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CAN THE COMMON LAW ADEQUATELY JUSTIFY A HOME TAPING ROYALTY USING ECONOMIC EFFICIENCY ALONE?

Ramon E. Reyes, Jr.*

I. INTRODUCTION

Over the past twenty years, the rapid development and spread of high quality sound reproduction technology have caused a great deal of debate within the United States copyright community. With the advent of recording devices capable of making high quality yet inexpensive and unauthorized reproductions of copyrighted sound recordings,1 scholars, authors, and recording industry officials have lobbied for legislation that would protect the interests of copyright owners.2 These individuals called for protection of copyrighted works in the form of a compulsory home taping royalty or a surcharge on blank audio tape and recording devices. At the same time, the recording technology industry, consumers organizations, and even some scholars, urged Congress and the courts to protect the right of the public to reproduce copyright protected sound recordings for private use.3 These groups have argued that the

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1. E.g., Digital Audio Technology (DAT) consists of devices capable of making near perfect digital copies of compact disks (CDs), phonographs (LPs), cassettes, and other media. Digital audio recordings result in no additional distortion or noise in the copy, unlike analog recordings. See Douglas Reid Weimer, Digital Audio Recording Technology: Challenges To American Copyright Law, 22 ST. MARY'S L.J. 455, 475-80 (1990).

2. See, e.g., Witnesses Hail Compromise Bill on Home Taping and DAT Royalties, 42 Pat. Trademark & Copyright J. (BNA), 613, 614 (1991) [hereinafter Compromise Bill on Home Taping].

3. See generally Barbara Ringer, Copyright in the 1980s, 23 BULL. COPYRIGHT SOC' Y
Unauthorized copying of protected sound recordings does not infringe upon the rights of copyright owners or otherwise adversely affect the market for prerecorded sound recordings. Herein lies the home taping controversy.

The home taping of sound recordings is the unauthorized reproduction of copyright protected phonographs (LPs), prerecorded cassettes, 8-track tapes, and compact disks (CDs), for the private use of the copyist. Home taping must be distinguished from record piracy, which is the unauthorized reproduction of sound recordings on a large scale and the subsequent sale of the copies to the public. Although both home taping and record piracy involve the unauthorized reproduction of copyright protected sound recordings, the two situations need to be distinguished because of the way each draws into conflict the interests of copyright owners and consumers. In the case of record piracy, the legitimate interests of copyright owners in the economic return from their labor conflict with the illegitimate interests of the "pirates" to benefit financially from copying and distributing a protected work. On the other hand, the conflict in home taping situations is between the interest of copyright owners to receive an additional economic benefit from their artistic or distributive effort and the interest of consumers to make a copy of a lawfully purchased sound recording for their private use.4 In the instance of home taping, the

299, 303 (1976).

4. Some would argue that this is an oversimplification of the home taping controversy because it does not take into account consumer to consumer distribution of home taped copies of protected works. See generally Joel L. McKuin, Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis, 12 Hastings Comm. & Ent. L.J. 311 (1994). However, although consumer to consumer distributions do occur, there is no reliable accounting of approximately how much exists. Id. at 314 n.9. The lack of reliable information makes it difficult to factor such distributions in the home taping analysis. As a result, recently enacted legislation in the United States requires all digital audio recording devices to contain a copy protection device that would prevent copying from a copy, and thus decrease the amount of consumer to consumer distribution of home taped works. See Audio Home Recording Act of 1992, (codified at 17 U.S.C. § 1001 et seq. (1992)). Nevertheless, even taking into account consumer to consumer distributions, my conclusion remains the same: the traditional common law copyright principles of economic efficiency alone cannot adequately justify a home taping royalty. See infra notes 140-65 and accompanying text.

It is also important to note that much of the international home taping legislation specifically excludes consumer to consumer distribution of copies from the protection of the exemption schemes. For example, in Australia, the home taping law states:

(1) Copyright . . . is not infringed by making on private premises a copy of the sound recording if the copy is made on or after the proclaimed day on a blank tape for the private and domestic use of the person who makes it.

(3) Where a copy of a sound recording made in reliance on subsection (1) is used otherwise than for the private and domestic use of the person who made
Copyright owner has already benefited from the consumer's initial purchase of the protected work, and a strong argument can be made that the additional economic benefit is unwarranted.

Initially, the advent of home audio recording technology did not cause copyright owners to be concerned with the unauthorized reproduction of their works.\(^5\) However, over time, copyright owners became concerned with the effect of high quality reproductive technology on their copyrighted works. As technological advances made the quality of home taped copies better and less expensive, copyright owners claimed that this caused a decrease in the potential market for their sound recordings.\(^6\) Copyright owners argued that because the consuming public was able to reproduce sound recordings more easily and at lower costs, the public would spend less money purchasing record albums, prerecorded cassettes, and CDs.\(^7\) This problem is exacerbated by the impending spread of digital audio recording technology,\(^8\) which allows the "home taper" to make digital recordings from CDs, cassettes, or LPs that are far superior in sound quality to those produced by older recording methods, e.g., analog.\(^9\)

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\(^5\) This was because the quality of these early home recordings was quite low. The cost of buying a recording device capable of making a high quality sound recording was too high for a large percentage of the consuming public, and buying albums and prerecorded cassettes was more cost efficient. See generally Jane C. Ginsburg, Reforms and Innovations Regarding Authors and Performers' Rights in France: Commentary on the Law of July 3, 1985, 10 COLUM.-VLA J.L. & ARTS 83 (1985) [hereinafter Ginsburg, Reforms].

\(^6\) For example, in the Republic of France, from 1978 to 1983 the number of LPs sold decreased by approximately one-third. Id. at 94 (citing Assemblée Nationale, Rapport de la commission des lois No. 2235, at 12 (June 26, 1984)).

\(^7\) See Ginsburg, Reforms, supra note 5, at 93 n.9.

\(^8\) For a discussion of the advent of digital audio tape, see McKuin, supra note 4, at 321-22.

\(^9\) Digital audio recording devices allow individuals to make copies of sound recordings that are equal in audio quality to the original recording. With digital audio recording
It is claimed that the spread of sound reproduction technology causes serious problems in the international recording industry. For example, in France, about one-half of the homes owned audio reproduction devices by 1983. Simultaneously, the annual sales of LPs had decreased by about one-third, while annual sales of blank audio cassettes increased to approximately $40 million by 1984. In the United States alone, the recording industry estimates that the home taping of sound recordings results in $1.5 billion of lost sales per year. The concerns of copyright owners motivated many in the recording industry to lobby their legislatures to examine the home taping situation and enact legislation to rectify the problem.

The home taping of copyrighted sound recordings brings into conflict the interest of the public in reproducing lawfully purchased recordings for private enjoyment with the interest of copyright owners in receiving additional compensation for creating and distributing such works. Home taping laws are designed to balance those interests by imposing a small fee for the purchase of blank audio tape and recording devices, and then distributing the collected royalty for the benefit of copyright owners. In common law countries, the conflict between copyright owners and consumers may be resolved by using traditional copyright principles to justify a statutory system of compulsory licensing or home taping royalties for the taping of sound recordings. Under these traditional copyright devices that are unequipped with copy protection, consumers can make an unlimited number of near perfect copies of CDs, LPs, and cassettes. This form of recording is far superior to the analog systems of the past. See Mary L. Mills, New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change, 65 CHI.-KENT L. REV. 307, 327 (1989).

10. Ginsburg, Reforms, supra note 5, at 94.
11. Id. at 95.
12. See id. at 94 (citing Assemblée Nationale, Rapport de la commission des lois No. 2235 at 12 (June 26, 1984)).
13. See id. (citing Sénat, Rapport de la commission spéciale No. 212, Vol. 3 at 22 (Mar. 20, 1985)).
14. NBS Nixes Proposed System to Prevent Copyright Violation by DAT Recorders, Daily Rep. for Executives (BNA), No. 101, A-1 (Mar. 2, 1988). In 1982, economist Alan Greenspan stated that overall retail losses from home taping were approximately $1.05 billion in the United States. Diverse Groups Ask Supreme Court to Review Decision Blocking Home Video Recording, Daily Rep. for Executives (BNA), No. 101, A-1 (May 25, 1982). However, Jack Watman, senior vice president of the Consumer Electronics Group of the Electronic Industries Association, argued that the decline in record sales is equally attributable to changing lifestyles as it is to home taping. Id.
principles, the focus of providing copyright protection is on the benefits the public derives from the fruits of an author's creative effort. The primary goal of copyright is to enhance the public welfare; economic reward to the author is secondary. In contrast, in civil law countries, traditional copyright principles are focused on the rights of the author in the work product, and the copyrighted work is viewed as an extension of the author's personality. The primary goal is to ensure the rights of the author; public access to copyrighted works is a secondary concern.

While home taping royalty schemes may attempt to balance the interests of copyright owners and the consuming public, there are numerous problems associated with their use. First, home taping royalties are an inefficient means of resolving the conflict between copyright owners and consumers. The administrative costs of such schemes and the problems associated with the appropriate distribution of the collected royalties make them inefficient as a means of reconciling the competing interests of copyright owners and consumers. Second, home taping royalty schemes unfairly restrict the rights of noninfringing consumers of blank audio tape and recording devices. A large number of musicians, composers, computer users, blind persons, and ordinary consumers use blank audio tape in ways that do not infringe upon the rights of copyright owners. It is patently unfair to require them to subordinate their interest in privacy to the author's economic interest, upon which they are not even infringing. Finally, home taping royalty schemes do not comport with the traditional common law economic efficiency principle of copyright protection. The incentive effects of a home taping royalty are minimal at best, and there is no proof that the lack of a home taping royalty has caused authors to stop, or even decrease, creating and distributing sound recordings. These problems make the common law economic efficiency

15. See Marshall Leaffer, Understanding Copyright Law 1 (1989); Gary Kauffman, Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents, 10 COLUM.-VLA J.L. & ARTS 381, 381-86 (1986) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 469 U.S. 417, 431 (1984)). Throughout this article the traditional common law copyright principles are referred to as "economic efficiency"—giving authors an economic incentive to produce and distribute sound recordings or other copyrighted material.
18. See Mills, supra note 9, at 330-34. See also infra notes 132-65 and accompanying text.
19. See infra notes 187-95 and accompanying text.
20. See infra notes 136-65 and accompanying text.
principle of copyright inadequate as the sole justification for a home taping royalty. Nevertheless, home taping royalty schemes serve a useful purpose—the protection of copyright owners’ moral rights. Accordingly, it is necessary to justify a home taping royalty using both the common law economic efficiency principle as well as the civil law author’s rights principle.

The balance of this article examines the adequacy of justifying a home taping royalty using the traditional common law copyright principles. Part II compares the copyright principles of common and civil law countries. Part III presents a representative sample of the current legislative solutions to the home taping problem used in civil law and common law countries. Part IV then discusses the shortcomings of home taping royalty schemes when analyzed under traditional common law copyright principles. This section analyzes the specific problems of a home taping royalty and the general inadequacy of economic analysis as a means of determining copyright policy. Finally, Part V argues that the economic efficiency principle is not an adequate justification for requiring consumers to pay a

21. It is necessary to draw a distinction between economic efficiency and author’s rights because common law countries recognize only economic efficiency as the justification for copyright protection. Professor Alfred Yen observes that under the economic copyright model, the propriety of copyright’s expansion rests solely on an economic cost-benefit calculation. Courts should allow copyright to expand as long as the benefits of increased creative activity outweigh its costs. If we are serious about the exclusion of other property theories from copyright jurisprudence, no other considerations are relevant. Even though the concepts of fairness, equity and justice might suggest directions in which to proceed, we must ignore them in favor of economic analysis.

Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 520 (1990) (emphasis added). Professor Yen criticizes the traditional economic copyright model and would probably agree with this author that when deciding the home taping issue, common law nations need to consider equity, fairness, and natural law. Economic analysis is simply inadequate as the sole justification for a home taping royalty. See id. at 520-46.

22. This article is in no way making a negative assessment of the need for home taping royalties. In fact, such royalties are a beneficial protection device because they allocate the costs of unauthorized reproduction of protected sound recordings, protect the rights of authors, and enable consumers to “home tape” without the threat of prosecution. However, this type of protection cannot be justified by the common law economic efficiency principle alone because the systems of protection are not economically efficient and infringe upon the rights of innocent purchasers of audio recording devices and tape. Using the natural law, or author’s rights principle, allows a legislature to justify an economically inefficient royalty which infringes upon the rights of a class of consumers but protects the rights of authors.
compulsory home taping royalty. A home taping royalty, or compulsory license fee, can only be adequately justified using the copyright principles of both the common law and civil law world—economic efficiency and natural law.

II. TRADITIONAL COMMON LAW AND CIVIL LAW COPYRIGHT PRINCIPLES

Copyright legislation throughout the world covers a wide variety of issues. These issues range from the subject matter of copyright to the scope and duration of the copyright protection. The substance of a nation’s copyright legislation depends largely on its jurisprudential heritage. While many countries afford many of the same types of protection, there are some differences between the types of protection afforded in common law versus civil law countries. These differences arise due to the basic principles of copyright law in the two types of nations.

In the common law world, copyright protection is perceived as a way of encouraging the creation and dissemination of artistic works. The first copyright statute, the Statute of Anne, was passed in 1710 by the British Parliament. Parliament enunciated the policy that has become the


24. See generally Rudolf Monta, The Concept of “Copyright” Versus the “Droit d’Auteur,” 32 S. CAL. L. REV. 177, 177-78 (1959). For example, most common law countries do not recognize the “moral rights” of an author, while most civil law countries do recognize such rights. See Leaffer, supra note 15, at 2 n.3.


26. The general philosophy of copyright is one of economic efficiency. The creation and dissemination of the useful arts are promoted by providing an economic incentive for authors to create. Yen, supra note 21, at 517. For example, the United States Supreme Court stated that copyright exists solely to provide economic incentives for authors to produce useful art. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429, reh’g denied, 465 U.S. 1112 (1984) (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).

cornerstone of Anglo-American copyright law—copyright is an incentive for authors to create artistic and scientific works so that the public may have access to, and benefit from, such works.\(^{28}\) In the United States,\(^ {29}\) England, Australia, and most of the common law world, the limited rights granted by copyright legislation\(^ {30}\) are a means by which this important public interest may be achieved. The limited monopoly given to the author is intended to motivate the creation of useful works of art and science, and to ensure that they are made available to the public. Granting authors the ability to control the reproduction and distribution of their work ensures an economic return from which authors benefit and, thereby, provides an incentive to create works.

Copyright protection in common law nations is viewed as necessary because without it individuals desirous of an author's work would copy it rather than pay for it. Authors would then find their returns insufficient, and, therefore, the public would ultimately suffer because authors might not create or distribute works of art and science.\(^ {31}\) This perception is based on the assumption that the production of such works is based primarily on economic factors.\(^ {32}\)

In the civil law world, the analog of copyright is a system of rights called author's rights.\(^ {33}\) Author's rights embody two concepts—economic and moral rights.\(^ {34}\) Although the civil law recognizes the economic and moral nature of author's rights protection, both concepts are derived from

\(^{28}\) See Ginsburg, Two Copyrights, supra note 27, at 992.

\(^{29}\) In Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834), the United States Supreme Court announced that copyright was a statutory creation and not a common law property right nor a natural right of the author. Id. at 661. Therefore, the Court subordinated the author's protection to the interest of the public to access the works.


\(^{31}\) Yen, supra note 21, at 518.

\(^{32}\) For a discussion of the empirical comparisons necessary to analyze this assumption and copyright's incentive effects, see Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 Stan. L. Rev. 1343, 1349, 1413-21 (1989).

\(^{33}\) These systems of rights are called droit d'auteur (France), derecho de autor (Spain), and Urheberrecht (Germany). Leaffer, supra note 15, at 1.

\(^{34}\) For example, in France, droit patrimonial recognizes the author's economic interest and droit moral recognizes nonpecuniary interests such as integrity or paternity. Russell DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 Bull. Copyright Soc'y 1, 9-11 (1980).
natural law. Author's rights recognize the right to claim authorship throughout the existence of the work, to distribute the work as desired, to derive monetary return from distribution of the work, and to protect the work from injury or destruction.\textsuperscript{35} The civil law tradition views the author's work as an extension of the author's being, which the author brought into existence through an act of creation.\textsuperscript{36} In contrast with the common law, where copyright is derived by statute and is based on public policy, author's rights are derived through the creation of the work and are not necessarily subordinate to the overriding interests of the public.\textsuperscript{37} This is a more sympathetic treatment of authors than under the common law because authors are viewed as having a moral entitlement to control the product of their creative effort.\textsuperscript{38}

Even though the concept of author's rights encompasses both the economic and moral nature of protection, neither aspect is viewed as superior to the other.\textsuperscript{39} In deciding whether to enact legislation, civil law legislatures consider both the economic and moral consequences of a measure. This is a double theory of protection.\textsuperscript{40}

It is the creation, intellectual manifestation of the personality, that invests the author with the number of rights which proclaim explicitly that the two prerogatives are born for the benefit of the author, one


\textsuperscript{38} Leaffer, \textit{supra} note 15, at 2.


\textsuperscript{40} See Monta, \textit{supra} note 24, at 181. Note, however, that some civil law countries view author's rights as a monist or unitary system. That is, while recognizing the existence of the two elements, they are viewed as indistinguishable—two facets of a single right. This view affects the rights of transfer and may differ from a dualist approach. For a full discussion of this distinction, see Whale, \textit{supra} note 39, at 23.
of which is of a material kind, the pecuniary rights—and the other of an immaterial kind, the moral right.  

This concept of protection is quite different from that of the common law world.  

An excellent manifestation of the conceptual difference between common law and civil law copyright principles is in the area of moral rights. Generally, moral rights include the rights of integrity, paternity, withdrawal, and disclosure. These rights allow authors to control certain aspects of their work even after the work has been sold or otherwise disposed. The recognition of these rights is founded in the natural law notion that a work of art belongs to its creator "in a way that transcends the sale or transfer of the work to a new owner . . . because the artist has imbued the work with her personality." Allowing an author to retain some control over a protected work may cause conflict between the interest of the public to access works of authorship and the interest of the author in the work. As such, moral rights are an exception to the economic rights granted to the author in common law countries because they settle conflicts based on natural law principles, not economics. In the common law world, moral rights are viewed by many as antithetical to the notion of copyright as a means of achieving an optimal level of societal welfare.

41. Monta, supra note 24, at 181.  
43. Depending on the civil law country, moral rights also include the right of access, the resale royalty right (droit de suite), and the right of destruction. See generally Monta, supra note 24, at 177-84.  
44. The right of integrity is the right to see that the work is not mutilated or destroyed even after it leaves the possession of the author. See Leaffer, supra note 15, at 255.  
45. "The right of paternity [is] the right to assert authorship." Id.  
46. "The right of withdrawal [is] the right to withdraw the work from publication or to make modifications to it." Id.  
47. The right of disclosure allows the author to control "when and in what form the work may be presented to the public." Id.  
The home taping problem has been addressed by the legislatures of many nations. As of March 1992, at least twenty countries had adopted laws designed to balance the interests of copyright owners and the consuming public: Australia, Austria, Bulgaria, Cameroon, Congo, Finland, France, Gabon, Germany, Hungary, Iceland, Italy, Kenya, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and Zaire. Although the specific provisions of these laws vary greatly, the solutions to the home taping problem can be generalized as follows. First, each of the laws specifically exempts home taping of sound recordings from copyright infringement actions. These exemptions protect the rights of consumers to freely tape copyright protected sound recordings for their own personal use. Second, the laws create a type of compulsory license for the home taping of copyrighted sound recordings.

The various home taping royalties exist as a surcharge on blank audio tape, recording devices, or both. Generally, the surcharge on audio tape is either a flat fee per tape or a percentage fee based on the recording time or quality of the tape. The surcharge on recording devices is a percentage of the price for the device, and may be based on the number of simultaneous recordings which can be made thereon. Some of the royalty schemes exempt professional recording devices from the surcharge. The royalties are charged to the manufacturers or distributors of the audio tape and recording devices, who pass the cost along to consumers. Once the home taping royalties are collected, they are distributed to various copyright owners, including record companies, musicians, composers, and performers.

50. McKuin, supra note 4, at 331.
52. Consumer to consumer transfers of copied works are not included within this protection. See id.; see also supra note 4 and accompanying text.
53. See, e.g., Law of July 3, 1985, (France); German Copyright Statute.
54. See, e.g., Law of July 3, 1985, (France); German Copyright Statute. See also Ginsburg, Reforms, supra note 5, at 95-97.
55. Ginsburg, Reforms, supra note 5, at 97.
56. Id. at 95-97.
57. See, e.g., Law of July 3, 1985 art. 38 [hereinafter French Law on Authors' Rights].
Regardless of particular legislative solutions to the home taping problem adopted by these countries, there is an underlying concept of natural law which justifies their use. The natural law justification for home taping royalties is necessary because of the inadequacy of justifying such schemes using economic efficiency alone. Legislative solutions to the home taping problem burden society, especially individuals who do not tape at home, but who use blank audio tape and recording devices in legitimate, noninfringing ways. Further, all home taping royalty schemes are extremely inefficient and have not been proven to increase societal welfare. Requiring consumers to pay a fee to exercise rights incident to the lawful ownership of copyrighted sound recordings is especially unfair when the justification for doing so is illusory at best. Permitting a legislative response to burden equally infringing and noninfringing consumers cannot be justified using an economic efficiency argument alone, and must be based at least in part on recognizing the natural rights of the author. What follows is an examination of the typical solutions to the home taping problem in civil law and common law countries, using France and the United States as representative examples.

A. The Republic of France

In the Republic of France, legislation dealing with the private reproduction of copyright protected works dates back to 1957. According to the Law of March 11, 1957 ("Act"), a copyright owner could not prohibit the private copying or reproduction of disclosed works that was strictly for the personal use of the copyist. However, at the time the French Parliament did not contemplate technology that would

58. Yen, supra note 21, at 521.
59. See generally id.
60. Id., at 517.
61. This discussion uses France and the United States as representatives of civil and common law countries. These legislative solutions are in no way the only methods used by all nations within the civil or common law world. The examples are only provided to show the conflicting interest of copyright owners and consumers under traditional copyright principles of common law nations and author's rights within the civil law world. For other examples of international home taping laws, see Sterling, supra note 51, § 20.
63. Id. Although the Act did not specifically mention the home taping of sound recordings, its language was explicit—private copying would have been allowed as long as the copyist retained possession of the copy. See Ginsburg, Reforms, supra note 5, at 93.
enable large numbers of consumers to copy protected works with ease, especially in relation to sound recordings.\textsuperscript{64} As reproductive technology made it easier and less costly for consumers to copy protected works, authors, scholars, and legislators called into question the validity of the private copying exemption.\textsuperscript{65}

In 1976, the French Parliament addressed the perceived problem of home taping when it considered a law that would have imposed a four percent surcharge on audio tape recording devices.\textsuperscript{66} This law was ultimately rejected.\textsuperscript{67} However, the interests of copyright owners and users continued to be drawn into conflict because of advances in sound reproduction technology. In 1985, the steady rise in home taping caused Parliament to reconsider legislation to curb the taping of copyright protected sound recordings.\textsuperscript{68} The result was the reform of French copyright law.\textsuperscript{69}

The 1985 copyright reform did not prohibit home taping. Rather, it created a form of compulsory license for private taping of sound recordings.\textsuperscript{70} The compulsory license exists in the form of a surcharge on blank audio tape.\textsuperscript{71} The surcharge is based on the quality of the audio tape and its recording length.\textsuperscript{72} After the home taping revenue is collected, it

\textsuperscript{64} Ginsburg, \textit{Reforms}, supra note 5, at 93.
\textsuperscript{65} Id. at 84.
\textsuperscript{66} Id. at 94.
\textsuperscript{67} The proposed surcharge would have been used to fund a national center for music and dance. \textit{Id.} at 94-95.
\textsuperscript{68} Id. at 94.
\textsuperscript{70} See Ginsburg, \textit{Reforms}, supra note 5, at 95.
\textsuperscript{71} All French manufacturers and importers of blank audio tape are required to pay the surcharge and are expected to pass the added cost along to consumers, who are the ones responsible for the home taping problem. \textit{Id.} The initial surcharge was 1.5 francs per sixty minutes of tape. \textit{See France to Levy Cassette Duty on Behalf of Creators, \textit{REUTERS N. EUR. SERV.}, Sept. 18, 1986, \textit{available in LEXIS}, Nexis Library, WIRES File. The home taping surcharge also applied to blank video tape as well. This aspect of the law, however, will not be discussed in this article. For a more detailed discussion of the home video taping problem, see Mills, \textit{supra} note 9, at 309.
\textsuperscript{72} Ginsburg, \textit{Reforms}, supra note 5, at 96. A commission representing interested parties was established to determine the amount of the surcharge. Half of the commission members are representatives of authors, one-fourth represents consumers, and the remaining one-fourth represents manufacturers and importers. \textit{Id.} The revenue derived from the tape surcharge is collected by a performing arts society similar to the American Society of Composers, Authors and Producers ("ASCAP") and Broadcast Music, Inc. ("BMI") in the United States. \textit{See} Law on Authors' Rights art. 38. Prior to receiving
is distributed to the authors, performers, and producers of copyrighted sound recordings based on the frequency with which each sound recording is copied.

Unfortunately, the copyright reform law does not specify the manner in which the frequency of home taping is to be calculated. The legislative history of the law, however, refers to procedures used by the French composers’ rights society, the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), to distribute royalties from performance licenses granted to jukebox operators and other licensees. The SACEM determines the frequency of public performances of licensed works by identifying a representative sample of music licensees, and then sends SACEM experts to note the compositions performed on the licensees’ premises. When the law was being debated, the French Parliament estimated that the home taping surcharge would produce at least 200 million Fr. per year. Although current statistics are difficult to obtain, the French surcharge on blank tape is viewed as a successful solution to the home taping problem.

B. The United States

The United States has experienced market conditions similar to those in France, the United Kingdom, and much of the world with respect to

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73. Authors receive one-half of the revenue while performers and producers each receive one-fourth. See Law on Authors’ Rights art. 36. Twenty-five percent of the total revenue collected from the home taping royalty is used to assist in the creation and communication of live theater and also to assist in the training of performing artists. Id. art. 38.

74. Id. art. 33. See also Ginsburg, Reforms, supra note 5, at 97.

75. Ginsburg, Reforms, supra note 5, at 103.

76. See id.

77. See id.

78. See id. at 97.

79. See id. at 115-17.

80. The United Kingdom has experienced similar conditions and has also sought to enact legislation protecting copyright owners against the unauthorized reproduction of their works. See David Churchill, Plans for Blank Tape Levy Under Review, FIN. TIMES (London), Nov. 4, 1985, § 1, at 8. In 1985, because of claims that home taping cost the music and film industries millions of pounds per year, the government planned to introduce a levy on blank video and audio tape, as well as to legitimize the home taping
the home taping of copyright protected sound recordings and the sale of prerecorded music. Since the early 1980s, the Senate and House of Representatives discussed numerous bills which not only would have permitted home taping, but also would have imposed a compulsory home taping royalty on the purchase of blank audio tape and recording devices. In contrast with France, however, the United States has only recently enacted legislation which establishes a compulsory royalty for the home taping of copyright protected sound recordings.

of copyrighted material. Id. The levy was to be twenty-five pence per video cassette, and ten pence per audio tape. Id.

81. See supra notes 10-14 and accompanying text. For example, in Japan, government advisors have endorsed a Cultural Affairs Agency plan to subject digital audio recording devices and blank tape to a royalty. The royalty will be imposed only on digital audio tape and equipment because, although analog tape and equipment should be included in the royalty, "they are so widely used that it is impossible to collect royalties from the equipment that is already in use . . . ." See Plan to Collect Royalties From Individuals Receives Endorsement, Pat. Trademark & Copyright L. Daily (BNA) (Jan. 15, 1992).

In Australia, a home taping royalty exists on the first sale of blank audio tape. Tapes less than 30 minutes in length, video tapes, or computer storage media are exempted from the royalty. See Copyright Amendment Act 1989, ch. 2, § 135zzj (Austl.). The amount of the royalty is determined by the Australian Copyright Tribunal using the following formula: A x NM, where A is the amount per minute determined by the Tribunal, and NM is the number of minutes of normal playing time of the tape. See Copyright Amendment Act 1989, ch. 2, § 135zzn (Austl.). A collecting society distributes the royalty under a claim procedure initiated by copyright owners and manufacturers. See Copyright Amendment Act 1989, ch. 2, §§ 152-53 (Austl.). Exempt bodies or prescribed organizations can recover the amount of royalty they paid upon written proof to the collecting society. See Copyright Amendment Act 1989, ch. 2, § 135zzs (Austl.).

82. See infra notes 89-97 and accompanying text.

83. 17 U.S.C. § 1001 (1992). However, the United States Congress has at numerous times debated a home taping law, but a bill has yet to pass both the House of Representatives and the Senate. See, e.g., Arguments Before the Court, 52 U.S.L.W. 3227 (U.S. Oct. 11, 1983); Regulatory and Legal Developments, Daily Rep. for Executives (BNA) No. 79, at A-29 (Apr. 23, 1982).

There is an ongoing debate as to whether there is a home taping exemption under current United States copyright law. Those in favor of the exemption argue that the legislative history of the Sound Recording Amendments of 1971 recognizes the home taping rights of consumers. See Sound Recording Amendments, Pub. L. No. 92-140, 85 Stat. 391 (1971). Scholars have also argued that there is a universal feeling that home taping is not a copyright infringement as there have been no court challenges to home taping as an infringement. 3 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 13.05 (F)(5) (1990). Opponents of the home taping exemption argue that there is no exemption, and that the only possible defense for home taping is the fair use doctrine. See 17 U.S.C. § 107 (1988). See also Weimer, supra note 1, at 482-83.
The home taping issue was first addressed by Congress in 1971, albeit indirectly. When Congress enacted the Sound Recording Amendments of 1971 ("1971 Amendments"), which extended copyright protection to sound recordings, it made clear that the 1971 Amendments were aimed at record piracy, not home taping. Although the text of the 1971 Amendments did not mention home taping, the House Report stated, "it is not the intention of the Committee to restrain home recording . . . where [it is done] for the private use and with no purpose of reproducing or otherwise capitalizing commercially on it." 84 In other words, Congress believed home taping was not an infringing activity.

A few years later Congress enacted the Copyright Act of 1976 ("1976 Act"), which codified the fair use exception to copyright infringement actions85 and brought the home taping issue into question once again. As with the 1971 Amendments, neither the 1976 Act nor its legislative history directly mentioned the home taping issue.86 Rather, the House Report of the 1976 Act merely stated that the 1976 Act was "not intended to give [home] taping any special status . . . beyond the normal and reasonable limits of [the] fair use" exception to copyright infringement.87 This language has been viewed by some scholars as a significant indication that Congress viewed home taping as copyright infringement.88

The first series of legislative attempts to address the home taping problem directly began with the proposed Home Recording Act of 1982 ("1982 Act").89 The 1982 Act would have created an exemption for the private copying of sound recordings for personal use and would have instituted a reasonable royalty fee on all blank tape and recording

89. See S. 1758, 97th Cong., 2d Sess. § 119 (1982); H.R. 5705, 97th Cong., 2d Sess. (1982). Since then, Congress has considered various forms of legislation aimed at balancing the conflicting interests of copyright owners and consumers. In 1990, the United States Congress considered a bill to implement a serial copy management system (SCMS) for digital audio tape. This system would have allowed copying of digital recordings onto the digital media, but would have prevented subsequent copying from the copy. See H.R. 4046, 101st Cong., 2d Sess. (1990).
The fee would have been charged to importers and manufacturers and would have been determined by the United States Copyright Royalty Tribunal ("Royalty Tribunal"). Evidence of the economic efficiency motivation for the bill is found in Stanley M. Gortikov's statement that the bill "will establish a royalty system that will create a fair incentive for the recording of music." In part because of intense criticism of the bill by both sides of the home taping debate, the bill died in committee.

In 1983, Congress again took up the home taping issue when it considered the proposed Home Recording Act of 1983 ("1983 Act"). The 1983 Act was nearly identical to the 1982 Act except for the absence of the Royalty Tribunal in determining the royalty fee. Under the 1983 Act, the royalty fee would have been determined independently by copyright owners and organizations representing such copyright owners. In the event a voluntary agreement could not be reached, the parties would be subject to compulsory arbitration under the auspices of the Royalty Tribunal. History repeated itself when the 1983 Act died in committee. In 1986, Congress again failed to enact legislation which was similar to the two prior bills except that a fixed royalty rate was to be used. The

93. See id.
95. Voluntary agreements would be legally binding provided that
   [t]he agreements are accepted unanimously by the panel of copyright owners in accordance with paragraph 3 of this clause and copies of the agreements are filed in the copyright office within thirty days of execution in accordance with regulations that the register shall prescribe.
97. See S. 1739, 99th Cong., 2d Sess. § 2 (1986). The fixed royalty rate was as follows: (1) five percent of the price for the first domestic sale of each audio recording device; (2) twenty-five percent of the domestic sale price for dual recording devices; and (3) one cent per minute of the maximum playing time for blank audio tape. Microphone-only record and playback-only machines were to be exempt from the royalty. See id.
1986 legislation also failed amid criticism and concern over the royalty administration and distribution methods.

The next wave of legislation began after the advent, but before the marketing, of digital recording devices. Because of the superior quality of digital recordings, copyright owners became increasingly concerned with the effect digital recording technology would have on the already serious home taping problem. As a result, copyright owners extensively lobbied Congress to restrict the sale and use of digital audio tape in the United States. In 1987, the Senate and House of Representatives discussed numerous bills aimed at requiring special copy-chip protection for digital recording devices. Copy-chip protection would enable home taping of sound recordings by digital recording devices, but would encode the tape with an inaudible signal that would prevent future copying from that copy. After this attempt failed, Congress considered the Digital Audio Tape Recorder Act of 1990 ("1990 Act"), which required the same type of copy prevention mechanism on home digital recording devices. Renamed the Serial Copy Management System ("SCMS") under the 1990 Act, all digital recording devices sold in the United States would have been equipped with this preventative technology.

Although the SCMS was applauded by the recording industry as adequate protection for copyrighted sound recordings, composers argued that their rights in the underlying musical compositions were not being protected and complained that the bill lacked a royalty system. Under such criticism, the 1990 Act stalled in committee.

Nevertheless, Congress again sought to protect sound recordings from home taping with the Audio Home Recording Act of 1991 ("1991 Act").

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Unlike its predecessor, the 1991 Act included both the SCMS requirement and a home taping royalty. Under a comprehensive distribution plan, the royalty was to be distributed to "interested copyright parties," which included composers, publishers, and musicians. Although the 1991 Act was viewed as a positive solution to the home taping problem and was supported by parties on both sides of the home taping debate, it also died in committee.

The persistence of the United States home taping lobby paid off on October 28, 1992, when President George Bush signed the Audio Home Recording Act of 1992 ("AHRA") into law. The AHRA is basically a codification of an agreement reached between the recording and music industries and the audio equipment manufacturing and distribution industries. This agreement paved the way for the widespread marketing of digital recording devices and blank tape. In short, the AHRA consists of three components: (1) a SCMS requirement for all home digital audio recording devices manufactured, imported, or sold in the United States; (2) a home taping royalty scheme for digital recording devices and media; and, (3) a prohibition on copyright infringement actions based on digital or analog home taping.

The first prong of the AHRA prohibits the importation, manufacture, or sale of any digital audio recording device not equipped with an SCMS or its equivalent. The AHRA requires the Secretary of Commerce to establish a procedure to verify, upon the petition of each "interested

105. See S. 1623.

106. Interested copyright parties were defined as the owners of exclusive rights under § 106(1) of the Copyright Act of 1976—"reproduce a sound recording of a musical work that has been lawfully made and distributed to the public. See S. 1623, 102d Cong., 1st Sess. § 1001(6)(a) (1991).

107. See S. 1623, 102d Cong., 1st Sess., § 1014(a)&(b) (1991). The collected royalty would have been allocated to two funds, the Sound Recording Fund, and the Musical Works Fund. Each fund would have served a separate portion of the interested parties, who would have needed to make claims to receive compensation. See S. 1623, 102d Cong., 1st Sess. § 1014-16 (1991).

108. See Compromise Bill on Home Taping, supra note 2, at 613.


112. § 1002(a).
party," that a system meets the standards of the SCMS. Accordingly, each manufacturer or importer of digital audio recording devices must petition the Secretary of Commerce before it can lawfully sell such devices in the United States. The AHRA also prohibits the importation, manufacture, or sale of any device capable of circumventing the SCMS of any digital audio recording device. In addition, each manufacturer or importer must file an appropriate notice, provide quarterly and annual statements of account, and deposit the requisite royalty payments with the Register of Copyrights before it can import or sell digital audio recording devices in the United States.

The second prong of the AHRA establishes the home taping royalty. The royalty on blank digital audio tape is two percent of the "transfer price"—the actual entered value at United States Customs or FOB the manufacturer exclusive of direct sales and excise taxes. In the case of recording devices, the royalty is two percent of the transfer price, subject to a statutory minimum and maximum of $1 and $8 per device, respectively. If the unit is physically integrated and contains more than one digital audio recording device, the maximum royalty is $12. Beginning on October 28, 1998, the royalty rates for recording devices may be adjusted annually upon the petition of an interested party to the Librarian of Congress, "if more than [twenty] percent of the royalty payments are at the relevant royalty maximum . . . ."

113. § 1002(b).
114. Violation of § 1002 or § 1003 subject the violator to significant penalties. Civil actions based on violations of these sections may be brought in the United States district courts by an interested copyright party or "any person injured by [such] violation." § 1009(a) & (b). The district courts are authorized to grant temporary or permanent injunctions, award actual and statutory damages, and impound and destroy infringing articles. In the case of a violation of § 1003 (royalty section), actual damages include the amount of the royalty plus an additional amount equal to fifty percent of the actual damages. § 1009(d)(1)(A)(ii).
115. § 1002(c).
116. § 1003.
117. § 1004.
118. § 1004(a)(1).
119. § 1001(12)(A). If the transferor and transferee are related or within a single entity, the transfer price shall not be less than "a reasonable arms-length price under the principles of the regulations adopted pursuant to § 482 of the Internal Revenue Code of 1986 . . . ." § 1001(12)(B).
120. § 1004(a)(1)(3).
121. § 1004(a)(3).
122. However, the increase in the royalty shall not exceed the percentage increase in
The home taping royalties are collected by the Register of Copyrights and deposited in the Treasury of the United States.\textsuperscript{123} The royalties are divided into two funds—the Sound Recordings Fund and the Musical Works Fund.\textsuperscript{124} Sixty-six and two-thirds percent of the total royalty is allocated to the Sound Recordings Fund, and the remaining thirty-three and one-third percent is allocated to the Musical Works Fund.\textsuperscript{125} The royalties deposited in the Sound Recordings Fund are made available to various interested parties in the following percentages: nonfeatured musicians (2.625%); nonfeatured vocalists (1.375%); featured recording artists (38.4%); and copyright owners, usually record companies (57.6%).\textsuperscript{126} The royalties deposited in the Musical Works Fund are made available to music publishers and writers in equal percentages.\textsuperscript{127}

After the home taping royalties are collected, they are distributed by the Librarian of Congress based on claims filed by the relevant interested copyright parties.\textsuperscript{128} The interested copyright parties within a particular group may agree among themselves as to the appropriate distribution of the royalty payments: lump their claims together and file them jointly or as a single claim; or appoint an agent to file for them.\textsuperscript{129} If there are disputes as to the distribution of the royalty payments, the Librarian of Congress is obligated to convene a copyright arbitration royalty panel to determine the appropriate distribution of the royalty payments.\textsuperscript{130}

The final prong of the AHRA prohibits copyright infringement actions based on the manufacture and noncommercial use of both digital and analog home recording devices and media.\textsuperscript{131} Accordingly, the private home taping of protected sound recordings infringes neither the copyrights in the sound recordings nor the underlying musical compositions themselves. This prohibition ends the two decade debate over the legality of the home taping of sound recordings—home taping is now legal under federal law. However, record piracy is still illegal.

\textsuperscript{123} “All funds held by the Secretary of the Treasury [are] invested in interest-bearing United States securities for later distribution with interest under § 1007.” § 1005.
\textsuperscript{124} § 1005.
\textsuperscript{125} § 1006(b).
\textsuperscript{126} § 1006(b)(1).
\textsuperscript{127} § 1006(b)(2).
\textsuperscript{128} § 1007.
\textsuperscript{129} § 1007(a)(2).
\textsuperscript{130} § 1007(c).
\textsuperscript{131} § 1008.
IV. SHORTCOMINGS OF THE HOME TAPEING ROYALTY

Royalty and compulsory licensing schemes, as well as other legislative attempts to balance the competing interests of copyright owners and the consuming public, are viewed by many as excellent solutions to the home taping problem. Former United States Register of Copyrights Barbara Ringer has stated that a royalty or compulsory licensing scheme is a possible solution to the home taping problem when technological advances make it impossible to reconcile the interests of copyright owners and users. In fact, Ringer claims that a compulsory licensing scheme may be the only solution to the home taping problem when technological advances make it impossible to provide exclusive rights under copyright law. Professor Melville Nimmer has advocated the use of a home taping royalty system as a remedy in cases of copyright infringement by the home taping of sound recordings. Other scholars and commentators have argued that compulsory licensing schemes and other legislative actions are necessary given the exacerbation of the problems of copyright enforcement because of developing technology. In general, legislative solutions to curb home taping are viewed as positive solutions to the home taping problem.

In contrast, however, some argue that a legislature is unable to provide an efficient solution to the home taping problem. Using the common law copyright principles, these legislative solutions must be

132. See generally Mills, supra note 9 (although Mills advocates using a market solution to solve the problem of home taping, she points out that legislative solutions are viewed as appropriate solutions to the unrestricted home taping of sound and audiovisual recordings).

133. See Ringer, supra note 3, at 306-07.

134. Id.

135. See Melville Nimmer, Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth, 68 VA. L. REV. 1505, 1530 (1982). Nimmer contemplated a judicial solution to home taping wherein copyright owners would license defendant manufacturers of recording equipment to continue producing the equipment in exchange for a percentage of the manufacturers' revenue. Nimmer also envisioned that the manufacturers would pass the cost of the royalty along to the consumer. This is justified because "the consumer is the primary infringer, [and] there is no reason why he should not ultimately pay for the privilege of recording copyrighted works." Id. at 1531-33.


137. See Mills, supra note 9, at 318.
guided by economic efficiency. However, one scholar has pointed out that economic analysis is problematic when used to determine copyright protection. The current legislative solutions have fundamental flaws and do not completely reconcile the competing interests of copyright owners and consumers. In fact, it has been argued that reconciling the competing interests of copyright owners and consumers can be more efficiently addressed in the market place. Accordingly, the common law copyright principle of economic efficiency fails to be an adequate justification for a home taping royalty because more efficient and less restrictive alternatives are available.

A. Shortcomings of Economic Analysis of Copyright

The use of economic analysis in copyright law is problematic because of the problems inherent in defining and measuring societal welfare. Although these flaws are reason enough for not grounding copyright law on economic analysis alone, historically, copyright protection in the common law has been determined solely using this analysis. Generally, there are two methods used to analyze social welfare in economic terms: Paretianism and wealth maximization. Under Paretianism, if at least one person is better off with the copyright protection, and no one is worse off, and no other superior situation exists, the protection is socially beneficial. Under wealth maximization, the copyright regime that maximizes society's total wealth, regardless of distribution, is most appropriate. Wealth maximization holds that the optimal level of protection is that which maximizes the difference between the economic gains derived and the loss resulting from copyright protection.

138. See Yen, supra note 21, at 539-46.
139. See generally Mills, supra note 9.
140. See Yen, supra note 21, at 539.
141. See id.; Gordon, supra note 32, at 1435-68.
142. For a complete discussion of the principle of Paretianism, see Yen, supra note 21, at 539-41. See also JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 97-98 (1988).
144. See Yen, supra note 21, at 539-40.
145. See id. at 541; see generally Richard A. Posner, Utilitarianism, Economics, and
Paretianism and wealth maximization as measures of societal welfare, however, are flawed. Thus, even if they produce satisfactory results, they are inadequate as the sole grounds for justifying copyright protection and, in particular, home taping royalties.

Although the normative use of economics is problematic when analyzing social welfare, its use is not surprising. Copyright scholar Wendy Gordon has stated: “That economics should be a focus of attention is [not] surprising, since both copyright and patent law are seen as serving primarily economic incentive functions.” However, Gordon also points out that “‘wealth maximization’ as an aggregative criterion that disregards the possibility of independently derived individual rights, cannot serve as an acceptable foundation for the initial assignment of entitlements.” In fact, critics have expressed concern that copyright’s incentive effects might be too weak to justify certain types of protection. In all “a fairly wide range of [efficiency theory] commentary centers on the possibility that the institution of intellectual property is not carrying its economic weight.” Therefore, “there is little justification for placing all of our faith in economic analysis as a workable method for shaping copyright in any meaningful [way].”

1. Paretianism

Under Paretianism, copyright protection is based on a comparison of the existing and proposed methods of protection. If one person is better off under the proposed method than under the existing method, and no one is worse off, the proposed method of protection is said to be “pareto superior” to the existing method of protection. The pareto superior position is said to be “pareto optimal” if there is no other pareto superior position. At first glance, Paretianism appears to be an acceptable way of determining copyright protection. However, closer analysis reveals that

Legal Theory, 8 J. LEGAL STUD. 103, 119 (1979) [hereinafter Posner, Utilitarianism].
146. Yen, supra note 21, at 539.
147. See Gordon, supra note 32, at 1348.
148. See id. at 1351.
149. See id. at 1349.
150. See id. at n.25.
151. Yen, supra note 21, at 543.
152. See id.
153. See id. at 540.
quantifying social welfare using the theory of Paretianism is problematic. Paretianism fails to compare all possible pareto optimal protection schemes simultaneously. Because Paretianism is incapable of determining whether one pareto superior situation is better than another pareto superior situation, the pareto principle does not lead to one pareto optimal solution. This inability to lead to a single proposed protection scheme demonstrates that Paretianism alone is incapable of prescribing the most beneficial level of copyright protection. Therefore, a principle other than Paretianism is "required to justify an initial arrangement and select from the remaining Pareto optimal solutions."  

2. Wealth Maximization

Wealth Maximization "uses the concept of wealth as [its] scale," which is analogous to the common law principle of economic efficiency. New works of authorship, which are allegedly created because of the incentive effects of providing protection, increase society's wealth. The appropriate level of protection is determined by comparing the increase in society's wealth with the losses imposed by protection. If there is a net increase in society's wealth, the proposed change is beneficial. In other words, situation A is superior to situation B if in A: 1) at least one person is better off than in B; and 2) those people better off in A are capable of retaining some of their gains while compensating those who have become worse off. Wealth Maximization appears to be a relatively easy way to determine the appropriate level of copyright protection by suggesting a single result on how far to extend copyright protection.

Despite its appearances, Wealth Maximization is flawed as the sole measure of societal welfare. It is problematic because the determination of wealth requires information which often is not available.  

154. See id. at 539.
155. Id. at 541.
156. Id. Judge Posner defined wealth as the following:
[T]he value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market.
Posner, Utilitarianism, supra note 145, at 119.
157. See COLEMAN, supra note 142, at 100.
158. The information typically not available for a complete analysis under Wealth Maximization is calculation of the frequency of copying, the costs and benefits of a home
determination requires a ranking of all potential uses of a work or consequences of a level of protection in the order of their relative costs and benefits. Involved in this ranking is a determination of how the particular change in protection will motivate authors to create, and how potential infringing consumers will behave. This information simply is impossible to obtain. Hard empirical information necessary to accurately determine the effect of copyright protection on the actions of authors and consumers is unavailable.

Wealth Maximization is further flawed because its reliance on price as a determinative factor creates the risk of indeterminacy—copyright protection is expanded and contracted as the relative price of products change. Finally, Wealth Maximization analysis lends itself to justifying whatever copyright protection is proposed. Reliance on this method of economic analysis is suspect, and it should not be the sole determinative factor in deciding whether to expand copyright protection.

Aside from its economic limitations, Wealth Maximization also rests on questionable ethical grounds. Although wealth has a place in society, it is not the only thing that is valued highly. In some situations, societal wealth may not be increased by a particular protection scheme, but the scheme is desirable nevertheless, e.g., it is the right thing to do. Great debate has occurred on whether wealth is a component of social value. Whatever the outcome, wealth must certainly not be the only factor to be considered in ordering society. Factors such as equity, privacy, and freedom must be considered in determining the proper structure of society's laws, whether copyright or otherwise.

taping royalty, and the effect of a home taping royalty on the incentive to create and distribute sound recordings. See Yen, supra note 21, at 542.

159. See id. at 543.
160. Professor Yen notes that:
Brief reflection reveals the practical impossibility of undertaking such an endeavor. No judge (or legislature, for that matter) could ever identify all of the possible uses of a work. Moreover, the empirical information necessary to calculate the effects of copyright law on the actions of authors, potential defendants, and consumers is simply unavailable, and is probably uncollectible. 
Id. at 542-43 & n.162.
161. See id. at 544-46.
163. See generally Dworkin, supra note 143, at 191-226.
164. See id. at 224-26; Posner, Value of Wealth, supra note 143, at 243-52.
165. See Yen, supra note 21, at 542. On this point, Professor Yen writes the
B. Shortcomings of Compulsory Licensing Schemes

The shortcomings of the current home taping royalty schemes are manifold. Primarily, no legislative solution can efficiently address changes in technology that present new challenges to the interests of copyright owners and users. Second, the solutions unfairly disadvantage purchasers of blank audio tape and audio recording devices who do not participate in home taping of copyrighted sound recordings. Third, and perhaps most important, the current solutions have fundamental flaws in their use when traditional copyright principles are examined: specifically with reference to providing an economic incentive for authors to create artistic works. These shortcomings add to the problems inherent in economic analysis and support the conclusion that the traditional copyright principles of common law nations are insufficient as the sole justification for a home taping royalty.

A legislative solution to any problem will suffer the shortcoming of only being able to address conflicting interests under then existing technology. Rapid changes in technology bring interests into conflict in ways the legislature did not expect when enacting the legislation. Although legislators attempt to make laws that will adapt to societal and technological change, it is often impossible to foresee how interests will be brought into conflict in the future. For example, the 1985 French home taping royalty scheme did not address the potential economic effects of digital audio tape on the sound recording market. Even then, digital audio recording devices presented the possibility of producing copies that

following:

[If wealth maximization truly identifies the optimal order of society, it must do so because a society which maximizes wealth necessarily observes all other values worth recognizing. In my view, such an assumption is patently unrealistic. Since wealth maximization responds only to those values which are backed up by money . . . there is simply no reason to believe that a society which values wealth will also properly respect values which are not bought or sold . . . .

Id.

166. Although the United States has dealt with the new digital audio recording technology, it took Congress nine years of considering home taping to decide the issue. See supra notes 89-109 and accompanying text.

167. Note, however, that S. 1623 and H.R. 3204 would have required a surcharge on blank audio tape, and recording devices that are now known or hereafter developed trying to solve the problem of rapid technological change. See S. 1623, 102d Cong., 1st Sess. (1991); H.R. 3204, 102d Cong., 1st Sess. (1991). See also Compromise Bill on Home Taping, supra note 2, at 614, col. 2.
are equal in sound quality to the original recording. Similarly, the United States' AHRA does not address the potential effects of recordable CD technology, which is just now becoming available to consumers. To respond to this new technology, Congress will have to redraft the AHRA to take into account the new recording devices as well as the recordable CDs.\footnote{At the very least, the surcharge will have to be re-evaluated to take into account this new form of recording technology. These re-evaluations take considerable time, as evidenced by the United States Copyright Royalty Tribunal taking over a year to adjust the compulsory licensing royalties for sound recordings in jukeboxes. \textit{See} Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 6 (D.C. Cir. 1981).}

Another instance of the inefficiency of legislative solutions to the home taping problem is found in the administrative costs of compulsory licensing systems.\footnote{Although these costs may be passed on to users, as infringers, legislatively imposed licensing schemes are an inefficient solution as compared with, for example, a market solution. \textit{See} Mills, \textit{supra} note 9, at 320-21.} As with any legislative solution, compulsory licensing systems have administrative costs associated with their use which make the collection and distribution of a licensing fee inefficient. Whenever a legislature attempts to solve a problem through mandatory licensing, an agency must be established, or an existing agency utilized, to oversee the licensing system.\footnote{Example of these agencies include, for instance, the United States Copyright Royalty Tribunal, or the French Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM). Whether private or public, these agencies have budgets that draw their funding from the collected licensing fees.} To function, these agencies require significant budgets. The funding for these agencies most often is drawn from the licensing fees collected, which are supposed to be earmarked for distribution to copyright owners.\footnote{For example, the 1992 AHRA allows both the Register of Copyrights and the Librarian of Congress to deduct “reasonable administrative costs” from the collected royalties before distribution. 17 U.S.C.A. §§ 1005, 1007(b) (1993).} Because of the nonprofit nature of state agencies, or even state-sanctioned private agencies, their operations tend not to be as efficient as a pure market participant. Tolerating this inefficiency cannot be adequately justified using economic efficiency as a maxim, especially when more efficient means exist.\footnote{\textit{See} Mills, \textit{supra} note 9, at 330-38.}

Further problems with home taping royalty schemes exist in their distribution systems. Any home taping royalty that is aimed at reconciling the competing interests of copyright owners and users necessarily entails some type of distribution system.\footnote{Note that the French Parliament originally attempted to use the compulsory
claim procedure or frequency calculation—the frequency with which each sound recording is copied. Claim procedures and frequency calculations are problematic because they are highly speculative and inequitable at best. For example, the AHRA’s claim procedure is in no way related to the amount of home taping that affects particular artists and music producers. Aside from the fact that there is no way to adequately determine the amount of home taping that occurs with respect to a particular artist’s or producer’s works, the amounts allocated within the two Funds disproportionately favor large record companies and do not provide a sufficient incentive for lesser known and new artists and producers to produce musical works.

The 1985 French compulsory licensing system’s frequency calculation, which is based on the number of times songs are played on jukeboxes within France, is similarly flawed. This calculation presupposes that the majority of the sound recordings being copied are the ones being played on jukeboxes or appear on record charts. The validity of this assumption is questionable. Granted, some of the jukebox selections are representative of the sound recordings being copied by the home tapers. However, at least some of the sound recordings that are being copied are of older recordings, which do not appear on jukeboxes; or of more contemporary records that are not popular enough to be included in jukebox selections. Simply put, the causal relationship between frequency calculations and the amount of actual home taping is impossible to prove.

The problems with frequency calculations and claim procedures become more apparent when the purpose of copyright protection in the licensing fee to fund a national center for music. See Ginsburg, supra note 5, at 94-95. This attempt was opposed by the SACEM, which wanted the licensing fee to be distributed to authors, musicians, and producers. Id. at 95.

175. See generally Ginsburg, Reforms, supra note 5, at 96-97.
176. See McKuin, supra note 4, at 336.
177. See id. at 337-38.
178. See McKuin, supra note 4, 338-39.
179. See supra notes 76-78 and accompanying text.
180. Authors who do not rank very highly on record charts, or do not have many recordings in jukeboxes, may not receive enough of a percentage of the distributed home taping royalty to encourage them to produce. Although the Audio Home Recording Act of 1992 attempts to solve this problem through instituting a claim procedure, see 17 U.S.C.A. § 1007(a), its ability to protect and compensate newer and lesser known authors, musicians, and producers is unproven.
common law world is examined. The purpose behind copyright law, and therefore compulsory licensing systems, is to promote the production of the useful arts by providing a set of rights that allows authors to receive compensation for their efforts—economic efficiency. How are the goals of copyright served by providing the most popular musicians, performers, and producers, who already receive a great deal of compensation from high volume sales, additional compensation through a home taping royalty? These artists and producers need little incentive to produce sound recordings other than the lucrative recording contracts they already have and are able to sign. Less famous artists and producers will not share in royalty systems to the extent of more famous individuals, and will not be encouraged to produce such works. In this regard, home taping royalties may act as a disincentive for lesser known artists because such artists will not view themselves as benefiting from the royalties.

Another area where home taping royalty schemes are problematic is the control over the copyrighted sound recordings. Copyright owners lose control over their works when centralized agencies set the royalty fees and control the distribution of the collected royalties. Barbara Ringer expressed concern over the prospect of the United States Copyright Office taking too much of a regulatory role in compulsory licensing schemes. Ringer stated that she was troubled about government involvement in authorship, because compulsory licensing invites state oversight of the creative efforts of authors and threatens a loss of individuality of authors and artistic works. This loss of control is of critical importance to copyright owners and makes a legislatively imposed compulsory licensing system appropriate only in extreme situations. Some copyright owners and scholars argue that the home taping problem is an extreme situation.

181. These popular musicians, like Madonna, Michael Jackson, and Bruce Springsteen, will be the individuals who benefit disproportionately from a compulsory licensing system aimed at home taping because they are the artists who appear at the tops of the record charts, or on jukebox selections. These artist will continue to produce music without a compulsory licensing system because they are already being sufficiently compensated through lucrative recording contracts.

182. See Braunstein, supra note 136, at 243.

183. Mills, supra note 9, at 320.

184. See Ringer, supra note 3, at 303.

185. See Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1613 (1982). Gordon states that “[i]n extreme instances, Congress may correct for market distortions by imposing a regulatory solution such as a compulsory licensing scheme . . . . But the broad brush of this regulatory solution is too sweeping for most cases.” Id.
However, compulsory licensing has been criticized as going too far toward governmental intrusion into the useful arts and into an area where the market place can be successful in working out its own problems.\textsuperscript{186}

Additional problems with the legislative solutions to the home taping problem exist because of the disadvantages to noninfringing users of blank audio tape and recording devices. A surcharge on all blank audio tape or recording devices presupposes that all tapes and devices are used in infringing ways. Actually, numerous individuals use blank tape and recording devices for legitimate, noninfringing purposes. Among the members of the noninfringing class are individuals who would be beneficiaries of a home taping royalty: musicians, composers, and producers, both professional and amateur.\textsuperscript{187} Other members of the noninfringing class include the computer industry, computer users, the blind, and individuals who use recording devices only for noninfringing purposes, e.g., for recording letters.

Musicians and composers account for a large percentage of the blank audio tape consuming public.\textsuperscript{188} These professionals use blank audio tape and recording devices to record songs, lyrics, live performances, and music that they hope to publish, use as "demos," or use again in the future.\textsuperscript{189} Requiring these individuals to pay a home taping royalty when

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187. Although the 1992 AHRA excludes from the royalty scheme “professional model products,” 17 U.S.C. § 1001(3)(A), this exclusion is problematic at best. First, the definition of “professional model products” is vague—“an audio recording device that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business, in accordance with such requirements as the Secretary of Commerce shall establish by regulation.” 17 U.S.C. § 1001(10) (emphasis added). Further, there are thousands of struggling musicians and “recording professionals” who use normal digital audio recording devices exclusively in noninfringing ways. These individuals often cannot afford the rather expensive professional models, and instead purchase nonprofessional home recording devices for use in their professional endeavors. Requiring these individuals to pay a royalty for use of such devices is patently unfair.

188. Even though the actual number of musicians and composers as a percentage of blank tape purchasers is unavailable, it is reasonable to assume that the number is not insignificant. The actual percentage of blank tape purchased by this group may even be larger than their percentage of the number of “home tapers” given the large numbers of tapes used by each of these individuals.

189. These tapes are often high quality CrO or metal tapes, whose royalties may be higher per tape. Amateur musicians and composers also purchase large numbers of blank
they do not violate the copyrights of others is patently unfair. Further, musicians purchase expensive recording and duplicating equipment to use in these efforts. A home taping royalty proportional to the quality of the recording device is another disadvantage to these individuals. Although some compulsory licensing schemes exempt certain groups from the surcharge, it is impractical to create a scheme whereby the interests of this group are adequately protected. Logistically, it would be extremely difficult, if not impossible, to identify all the individuals within this class and to provide cost-efficient ways to enable them to purchase the tapes and devices they need on a royalty-free basis. Therefore, home taping royalties unfairly disadvantage this class of audio recording device and blank tape consumers.

Other classes of consumers who are disadvantaged by a home taping royalty system are the computer industry and computer consumers. Computers often use the identical blank digital tape as digital audio recorders for a recording medium on which to store computer software and data. A surcharge on blank tapes disadvantages this class of audio tapes in furtherance of the same goals, although they may not seek to publish their musical ideas.

190. Professional and amateur musicians and composers often buy very expensive recording devices. Some of these devices are specialized, e.g., four, eight, and sixteen-track analog and digital recorders which can record four, eight, and sixteen tracks of musical information on a blank cassette, respectively, unlike "standard" cassette recorders which record on only two tracks. Others buy very expensive "standard" recording devices. These devices, whether specialized or standard, are essential to their artistic efforts, chosen occupation, or hobby. These devices can also be used by nonmusicians for high quality home taping or regular listening. A surcharge on these devices will result in a disproportionate share of the home taping royalty being paid by a noninfringing class of individuals. Indeed, since they do not contribute to the home taping problem, these individuals should not have to pay a royalty at all.

191. See Ginsburg, Reforms, supra note 5, at 97. For example, "broadcasters, professional producers of audio and audiovisual works, and organizations aiding the aurally and visually handicapped are entitled to reimbursement from the collection societies for the royalties paid on the blank tape." Id. (citing Law of July 3, 1985, art. 37).

192. An exemption scheme requires that these individuals be recognized as exempt, and enabled to purchase tapes without the additional charge. It would be very difficult to institute and administer a system that recognizes all the individuals within the class.

193. See Compromise Bill on Home Taping, supra note 2, at 614-15. Note that while noninfringing consumers (those who do not tape copyrighted sound recordings, but buy cassette machines to listen to prerecorded cassettes) are not excluded from paying the royalty. The Audio Home Recording Act of 1992 has an exemption for play-only devices, 17 U.S.C. § 1001(4)(B)(ii), and microphone-only recording devices, i.e., dictaphones. This in part protects some within the noninfringing class. 17 U.S.C. § 1001(3)(B).

194. See Compromise Bill on Home Taping, supra note 2, at 614-15 (citing testimony
consumers by requiring it to pay for the home taping of copyright protected recordings in which they do not participate. Similarly, blind individuals use blank audio tape in ways that do not infringe the copyright interests of others. This class of consumers records audio letters and talking books on digital and analog tape. A surcharge on such tape, or recording devices, is unfair to this otherwise disadvantaged class. Although legislative schemes may exempt these individuals from a home taping royalty, it is unlikely that such plans could be efficiently implemented.

V. ECONOMIC EFFICIENCY IS INADEQUATE AS THE SOLE JUSTIFICATION FOR A HOME TAPING ROYALTY

Based on the foregoing discussion it is clear that the traditional common law copyright principle—economic efficiency—is inadequate as the sole justification for a home taping royalty. This is due in part to the problematic nature of using economics as a means of measuring social welfare. Also, the shortcomings of home taping royalties, both practical and theoretical, expose the conflicting interests of copyright owners and consumers, which cannot be reconciled using economic efficiency alone. These inadequacies indicate that the copyright owners’ moral rights must be considered in the home taping royalty analysis. In fact, there is already a move toward recognizing author’s rights in the copyright jurisprudence of common law countries. This is a “natural” response because of the difficulty of balancing the conflicting interests of copyright owners and consumers that have been exposed through changing technology. Therefore, the common law world should cease trying to justify proposed home taping royalty schemes using the principle of economic efficiency alone and formally embrace the concept of rights.

of Philip Greenspun (research assistant with the Massachusetts Institute of Technology), to the Senate Subcommittee on Patents, Copyrights and Trademarks, Oct. 29, 1991). Although the 1992 AHRA exempts digital audio recording media marketed primarily for the purpose of computer and database use, 17 U.S.C. § 1001(4)(B)(ii), such an exemption is problematic because there is often no distinction in the market place between digital computer and audio tapes.

196. See Yen, supra note 21, at 539.
197. See id.
198. See supra notes 166-95 and accompanying text.
199. See supra notes 140-65 and accompanying text.
200. It is interesting to note that the proponents of the Audio Home Recording Act of
As home taping royalty schemes are viewed as necessary to balance the interests of copyright owners and consumers—which they should be—they must be justified using both the principles of economic efficiency and author’s rights.\(^{201}\)

\[\textbf{A. Economic Analysis Insufficient}\]

The problems of using economic analysis to measure social welfare weigh against justifying a home taping royalty only in terms of economic efficiency.\(^{202}\) The theoretical limitations of Paretianism and Wealth Maximization described above make them improper to determine a socially beneficial level of copyright protection using economic analysis alone.\(^{203}\) When a home taping royalty is analyzed using these two concepts, it becomes clear that imposing a fee to purchase blank audio tape and recording devices needs further justification.

1. Pareto Noncomparability

Upon analyzing a home taping royalty using Paretianism, one finds a situation of pareto noncomparability. That is, a home taping royalty is neither pareto superior nor pareto inferior to the status quo—no home taping royalty.\(^{204}\) Where there is a situation of pareto noncomparability, Paretianism does not support a preference of one protection scheme over another.\(^{205}\) Since a home taping royalty presents a situation of pareto noncomparability when compared to having no home taping royalty,

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\(^{201}\) Yen, supra note 21, at 538.

\(^{202}\) Id. at 539.

\(^{203}\) See supra notes 117-27 and accompanying text. Currently, analog recording devices and tape are by far more popular than digital audio tape, and account for a much larger portion of the market. Why not include analog recording devices and tape in the royalty, and thereby provide a larger collected royalty and incentive to create? Perhaps the exclusion is due in part to the feeling that this issue involves a balancing of individual rights—owner’s and consumer’s—and is not motivated solely by society’s interest in the distribution of sound recordings.

\(^{204}\) See Yen, supra note 21, at 540.

\(^{205}\) Id.
another principle must justify changing the status quo and imposing a fee for purchasing blank audio tape or recording devices.

A home taping royalty is neither pareto superior nor inferior to having no royalty because it will increase the welfare of copyright owners while decreasing the welfare of consumers. As was stated earlier, it is not disputed that a home taping royalty will increase the welfare of composers, musicians, and producers by increasing the amount of money they receive for their sound recordings. This effect of the royalty is viewed as a positive factor in determining whether the royalty is appropriate. However, such a royalty will greatly affect the rights of noninfringing consumers. It cannot be denied that a home taping royalty will unfairly affect numerous musicians, computer users, blind individuals, and other innocent purchasers of blank audio tape and recording devices by requiring them to pay a fee to purchase such equipment. In this situation, the principle of Paretianism gives no guidance in determining the proper way to resolve the conflict between copyright owners and consumers. Therefore, in deciding whether to impose a home taping royalty on consumers, another justification must be advanced.

2. Wealth May Not Be Maximized

Wealth Maximization is often suggested as the most appropriate way of determining the proper level of copyright protection. Given the appeal of the concept, it is not surprising that many common law nations seek to justify a level of protection using this method of economic analysis. However, when a home taping royalty is analyzed using Wealth Maximization it becomes evident that the concept is inadequate as the sole justification for imposing a fee for purchasing blank audio tape and recording devices.

In particular, it is extremely difficult to make an accurate Wealth Maximization determination with respect to a home taping royalty. This determination requires information that is impossible to obtain. For instance, an accurate determination requires that all possible uses, and classes of consumers, of blank audio tape and recording devices be identified. This information will enable the legislature to predict the effect a royalty will have on consumer behavior. Further, an accurate

206. See generally id. at 539-40 (describing the situation of Pareto noncomparability).
207. See id. at 541.
208. Id. at 545.
209. See Yen supra note 21, at 542.
determination of the royalty’s incentive effects and the frequency of home taping is needed to determine how authors will behave under a royalty system. While much has been said concerning the answers to these problems, little has been proved.

The use of Wealth Maximization to analyze a home taping royalty is particularly problematic because of a number of faulty assumptions on which the economic efficiency theory is based. With respect to home taping royalties, the first assumption of economic efficiency is that there is a causal relationship between a royalty payment and the creation and dissemination of sound recordings. In other words, the increased sales of blank audio tape has caused the loss in sales of LPs, CDs, and cassettes. As a result of the decrease in sales of LPs, CDs, and cassettes, authors will not produce as many new sound recordings. Further, this reduction in creative effort decreases societal welfare and necessitates a home taping royalty. While the first part of the relationship cannot be argued, i.e., that there has been an increase in sales of blank audio tape, the remainder of the assumption is suspect. The home taping literature lacks convincing evidence of a causal relationship between increased sales of blank audio tape and decreased sales of LPs, CDs, and cassettes.

While there may be some causal connection between the increased sales of blank audio tape and decreased sales of prerecorded music, it has

210. See id. at 543.
211. See, e.g., George L. Priest, What Economists Can Tell Lawyers, in 8 RESEARCH IN LAW & ECONOMICS 19 (John Palmer & Richard O. Zerbe eds., 1986). Professor Priest writes:

The ratio of empirical demonstration to assumption in this literature must be very close to zero . . . . The inability of economists to resolve the question of whether activity stimulated by the . . . protection of intellectual property enhances or diminishes social welfare implies, unfortunately, that economists can tell lawyers ultimately very little about how to enforce or interpret the law of intellectual property.

Id. at 19-21.

212. Beverly Sills, as chairperson of the Coalition to Save America's Music, stated that the “home taping of music has resulted in fewer new releases of records, and as a direct result, fewer opportunities for new talent.” See Diverse Groups Ask Supreme Court to Review Decision Blocking Home Video Recording, Daily Rep. for Executives (BNA), No. 101, at A-1, May 25, 1982. The author doubts the validity of this statement given the rise in new record labels within the past few years. It appears that more new talent has emerged on these new labels as a result of the music industry's failure to adapt to changing tastes. See generally FREDERIC DANNEN, HIT MEN 85-110 (1991).

Moreover, both proponents and opponents of home taping royalties admit that the statistical evidence on the incentive effects of such schemes are suspect at best. See McKuin, supra note 4, at 332-33 n.110.
not been proven that the alleged $1.9 billion loss in sales per year is totally because of home taping. Some argue that a large part of the loss in sales is because of the ever-changing taste of the public and the failure of the large record companies to keep pace with that change. Also, there is no proof that the lack of a home taping royalty has caused a decrease in opportunity for new talent. As a result of the traditional difficulty in getting a recording contract with a large record company and the failure of many of the larger companies to recognize viable new talent, many composers, musicians, and producers are turning to independent record companies and personal promotional efforts to get their music to the public. Although this is difficult, and may not account for a substantial part of the music industry, it affords the opportunity to distribute sound recording to the public. Therefore, even without a home taping royalty, the often stated goal of copyright law in common-law nations—encouraging creation and dissemination of works of art—is ensured.

The second assumption lies in the incentive effects of copyright protection. It is assumed that the leading incentive to produce artistic works is economic reward, and without that incentive fewer works would be produced and distributed and society would suffer. This assumption is critical to the economic efficiency principle of copyright, as works are given protection because protection is a “prerequisite” to creation. However, a careful look at authorship shows that copyright protects works whose creation does not depend on the economic incentive of copyright. Copyright protects the works authored by students in fulfilling their academic requirements, as well as works which are the result of an

213. In fact, there are many reasons why the record industry is losing money. High overhead and poor artist development are partly to blame, along with “promotional expenditures.” See Dannen, supra note 212, at 85-110.


215. This situation predates the home taping controversy.

216. Although producing and distributing sound recordings without large record companies is very difficult, many new acts produce records and distribute their own work. The obstacles are formidable, distribution networks are often controlled by the larger record companies, and promotion by radio stations is difficult to obtain. See generally Dannen, supra note 212.

217. See Yen, supra note 21, at 520, 537.

218. For example, in the United States, there is no exclusion for academic works. See 17 U.S.C. § 102(a) (amended 1990) (including works of the mind as copyrightable). See also Yen, supra note 21, at 537 n.133.
Copyright even protects works that an author may be compelled to create. Because these works would be created without protection, a literal reading of the economic efficiency principle of copyright would require that those works, and all others which would be produced without copyright, not be given protection. The common law world's failure to exclude such works from copyright protection indicates that there is some other underlying justification for copyright protection.

Even if the foregoing assumption were true, it ignores other factors that induce artistic effort, and makes economic analysis insufficient as the sole determinative factor for expanding copyright protection. Other incentives do exist, and although they are not in themselves determinative, they at least need to be considered in the home taping decision. For example, one of the primary incentives to write, record, and distribute music is the pleasure derived from the effort. Many musicians, and struggling producers, continue to write and record music on their own despite the cost and low economic reward. If there is already an incentive to create music, is a home taping royalty necessary? Although there is a strong argument for enacting a home taping royalty notwithstanding other incentives to produce, the royalty cannot be justified using economic efficiency alone.

B. It's About Rights

A solution to the home taping problem must be based on principles other than economic efficiency. Perhaps imposing a home taping royalty is proper to balance the interests of owners and consumers. That is, in balancing the conflicting interests of copyright owners and users, the interests of the owner are deemed more important than those of the

219. See Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951). The court stated that, "a copyist's bad eyesight of defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it." Id. (emphasis added).

220. See Hutchinson Tel. Co. v. Fronteer Dir. Co. of Minn., 770 F.2d 128, 132 (8th Cir. 1985) (the court found "nothing in the Copyright Act to support the District Court's conclusion that [plaintiff] Hutchinson's directory is excluded from copyright protection on the ground that Hutchinson is required by law to publish a directory").

221. Using the economic efficiency rationale one could argue that such works should be excluded because they will be created without copyright, and charging a price for them would be unduly burdensome to society.

222. Many bands make sound recordings and promote their music through concert tours even though they do not earn a profit. See generally DANNEN, supra note 212.
consumer because the owner's property is being taken without appropriate compensation. This justification is based on natural law—copyright protection is justified because of the labor and artistic contributions of the musician, composer, and producer. Countering this argument, Wendy Gordon writes the following:

There is often a distrust of copyright when its compulsions conflict with the usual expectations people have of the freedoms they should be entitled to exercise over their physical possessions. In everyday experience, when people who buy records, video cassettes, and computer programs are told not to use their own home machines to make copies of them, or when radio listeners are told it might be unlawful for them to tape music off the air, there is often a feeling of unfair restriction . . . . In addition, an act of copying seems to harm no one.

Gordon's statement highlights the fact that there is an underlying conflict of individual interests involved. To charge consumers to use lawfully purchased sound recording in a private way—copying the sound recording for personal enjoyment—must be to assert the author's rights over the consumers' because economic efficiency alone cannot reconcile these interests. This conflict was recognized when Parliament enacted the 1985 French home taping law. In deciding not to prohibit home taping, Parliament recognized the right of the public to make personal copies of lawfully purchased sound recordings. At the same time, it recognized the right of an author to receive appropriate compensation from the unauthorized reproduction of the author's work. Parliament balanced the competing interests using the natural law basis of author's rights. Jane Ginsburg observes:

The legislators recognized that 'it no longer seem[ed] possible to call into question the right of individuals to reproduce works of authorship by means of existing technology.' On the other hand,

225. See Ginsburg Reforms, supra note 5, at 95.
226. See id.
it had become clear that home taping should no longer be free of remuneration to the authors of the works recorded.\textsuperscript{227}

This underlying use of author's rights is not surprising given the history of copyright law in the civil law world, and the current trend in recognizing the natural law aspect of copyright.

\textbf{C. Presence of Natural Law}

Although copyright protection in the common law world is supposedly guided by society's interest in economic efficiency, a number of scholars have argued that natural law, or author's rights, should actually motivate the principles of copyright protection.\textsuperscript{228} Further, there has been a trend on the part of common law nations to accept the natural law justification of copyright in accordance with certain international treaty obligations.\textsuperscript{229}

Gary Kauffman has claimed that the common law world's reliance on economic efficiency is suspicious.\textsuperscript{230} Kauffman points to five "historical accidents" through which the common law principle of economic efficiency was developed.\textsuperscript{231} First, the English common law courts were

\begin{itemize}
\item \textsuperscript{227} Id. (citing J.O. D\ébats, Assemblée Nationale, First Session of June 28, 1984, at 3825).
\item \textsuperscript{228} Some even argue that there is a great deal of evidence pointing to the presence of natural law in the copyright jurisprudence of common law countries. \textit{See, e.g.}, Kauffman, supra note 15, at 387-420 (contending that the common law world's reliance on economic efficiency is a series of historical accidents); \textit{see, e.g.}, Yen, supra note 21, at 519-39 (examines the presence of natural law in modern copyright); \textit{see, e.g.}, Gordon, \textit{supra} note 32, at 1343-50 (contending that natural rights are the basis for copyright).
\item \textsuperscript{230} \textit{See} Kauffman, \textit{supra} note 15, at 381-88.
\item \textsuperscript{231} \textit{See id.} at 387-419. As Kauffman explains: \textit{Copyright rhetoric speaks of encouraging authorship; and yet, it has never been suggested that any legislator ever proposed a copyright bill because "authors were not simply writing enough." Moreover, neither Congress nor Parliament has ever passed copyright legislation due to an actual decline in book production. To be sure, most copyright legislation appears when there is a massive invasion of the natural right: plagiarism, unauthorized performance, and literary and record piracy are prime examples. Thus, when one considers that copyright is a natural right, and that the evils that incite copyright legislation are invasions of that right, then the purpose of a copyright statute appears to be codification of the right—primarily for the author.}
\end{itemize}
unable to define copyright protection before Henry VIII proclaimed a "royal prerogative" for printing. This inability, along with the Stationers' power to control printing and avoid purely legal solutions to their problems, kept the courts from even hearing copyright cases. It is argued that, but for the fact of the royal prerogative, the courts would have chosen to recognize an author's property right in the works created.

The second "accident" occurred with the enacting of the first copyright statute. Although the Statute of Anne stated a public purpose, viz., "An Act for the Encouragement of Learning," those urging its enactment would in fact do so to protect the interest of private rights. The wording may have only been decorative, or may have been a way of justifying the "monopoly" given to the Stationers' Company. Either way, copyright protection was guided by recognizing and protecting the rights of authors and producers (Stationer's Company), not the interest of society.

After the Statute of Anne became law, the common law courts began to decide copyright cases. The third "accident" was that in early copyright cases there was no distinction made between the issues of whether copyright was "property" and, if it was, whether it was perpetual. That is, the issues were fused, i.e., "if property, then perpetual." Early courts, holding that copyright was not property, were guided in part by the notion that protection would have to be perpetual if copyright was property. Because granting perpetual rights was viewed

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234. See Kauffman, supra note 15, at 389-90.
235. See id. at 392. Kauffman states that: "[s]ince copyrights are only product monopoly, that is, property rights, the preamble ought to have clearly reflected the primacy of such individual rights; a public purpose title is appropriate in antitrust legislation, not copyright laws." Id. at 397.
236. Id. at 392.
237. Id. at 398.
238. Id.
as undesirable, copyright was, therefore, not deemed to be property. Thus, a natural law basis for copyright was rejected.\textsuperscript{240}

The fourth "accident" was that despite current copyright jurisprudence, an explicit recognition of an author's rights is, in fact, recognized\textsuperscript{241} in the Empowering Clause of the United States Constitution.\textsuperscript{242} Because the framers of the Constitution were acquainted with the Statute of Anne, the wording of the Constitution may be based on the second "accident"—the wording of the Constitution may only be decorative.\textsuperscript{243} Also, many of the proposed wordings of the Copyright Clause made no mention of economic efficiency or a public purpose behind copyright and, in fact, recognized author's rights.\textsuperscript{244} Further, because the Patent Clause, which read "To encourage, by proper premiums and provisions, the \textit{advancement of useful knowledge} and discoveries," was introduced concurrently with the Copyright Clause,\textsuperscript{245} the framers may have been unconcerned with the language and thought it best to fuse the two together, which they did.\textsuperscript{246} Additionally, the individual writings of some of the framers indicate that the "primacy of society's interest in fostering [copyrighted works] is simultaneously advanced by giving economic reward, and therefore incentive, to authors."\textsuperscript{247} Finally, after \textit{Wheaton v. Peters},\textsuperscript{248} the Copyright Act of 1909 codified the primacy of society's interest in works of authorship and formally rejected copyright as a natural right, hence the fifth "accident."\textsuperscript{249} This "accident" occurred in spite of the lack of literature supporting the view of the primacy of society's interest in copyrighted works.\textsuperscript{250}

\begin{itemize}
\item\textsuperscript{240} See Kauffman, \textit{supra} note 15, at 397-402.
\item\textsuperscript{241} See \textit{id.} at 403.
\item\textsuperscript{242} U.S. CONST. art I, § 8, cl.8.
\item\textsuperscript{243} See Kauffman, \textit{supra} note 15, at 403.
\item\textsuperscript{244} 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321 (Max Farrand ed., 1911).
\item\textsuperscript{245} Kauffman, \textit{supra} note 15, at 404-05 (emphasis added).
\item\textsuperscript{246} See U.S. CONST. art I, § 8, cl. 8.
\item\textsuperscript{247} Kauffman, \textit{supra} note 15, at 406.
\item\textsuperscript{248} 33 U.S. (8 Pet.) 591 (1834) (holding that copyright did not exist at common law but was rather created by statute). The court relied on \textit{Donaldson}, 98 Eng. Rep. 257 (H.L. 1774), which had a similar holding.
\item\textsuperscript{249} See Kauffman, \textit{supra} note 15, at 409-11.
\item\textsuperscript{250} See \textit{id.} at 411. Kauffman claims that the rejection of copyright as a natural right, and the promotion of society's interest in the Copyright Act of 1909, was motivated by the fear of monopoly, perpetuity confusions, and patent confusion. \textit{Id.}
\end{itemize}
Other authors have noted similar challenges to the traditional economic efficiency theory of common law copyright. Professor Jane Ginsburg claims that early references to an author’s property interest and the public’s interest in the advancement of knowledge are “separate considerations of equal weight.”251 Whatever the conclusion, it is clear that there is a basis for the argument that natural law, or author’s rights, has a place in the common law copyright jurisprudence. Therefore, economic efficiency need not be the sole justification for any type of copyright protection and, in this instance, a home taping royalty.

Further evidence of the common law world’s growing acceptance of the natural law view of copyright is found in recent adherence to the Berne Convention for the Protection of Literary and Artistic Works (“Convention”).252 Article I of the Convention states its purpose as “a Union for the protection of the rights of authors in their literary and artistic works.”253 The American, British, Australian, and Irish adherence to the Convention indicates implicit legislative recognition of the natural

251. See Ginsburg, Two Copyrights, supra note 27, at 999 (emphasis added). Ginsburg writes the following:

Sources chronologically closer to the Constitution, however, treat the private and public interests more even-handedly. While records from the Constitutional Convention concerning the [C]opyright [C]lause are extremely sparse, a document dated August 18, 1787, notes that the proposed legislative powers were submitted to the Committee of Detail: “To secure to literary authors their copy rights for a limited time. To encourage by proper premiums and provisions the advancement of useful knowledge and discoveries.” The referral to the Committee of Detail thus sets forth the author’s property interest (“their copy rights”) and the public interest in advancement of knowledge as separate considerations of equal weight. Similarly, in The Federalist Papers, Madison endorsed the [C]opyright [C]lause, asserting, “[t]he public good fully coincides in both cases [of patents and copyrights] with claims of individuals.”

Id.

252. Berne Convention, supra note 229, art. 1.

253. Id.
law dimension of copyright protection. Therefore, again, economic efficiency need not be the sole justification for copyright protection.

VI. CONCLUSION

While home taping royalty schemes are appropriate mechanisms to balance the interests of copyright owners and users, there are numerous problems associated with their use which make economic efficiency inadequate as their sole justification. Home taping royalties are an inefficient means to resolve the conflict between copyright owners and consumers. A home taping royalty unfairly restricts the rights of noninfringing consumers of blank audio tape and recording devices. Moreover, these royalty schemes do not comport with the traditional common law economic efficiency principle. Further, there is evidence of a presence of natural law rights in traditional common law copyright jurisprudence. Given all these shortcomings, it is necessary to justify a home taping royalty using more than the economic efficiency principle of copyright in common law countries. Such a royalty can, and must, be justified using both the economic efficiency principle of the common law world and the author's rights principle of the civil law world.

254. For a more complete discussion of natural law references in United States law, see Yen, supra note 21, at 537 n.136. Professor Yen writes

[T]he Berne Convention Implementation Act of 1988 . . . eliminated certain formal prerequisites to copyright protection. In particular, notice of copyright is no longer required to keep a work from falling into the public domain. Although minor, such a change suggests a natural law orientation because it seemingly codifies the notion that copyright is the inevitable consequence of an author's creative labor. This orientation is further supported by article one of the Berne Convention, which states, "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." [emphasis added] Adherence to such language certainly implies recognition of the fact that something more than economic convenience supports copyright.

Yen, supra note 21, at 537 n.136 (citations omitted).