

A NEGOTIATED SOLUTION TO AUDIO HOME RECORDING?: LESSONS FROM THE US *AUDIO HOME RECORDING ACT OF 1992*

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I INTRODUCTION

A The Australian Context

In October 2002, the Audio-Visual Copyright Society ('Screenrights') and the Australasian Performing Right Association ('APRA') presented a submission to the Commonwealth Government seeking the introduction of a private copying remuneration scheme.¹ Noting the unprecedented scale of private copying, the submission called upon the Government to enact a remuneration scheme for the purpose of compensating copyright owners for the private and unauthorised copying of their works.² Neither a follow-up letter dated 22 January 2003³ nor a renewed call by APRA on 20 November 2003⁴ have yielded a formal

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1 See Simon Lake, 'Home Copying: Making It Legal' (2003) 12 *Screenrights' Newsletter* 1 <<http://www.screen.org/Newsletters/OTA60.pdf>> at 12 July 2004. The documents which formed part of the submission included: Australian Mechanical Copyright Owners Society and Screenrights, *The Case for a Private Copying Levy* (2001) Screenrights <<http://www.screen.org/about/submissions.html>> at 12 July 2004; Draft Private Copying Bill (2002) Screenrights <<http://www.screen.org/about/submissions.html>> at 12 July 2004; *The Proposed Statutory Copyright Licence for Private Use of Recordable Media Explanatory Note* (2002) Screenrights <<http://www.screen.org/about/submissions.html>> at 12 July 2004.

2 Ibid. The submission followed the publication of a Discussion Paper by the Australian Copyright Council in September 2001, entitled *Remuneration for Private Copying in Australia*, in which the rationale for such remuneration schemes was identified as the provision of compensation to copyright owners 'for private copying they are unable to prevent or licence in practice'. See Australian Copyright Council, *Remuneration for Private Copying in Australia: A Discussion Paper* (2001) 25.

3 Letter from Mr Brett Cottle, Chief Executive Australasian Performing Right Association et al to Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts, 22 January 2003, Screenrights <<http://www.screen.org/about/submissions.html>> at 12 July 2004.

4 APRA, 'Media Release' (Press Release, 20 November 2003) <<http://www.apra.com.au/Comm/Mr031120.htm>> at 12 July 2004.

Government response and thus the issue of private copying awaits a legislative ‘solution’ in Australia.

If the above submission is not acted upon, it will not be the first unsuccessful attempt to introduce a private copying remuneration scheme in Australia. The *Copyright Amendment Act 1989* (Cth) sought to establish a blank tape royalty scheme by inserting a new Part VC into the *Copyright Act 1968* (Cth) (‘the Proposed Part VC’). The Proposed Part VC would have allowed a copy of a sound recording to be made without infringing the copyright subsisting therein, provided that the copy was made on private premises and on a blank tape for the private and domestic use of the person who made it.⁵ The scheme contemplated the payment of a ‘royalty’ by the vendor who first sold, let for hire or otherwise distributed a blank tape in Australia,⁶ with such royalties to be paid to a collecting society and subsequently distributed to relevant copyright owners as a form of compensation for the private copying of sound recordings. However, in *Australian Tape Manufacturers Association Ltd v Commonwealth*⁷ (‘*Australian Tape Manufacturers*’), a majority of the High Court held that the scheme was invalid by virtue of its failure to comply with s 55 of the *Constitution*.⁸

The Government subsequently proposed a Blank Audio Media Recording Levy (‘BARML’) in 1993. However, this proposal was ‘eclipsed by other copyright reform issues’ and lapsed.⁹ More recently, a recommendation against the introduction of such a scheme was made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in *Cracking Down on Copycats: Enforcement of Copyright in Australia*.¹⁰ Thus, an historical review of private copying remuneration schemes in Australia demonstrates that previous proposals for the introduction of such schemes have lapsed,¹¹ have failed to be enacted in constitutionally valid form¹² or have been rejected.¹³

B Definition and Legal Status of Audio Home Recording

Private copying, or ‘audio home recording’, refers to the unauthorised copying of musical works and sound recordings for non-commercial purposes, within a private setting such as the home.¹⁴ The ‘paradigmatic’ example of audio home recording is ‘space-shifting’, namely, the practice of copying musical works from

5 *Copyright Act 1968* (Cth) s 135ZZM(1).

6 *Copyright Act 1968* (Cth) ss 135ZZN(1), 135ZZP(1).

7 (1993) 176 CLR 480.

8 *Ibid* 507.

9 Australian Copyright Council, above n 2, 5.

10 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Cracking Down on Copycats: Enforcement of Copyright in Australia* (2000) [2.44].

11 Such proposals have lapsed twice: first in relation to a 1983 proposal and again in relation to the 1993 BARML proposal: see Australian Copyright Council, above n 2, 3–5.

12 *Australian Tape Manufacturers* (1993) 176 CLR 480.

13 See House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 10.

14 Gillian Davies and Michele E Hung, *Music and Video Private Copying: An International Survey of the Problem and the Law* (1993) 1.

one medium (eg, audio CD) to another medium (eg, audio cassette tape) for the purpose of rendering those works 'portable'.¹⁵

Audio home recording implicates a number of the exclusive rights conferred by the *Copyright Act 1968* (Cth). Those who engage in audio home recording exercise the exclusive right to reproduce a musical work in a material form¹⁶ and the exclusive right to make a copy of a sound recording,¹⁷ without the license of the copyright owner. Audio home recording does not fall within one of the defined exceptions to the exclusive rights of a copyright owner¹⁸ and, accordingly, such conduct represents an act of infringement under Australian copyright law.

In contrast, the legal status of audio home recording in the United States has long been the subject of academic debate.¹⁹ In the particular context of US copyright law, the debate has concerned whether or not audio home recording falls within the ambit of the doctrine of 'fair use'. This doctrine represents a limitation upon the exclusive rights of a copyright owner and thus effectively provides a defence to a claim of infringement. Section 107 of the US *Copyright Act of 1976* enumerates a non-exhaustive list of considerations which must be taken into account for the purpose of 'determining whether the use made of a work in any particular case is a fair use'.²⁰ Those considerations include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²¹

US copyright owners contend that audio home recording causes significant economic harm, thus militating against a finding of fair use. The countervailing argument, advanced by US electronics and blank tape manufacturers, is that audio home recording is non-commercial in nature and should properly be regarded as a fair use. In response to these conflicting claims, and at the behest of

15 *Recording Industry Association of America v Diamond Multimedia Systems Inc*, 180 F 3d 1072, 1079 (9th Cir, 1999).

16 *Copyright Act 1968* (Cth) s 31(1)(a)(i).

17 *Copyright Act 1968* (Cth) s 85(1)(a).

18 Such as fair dealing for the following purposes: see *Copyright Act 1968* (Cth) ss 40, 103C (research or study); ss 41, 103A (criticism or review); ss 42, 103B (reporting news).

19 Joel L McKuin, 'Home Audio Taping of Copyrighted Works and the *Audio Home Recording Act of 1992*: A Critical Analysis' (1994) 16 *Hastings Commercial Entertainment Law Journal* 311, 319: The legislative history of the US *Sound Recording Amendment of 1971* (*Sound Recording Amendment of 1971*, Pub L No 92-140, 85 Stat 391 (1971)) suggests that audio home recording constitutes fair use, whereas, neither the legislative history nor the provisions of the 1976 *Copyright Act* speak directly to the status of audio home recording.

20 *Copyright Act*, 17 USC §§ 101-810 (1976).

21 *Copyright Act*, 17 USC §§ 107(1)-(4) (1976).

interested parties, Congress enacted the *Audio Home Recording Act*²² ('*AHRA*') in 1992. There is no equivalent legislation in Australia.²³ The question that arises, and to which this article is primarily addressed, is whether such legislation should be enacted.

C Purpose and Outline of this Paper

The object of this article is to critically examine the *AHRA* for the purpose of determining whether Australia should emulate the template it provides. In theory, Australia could emulate the substantive provisions of the *AHRA* or the process of 'negotiated compromise' which led to its enactment. However, for the reasons discussed in Part IV below, it is unlikely that Australia could emulate both of these elements. While the aforementioned elements can be isolated for analytic purposes, the article seeks to demonstrate their inter-relationship.

The article identifies the extent to which the process of negotiated compromise both informs an understanding of the general structure and evolution of the *AHRA* (Part II) and is responsible for substantive criticisms of the Act (Part III). Part IV applies the process of negotiated compromise to the Australian context in order to address the countervailing contention that the *process* of negotiated compromise is the most effective means of balancing the competing interests and thereby achieving justice.

II THE US *AUDIO HOME RECORDING ACT OF 1992*

A Background to the Act

1 *Analog Home Recording - Sony Corporation v Universal City Studios*

In *Sony Corporation of America v Universal City Studios Inc*²⁴ ('*Sony*'), the Supreme Court of the United States was required to consider whether Sony Corporation was liable for contributory infringement by virtue of supplying the means (Betamax video tape recorders) by which its customers could infringe the copyright subsisting in television broadcasts.²⁵ Invoking the 'staple article of commerce doctrine', the Court held that a product 'need merely be capable of substantial non-infringing uses' in order for a vendor of that product to avoid liability for contributory infringement.²⁶ Significantly, it was necessary for the Supreme Court to consider the legal status of 'time-shifting' (recording a television program for subsequent *viewing*) for the purpose of determining

22 *Audio Home Recording Act*, 17 USC §§ 1001-1010 (1992).

23 Notwithstanding the enactment of a blank tape levy which was ultimately found to be unconstitutional: *Australian Tape Manufacturers* (1993) 176 CLR 480.

24 464 US 417 (1984).

25 The Court rejected the proposition that merely supplying a third party with the 'means' for committing an act of infringement (combined with encouraging that activity via advertising) is sufficient to establish liability for contributory infringement. See *ibid* 436.

26 *Ibid* 442.

whether the Betamax was capable of substantial non-infringing use.²⁷ The Court held that home time-shifting, even if unauthorised, constitutes a fair use.²⁸ On the basis of its conclusion that time-shifting fell within the doctrine of fair use,²⁹ the Court held that the Betamax was capable of substantial non-infringing use, thereby precluding a finding of contributory infringement.

The reasoning of the Supreme Court with respect to fair use arguably applies with equal force to the *audio* home recording context,³⁰ notwithstanding the fact that the *Sony* decision was specifically concerned with the time-shifting of television broadcasts. In particular, it is arguable that the time-shifting of radio broadcasts is sufficiently similar to the time-shifting of television broadcasts to amount to fair use.³¹ (The capacity of audio recording devices to facilitate the ‘space-shifting’ of musical works (arguably a form of non-infringing use) could also provide a sufficient basis to preclude liability for contributory infringement).

2 *Digital Home Recording – the Cahn and Athens Agreements*

The introduction of digital audio tape (‘DAT’) technology provided a basis for the recording industry to distinguish the reasoning in *Sony*.³² The capacity of digital recording technology to create ‘multiple generations’³³ of near-perfect copies raised the prospect of more extensive economic harm than that associated with the analog recording technology at issue in *Sony*, thus diminishing the strength of a fair use defence.

The confluence of several events in the late 1980s conferred upon the recording industry a degree of bargaining power which possibly exceeded that warranted by the strength of its legal arguments alone. In particular, the introduction of DAT recording technology into the United States depended upon two factors which fell within the control of the recording industry.³⁴ First, the success of DAT recording technology was contingent upon the recording industry’s willingness to record musical works in a compatible digital form. Second, a decision to introduce DAT recording devices into the United States required a sufficient degree of certainty that contributory infringement proceedings would not be brought.³⁵

27 ‘Time-shifting’ was defined by the Court as ‘the practice of recording a [television] program to view it once at a later time, and thereafter erasing it’. See *ibid* 423.

28 *Ibid* 454–5.

29 *Ibid*.

30 Christine C Carlisle, ‘The *Audio Home Recording Act of 1992*’ (1994) 1 *Journal of Intellectual Property Law* 335, 345.

31 *Ibid*.

32 Alex Alleman, ‘Manifestation of an *AHRA* Malfunction: The Uncertain Status of MP3 under *Recording Industry Association of America v Diamond Multimedia Systems Inc*’ (2000) 79 *Texas Law Review* 189, 194.

33 *Ibid*.

34 McQuin, above n 19, 321.

35 *Ibid* 338. Settlement of the Cahn Proceedings thus facilitated the immediate introduction of DAT recording technology into the United States by removing the threat of contributory infringement proceedings: ‘The electronics manufacturers correctly believed that an agreement on royalties was preferable to years of costly litigation which could have delayed the introduction of DCC and MiniDisc to US markets’: *ibid* 338.

These events created conditions which were conducive to compromise. Accordingly, in 1989 the International Recording Industry and the Consumer Electronics Industry concluded the 'Athens Agreement', a compromise agreement pursuant to which manufacturers of DAT devices agreed to incorporate the Serial Copy Management System ('SCMS') into DAT recorders.³⁶

However, the Athens Agreement failed to appease all copyright owners. Thus, in July 1990, a number of plaintiffs, discontented with the absence of royalties in the Athens Agreement,³⁷ commenced proceedings seeking an injunction to restrain the manufacture, importation and distribution of DAT recorders and blank DAT cassettes in the United States ('the Cahn Proceedings').³⁸ Contending that audio home recording constitutes copyright infringement, the plaintiffs in the Cahn Proceedings argued that Sony Corporation was or would be liable for contributory infringement by virtue of supplying DAT recorders which had no substantial non-infringing uses.³⁹ In July 1991, the Cahn Proceedings were resolved pursuant to a court-sanctioned settlement agreement ('the Cahn Agreement'). The Cahn Agreement required Sony Corporation to support a legislative solution to the audio home recording dispute (involving the imposition of legislative royalties) in consideration for the plaintiffs' agreement to discontinue the proceedings.

Thus, the parties to the Cahn Proceedings chose to avoid a judicial resolution of their dispute, preferring the certainty of legislation which they had authored. But for the consensus reached in the Cahn and Athens Agreements, the audio home recording dispute would have been resolved judicially by reference to the doctrines of fair use, contributory infringement and vicarious liability. In enacting legislation which substantially incorporates those Agreements, Congress codified the parties' privately negotiated 'solution' to those questions.

B The 'Middle Ground' Solution of the Act

In the absence of the Cahn Agreement, a court would have been required to engage with the binary logic of the fair use doctrine, pursuant to which audio home recording either qualifies as a fair use or it does not. Consequently, a judicial resolution of the audio home recording dispute would have been constrained by outcomes: (1) fair use: no remuneration and no injunction; or (2) no fair use: remuneration and/or injunction. These two outcomes are elaborated below:

36 McKuin, above n 19, 322.

37 Ibid.

38 Gary S Lutzker, 'DAT's All Folks: *Cahn v Sony* and the *Audio Home Recording Act of 1991* – Merrie Melodies or Looney Tunes' (1992) 11 *Cardozo Arts & Entertainment Law Journal* 145, 164–5.

39 Ibid 167.

- (1) If audio home recording qualified as a fair use, then audio home recording would not have been remunerated and the distribution of DAT recorders would not have been restrained;⁴⁰ or
- (2) If audio home recording did not qualify as a fair use, then audio home recording may have been remunerated via ongoing royalties or an award of damages⁴¹ and the distribution of DAT recorders may have been restrained by injunction.

Significantly, outcomes (1) and (2) above are mutually exclusive, in light of the binary nature of the choice from which those outcomes derive. Therefore, prior to the enactment of the *AHRA*, US copyright law was incapable of integrating the following three elements:

- Providing *remuneration* for losses arising out of audio home recording;
- Conferring a *right* to engage in audio home recording; and
- Allowing for the lawful distribution of DAT recorders.

This is the deficiency to which the *AHRA* responds. The *AHRA* circumvents the binary logic of the fair use doctrine by generating a third outcome ('outcome (3)') which integrates the three elements above and thereby appeases the primary parties to the audio home recording dispute. Outcome (3) combines those elements of outcomes (1) and (2) above which were required to achieve consensus (namely, remuneration for audio home recording, an audio home recording right and lawful distribution of DAT recorders) by subtracting from outcomes (1) and (2) those elements which precluded their co-existence (namely, the claim of consumers to an absolute right to engage in audio home recording pursuant to the fair use doctrine and the claim of copyright owners to an absolute right to restrain audio home recording and the distribution of devices which facilitate such home recording via an injunction).

At best, a judicial resolution of the audio home recording dispute may have approximated the outcome generated by the *AHRA*. In particular, a judicial remedy sought (but rejected) in *A&M Records Inc v Napster Inc*⁴² ('*Napster*') was the imposition of continuing royalties rather than an injunction restraining the offending conduct:

Napster contends that the district court should have imposed a monetary penalty by way of a compulsory royalty in place of an injunction ... Napster tells us that 'where great public injury would be worked by an injunction, the courts might ... award damages or a continuing royalty instead of an injunction in such special circumstances': *Abend v MCA Inc*, F 2d 1465, 1479 (9th Cir, 1988) ... *aff'd*, 495 US 207 (1990).⁴³

However, whereas continuing royalties would facilitate the court-sanctioned distribution of digital audio recording devices in the audio home recording context, such an outcome would be predicated on a finding that audio home

40 Because those who engage in such conduct cannot be held liable for copyright infringement and (in the absence of primary infringement) there can be no liability for contributory infringement justifying the imposition of damages or an award of an injunction.

41 Via direct infringement proceedings or (more probably) via contributory infringement proceedings.

42 239 F 3d 1004 (9th Cir, 2001).

43 *Ibid* 1004.

recording does not qualify as a fair use. Accordingly, there would be no formal 'right' to engage in audio home recording pursuant to this remedy, thus militating against Congress' capacity to secure the consent of the audio home recording public.

C Operation of the Act

1 Purposes of the Act

The *AHRA* has three primary purposes, namely: (i) to confer upon consumers a 'right' to engage in non-commercial audio home recording; (ii) to provide compensation for losses arising out of such recording; and (iii) to ensure the incorporation of technological copy protection measures within digital audio recording devices.⁴⁴ Part IIC identifies the provisions of the Act which give effect to these purposes.

2 An Audio Home Recording 'Right'

Section 1008 of the *AHRA* precludes the commencement of copyright infringement proceedings 'based on the non-commercial use by a consumer of [a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium] for making digital musical recordings or analog musical recordings'.⁴⁵ This provision purports to give effect to the first purpose noted above, namely, to confer upon consumers a 'right' to engage in non-commercial audio home recording.

Section 1008 precludes the commencement of copyright infringement proceedings 'based on the manufacture, importation, or distribution' of a digital audio recording device or medium or an analog recording device or medium',⁴⁶ thus providing an environment wherein manufacturers, importers and distributors of digital audio recording devices can operate without the risk of liability for contributory infringement. This aspect of s 1008 gives practical content to the audio home recording right discussed above by ensuring that consumers have access to the audio recording devices which facilitate audio home recording.

3 Compensation for Audio Home Recording

Sections 1003 and 1004 of the *AHRA* impose an obligation upon manufacturers, importers and distributors of digital audio recording devices and digital audio recording media to pay a royalty of two per cent and three per cent

44 S Rep No 102-294, 32.

45 *Audio Home Recording Act*, 17 USC § 1008 (1992): 'No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the non-commercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings'.

46 The definition of a 'digital audio recording device' is discussed in Part IID below.

of the transfer price of each device and medium, respectively.⁴⁷ The royalty need only be paid once by the first person to manufacture and distribute or import and distribute the device or medium.⁴⁸

Royalties collected pursuant to the *AHRA* are allocated to two funds: the 'Sound Recordings Fund' and the 'Musical Works Fund'.⁴⁹ Two-thirds of the total royalty payments collected are allocated to the Sound Recordings Fund,⁵⁰ while the remaining one-third of collected royalties are allocated to the Musical Works Fund.⁵¹ Total royalty payments collected pursuant to the *AHRA* are distributed as follows: 'featured recording artists'⁵² receive 25.59 per cent of total royalties collected; copyright owners in sound recordings of musical works receive approximately 38.4 per cent of total royalty payments; 'nonfeatured musicians' receive 1.75 per cent of total royalty payments; 'nonfeatured vocalists' receive 0.917 per cent of total royalty payments; and 'music publishers'⁵³ and 'writers'⁵⁴ both receive 16.66 per cent of total royalty payments collected. These provisions purport to give effect to the second purpose noted above, namely, to provide compensation for losses arising out of audio home recording.

The *AHRA* permits each group of royalty recipients to formulate voluntary proposals for the distribution of royalties. In particular, interested parties may agree to the proportionate division of royalty payments within their respective group, notwithstanding antitrust provisions to the contrary.⁵⁵ In the event that individual members of the various groups cannot reach agreement on the proper division of royalties, the Librarian of Congress is required to convene a Copyright Arbitration Royalty Panel to determine the distribution of payments.⁵⁶ The panel must allocate royalty payments based on the extent to which the relevant sound recording or musical work was distributed (in the form of digital

47 Royalties in respect of digital audio recording devices are subject to a maximum amount of US\$8 per device and a minimum amount of US\$1 per device: *Audio Home Recording Act*, 17 USC § 1004(a)(3) (1992).

48 *Audio Home Recording Act*, 17 USC §§ 1004(a)(1), (b) (1992).

49 *Audio Home Recording Act*, 17 USC § 1006(b) (1992).

50 Royalty payments allocated to the Sound Recordings Fund are distributed to 'nonfeatured musicians' (2.625 per cent of the Sound Recordings Fund) and 'nonfeatured vocalists' (1.375 per cent of the Sound Recordings Fund) 'who have performed on sound recordings distributed in the United States'. Forty per cent of the remaining royalties in the Sound Recordings Fund are distributed to 'featured recording artists' (38.4 per cent of the Sound Recordings Fund), while 60 per cent of the remaining royalties in this Fund are distributed to the owners of the copyright in a sound recording of a musical work distributed in the United States in either digital or analog form (57.6 per cent of the Sound Recordings Fund).

51 Royalty payments allocated to the Musical Works Fund are distributed equally among 'music publishers' and 'writers': *Audio Home Recording Act*, 17 USC § 1006(b)(2)(A) (1992).

52 Defined by *Audio Home Recording Act*, 17 USC § 1006(b)(1) (1992) as those featured recording artists who perform on a sound recording that has been distributed.

53 Defined by *Audio Home Recording Act*, 17 USC § 1001(9) (1992) as a person authorised to license the reproduction of a particular musical work in a sound recording.

54 Defined by *Audio Home Recording Act*, 17 USC § 1001(13) (1992) as the composer or lyricist of a particular musical work.

55 *Audio Home Recording Act*, 17 USC § 1007(a)(2) (1992).

56 *Audio Home Recording Act*, 17 USC §§ 1006(c), 1007(c) (1992).

musical recordings or analog musical recordings) or disseminated to the public (via transmissions) during the relevant period.⁵⁷

4 Prevention

Section 1002 of the *AHRA* prohibits the importation, manufacture and distribution of digital audio recording devices which do not conform to the SCMS or a functionally-equivalent system. Digital recording devices which incorporate the SCMS allow unlimited digital copying from original recordings (first generation copying) but preclude the making of further copies from such first generation copies.⁵⁸ These provisions thus purport to give effect to the purpose of *preventing* unauthorised ‘serial copying’, namely, the reproduction in a digital recording format of a copyrighted musical work or sound recording from second, third or fourth (etc) generation copies of the digital musical recording.⁵⁹

D Scope of the Act

The *AHRA* is of limited application in terms of the technological devices it subsumes and consequently has proven to be of limited temporal relevance. However, the *AHRA*’s limited application is not an accident of legislative drafting. In particular, it does not reflect an unintentional failure to express the provisions at a sufficiently high level of abstraction. Rather, it reflects Congress’ primary criterion of evaluation: consensus. In particular, the ambit of the *AHRA* is a product of Congress’ willingness to enact the negotiated compromises reached by the interested parties, subject to third party consent. Accordingly, the scope of the Act is determined by the deliberate inclusion of a specific technology (as agreed to by the primary parties to the dispute) and the deliberate exclusion of technologies manufactured by non-consenting parties:

In crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording ... *The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication.*⁶⁰

One such party was the computer industry, whose consent to the passage of the *AHRA* was contingent on the inclusion of language which made it clear that neither a computer nor any of its ‘peripherals’ fell within the scope of the Act.⁶¹ The definition of a ‘digital audio recording device’ evidences Congress’ compliance with this requirement:

57 *Audio Home Recording Act*, 17 USC § 1006(c) (1992).

58 McKuin, above n 19, 325.

59 *Audio Home Recording Act*, 17 USC § 1001(11) (1992).

60 S Rep No 102-294, 131–132 (1992) cited in Ted J Barthel, ‘*RIAA v Diamond Multimedia Systems Inc: The Sale of the Rio Player Forces the Music Industry to Dance to a New Beat*’ (1999) 9 *Journal of Art and Entertainment Law* 279, 296 (emphasis added). ‘The *AHRA* deftly navigates the tension between the various competing interests by excluding computers and general purpose computer storage media (such as hard drives) from the statutory definition of “digital musical recording”. This reflected a clear legislative intent to affect only the audio recording industry’: at 296.

61 Stephanie L Brauner, ‘High-Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle between the RIAA and MP3ers’ (1999) 4 *Virginia Journal of Law & Technology* 5, 20.

A 'digital audio recording device' is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use ...⁶²

The concept of a 'digital audio recording device' is contingent on the device's capacity to make a 'digital audio copied recording':

A 'digital audio copied recording' is a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.⁶³

In light of the above definition, a device must possess the capacity to reproduce (in a digital recording format) a 'digital musical recording'⁶⁴ in order to fall within the scope of the *AHRA*.⁶⁵ A 'digital musical recording' is further defined as a 'material object' in which only sounds and material incidental to those sounds are fixed (in a digital recording format)⁶⁶ and is specifically defined to exclude a 'material object' in which 'one or more computer programs' are fixed (the 'material object exception').

The nature of a 'digital musical recording' was considered by the US Court of Appeals in *Recording Industry Association of America v Diamond Multimedia Systems Inc*⁶⁷ ('*Diamond*'). The Court of Appeals concluded that computer hard drives were excluded from the scope of the definition of a 'digital musical recording' because hard drives 'ordinarily contain ... numerous [computer] programs ... that are not incidental to any sound files that may be stored on the hard drive'.⁶⁸ The Court adopted this construction, notwithstanding its acknowledgement that the exemption of hard drives from the definition of a 'digital musical recording' would 'effectively eviscerate' the Act.⁶⁹

Finally, the digital recording function of a device must be 'designed or marketed for the *primary purpose of* [and be capable of] making a digital audio copied recording for private use'⁷⁰ (the 'primary purpose test') in order for the relevant device to fall within the scope of the Act. As confirmed by the US Court of Appeals in *Diamond*, personal computers are *not* digital audio recording devices, and thus do not fall within the scope of the Act, because their primary purpose is not to make digital audio copied recordings.⁷¹ The exclusion of personal computers from the scope of the *AHRA* is thus secured by the 'primary purpose test' *and* the 'material object exception'.

62 *Audio Home Recording Act*, 17 USC § 1001(3) (1992).

63 *Audio Home Recording Act*, 17 USC § 1001(1) (1992).

64 Either 'directly' or via a 'transmission': *Audio Home Recording Act*, 17 USC § 1001(1) (1992).

65 *Recording Industry Association of America v Diamond Multimedia Systems Inc*, 180 F 3d 1072, 1076 (9th Cir, 1999).

66 *Audio Home Recording Act*, 17 USC §§ 1001(5)(A), (5)(B) (1992).

67 180 F 3d 1072 (9th Cir, 1999).

68 *Ibid*.

69 The decision in *Napster* confirmed the eviscerated state of the *AHRA*. In a mere two paragraphs, the US Court of Appeals for the 9th Circuit dismissed Napster's contention that the *AHRA* covers the downloading of Moving Picture Experts Group-1 Audio Layer 3 ('MP3') files to computer hard drives.

70 *Audio Home Recording Act*, 17 USC § 1001(3) (1992) (emphasis added).

71 *Diamond*, 180 F 3d 1072, 1078 (9th Cir, 1999).

The definition of a digital audio recording device, discussed above, is expressed at a high level of generality and thus appears to reflect a considered legal principle. However, while the definition is expressed in general terms, it appears to have been crafted to achieve a fact-specific result, namely, to ensure the inclusion of DAT machines and thereby implement the terms of the Cahn Agreement. This is evidenced by the fact that the ‘primary purpose test’, the express exemptions identified in sub-ss 1001(3)(A) and 1001(3)(B), and a further series of narrowly defined terms within the definition itself, effectively ensure that the Act governs a very limited range of devices other than DAT recorders, such as audio CD burners which operate independently of a computer (for example, Philips CDR785 ‘stand-alone’ audio CD recorders).⁷² Thus, the definition of a ‘digital audio recording device’, though disguised as a legal principle, is arguably a fact-specific provision which was intended to provide the certainty that the parties to the Cahn Proceedings and Congress required.

III EVALUATION OF THE US LEGISLATIVE SOLUTION

A Congress’ Standard of Evaluation

Jessica Litman has documented the ‘unspoken premise’⁷³ which has informed the formation of copyright legislation in the United States in the past, namely, that Congress’ primary criterion for evaluating proposed legislation was whether or not consensus had been reached among the interested parties:

The inquiry relevant to copyright legislation long ago ceased to be ‘is this a good bill?’ Rather, the inquiry has been, and continues to be ‘is this a bill that current stakeholders agree on?’ The two questions are not the same.⁷⁴

A similar premise informed the resolution of the audio home recording dispute, as evidenced by the fact that the *AHRA* substantially codifies the consensus reached in the Cahn Agreement and the Athens Agreement.⁷⁵ Indeed, the incorporation of the Cahn Settlement into Federal law is candidly acknowledged in the Senate Report:

a historic compromise was reached by all of the parties to the audio home recording dispute. The suit against Sony was subsequently dropped. The compromise was incorporated into a legislative proposal and introduced in the Senate and the House ... [Senate Bill] 1623 embodies the compromise ...⁷⁶

72 Australian Copyright Council, above n 2, 24.

73 Jessica Litman, ‘Copyright Legislation and Technological Change’ (1989) 68 *Oregon Law Review* 275, 314. See also Jessica Litman, ‘Copyright, Compromise and Legislative History’ (1987) 72 *Cornell Law Review* 857.

74 Litman, ‘Copyright Legislation and Technological Change’, above n 73, 357.

75 Lewis Kurlantzick and Jacqueline E Pennino, ‘The *Audio Home Recording Act of 1992* and the Formation of Copyright Policy’ (1998) 45 *Journal of the Copyright Society of the United States of America* 497, 501; McKuin, above n 19, 322. The fact that the *AHRA* was drafted by 12 lawyers representing the parties to the Cahn Proceedings also evidences this phenomenon: Lutzker, above n 38, 145 (fn 5).

76 Cited in Kurlantzick and Pennino, above n 75, 501.

Congress readily enacted the Cahn and Athens Agreements (subject to the need to procure the consent of affected third parties) because those Agreements embodied the negotiated consensus of the primary parties to the dispute. It is unlikely that Congress codified the Cahn and Athens Agreements because they corresponded with Congress' independently generated views as to the appropriate balance between the competing interests. However, this does not necessarily preclude a just outcome. Nor does it mean that considerations of justice did not inform Congress' decision to enact the *AHRA*. Indeed, the *AHRA* arguably reflects a different conception of justice in which the process of negotiated compromise serves as the primary means of balancing competing interests and thereby achieving justice.⁷⁷ Nevertheless, to the extent that the substantive provisions of the *AHRA* accord with the requirements of justice, it is arguable that such correspondence is a product of accident rather than design because Congress' *primary* criterion of evaluation was consensus rather than justice *per se*.

B Right to undertake Audio Home Recording

The 'right' to engage in audio home recording conferred by the *AHRA* is properly classified as a statutory licence, rather than an unqualified fair use right, for the following reasons. First, the right of a consumer to engage in audio home recording pursuant to the fair use doctrine necessarily implies an absence of liability for copyright infringement,⁷⁸ whereas the *AHRA* requires consumers to 'pay' (by way of higher prices on digital audio recording devices and media) for the 'right' to engage in digital audio home recording. Alternatively, to the extent that *AHRA* royalties are absorbed directly by the manufacturers upon whom they are levied, there would be no legal basis for imposing such royalties if audio home recording qualified as a fair use because there can be no secondary infringement in the absence of direct/primary infringement. For the purposes of this article, the audio home recording right conferred by the *AHRA* is evaluated by reference to consumers' claims to a fair use right, standards of internal consistency and the practical value of the relevant right.

1 Consumers' Perspective – Relinquishment of Fair Use

It can be seen from the above that in consenting to the enactment of the *AHRA*, consumer representatives relinquished a claim to an unqualified fair use right in consideration for the certainty of a less valuable statutory licence. To the extent that one subscribes to the view that audio home recording is an unqualified right of consumers, the foundation for the *AHRA* royalty structure is thus undermined⁷⁹ and consumer interests are betrayed:

77 Litman, 'Copyright, Compromise, and Legislative History', above n 73, 894; Litman, 'Copyright Legislation and Technological Change', above n 73, 358–9.

78 Carlisle, above n 30, 349.

79 *Ibid.*

Based on the *Sony* analysis of fair use, private DAT home recording should qualify as fair use. Such a finding would undercut the *AHRA* royalty scheme because it charges consumers when they have a right to the free fair use of copyrighted works. Further, the *AHRA* bases its royalty system on copyright holders promising not to sue infringing consumers or DAT manufacturers. If DAT recording is a fair use, that promise is hollow.⁸⁰

The process of negotiated compromise may have contributed to this outcome. In particular, it has been suggested that consumer interests were inadequately protected during the negotiations which culminated in the enactment of the *AHRA* because the ‘dominant parties’ (namely, members of the music and electronics industries) were content to accept the royalty structure on the basis that those royalties would ‘be passed on to consumers as a cost of doing business’.⁸¹ It has also been suggested that the concept of fair use was inadequately defended during negotiations because participants from the music industry and electronics industry were ‘in some instances the same companies’⁸² and, therefore, certain segments of the electronics industry were presumably less concerned about incurring the cost of royalty payments because those royalties would ultimately be distributed to related companies in the music industry.

It is important to acknowledge that Congress implicitly eschewed the concept of a fair use right. Such an acknowledgement is important because it demonstrates the possibility of a contrary policy choice. In particular, it highlights the competing contention that audio home recording should be codified as an unqualified right of consumers, rather than a statutory licence born of compromise. It is particularly important to acknowledge the nature of Congress’ policy decision in this respect because Congress’ public proclamations regarding the purpose of the *AHRA* arguably obfuscated its implied rejection of the fair use doctrine:

The purpose of [the *AHRA*] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, non-commercial use. Moreover, [the *AHRA*] contains a royalty payment system that provides modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music. In addition, the [*AHRA*] contains a serial copy management system that would prohibit the digital serial copying of copyrighted music.⁸³

The quest for consensus arguably explains Congress’ (mis)description of the *AHRA* as enshrining a ‘right’ to engage in analog or digital audio home recording. In particular, the consent of another interested party – the American public – was more likely to be secured if the *AHRA* was marketed on the basis

80 Ibid.

81 Ibid 350–51.

82 Ibid.

83 S Rep No 102-294, 32, cited in David A Helper, ‘Dropping Slugs in the Celestial Jukebox: Congressional Enabling of Digital Music Piracy Short-Changes Copyright Holders’ (2000) 37 *San Diego Law Review* 1165, 1178. Similarly, in *Diamond*, 180 F 3d 1072, 1079 (9th Cir, 1999) the United States Court of Appeals identified the facilitation of audio home recording as the primary purpose of the Act: ‘... the Rio’s operation is entirely consistent with the Act’s main purpose – the facilitation of personal use. As the Senate Report explains, “[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their *private, non-commercial use*” (emphasis added).

that it enshrined a ‘right’ to engage in audio home recording, rather than abrogating a pre-existing fair use right to engage in audio home recording or declaring that such a right did not previously exist.

Notwithstanding the *AHRA*’s failure to confer an unqualified fair use right, it nevertheless confers upon audio home recorders something of value in consideration for absorbing the cost of royalties. In particular, s 1008 confirms the *legality* of audio home recording⁸⁴ and thereby removes the uncertainty which surrounded its status prior to the enactment of the *AHRA*. Thus, in consideration for absorbing the cost of *AHRA* royalties consumers receive the *certainty* afforded by s 1008.

2 Internal Consistency – Treatment of Analog Home Recording

In contrast to the *AHRA*’s treatment of *digital* audio home recording, the provisions of the *AHRA* in respect of *analog* audio home recording are consistent with a fair use right because consumers need not ‘pay’ for the right to engage in analog audio home recording.⁸⁵ In particular, the *AHRA* precludes the commencement of proceedings alleging copyright infringement ‘based on the noncommercial use by a consumer’ of ‘an analog recording device’ or ‘an analog recording medium’⁸⁶ but fails to impose levies in respect of analog recording devices or analog recording media.⁸⁷ Therefore, consumers may freely engage in analog audio home recording but are required to absorb the cost of royalties⁸⁸ in order to engage in digital audio home recording. There is no rational basis for this distinction. Indeed, from the perspective of copyright owners, s 1008 unfairly confers an immunity to engage in analog audio home recording without compensating copyright owners in respect of such home recording.

It has been suggested that the distinction drawn between analog home recording and digital home recording represents an arbitrary product of the negotiation process (in which ‘the recording industry was forced to give up its fight for home analog taping compensation in return for the compromise on digital recording royalties and SCMS’),⁸⁹ rather than the result of considered policy formation by Congress.⁹⁰ In particular, the arbitrary nature of the above distinction arguably represents a consequence of uncritically codifying a negotiated compromise, pursuant to which the ‘justice’ of consensus supplants the justice of internally consistent principles.

Furthermore, the *AHRA* does not expressly define the concept of an ‘analog recording device’ or an ‘analog recording medium’. Therefore, the precise nature of the Act’s distinction between an analog recording device/medium and a digital

84 Within the limited context of the devices governed by the *AHRA*.

85 In the sense in which consumers are required to ‘pay’ for the digital audio home recording right, namely, by absorbing the cost of royalties levied upon manufacturers, importers and distributors of digital audio recording devices and digital audio recording media.

86 *Audio Home Recording Act*, 17 USC § 1008 (1992).

87 *Audio Home Recording Act*, 17 USC § 1003 (1992).

88 Levied upon manufacturers, importers and distributors of digital audio recording devices and digital audio recording media.

89 McKuin, above n 19, 341.

90 *Ibid*.

recording device/medium is as unclear (in practical terms) as the policy basis for the Act's differential treatment of analog home recording and digital home recording.

3 *Practical Value – Exclusion of Computers*

The scope of the 'immunity' to engage in audio home recording conferred by s 1008 of the Act corresponds with the scope of the definition of a 'digital audio recording device'. For the reasons discussed above in Part IID, a personal computer falls outside the definition of a 'digital audio recording device' despite the fact that computers represent the primary means by which digital audio recording is effected today (as exemplified by the Napster phenomenon and the downloading of MP3 audio files from a personal computer to portable music players). Therefore, from the perspective of consumers, the right to engage in audio home recording conferred by s 1008 of the *AHRA* is arguably of limited practical value because digital audio recording today is generally contingent upon the involvement of a personal computer, rather than the DAT recording devices governed by the *AHRA*. Conversely, from the perspective of copyright owners, the *AHRA* royalty regime is correspondingly deficient because it fails to impose royalties upon 'the ultimate digital audio recording devices', namely, computers.⁹¹

C Liability for Contributory Infringement

Liability for contributory infringement arises in circumstances where a defendant 'induces, causes, or materially contributes to'⁹² the infringing conduct of another and the defendant has knowledge (or a reason to know) of the infringing conduct of that other.⁹³ In *Sony*, the Supreme Court of the United States located the doctrine of contributory infringement within its broader jurisprudential context.⁹⁴ In particular, the Court classified the doctrine of contributory infringement as a sub-set of the 'broader [legal] problem' of determining when it is 'just to hold one individual accountable for the actions of another'.⁹⁵

The parties to the Cahn Proceedings were not required to engage directly with the question of policy noted above. Rather, it was sufficient for the Cahn parties to arrive at a negotiated compromise without the need to justify the result by reference to general principles of justice or by reference to the specific principles of contributory infringement. Nevertheless, a general standard of liability can be *inferred* from the objective circumstances in which the *AHRA* imposes an obligation to make royalty payments. Employing the reasoning in *Sony*, the *AHRA* *implies* that one who distributes a 'digital audio recording device' or a

91 Helper, above n 83, 1166.

92 *Gershwin Publishing Co v Columbia Artists Management Inc*, 443 F 2d 1159, 1162 (2nd Cir, 1971), cited with approval in *Napster*, 239 F 3d 1004 (9th Cir, 2001).

93 *Cable/Home Communication Corp v Network Productions Inc*, 902 F 2d 829 (11th Cir, 1990).

94 *Sony* 464 US 417 (1984).

95 *Ibid* 435.

'digital audio recording medium' contributes to the infringing conduct of others to an extent that renders it just that he or she be held financially responsible via the payment of royalties pursuant to the Act. The scope of the definitions of 'digital audio recording device' and 'digital audio recording medium' thus provide the primary means by which liability for 'contributory infringement' is circumscribed. In other words, liability for contributory infringement under the *AHRA* is effectively circumscribed by the scope of devices covered by the Act. In light of the discussion in Part IID above, the *AHRA* 'standard' of liability can be reduced to two general rules, the first inclusionary and the second exclusionary:

Rule 1: Subject to Rule 2, one is liable to pay royalties if one distributes a DAT machine and a limited range of similar devices in the United States. This rule codifies the outcome of the Cahn Settlement.

Rule 2: One is not liable to pay royalties if one distributes a personal computer or personal computer-dependent audio recording device. Congress insisted upon this rule to preserve consensus.

For the purposes of this article, the standard of liability posited by the *AHRA* is evaluated by reference to fault-based principles of justice. In the particular context of the audio home recording dispute, liability to pay or absorb the cost of royalties should only be imposed in circumstances where the 'defendant' is at fault in some way by virtue of personally engaging in audio home recording⁹⁶ and/or copyright infringement or contributing to others' engagement in such conduct to the requisite extent. (The *AHRA* standard of liability for contributory infringement is evaluated by reference to a number of concepts of 'contributory fault'). Those who neither engage in, nor contribute to, audio home recording or copyright infringement should not be required to pay for the audio home recording/copyright infringement of others.

1 *Departure from the Sony Standard of Liability*

The *AHRA* compensates copyright owners for losses arising out of audio home recording at the expense of a not insignificant number of 'non-infringing' consumers, namely, those who are required to absorb the cost of royalties but do not engage in audio home recording or copyright infringement.⁹⁷ This situation arises by virtue of the fact that 'digital audio recording devices' possess the capacity for non-infringing use. For example, the use of consumer-oriented DAT recording devices⁹⁸ to record and duplicate original music highlights the non-infringing uses to which DAT recorders can be deployed. To the extent that such non-infringing use satisfies the *Sony* test of substantiality (that is, to the extent that DAT recorders are held to possess the capacity for *substantial* non-infringing use), the *AHRA* represents a significant departure from the policy which informs the *Sony* standard of liability for contributory infringement.

96 The competing fair use perspective is discussed above in Part IIIB.

97 Kurlantzick and Pennino, above n 75, 523.

98 Rather than the 'professional model products' (as defined in *Audio Home Recording Act*, 17 USC § 1001(10) (1992)) which are exempt from the *AHRA*.

2 *Different Standards of Liability for Digital Audio Recording Media compared to Digital Audio Recording Devices*

A device which is designed and/or marketed for a primary purpose *other* than ‘digital audio recording’ may nevertheless possess the capacity for and, indeed, be most commonly used for the purposes of audio home recording and/or copyright infringement. This possibility arises because the primary purpose for which a device has been designed or marketed does not necessarily correspond with its primary actual use. For example, a computer-dependent CD burner may be primarily designed or marketed for lawful purposes (such as data storage) however among certain consumers it may most commonly be used for the purposes of audio home recording and/or copyright infringement.

Similarly, a recordable compact disc (‘CD-R’) may most commonly be used for the purposes of audio home recording and/or copyright infringement, notwithstanding the fact that it was designed and/or marketed for the primary purpose of data storage. In those circumstances, a significant number of consumers would not have purchased the CD-R *but for* the product’s capacity to facilitate audio home recording and/or copyright infringement. Therefore, on one view, an importer, distributor or manufacturer of CD-Rs would be ‘unjustly enriched’⁹⁹ in those circumstances because he or she would not have received the profits of the transaction *but for* the product’s capacity to facilitate audio home recording and/or copyright infringement. A similar concept of justice was embraced by the dissenting judgment of Justice Blackmun (with whom Marshall, Powell and Rehnquist JJ concurred) in *Sony*: ‘if no one would buy the product for non-infringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed.’¹⁰⁰

The *AHRA* gives effect to the above concept of unjust enrichment in respect of digital audio recording media but fails to do so in respect of digital audio recording devices. In particular, s 1001(4)(A) of the Act posits a different ‘standard of liability’ in respect of those who import, distribute or manufacture any ‘digital audio recording *medium*’ and those who import, distribute or manufacture any ‘digital audio recording *device*’. This distinction arises out of the definitions of the relevant terms. A ‘digital audio recording medium’ is defined as a material object ‘that is primarily marketed *or most commonly used* by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device’. In contrast, a device’s most common *actual* use is not directly relevant to the definition of a ‘digital audio recording device’.¹⁰¹ As noted in Part IID above, the recording function of a ‘digital audio recording device’ must be *designed or marketed* for the primary purpose of

99 In the sense of unfairly profiting from another’s wrong, rather than in accordance with the strict legal definition of ‘unjust enrichment’. In particular, whereas the manufacturer of such devices may have been unfairly enriched, such enrichment does not appear to have been ‘at the plaintiff’s expense’, as required by the law of unjust enrichment: See Peter Birks, *An Introduction to the Law of Restitution* (1989) 132–139.

100 464 US 417, 491–2 (1984).

101 Except to the extent that it may evidence the primary purpose for which the device was designed.

making a digital audio copied recording for private use, rather than be most commonly used for such a purpose.

If the ‘most common use’ standard of liability is the preferred standard (as the *AHRA* seems to accept in the context of digital audio recording media), then the *AHRA* fails to apply this test consistently. In particular, on this view of justice, the *AHRA* fails to impose liability in circumstances where liability should be imposed, namely, in circumstances where those who import, distribute or manufacture any ‘digital audio recording device’ have profited from a transaction *because of* the device’s capacity to facilitate audio home recording and/or copyright infringement.

3 *Arbitrary Exclusion – the ‘Material Object Exception’*

As confirmed by the US Court of Appeals in *Diamond*, devices which make reproductions from a material object which includes one or more computer programs (such as the hard-drive of a personal computer) are specifically excluded from the scope of the *AHRA*. Thus, a device may be designed or marketed for the primary purpose of audio home recording and/or copyright infringement (or be *exclusively* used for such purposes) and yet be excluded from the scope of the *AHRA* merely by virtue of the fact that the audio recording process was contingent upon the involvement of a computer. For example, a computer-dependent CD burner may be exclusively used for the purposes of audio home recording and/or copyright infringement and yet be excluded from the scope of the *AHRA* merely because the audio files which it reproduces are stored on the hard-drive of a computer. Similarly, a device may be exclusively used to reap the rewards of infringing conduct (such as playing infringing MP3 files on a portable music player) and yet be excluded from the scope of the Act because the MP3 files which it reproduces are stored on the hard-drive of a computer. The mere fact that a device makes reproductions from a material object which includes one or more computer programs is an arbitrary basis on which to determine whether a device should be excluded from the scope of the *AHRA*. This arbitrary result reflects the need to ensure consensus (by excluding a non-consenting third party), rather than a quest to define a principled standard of liability.

IV A NEGOTIATED AUSTRALIAN SOLUTION?

The object of Part IV is to address the contention that the *process* of negotiated compromise represents the most efficacious means of balancing competing interests and thereby achieving justice.¹⁰² Applying the logic of this argument, Part IV discusses a compromise that could (hypothetically) be reached if Australia were to emulate the US process of negotiated compromise.

102 Litman, ‘Copyright, Compromise, and Legislative History’, above n 73, 894; Litman, ‘Copyright Legislation and Technological Change’, above n 73, 358–9.

A The Doctrine Of Infringement By Authorisation

Copyright in a literary, dramatic, musical or artistic work is infringed by a person who (without the licence of the copyright owner) authorises the doing of

any act comprised in the copyright of that work.¹⁰³ Section 36(1A) of the *Copyright Act 1968* (Cth) enumerates a non-exhaustive list of considerations which must be taken into account for the purposes of determining whether or not a person has authorised the doing of any act comprised in the copyright in a work, including:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Section 36(1A) 'essentially codifies'¹⁰⁴ the position at common law. Therefore, liability for authorisation extends to those who 'sanction, approve or countenance'¹⁰⁵ the infringing conduct of another, having regard to the factors enumerated in s 36(1A) above.

In *Australian Tape Manufacturers*,¹⁰⁶ the High Court held that the manufacture or sale of articles which have lawful uses does not constitute 'authorisation' for the purposes of Australian copyright law even if it is likely that those articles will be used for an infringing purpose.¹⁰⁷ However, this proposition is contingent on the vendor's *inability* to exercise control over the purchaser's use of the article:

103 *Copyright Act 1968* (Cth) s 36(1):

Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

104 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth) [57]: 'The inclusion of these factors in the Act essentially codifies the principles in relation to authorisation that currently exist at common law (see in particular *University of New South Wales v Moorhouse* (1975) 133 CLR 1)'.
105 The test for authorisation adopted by the High Court in *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

106 (1993) 176 CLR 480.
107 *Ibid* 498.

manufacture and sale of articles such as blank tapes or video recorders, which have lawful uses, do not constitute authorisation of infringement of copyright, even if the manufacturer or vendor knows that there is a likelihood that the articles will be used for an infringing purpose such as home taping of sound recordings, *so long as the manufacturer or vendor has no control over the purchaser's use of the article*.¹⁰⁸

The defendant's capacity to exercise 'control' over the infringing conduct also emerges as a relevant consideration in the minority judgment of Gibbs J in *University of New South Wales v Moorhouse*¹⁰⁹ ('Moorhouse'), in which the 'power' to prevent infringement was regarded as a necessary condition of liability: 'A person cannot be said to authorise an infringement of copyright unless he has some power to prevent it ...'¹¹⁰

The reasoning of the High Court in *Australian Tape Manufacturers* and of Gibbs J in *Moorhouse* suggest that liability for authorisation cannot arise in circumstances where those who manufacture or sell products which have lawful uses lack the capacity to exercise control over a purchaser's use of those products. Manufacturers of audio recording media and audio recording devices are thus likely to contend that they lack the requisite degree of control for the purposes of the doctrine of authorisation. This is discussed further in Parts IVB (audio recording media) and IVC (audio recording devices) below.

B Liability For Digital Audio Recording Media

In *Australian Tape Manufacturers*, the High Court was required to determine whether the sale of blank audio tapes gave rise to liability for authorisation of copyright infringement. The High Court held that the inability of the vendor to control the 'ultimate use' of the blank tapes precluded a finding of authorisation: 'The sale of a blank tape does not constitute an authorisation by the vendor to infringe copyright. That is principally because the vendor has no control over the ultimate use of the blank tape ...'¹¹¹

Relying upon the specificity of the above comments, Australian manufacturers of digital audio recording media are likely to conclude that they would not be liable for infringement of copyright by authorisation. Accordingly, they would most likely reject a compromise in the form embodied in the *AHRA*, namely, a negotiated compromise pursuant to which royalties are imposed on manufacturers, importers and distributors of digital audio recording media. This is because they have nothing to gain from such an outcome (an immunity from liability is of little value if there is a very low risk of liability) and something to lose (lost sales and profits due to the higher price of digital audio recording media). Part IVC below considers whether different considerations apply in respect of digital audio recording *devices*.

108 Ibid (emphasis added).

109 (1975) 133 CLR 1.

110 Ibid 12.

111 (1993) 176 CLR 480, 497.

C Liability For Digital Audio Recording Devices

The decision of the House of Lords in *CBS Songs Ltd v Amstrad Consumer Electronics*¹¹² (*Amstrad*) addressed the issue of authorisation in the context of audio recording devices. The House of Lords held that the manufacture and sale of twin-deck audio recording devices ‘may’ have ‘facilitate[d]’¹¹³ copyright infringement but did not amount to an authorisation thereof. In particular, whereas the manufacturer of such devices (Amstrad) conferred upon purchasers the ‘power’ to infringe copyright, it neither granted nor purported to grant the right to engage in such conduct.¹¹⁴ Significantly, the House of Lords appeared to arrive at this conclusion for reasons which included Amstrad’s lack of ‘control over the use of their models’ subsequent to the point of sale.¹¹⁵ An Australian court is likely to have regard to the decision in *Amstrad* and, in particular, its conclusion that Amstrad lacked control over the use of audio recording devices subsequent to the point of sale. Accordingly, *Amstrad* militates against a finding of infringement (by authorisation) in the Australian context and thus reduces the likelihood of a negotiated compromise pursuant to which manufacturers of digital audio recording devices agree to an ongoing award of damages, as per the *AHRA* royalty scheme.

However, one of the grounds¹¹⁶ upon which Australian copyright owners may seek to distinguish *Amstrad* is that it concerned *analog*, rather than *digital*, audio recording devices. In particular, manufacturers of the analog recording devices at issue in *Amstrad* lacked the technological capacity to exercise control over the extent to which their products were used for infringing purposes. In contrast, it is arguable that manufacturers of digital audio recording devices *currently* possess the technological capacity to exercise control over a purchaser’s use of their products via the installation of technological copy protection measures, such as the SCMS.

Therefore, copyright owners could contend that a manufacturer’s failure to configure his or her products so as to limit the incidence of audio home recording and/or copyright infringement (for example, via the installation of the SCMS) amounts to an authorisation of all copying which could otherwise have been prevented by means of that configuration.¹¹⁷

112 [1988] AC 1013.

113 *Ibid* 1053.

114 *Ibid* 1054.

115 *Ibid*.

116 Australian copyright owners could also seek to distinguish *Amstrad* by contending that the law of infringement by authorisation in the UK is narrower than that which prevails under Australian copyright law. Thus, in *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 286 Gummow J noted the view expressed by Lawton LJ in *Amstrad Consumer Electronics plc v The British Phonographic Industry Limited* [1986] FSR 159, 207 that ‘the concept of granting or purporting to grant to a third person the right to do the act complained of came much nearer to the meaning of the word “authorise” [under UK law] than the synonyms approved by the High Court of Australia in *Moorhouse* [of “sanction, approve, countenance”]’.

117 Copyright owners could invoke s 36(1A)(c) of the *Copyright Act 1968* (Cth) in support of this contention, arguing that a failure to install a SCMS within a digital audio recording device represents a failure to take ‘reasonable steps to prevent or avoid the doing of the [infringing] act’.

It is unclear whether this ‘extended’ concept of control is likely to be accepted by an Australian court. Nevertheless, in light of the risk that such an argument might succeed, manufacturers of digital recording devices may agree to a compromise solution pursuant to which they are required to incorporate technological copy protection measures but are under no obligation to pay royalties in relation to devices which contain such protection measures.

D Liability For Digital Audio Home Recording

Finally, as it is clear that audio home recording constitutes an act of infringement under Australian copyright law,¹¹⁸ consumers may lack sufficient bargaining power to extract the concession of an audio home recording right or licence. This is to be contrasted with the position of US consumers prior to the enactment of the *AHRA* who enjoyed relatively greater bargaining power than their Australian counterparts because of the uncertainty which surrounded the legal status of fair use. In particular, US consumers were able to secure the ‘middle ground’ of an audio home recording licence, in light of the risk to copyright owners of an adverse finding with respect to fair use. This demonstrates that one of the primary determinants of a negotiated outcome is the existence of uncertainties in the law. More significantly, it raises the question of why legal policy should be governed by private risk-assessments of what the law *might* be, rather than the normative question of what the law *should* be.

E The Hypothetical Australian Solution

In summary, the hypothetical resolution of the audio home recording dispute discussed above (‘the hypothetical Australian solution’) contains the following elements:

- a duty to incorporate technological copy protection measures within digital audio recording devices;
- no obligation upon manufacturers of digital audio recording devices or digital audio recording media to make royalty payments;
- manufacturers of digital audio recording devices and digital audio recording media receive immunity from liability for authorisation of copyright infringement; and
- no audio home recording right - rather, audio home recording remains an act of infringement which copyright owners are responsible for preventing by technological means.

In contrast to the *AHRA*, the hypothetical Australian solution neither generates a royalty stream for copyright owners nor confers upon consumers an audio home recording right, thus demonstrating that the process of negotiated compromise does not generate a uniform outcome across all jurisdictions. Rather, the outcome is determined by a range of jurisdictionally-specific and historically-contingent factors.

118 See Part IB above.

V CONCLUSION – LESSONS FOR AUSTRALIA

The process of negotiated compromise has the capacity to transcend perceived limitations in existing law, as exemplified by the *AHRA*'s circumvention of the binary logic of the fair use doctrine. In particular, the *AHRA* transcended limitations of the fair use doctrine by integrating those elements of existing law which were required to appease the primary parties to the dispute, whilst subtracting those elements which were inconsistent with their co-existence (namely, the 'absolute' elements of the parties' respective claims). Similarly, the hypothetical Australian solution demonstrates the value of employing the process of negotiated compromise as a means of generating novel policy options. Specifically, the absence of a statutory licence and levy in the hypothetical Australian solution represents a significant departure from the solution to the issue of audio home recording typically adopted in other jurisdictions, such as the United States.

However, to the extent that the substantive criticisms of the *AHRA* identified in this article are representative of the kind of deficiencies to which the process of negotiated compromise is susceptible, it is necessary to have regard to the possibility that the following deficiencies might arise. First, provisions which give effect to a negotiated compromise may generate internal inconsistencies within the relevant Act, as evidenced by the creation of an analog audio home recording ('fair use') *right* as compared to a digital audio home recording *license*. Second, the scope of legislation may be particularly limited because of the need to exclude non-consenting parties and thereby preserve consensus (as evidenced by the personal computer exemption), thus leading to an Act of limited practical value to both consumers and copyright owners. Arbitrary provisions may be required in order to facilitate such limitations in legislative scope, as evidenced by the 'material object exception' in s 1001(5)(B)(ii) of the *AHRA*. Finally, consumers may lack sufficient bargaining power to adequately protect their interests, particularly if they lack the requisite degree of legal uncertainty with which to bargain,¹¹⁹ thus highlighting consumers' reliance on legislatures to protect their interests.

In conclusion, while the process of negotiated compromise may provide a useful means of generating legislative possibilities, it does not absolve the legislature of the responsibility for critically evaluating legislation on substantive grounds.

119 This is evidenced by the hypothetical Australian solution.