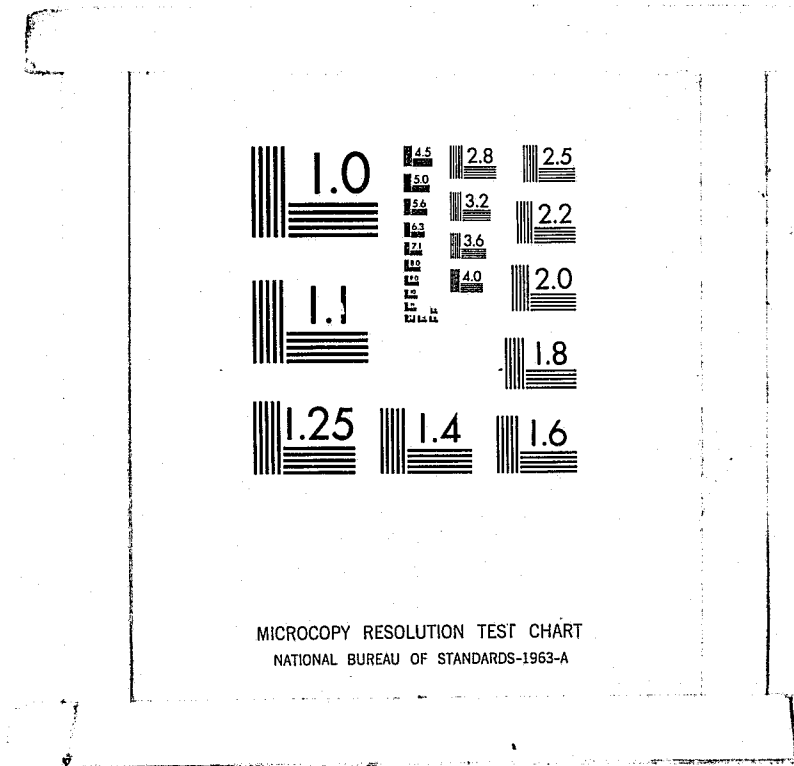


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REFORM OF THE FEDERAL CRIMINAL LAWS

NCJRS

OCT 20 1980

HEARINGS
BEFORE THE
ACQUISITIONS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

SEPTEMBER 11, 13, 18, 20, 25, AND OCTOBER 5, 1979

PART XIV

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NCJ# 73375
 Motion Picture Association of America, Inc.
 and Recording Industry of America Inc.
 Concerning Film and Record Piracy and
 Counterfeiting

73375
 MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND RECORDING INDUSTRY OF
 AMERICA INC. CONCERNING FILM AND RECORD PIRACY AND COUNTERFEITING
 This statement is submitted by the Motion Picture Association of America,
 Inc. ("MPAA") and the Recording Industry Association of America, Inc.
 ("RIAA"). MPAA represents ten of the largest producers-distributors of theatri-

cal and television programs exhibited in the United States and throughout the world. RIAA is a trade association of recording companies whose members create and market approximately 90 percent of the records and tapes sold in the United States.

We welcome this opportunity to comment favorably on S. 1722, the proposed Criminal Code Reform legislation which, for the first time, brings the offense of criminal copyright infringement into Title 18 and classifies that offense as a felony. The record and film industries have long taken the position that such legislation is the minimum necessary to begin to curb the alarming growth of the piracy and counterfeiting of films and records. MPAA and RIAA strongly believe that only through strong penalties can the law better serve the public interest ineffectively deterring the sophisticated criminals now masterminding the illegal reproduction and distribution of motion pictures and sound recordings.

We are pleased to endorse the proposed provision in S. 1722 on civil forfeiture of infringing reproductions and reproduction equipment (Section 4001(a)(12)) and the provision including criminal copyright infringement within the definition of racketeering activity (Section 1807(f)(1)). We believe these provisions clearly advance the public interest in effective law enforcement. We believe, however, that the Committee can improve the effectiveness of the copyright infringement provision (Section 1738). In this regard, we urge the Committee to consider the approach adopted in several provisions of the most recent draft of the Criminal Code legislation before the Criminal Justice Subcommittee of the House Judiciary Committee.¹

The House provisions² dealing with record and film piracy and counterfeiting differ from the Senate version in the following respects:

"Separate provisions are included for the separate crimes of criminal copyright infringement (in Subchapter IV, Section 2537) and counterfeiting (in Subchapter V, Section 2546). The Senate version, by contrast, contains no separate provision for counterfeiting.

"The penalties for criminal copyright infringement are graded depending on the quantity and type of films or records illegally reproduced or distributed. The Senate version, by contrast, imposes Class D penalties for all infringement offenses, regardless of the volume of illegal reproductions."

We strongly endorse Section 2537 and Section 2546 in the current House bill and believe that they will serve as a more effective deterrent to film and record piracy and counterfeiting.

We discuss these provisions, and the nature of the problems faced by our industries, in greater detail in the text of this memorandum.

I. BACKGROUND

For a number of years now, the legitimate recording and motion picture industries have been victims of a mushrooming growth in record and film piracy. "Piracy" is the word popularly used to describe the unauthorized duplication of sound recordings and films, on LP discs, tape cartridges and cassettes and video cassettes. Piracy began its tumultuous growth when prerecorded tape cartridges were introduced into automobiles and then into homes. Pirates soon discovered that they could cheaply copy and sell hit commercial recordings and thus gain huge illicit profits.

The impact of piracy on the legitimate recording and motion pictures industries is enormous. As one Justice Department official described it:

"The effects of piracy are debilitating; the pirate brings no creativity to his entry into this art form; indeed, he feels as a parasite on the creativity, the productivity, and the enterprise of others. He is anticompetitive for, to a substantial degree, he suppresses the creativity and initiative of both artists and producers as he feeds like a vulture upon their creations. He is really a thief of major stature. . . ."³

¹ At the submission of this Statement, the most recent version of the House legislation was a working draft published by the Subcommittee, dated September 13, 1979. We recognize that S. 1722 embodies substantially the same provisions as does the current House draft, but S. 1722 does not contain modifications in the House legislation made since S. 1722 was introduced. Therefore, our comments in this Statement are based on the September 13 working draft of the House Subcommittee.

² We have also discussed with the Staff of the House Subcommittee a number of technical changes to the cited provisions. The Staff has agreed to incorporate those changes in the draft. A summary of those changes appears in Appendix A.

³ Testimony of John L. Murphy, Chief, Government Regulations Section, Criminal Division, U.S. Department of Justice, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 13304, 93d Cong., 2d Sess., at 7 (1974).

"Counterfeiting" is one step beyond piracy. In a "conventional" pirated tape, for example, the performance on the tape is an accurate copy of the original commercial version, but the package and graphics are usually unrelated in appearance to that original. In the case of a counterfeit disc or tape, however, the package and graphics as well as the performance are accurately duplicated—including artist photos, color art, company labels, corporate logos and trademarks. A counterfeit is very difficult to distinguish from the original. Indeed, identification of counterfeits is so difficult that unscrupulous retailers and distributors are able to meld the counterfeits into their stock of legitimate products.

Counterfeiting defrauds the public

Counterfeiting is a much more serious crime than traditional piracy, for counterfeiters also defraud the consuming public. Consumers are induced to believe that they are purchasing a product emanating from the motion picture studio or recording company identified on the counterfeit label. Sometimes even legitimate retailers who would otherwise refuse to handle copyright infringing products are defrauded into selling counterfeit products. Similarly deceived are the record manufacturers who unknowingly give full credit to retailers and distributors for returns which are, in fact, counterfeits.

Counterfeiters are stealing not only the intangible property belonging to the copyright owner, but also the business name and goodwill of the motion picture studio or recording company. And, of course, all of the other participants in the creation of the copyrighted product—composers, publishers, performing artists and background musicians—are denied their just compensation, which derives from the sale or rental of their creative product.

Every sale of a counterfeit motion picture or phonorecord directly displaces a sale of legitimate product. And it displaces it in exactly the same marketplace as the legitimate product is sold.

Film

Changes taking place in the motion picture industry have increased the opportunities not alone for piracy but also for counterfeiting. Motion pictures traditionally have been licensed, not sold, and have been made available for viewing by members of the public in a sequential series of outlets—theatres first, followed by pay television, network television, local television, and various non-theatrical outlets (hotels, ships, airplanes, etc.). In this traditional form of motion picture distribution—which has unique "piracy" problems of its own—members of the public never obtain ownership or physical possession of the films themselves; instead, they merely view them.

Within recent times motion picture companies have begun offering motion pictures for outright purchase and physical retention by consumers in the form of pre-recorded video cassettes. This new market, and the number of films made available to it, is expected to grow substantially in the years to come. Moreover, as consumers are able to purchase videodisc and videotape playback devices, this market will accelerate.

The sale to consumers of feature-length motion pictures in cassette or disc form is the same kind of business in which the sound recording industry has long engaged: the sale of recorded music to members of the public in tape or disc form. This aspect of the motion picture business will also produce exactly the same kind of piracy and counterfeiting which has long plagued the sound recording industry. This illegal duplication and sale of tapes and discs which are legitimately on the market will necessarily mean, as it has for the sound recording industry, that label and other identifying marks will be counterfeited so that illegally duplicated film tapes and discs can be passed off as the real item.

Piracy is growing

Record and film piracy—and counterfeiting in particular—are growing. Just last December, 300 agents of the FBI seized over \$150 million worth of counterfeit recordings, components and sound recording equipment in a raid of 19 sites in five states. Pirate operations with revenues of millions of dollars each are not at all uncommon. One film piracy outfit grossed over a half million dollars during a 7-month period in 1977, according to customs and shipping documents. (The actual value of the films and the amount actually received was well in excess of the Value Declared for U.S. Customs, because the film pirate—David Barnes—understated the value to decrease import duties payable to South Africa.) The scope of Barnes' illicit operation is illustrative: According to the Government's

sentencing memorandum, Barnes had amassed a vast network of suppliers, buyers, laboratories and workers spreading over three continents, all attracted to his criminal enterprise by the enormous (untaxed) profits which it promised and delivered.

According to Jules Yarnell, Special Antipiracy Counsel to the RIAA, record counterfeiting is now of such magnitude and growing at so substantial a rate that it is causing very serious concern not only to the industry, but also to enforcement officials in the FBI and IRS Intelligence. The present volume of record counterfeiting is believed to amount to more than \$250 million a year. It is estimated that all forms of record and film counterfeiting and piracy drain upwards of \$650 million annually from legitimate sales and rentals in both industries.

We believe the burgeoning growth in counterfeiting has been caused by a number of interrelated factors:

1. With the increased and highly effective activities of federal enforcement officials against manufacturers, distributors and retailers of infringements of recordings and motion pictures, more and more retailers who previously dealt in such pirated products have become reluctant to handle them. Pirated products are easily identifiable as such, making the retailer vulnerable to prosecution.

Counterfeit recordings, on the other hand, are more difficult to detect. This gives retailers the opportunity to escape prosecution by claiming that they did not know that the products were illicit.

2. Counterfeit recordings are more readily saleable through legitimate outlets. They also bring greater profits to the counterfeit manufacturers and distributors, because a higher price can be charged for counterfeit products than pirated products. Consumers will pay more because they are unaware that they are purchasing counterfeit products.

For example, one of the operations raided last year was alone responsible for producing and disseminating throughout the United States and Europe more than 25 million counterfeit recordings a year. The profit to the group manufacturing these counterfeits amounted to more than \$30 million a year. Another operation was producing upwards of 10 million counterfeit recordings a year with an annual profit of approximately \$30 million since it dealt with current hit products which brought a higher price in the market.

3. It is reported by enforcement officials that organized crime has become increasingly more active in the manufacture and distribution of counterfeit products because of their high profitability and the difficulty of detecting and tracing such products. (In fact, the December raid of record counterfeiting operations was accomplished only after a 20-month undercover operation of the Organized Crime Strike Force for the Eastern District of New York and Organized Crime squads of the FBI.)

The destructive effects of piracy

Pirates pay nothing to any recording artist, actor or actress; nothing to any producer, director, screenplay writer or musician; nothing to any film distributor or record company; and nothing to music composers and publishers. That is how pirates are able to sell their product at a bargain basement price—a third or less of regular retail prices. They avoid the primary costs reflected in the prices of legitimate products.

Who gets hurt by pirates?

1. Recording artists, actors and actresses are victimized by pirates. Most of these talented performers have only a very brief artistic career, because consumer tastes change rapidly. Pirates hurt them at the peak of their relatively short careers while their screen triumphs and their recording hits are selling well.

2. Producers, directors, and screenplay writers have a monetary stake in every movie that is produced. Their earnings are determined by how well a motion picture does at the box office. Whenever a pirate film is sold, nothing is paid to these creators of entertainment.

3. Musicians get hurt, too. They have a direct monetary stake in every record legitimately sold. Payments for musicians are made by record companies into special trust funds based on the number of records sold. Of course, pirate sales deprive musicians of this income. Every time a legitimate recording is sold, record companies also pay money—totaling about \$8 million per year—into Music Performance Trust Funds, which are used to finance free concerts for the general public, at Veterans' Hospitals, and in underprivileged and depressed areas, thus employing musicians. When a pirate recording is sold, nothing is paid on behalf of these musicians.

4. Film studios and recording companies take the risks and provide the investments in developing fresh talent and producing new films and recordings, seldom knowing what consumers will buy. A film company may invest \$20 million in the production of JAWS II and another \$20 million in distribution and advertising costs to market that movie. A record company may invest as much as \$75,000 to \$150,000 just to record a new album; it is seldom less than \$50,000. In addition, it will spend many thousands of dollars for manufacturing, storing, advertising, promoting and marketing that album. Only a small percentage of the films and recordings released make any money; most never earn enough revenues to recover basic production, talent, or promotion costs. A motion picture or a recording company is dependent upon a relatively few hit films and records to cover cost, develop talent, subsidize the losing films and records, and hopefully make a profit. But the pirates copy only hits—new hits and old hits—only those films and recordings with no risk.

5. Music composers and publishers are injured by pirates who rob them of their legitimate mechanical royalties.

6. Local retailers and wholesalers are among the business enterprises most damaged. A legitimate retailer selling a videocassette or tape cartridge cannot compete with a pirate version for sale at only a third of the cost of genuine product. The pirate can always undersell the real thing because he bears none of the costs of creating and marketing the legitimate product.

7. Minorities suffer, too. The entertainment world is one of the places where blacks, Chicanos and Latinos have traditionally "made it." Pirates can ruin their chances, wreck their opportunities. Ask Motown, one of the principal record companies featuring black artists, how badly pirates have damaged them.

8. Consumers are the victims of piracy, too. Apart from the questionable quality of pirated and counterfeited films and tapes sold to the consumer, there is another longer-term impact—piracy reduces the choice of records and films available and limits the opportunities for new artists to make films and recordings.

9. Government, too, is hurt because it receives less in taxes—none from pirates who deal strictly in cash, and less from legitimate businesses who have lost sales to illicit operators. Enforcement authorities also expend large sums of money to control this illegal conduct. Piracy attracts unsavory elements, those of questionable ethics, who mask their operations behind post office boxes and phone answering services, and who erode the sanctity of the law. Indeed, some of the largest pirate operations have been found to have links with organized crime.

Penalties under existing law

Copyright infringement.—The criminal penalties for infringement of the copyright in a sound recording or motion picture are:

Up to \$25,000 or one year in prison, or both, for a first offense;

Up to \$50,000 or two years in prison, or both, for any subsequent offense.

Counterfeiting.—Since 1962, there has existed a separate provision prohibiting and penalizing the interstate shipment of counterfeit recordings. 18 U.S.C. § 2318. As counterfeiting activity has grown, the penalties have been increased correspondingly. Thus, in 1974, Congress raised the maximum fine to \$25,000 for the first offense and \$50,000 for any subsequent offense, recognizing that "record piracy is so profitable that ordinary penalties fail to deter prospective offenders."⁴ When the copyright law was revised in 1976, however, the penalties under 18 U.S.C. § 2318 were reduced to their present level—\$10,000 for a first offense, and \$25,000 for any subsequent offense. (According to Bruce Lehman, Chief Counsel for the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, that change was made to bring the penalties into conformity with those recommended by the Brown Commission.)⁵ The result is a curious anomaly—the penalty for traditional piracy (which is still too low) is greater than the penalty for counterfeiting, which is a far more deceitful and insidious crime.

⁴ H.R. Rep. No. 93-1330, 93d Cong., 2d Sess. 4 (1974).

⁵ Final Report of the National Commission on Reform of the Federal Criminal Laws (Jan. 7, 1971).

II. THE MODIFICATION OF THE PENALTIES IN S. 1722

MPAA and RIAA strongly believe that the only way to deter piracy and counterfeiting is to substantially strengthen the applicable penalties and encourage increased enforcement efforts by U.S. Attorneys. We endorse Section 1738 of S. 1722 insofar as it increases the penalties for criminal copyright infringement and codifies that offense in Title 18.

A. Criminal copyright infringement

Codification in Title 18.—Both the motion picture and recording industries have established special antipiracy offices, the sole function of which is to investigate and combat piracy. Each industry is spending upwards of \$1 million a year in that effort. Moreover, the member companies of the MPAA and RIAA have taken steps aggressively to enforce their rights when pirate activity is discovered.

These industry efforts to stem the growth of record and film piracy have met with limited success, however. This is because copyright owners, like special antipiracy counsel for MPAA and RIAA, can only file *civil* infringement actions. Such actions have no effect on the sophisticated criminals who engage in pirate and counterfeiting activities.⁶

It follows that copyright owners in the motion picture and recording industries must prevail upon U.S. Attorneys to prosecute these offenses. *The codification of the criminal copyright provisions in Title 18 will undoubtedly encourage enforcement efforts by U.S. Attorneys.* Prosecutors are more concerned about and give much greater prosecutorial priority to conduct proscribed by the Criminal Code in Title 18, which prosecutors regard as their "charter." We therefore strongly support the placement of the criminal copyright infringement provisions where they rightfully belong—as part of the Criminal Code of Title 18.

Increased penalties.—We also believe that it is necessary to strengthen the applicable penalties to match the offense committed. The explosive growth of record and film piracy in recent years confirms that the existing penalties are inadequate. A misdemeanor conviction is little more than a slap on the wrist to the pirate laden with the cash profits of his illicit enterprise.

The modest penalties prescribed in existing law also tend to discourage enforcement efforts. U.S. Attorneys confronted with a wide range of possible prosecutions clearly prefer the prospect of a felony conviction to a misdemeanor conviction. Perhaps that is why indictments of pirates and counterfeiters focus, when possible, on related criminal offenses—such as mail fraud, wire fraud, ITSP (Interstate Transportation of Stolen Property), RICO (Racketeer-Influenced Corrupt Organizations) and even customs violations—rather than the principal criminal offenses committed—copyright infringement and counterfeiting.

The moderating impact of the misdemeanor penalty has previously been noted by John Murphy, formerly Chief of the Government Regulations Section of the Criminal Division of the Department of Justice:

"This mild sanction necessarily creates a psychological attitude on the part of prosecutors and courts that mitigates the seriousness of the offense and militates against the imposition of sentences compatible with it."⁷

This led Mr. Murphy to support a proposal making the penalty for a first offense a felony, arguing that many of those now engaged in pirate activity "would be deterred from embarking on their illegal ventures if the penalty were to be increased to a felony statute. . . ."⁸

Graded penalties.—We believe that the Senate bill classifying criminal copyright infringement as a Class D felony represents an important step in the modification of existing law. We suspect, however, that the House provision on copy-

⁶ George Tucker is a case in point: Tucker has been a defendant in three past civil actions, the earliest of which dates back to 1971—*Jondora v. Melody, CBS v. Melody*, and *Ahamio v. U.S. Tape*. In each case, the court issued an injunction prohibiting further unauthorized duplications. Yet George Tucker's name turned up all over again in the December raids by the FBI and Organized Crime Strike Force. (In August 1979, Tucker pleaded guilty to two counts of a criminal indictment stemming from that raid.) The lesson is clear: civil remedies cannot, by themselves, deter piracy.

⁷ Testimony of John L. Murphy, Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 13364, 93d Cong., 2d Sess. at 5 (1974).

⁸ *Ibid.* at p. 8.

right infringement which provides for graded penalties corresponding to the type and quantity of illegal reproductions will make for a fairer and more effective system of law enforcement. The pirate who deals in a large volume of illegal copies *should* be subject to greater penalties than a smaller scale operator. Under the Senate legislation, the person who pirates one copy of "Saturday Night Fever" is subject to the same penalties as a person who illegally distributes 10 million copies. The risk in imposing uniform penalties of five years for every record and film infringement offense, regardless of the number of copies involved, is that prosecutors may decide not to seek convictions of the smaller scale operator because of the severity of the penalties applicable to the offense. So too, juries would be less likely to convict a defendant on a stiff felony count when the possible sentence is disproportionate to the nature of the offense. The House provision imposing graded penalties allows the prosecutor greater flexibility and will, we believe, result in greater—and fairer—enforcement efforts.

One of the motivating factors for imposing Class D penalties for criminal copyright infringement is the strong deterrent effect such penalties would have on large scale operations, increasingly dominated by organized crime. These are the criminals who have contributed to the unprecedented growth of piracy in recent years. Penalties linked to the volume of illegal reproductions will have the strongest deterrent effect on those criminals whose illicit gains are greatest.

This concept of graded penalties parallels the general provisions relating to theft in both the Senate and House drafts, which impose greater penalties as the value of the stolen property increases.⁹

The quantity of films.—In discussions with the House Subcommittee's Staff with respect to the House provision on copyright infringement, we have proposed that the quantity of films that must be illegally reproduced or distributed to warrant felony treatment be reduced. The current draft, which requires 200 or more infringing copies for a Class D felony, and more than 20 but less than 200 copies for a Class E felony, places too heavy a burden of proof on the government. The House provision could require the government (or industry) to finance the purchase of at least 21 copies of a film before it could establish even a Class E felony, and more than 200 copies before it could establish a Class D felony.¹⁰ At \$5 to \$100 per copy, these undercover "buys" would be extremely costly, especially given the number of pirates under investigation. To ease the financial burden of proving that a felony has occurred, we have proposed, and the House Subcommittee Staff has agreed, that the quantity figures for motion pictures should be reduced to:

More than 100 copies of a motion picture for a Class D felony; and

More than 10 but less than 100 copies of a motion picture for a Class E felony.

These changes and other technical changes discussed with the Subcommittee's Staff are set forth in Appendix A. We urge the Committee to consider the advantages of the House provision on copyright infringement as amended.

Conforming amendment.—We have also proposed that Section 506(a) of Title 17 of the United States Code be amended¹¹, read as follows:

"(a) Any person who knowingly engages in conduct by which he infringes a copyright for purposes of commercial advantage of private financial gain commits an unlawful act that is an offense described in section 2537 of title 18."

⁹ The quantity approach, rather than the "value" approach of the general theft provisions, is appropriate in the case of criminal copyright infringement because of the difficulties inherent in determining the value of illegal reproductions. For example, if "property" is defined as the copyright which has been infringed, then the value will almost always be in excess of \$100,000, since any record or film worth pirating would have a copyright value worth at least that much. Thus, under this definition, the offense will almost always be a Class C felony. On the other hand, if property is defined as the *illegal reproduction*, the question arises as to what value (i.e., retail value, wholesale value, thieves' market value) would be the most appropriate measure for each unauthorized reproduction. Significantly, under existing case law, the value of the unauthorized reproduction frequently cannot be aggregated. See, e.g., *United States v. Atherton*, 561 F. 2d 747 (9th Cir. 1977); *United States v. Wise*, 550 F. 2d 1180 (9th Cir.), cert. denied, 434 U.S. 929 (1977). This poses serious obstacles to enforcement efforts in the film industry, since film pirates usually sell single copies to a large number of customers. As a result, if the value of the illegal reproduction were the basis for the grade of the penalty, film pirates would be liable for only a Class A (or even a Class B) misdemeanor.

¹⁰ These burdensome requirements are applicable even if the government were to raid the site of a large scale operation and discover hundreds of illegal reproductions and duplicating equipment and materials worth hundreds of thousands of dollars. Certainly, an investment in such equipment would only be feasible if used to reproduce copies on a large scale. Nevertheless, the law could be read to require proof that the requisite number of copies were reproduced or distributed. At a minimum, we suggest that the legislative history make it clear that large-scale purchases are not necessary.

B. Counterfeiting

It merits emphasis that one of the most important concerns of the record and film industries with respect to legislation against piracy and counterfeiting has been met: namely, that criminal copyright infringement be codified in Title 18 and classified as a felony. At a minimum, this is the only way to deter widespread piracy and counterfeiting. We believe, however, that this committee can increase the deterrent effect of S. 1722 by specifically prohibiting criminal counterfeiting activity. In this regard, we urge the Committee to consider Section 2546 of Subchapter V (Counterfeiting, Forgery and Related Offenses) of the House draft which treats the counterfeiting of labels for records and films as a separate offense, classifies it as a Class D felony, and imposes a uniform penalty regardless of the quantity of counterfeit copies.

The insidious nature of counterfeiting demands that this offense should be treated as a separate crime. Unlike the copyright infringement provisions, which are aimed at protecting the rights of the copyright owner, the counterfeiting provisions are designed to protect consumers who are defrauded into buying shabby reproductions, thinking they are buying the genuine product. Separate treatment of this offense serves to increase its visibility and highlight Congress' determination to bring an end to the mushrooming growth of counterfeit activity in films and records. There is no need for the grading approach utilized in the copyright infringement provision—no lawful purpose exists for the duplication of any quantity of counterfeit labels.

While we recognize that the Senate bill has attempted to address the problem of counterfeiting by increasing the penalties applicable to criminal copyright infringement of a film or record label, the Senate's approach provides only limited protection for the many records and films on which counterfeiters prey. The effect of dealing with the problem of counterfeiting under the copyright infringement provision is to prohibit duplication only of those labels which have been copyrighted. Traditionally, recording and film companies have not copyrighted labels. Of course, if this Senate provision were to become law, recording and film companies would take steps to copyright labels on unreleased products. But, under the Senate provision, there would be no way to protect noncopyrighted labels on older records already in public circulation.

Counterfeiters, no doubt would seize on such a dramatic loophole in the law to expand their already widespread illicit activities. Consider, for example, what has already happened in the case of Elvis Presley recordings. Since Elvis Presley's untimely death, counterfeiters, playing on the sympathies of the public, have manufactured and distributed massive quantities of fake Elvis recordings. These recordings, when originally issued, did not bear copyrighted labels and therefore would not be protected under the proposed Senate infringement provision. Thus, the provision presently in S. 1722 would encourage counterfeiters to continue to steal the creative product of this great star. We therefore urge that, if the Committee determines not to adopt a separate provision dealing with counterfeiting, it should at least retain the existing counterfeiting statute, 18 U.S.C. § 2318, to provide some degree of protection to noncopyrighted labels affixed to recordings already published.

Elimination of loopholes.—Section 2546 of the House draft also improves existing law by eliminating certain loopholes in the current counterfeiting statute. For example, 18 U.S.C. § 2318 presently requires that the counterfeit labels be "affixed" to recordings or films when shipped in interstate commerce. To avoid federal jurisdiction, counterfeiters have begun to ship across state lines only the unattached counterfeit labels and jackets, leaving the discs, eight-track cartridges or other containers to be shipped separately. The packaged product is then put together in the state where the dissemination or distribution will take place. Such precautions may preclude proof of violation of Section 2318. The language of the provision in Section 2546 would eliminate this loophole. So, too, that language would define counterfeit labels to include the entire packaging of a video cassette or sound recording—album covers, sleeves, packets and so on.

Jurisdiction.—To make clear the basis for asserting federal jurisdiction over counterfeiting activity, we have suggested to the House Subcommittee's Staff that Section 2546 include a separate jurisdictional provision. Given the nature of the offense, federal jurisdiction should not be presumed. Our suggested language will ensure the requisite nexus between counterfeiting activity and one of the traditional bases of federal jurisdiction. We have proposed to insert in Section 2546 language providing for federal jurisdiction if the offense is committed within

the special jurisdiction of the United States; or the counterfeit label is moved in interstate commerce in the planning, execution or concealment of the offense; or the counterfeit label is attached or designed to be attached to a copyrighted product.¹¹

The jurisdictional requirements as well as certain other technical improvements to Section 2546, agreed to by the House Subcommittee's Staff, are set forth in Appendix A.

Simulation.—We have proposed an additional modification in Section 2546 of the House draft to deal with the growing problem of "simulated labels." This is yet another fraudulent practice whereby counterfeiters and pirates use labels that simulate "genuine" labels that do not exist. These simulated labels have the same basic criminal purpose as any other counterfeit product: they are designed to defraud the consumer regarding the authenticity or source of the product. For example, cases have arisen where a counterfeiter has reproduced, packaged and distributed videotapes of a film that has never been released in that form to the public. At first blush, the labels on these videotapes appear to be genuine. *But in reality, there is no genuine label which the counterfeiter has duplicated.* The current draft of the definition of "counterfeit label" may not include such simulated labels, since there is no genuine product.

The problem of simulation is growing at an extremely rapid rate, and we believe this practice is destined to become even more prevalent if not addressed in newly enacted criminal reform legislation. Therefore, we have proposed to amend the definition of "counterfeit label" in Section 2546 as follows:

(b) As used in this section, the term (1) "counterfeit label" means an identifying label or container that purports to be genuine, but is not, or that omits information necessary to prevent that label or container from being misleading, or that conceals a material fact and thereby creates a false impression in such label or container.

C. Definition of "racketeering activity"

We strongly endorse the Senate provision including criminal copyright infringement in the definition of "racketeering activity" (Section 1807(f)(1)). There is no longer any doubt that organized crime has become deeply involved in the reproduction and distribution of pirate recordings and films, particularly counterfeit copies. Indeed, it appears that the mob's profits from illegal copies of a hit outstrip those of the legitimate recording company which must pay royalties and shoulder promotional expenses. As NBC News reported in a special segment of its Nightly News program on crime in the rock music business:

"In the last three years, the Mafia has become one of the biggest producers of records and tapes in this country, turning out millions of copies of the hits on the Top 20 list.

"The mob's first big hit was the music from the soundtrack of this movie, 'Saturday Night Fever,' featuring the Bee Gees. RSO Records, the company that made the original legal recording says it sold 28 million copies of the soundtrack from 'Saturday Night Fever.' Federal investigators say mob counterfeiters made and sold at least that many."¹²

Reports of the December 1978 five state raid which yielded millions of dollars worth of duplicating equipment, counterfeit cassettes, records and tapes, repeatedly referred to the involvement of organized crime. Indeed, the raid was the result of an undercover investigation by the Brooklyn Organized Crime Strike Force and Organized Crime squads of the FBI. One article on the raid reported,

"The FBI agent who led the . . . raids . . . said, 'And this racket is spreading, a growing industry nationwide. It's a typical white-collar industry with heavy mob involvement.'"

"Officials said the counterfeit recording industry is dominated by organized crime and that major New York-based mob figures, whom they did not identify, were involved."¹³

¹¹ Although it would appear that the nexus between a counterfeit label and a copyrighted product would be sufficient to invoke federal jurisdiction over counterfeiting in all circumstances, this is not the case. Record companies did not obtain the right to copyright their products until 1972. As a result, pre-1972 sound recordings are not copyrighted, but are frequently the subject of counterfeiting activity. To protect these pre-1972 recordings, jurisdictional bases other than attachment to a copyrighted product are required.

¹² Transcript of NBC Nightly News at 1-2, May 9, 1979.

¹³ *Newsday*, December 7, 1978, at 5, 19.

The first indictment as a result of those raids last December has now been handed up. This indictment included a count for violation of the Racketeer-Influenced Corrupt Organizations statute.

The inclusion of criminal copyright infringement within the definition of racketeering activity demonstrates this Committee's recognition of extensive mob involvement in copyright infringement activities. Clearly, the mob's involvement extends into counterfeiting activity also. We urge the Committee that if it accepts our proposal, based on the House approach, to list counterfeiting as a separate offense, then trafficking in counterfeit labels should similarly be included in the definition of racketeering activity.

D. Forfeiture of illegal reproductions and equipment used in their manufacture

MPAA and RIAA believe that it is essential that government enforcement authorities have available to them the authority they need to combat the burgeoning growth of piracy and counterfeiting. One such weapon is the authority to bring a proceeding for the forfeiture of pirate and counterfeit merchandise and the equipment used in their manufacture, as is provided in Section 4001(a)(12) of S. 1722. We strongly endorse this provision.

Organized crime's involvement in piracy and counterfeiting is a major factor contributing to the difficulty of controlling this criminal activity. Even where a conviction discourages a pirate from renewing operations, there is no shortage of criminals within the mob hierarchy to replace those that have been caught.

It is necessary to block every avenue that encourages pirates to enter the business. Apart from criminal penalties, it is the seizure and forfeiture or other disposition of the equipment used to manufacture, reproduce and assemble the pirated sound recordings that provide the most effective method of deterrence. Experience has demonstrated that, if the equipment used in pirate operations is not taken from the pirates, it will undoubtedly be used again for a similar purpose.¹⁴ A forfeiture provision would have the effect of drying up the source of the criminal activity.

With the increasing sophistication of pirates, piracy operations have become more difficult to detect. For example, the head of a large pirate operation will often be responsible for the manufacture of "pancakes," the large reels of tape from which individual cassettes or cartridges are wound. A great number of separate "winding operations" will, in turn, be run by small-time pirates. A raid on a single winding operation will close down only one small operator, leaving all the other winding operations, and more important, the pancake manufacturer, to continue their piracy efforts unimpaired. On the few occasions that a pancake manufacturer can be found, it is imperative that the equipment with which he perpetrates the unlawful activity be seized, to prevent him from renewing his illegal operations the next day.

Therefore, we applaud the inclusion of a forfeiture provision to ensure further the effective enforcement of the laws against copyright infringement.

A forfeiture provision would also enhance the ability of law enforcement authorities to control counterfeiting activities. We urge this Committee to include in the current forfeiture provision a reference to counterfeit copies and property used to manufacture such copies, if the Committee accepts our proposal to treat counterfeiting as a separate offense.

* * * * *

The need for legislation increasing the penalties in existing legislation is immediate. At this very moment, counterfeiters are peddling their wares to an unsuspecting public and pirates are reaping enormous illicit gains from unau-

¹⁴ One case in point involves an individual named Al Cecchi d/b/a Melody Recordings Inc. and A&G Packaging Co., large scale pirating enterprises making approximately 250,000 pirate tapes weekly. On April 19, 1972, FBI agents raided Melody's plant and seized large quantities of pirate recordings, machinery, and equipment. Subsequently, Cecchi's lawyer convinced the U.S. Attorney that seizure of the property had been improper and he obtained the return of the equipment. In June 1972, U.S. Marshalls again seized Melody's equipment, and thousands of pirated recordings pursuant to a writ of seizure obtained by a group of music publishers who were suing Melody Recordings. In June 1973, a federal judge ordered the seized equipment and pirated recordings returned to the premises of Melody Recordings. Soon thereafter, when the FBI learned that Melody was back in the pirating business, the FBI raided the premises of Melody again. Although the FBI seized masters and finished pirated recordings, it did not remove any machinery or equipment. The FBI discovered Cecchi again in 1974 at a different address, under an alias, running another piracy operation. Unfortunately, Cecchi is only one example of the high rate of recidivism among pirates.

thorized reproductions. Existing penalties are simply not adequate to deter the criminals engaged in this sophisticated version of theft. MPAA and RIAA strongly support the proposed changes in the law substantially strengthening the penalties for criminal copyright infringement and counterfeiting and, thereby, the law's deterrent effect. The enactment of such legislation—and hopefully the enactment of interim legislation increasing the existing penalties pending the effective date of a new Criminal Code—would be of significant assistance in combatting the theft of the creative property of recording artists, musicians, composers, publishers, actors, actresses, screenplay writers, motion picture studios and recording companies.

APPENDIX A

We have discussed a number of technical changes in the current draft with the House Subcommittee's Staff. The Staff agreed to change several provisions so that the text would read as set forth below.

I. CRIMINAL COPYRIGHT INFRINGEMENT

A. Section 2537, Subchapter IV (Criminal Infringement of a Copyright) is amended to read as follows:

(a) Whoever violates section 506(a) of title 17, United States Code, shall be punished as provided in subsection (b) of this section.

(b) An offense under subsection (a) of this section is—

(1) a class D felony if the copyrights infringed are:

(A) in sound recordings and the offense involved the reproduction or distribution of 1,000 or more phonorecords infringing one or more copyrights during any six month period;

(B) in motion pictures or audiovisual works and the offense involved the reproduction or distribution of 100 or more copies of such motion pictures or audiovisual works infringing one or more copyrights during any six month period; or

(C) in sound recordings, motion pictures, or audiovisual works and the offense involved a second or subsequent offense under this section;

(2) a class E felony if the copyrights infringed are—

(A) in sound recordings and the offense involved the reproduction or distribution of more than 100 but less than 1,000 phonorecords infringing one or more copyrights during any six month period; or

(B) in motion pictures or audiovisual works and the offense involved the reproduction or distribution of more than 10 but less than 100 copies of such motion pictures or audiovisual works infringing one or more copyrights during any six month period; and

(3) a class A misdemeanor in any other case.

(c) As used in this section, the term—

(1) "sound recording", the term "motion picture", the term "audiovisual work" and the term "phonorecord" have, respectively, the meanings given these terms in section 101 of title 17; and

(2) "reproduce" and the term "distribute" have, respectively, the meanings given those terms in section 106 of title 17.

II. COUNTERFEITING

Section 2546, Subchapter V is amended to read as follows:

Trafficking in counterfeit labels for phonorecords, or in copies of motion pictures and audiovisual works

(a) Whoever knowingly trafficks in a counterfeit label designed to be or which is affixed to a phonorecord, or to a copy of a motion picture or an audiovisual work, commits a class D felony.

(b) As used in this section, the term—

(1) "counterfeit label" means an identifying label or container that purports to be genuine but is not;

(2) "phonorecord", the term "motion picture", and the term "audiovisual work" have, respectively, the meanings given those terms in section 101 of title 17.

(c) Jurisdiction.—There is federal jurisdiction over an offense described in this section if:

(1) the offense is committed within the special jurisdiction of the United States;

(2) the counterfeit label is moved in interstate or foreign commerce in the planning, execution or concealment of the offense;

(3) the counterfeit label is designed to be affixed to or to enclose, or is affixed to, or encloses, a copyrighted audiovisual work or motion picture, or a phonorecord of a copyrighted sound recording.

END