

THE AUDIO HOME RECORDING ACT OF 1991

HEARING

BEFORE THE

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

S. 1623

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO IMPLEMENT A ROYALTY PAYMENT SYSTEM AND A SERIAL COPY MANAGEMENT SYSTEM FOR DIGITAL AUDIO RECORDING, TO PROHIBIT CERTAIN COPYRIGHT INFRINGEMENT ACTIONS, AND FOR OTHER PURPOSES

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THE AUDIO HOME RECORDING ACT OF 1991

TUESDAY, OCTOBER 29, 1991

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND
TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m. in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senator Leahy.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DeConcini. The subcommittee will come to order.

Senator Hatch is on the floor on the Civil Rights bill. He plans to join us shortly, so I'm going to proceed with his acquiescence.

Today we will take testimony concerning the Audio Home Recording Act of 1991. I introduced this legislation on August 1, and I'm pleased that just in that short period of time I've had 28 members of the Senate join me as cosponsors, including five members of the subcommittee that is hearing this bill today.

S. 1623 represents a historical compromise among traditionally opposing segments of the entertainment and electronic industries. As in all such compromises, all parties had to give a little to gain a little. I think that the compromise on which this legislation is based is fair and appropriate. I believe it represents sound public policy and is consistent with U.S. intellectual property laws.

The biggest winner if this legislation is adopted and becomes law will be the American consumer, who will gain access to a wider variety of better, more technologically advanced, and cheaper electronic equipment on which to play and record a greater variety of high-quality sound recordings.

I've been involved with the issue of home taping and its effects on the entertainment industry since 1981. A lot has changed in the last 10 years; a lot has stayed the same. Many of you who are here today were in this room on November 30, 1981, when I chaired a hearing on another bill I introduced on a similar issue. That bill never passed. Although many of us thought at the time that the various industries had more to gain by cooperating with each other than by fighting among themselves, it was difficult to envision a day when all of the competing voices would be urging the same legislative approach to the particular issue before us. May I congratu-

late all of you on your decision to work together to solve this problem.

I well understand the concerns among the creative community that the introduction of digital recording technology into widespread use in the United States will drastically worsen what they already perceive as the severe problem of displaced sales caused by home taping. I also understand why the electronics industry would want to resolve the issue of the legality of and Congress' reaction to home taping by digital recorders without lengthy and costly litigation.

While I know from many discussions I've had with both sides—or all sides—over the last 10 years that each is absolutely sincere in its belief that it is right and would ultimately prevail in litigation. However, I wholeheartedly believe that all of us are better off with a negotiated solution. Most importantly, it is especially advantageous to consumers that we resolve the problem here and now, because through the approach taken in S. 1623, they will have immediate access to the new digital recording technologies as well as access to recording copyrighted material on digital media.

I'm pleased that I was able to participate in the process that led to this historic compromise, and I'll insert the balance of my statement in the record that goes into the particular legislation in greater detail.

[The prepared statements of Senators DeConcini, Hatch, and Grassley follow:]

STATEMENT OF SENATOR DENNIS DeCONCINI
 JUDICIARY COMMITTEE
 SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
 AUDIO HOME RECORDING ACT OF 1991, S. 1623
 OCTOBER 29, 1991

The subcommittee will hear testimony today concerning the Audio Home Recording Act of 1991. I introduced this legislation on August 1, and I am pleased that I have been joined by 28 of my colleagues, including 5 members of the subcommittee, as cosponsors of this bill.

S. 1623 represents a historic compromise among traditionally opposing segments of the entertainment and electronics industries. As in all such compromises, all parties had to give a little to gain a little. I think that the compromise on which this legislation is based is fair and appropriate. I believe it represents sound public policy and is consistent with U.S. intellectual property law. The biggest winner, if this legislation is adopted, will be the American consumer who will gain access to a wider variety of better, more technologically advanced and cheaper electronics equipment on which to play and record a greater variety of higher quality sound recordings.

I have been involved with the issue of home taping and its affect on the entertainment industry since 1981. A lot has changed in the last 10 years; a lot has stayed the same. Many of you who are here today were in this same room on November 30, 1981, when I chaired a hearing on another bill I introduced on a similar issue. Although many of us thought at that time that the various industries had more to gain by cooperating with each other than by fighting among themselves, it was difficult to envision a day when all of the competing voices would be urging the same legislative approach to the issue. May I congratulate all of you on your decision to work together.

I well understand the concerns among the creative community that the introduction of digital recording technologies into widespread use in the United States will drastically worsen what they already perceive as the severe problem of loss of sales

caused by home taping. I also understand why the electronics industry would want to resolve the issue of the legality of and Congress' reaction to, digital recording without lengthy and costly litigation. While I know from many discussions I have had with both sides over the last 10 years, that each is absolutely sincere in its belief that it is right and would ultimately prevail, I wholeheartedly agree that all of us are better off with a negotiated solution. Most importantly, it is especially advantageous to consumers that we resolve this problem here and now, because through the approach taken by S. 1623, they will have immediate access to the new digital recording technologies as well as access to prerecorded copyrighted material on digital media. I am pleased that I was able to participate in the process that has led to this historic compromise.

S. 1623 provides for an exemption from copyright infringement liability for a consumer for digital and analog audio taping for private, noncommercial use. This provision clears the way for the introduction of new improved recording technologies by eliminating any marketplace uncertainty over the legality of audio home taping. The legislation would establish a compensation system that would impose royalties on all digital recording equipment sold or manufactured in the United States. The royalty fee would be 2% of the value of each digital audio recorder with a minimum of \$1 and a cap of \$8 for single deck machines and a cap of \$12 for dual deck. In addition, a 3% royalty would be applied to digital audio blank media, including compact disks, digital compact cassettes and minidisks. The legislation also specifies how these royalties will be distributed by the Copyright Royalty Tribunal, as well as allowing the benefactors to develop a non-governmental organization to take over the distribution role. The legislation will also require that all consumer quality digital audio recording equipment sold in the U.S. be equipped with the Serial Code Management System (SCMS) which prevents the making of subsequent digital copies of copies that have already been made of digital material.

STATEMENT OF SEN. ORRIN HATCH

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

HEARING ON S. 1623: AUDIO HOME RECORDING ACT OF 1991

Thank you, Mr. Chairman, for convening today's hearing on this timely and important subject. The legislation embodied in S. 1623 represents an agreement among all segments of the music industry of a highly contentious issue that has divided them for years. For many of us in Congress, it is also identifies a solution that we have urged for many years to resolve this issue. I am particularly pleased that the parties themselves have been able to agree on a solution without the federal government's having to impose a remedy. It is preferable that business and industry negotiate solutions to their problems rather than look to Congress to solve them. Government is better able then to fulfill its important function of protecting the public interest while encouraging marketplace solutions to business problems.

The United States leads the world in technological innovations and creativity, and we are foremost in the area of creating entertainment--books, art, movies, and music. Our intellectual property laws have fostered an environment in which people are encouraged to engage in and are rewarded for their creative efforts.

One issue, however, that we have been unable to resolve is the issue of how the copyright law should deal with private non-commercial taping of sound recordings. I have favored creating a system of royalties that would compensate copyright owners and artists for royalties they lose because of lost sales. Others have argued that such a system should only be created if there is proof that home taping does indeed result in lost sales for sound recordings. Until the agreement that is the basis for this legislation was reached, the issue had proven to be unresolvable.

The primary beneficiary of the agreement that this legislation embodies is the American music consumer. The dispute between the hardware manufacturers and the music industry has prevented listeners from accessing the latest technologies. Unlike most of the rest of the world, most U.S. music fans have been unable to buy digital audio tape equipment and prerecorded digital audio tape. Newer technologies such as mini-compact disks, digital audio cassettes and recordable compact disks are on the horizon, but their availability has been threatened and the availability of compatible software to play on them has been stalled by this dispute. S. 1623 clears the way for these exciting new technologies to become widely available to American consumers.

I believe that S. 1623 will benefit all segments of the music software and hardware industry. Electronics manufacturers will be able to introduce new recording technologies without worrying about the possibility of copyright infringements suits and with the knowledge that copyrighted material will be made available in the new digital formats. Copyright owners, songwriters, musicians, and performers will be compensated through a royalty system for the use of the copyrighted material. In addition, the bill also requires the use of a Serial Code Management System (SCMS) to prevent serial copying of copyrighted material. The SCMS allows unlimited copying of original source material, but prevents the copying of copies.

S. 1623 is comprehensive and flexible insofar as it will apply to all digital recording technologies. I am pleased that the parties were able to agree to a prospective solution that will encompass all digital recording technologies.

Mr. Chairman, I believe that this legislation is a fair solution to a complicated problem. It has benefits for all involved, including, first and foremost, the consumer. While I am pleased, like you, to be an original cosponsor of S. 1623, the Audio Home Recording Act of 1991, I hope that today's hearing will produce useful criticism of the legislation and insights as to how Congress might most effectively proceed in this area.

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

I am glad we are holding hearings on this legislation so soon after it was introduced. It is quite appropriate that we move the bill forward with dispatch, given the years it has taken to arrive at a wise and equitable solution to the digital audiotape issue.

I have cosponsored the Audio Home Recording Act because I believe it strikes a proper balancing of the interests of consumers and the holders of copyrights. I see that most of our witnesses this morning concur in that assessment, and look forward to hearing them articulate their support. I also am open to suggestions about how the legislation might be fine-tuned to make it an even more effective solution.

On this subcommittee, we are constantly faced with the challenges developments in technology pose to the traditional conceptualization of intellectual property rights. Fortunately, we have usually been able to find a fair and reasonable way to deal with such novel issues. This is such a case. By using the Serial Copy Management System to limit copying, along with a structured royalty schedule and a limitation on litigation, we have been able to craft an effective protection of the rights of copyright holders without abrogating the rights of consumers.

In addition to placing limits on litigation, the bill is notable in its use of alternative dispute resolution mechanisms to address disagreements between parties. As one who likes to keep the courts clear and encourage alternative dispute resolution, I am glad the bill allows for binding arbitration.

I look forward to hearing from your witnesses.

Senator DeCONCINI. We'll now hear from Mr. Ralph Oman, the Register of Copyrights.

Mr. Oman, we welcome you once again and thank you again for your steadfast cooperation in these matters, and we're pleased to have Dorothy Schrader, your general counsel, with you. Please proceed.

STATEMENT OF HON. RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, WASHINGTON, DC, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL

Mr. OMAN. Thank you very much, Mr. Chairman.

I want to add my voice to your voice and the mounting chorus that's singing praise to the audio hardware industry and the music industry. They have reached a historic compromise on the new digital audio technology, and as you said, this compromise is good news for everyone who enjoys music. It's in many ways, Mr. Chairman, a tribute to your leadership that we've come this far in the 10 years that you mentioned.

The compromise does represent a great breakthrough. For the first time, the equipment manufacturers have recognized that unbridled home taping injures the men and women who create the music. We see a growing consensus that some limits on home

taping is appropriate. Congress now has a golden opportunity to create an environment in which this new technology can reach its full potential. Politically, the time to act is now.

Your bill, Mr. Chairman, cuts with what I see as a surgical precision. It does not overreach. It does not cramp the taping habits of teenage America, who still use the analog format. These teenagers have little disposable income anyway, so it's harder to make the case that home taping displaces sales. They would not always buy prerecorded tapes if they couldn't copy.

But that's not the case with digital audiotapes, Mr. Chairman. We're dealing here with a very expensive, high-end technology. Only a serious audiophile with a large disposable income will buy the machines at \$800 a copy. Only he or she has the money to pay \$25 per prerecorded DAT tape. He or she insists on the best quality. With the DAT machines, the serious music lover can make perfect copies for the digital tape deck in the Mercedes. Without the DAT machine, he or she would buy that extra tape. So in the digital format, copying does displace sales.

The sooner you act, Mr. Chairman, I'd say the better. If we act now, we will be climbing on an international bandwagon. Today 17 countries have laws to compensate copyright owners for the private copying of their music. The lack of a royalty hurts our composers and music publishers and our record companies especially hard overseas. Many countries allow home taping royalties for a foreign copyright owner only if the foreigner's country pays their citizens royalties in return, so Americans now get the short end of the stick. Your bill would make our people eligible for their fair share of these foreign royalties.

That the United States has taken so long to get on that bandwagon really amazes our trading partners. They just can't understand why the United States, the greatest producer in the world of popular music, has not passed home taping legislation. Without that domestic legislation, our trade negotiators have to sit at ring side while others champion, often halfheartedly, the cause of composers and record companies.

Once you pass your bill, Mr. Chairman, Ambassador Hill will come out swinging. She will insist on equal treatment, and she will use our economic muscle to convince other countries to get on the royalty bandwagon. We will finally be free to advance our national self-interest overseas, and we will earn millions of dollars that we now lose.

Once this bill is enacted, Mr. Chairman, digital technology will take off. The U.S. public will get all the prerecorded tapes it needs to justify the expense of buying the DAT machine. The price of machines will fall if more people buy them, and the price of the tapes will fall, since record companies will not have to keep prices high to compensate for income lost to home taping.

The Copyright Office supports the bill, Mr. Chairman. I have suggested a few minor technical improvements in my written statement. They are intended mainly to streamline the whole process and to cut out redundant paperwork.

I commend the parties for their historic compromise and recommend favorable action by the Congress. The proposal seems sound, fair, balanced, and workable. All creative and proprietary interests

are accommodated by the compromise. Consumers will benefit from the full blossoming of this extraordinary new technology. As prices fall and more and more works are issued in the digital format, the public will benefit. The record companies also will sell more records and tapes, and the public and the broadcasters will have more music to enjoy. Everyone seems to benefit. At last the American creators will also share the profits of this wonderful technology as well as the equipment manufacturers.

I'd be pleased, Mr. Chairman, to answer any questions now or in writing, and I thank you for this opportunity to appear before the subcommittee.

[The prepared statement of Mr. Oman follows:]

Statement of Ralph Oman
Register of Copyrights and
Associate Librarian for Copyright Services
Before the Subcommittee on Patents, Copyrights and Trademarks
Senate Committee on the Judiciary
102nd Congress, First Session

The effect of unauthorized home taping on copyright proprietors has been discussed repeatedly during the last decades. At the heart of these discussions is the basic question of whether or not an author should be compensated for the unauthorized taping of copyrighted programs. Most of these discussions focused on analog duplication, and several countries have already determined that a royalty or tax should be imposed for the analog duplication of sound recording for commercial or personal use.

Senator DeConcini introduced S. 1623, on August 1, 1991. An identical bill, H.R. 3204, has been introduced in the House. Both bills are known as the Audio Home Recording Act.

The bill implements both a royalty payment system and a serial copy management system for digital audio recording. This legislation would also require manufacturers and importers of digital audio recording equipment who distribute digital audio recorders and blank digital audio recording media to make special royalty payments. The royalties, two percent for digital audio recorders and three percent for blank digital audio media, would be administered by the Copyright Office and distributed to claimants by the CRT.

In addition to royalty and SCMS provisions, the proposed legislation insulates consumers from infringement suits for home copying. Legal actions for copyright infringement based on private, non-commercial audio recording of either digital or analog phonorecords would be prohibited. The technical requirement regarding SCMS and the royalty provisions would apply to digital, not analog, audio recorders and blank digital audio recording media. Video recording equipment and media would not be affected, nor would dictation machines, telephone answering machines, or professional model digital audio recording equipment.

Although previous bills met with opposition from various interest groups, this year's bill has the definite advantage of agreement among three major affected groups, the record industry, music publishers and songwriters, and the consumer electronics industry. The provision of a royalty will not only alleviate some of the concerns of American musicians and composers but also those of the international copyright community.

The Audio Home Recording Act proposal represents a historic compromise that apparently takes account of all affected interests. The legislation will have a positive impact on protection for United States authors and copyright owners worldwide. American authors will now be able to claim their fair share abroad.

The Copyright Office fully endorses the principles of the proposed AHRA and recommends favorable action by the Congress.

Statement of Ralph Oman
Register of Copyrights and
Associate Librarian for Copyright Services
Before the Subcommittee on Patents, Copyrights and Trademarks
Senate Committee on the Judiciary
102nd Congress, First Session

October 29, 1991

Mr. Chairman and members of the Subcommittee, I am pleased to appear before this distinguished body. Thank you and your staff for the opportunity to appear here today and testify on S. 1623.

On July 11, 1991, representatives of the audio hardware and music industries announced their agreement to seek legislation clarifying rights of consumers, manufacturers, and copyright holders in light of advancements in digital technology. Senator DeConcini introduced S. 1623, on August 1, 1991. An identical bill has been introduced in the House. Both bills are known as the Audio Home Recording Act (AHRA).¹

The bill implements both a royalty payment system and a serial copy management system for digital audio recording. This legislation would require manufacturers and importers of digital audio recording equipment and those who distribute digital audio recorders and blank digital audio recording media to make special royalty payments. The payment would be two percent for digital audio recorders, based on the manufacturers' price of the equipment, and three percent for blank digital audio media. The legislation also specifies payment caps and a floor. The fund would be administered by the Copyright Office and distributed to claimants by the Copyright Royalty Tribunal (CRT).

¹ Representatives Brooks and Hughes introduced H.R. 3204 on August 4.