

products without concern over copyright infringement lawsuits.

As a result of this carefully balanced package, consumers are big winners too. By removing the fear of infringement actions against manufactureres, importers, and consumers, the bill paves the way for widespread distribution of exciting new digital audio recording products and prerecorded music as soon as they become available. Indeed, the legislation provides immunity against infringement lawsuits not only in the area of digital audio copying, but also in the area of analog audio copying -- and without royalty obligations being placed upon manufacturers or importers of analog recorders or blank media.

Although my colleagues are better positioned to describe the employment benefits of the bill, it strikes me that this legislation will likely serve to stimulate the creation of American jobs, not only in service-related sectors, but in manufacturing as well. In particular, perhaps it is not too soon to suggest that this legislation will contribute to the maintenance of a more vibrant U.S. consumer electronics manufacturing sector, a part of our economy that could well use the incentives that the bill provides.

It should also be noted that, because the bill extends to all analog and digital audio copying devices, whether now known or later developed, Congress will be spared from having to review the copyright laws each time a new audio recording format is introduced.

In addition, the bill reflects the U.S. commitment to Berne Convention principles and to the concept of strong international intellectual property protections. Intellectual property-based industries currently account for

a major segment of the U.S. GNP, and it is vital that the U.S. remain an international leader in the protection of intellectual property rights. By enacting this legislation, the U.S. will join more than a dozen other nations that have already adopted royalty systems to provide fair compensation for home recording of musical works and sound recordings protected by copyright. Moreover, with the adoption of this legislation, we will be able to argue more forcefully and persuasively that similar legislation should be adopted in countries where no royalty system presently exists -- such as in Japan, where discussions about the issue have gone on for years without result.

It is also important to note that certain nations that have already enacted home audio taping laws provide royalty benefits to U.S. music creators and copyright owners only on a reciprocal basis. Other nations may soon adopt similar reciprocity requirements. By enacting the Audio Home Recording Act, Congress will ensure that American music creators and copyright owners will be able to collect the foreign home taping royalties that are rightfully due them. Moreover, the national treatment principle incorporated in the legislation will hopefully encourage other countries to reject the idea of reciprocity requirements in this area.

As domestic industry after domestic industry has fallen victim to increasingly rigorous international competition, musical products remain a flagship of American exports, and one of the few consistent areas of trade surplus. It is, and should be, a matter of great national pride that American music is dominant throughout the world. Of course, this is not pre-ordained, but comes about because the environment here in the U.S. encourages creativity through the protection of intellectual property rights.

Absent continuation of such an environment, this industry could suffer the same fate as others about which we were equally confident of our "competitiveness" in the not-too-distant past.

V. The Narrow Focus of the Bill

While the Audio Home Recording Act of 1991 incorporates the many complex facets of the compromise among the industries, careful drafting has narrowly focused the bill on home audio copying.

The draft legislation specifically excludes from its scope non-audio technologies, where copyright and technical concerns are different from those raised by audio recording technologies. In particular, it is important to note that the bill carefully excludes both audiovisual and computer equipment and media (such as vcr's, videocassettes, PCs, and related software). Even in the area of audio recording technologies, the bill excludes audio recording devices which do not implicate the home taping of copyrighted works, such as dictating machines and telephone answering machines.

VI. Conclusion

As is always the case in a difficult compromise, each party gave up some of what it sought in order to achieve something that all can support. Thus, the bill is not absolutely perfect from any group's perspective, but it nevertheless has the enthusiastic support of composers and lyricists, music publishers, record companies, recording artists, electronics manufacturers and importers, and

various consumer groups (including the Home Recording Rights Coalition).

I am very proud to have helped engineer a compromise among industry groups whose past encounters on this issue have been well documented. I am also very pleased that the process of tough negotiations has produced a greater respect for one another and the interests of the industries that we represent. The push by members of Congress was a strong catalyst in getting us to sit down and talk to one another. Indeed, we would not be here today were it not for the wise counsel of this body. Now that a compromise has finally been reached, it is our hope that Congress will act swiftly to pass this legislation and send it to the President for signature.

In sum, this bill represents a comprehensive solution to a complicated legal and economic problem. There will be no cost to the U.S. Government associated with the legislation, and the benefits to music creators, copyright owners, electronics manufacturers, and consumers will be enormous. Without the bill, consumer access to digital audio recording technologies in the U.S. will continue to be problematic at best. In our view, the Audio Home Recording Act of 1991 possesses all the characteristics of a piece of legislation that serves the public good.

We look forward to working with the members of this Subcommittee to address any questions or issues that may arise, and, hopefully, to achieve enactment of this vital addition to the Copyright Act.

Thank you, Mr Chairman.

Senator DeCONCINI. Mr. Murphy, thank you indeed for your fine statement of support and explanation and also your leadership in putting together this legislation.

Before we proceed with the other panelists, I'll be glad to yield to my friend and colleague who is a cosponsor of S. 1623 and is the leader here in this body on the protection of technology in the patent and copyright area, and I'll be glad to yield to the Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. I just ask unanimous consent that a full statement of mine be put in the record.

Senator DeCONCINI. So ordered.

[The prepared statement of Senator Leahy follows:]

OPENING STATEMENT
SENATOR PATRICK LEAHY
HEARING ON S. 1623
AUDIO HOME RECORDING ACT OF 1991
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
OCTOBER 29, 1991

Mr. Chairman, in the last several decades we have witnessed what seems to be a permanent revolution in consumer electronics. As one innovation has followed another, we have all come to take for granted products that a few years ago were unheard of -- VCRs, camcorders and compact discs, whose clarity of sound made all of our record collections instantly obsolete.

Meanwhile, the software for all of this marvelous new gadgetry -- for consumers at home and the world over -- is produced right here -- in Hollywood and Motown, in New York and Nashville, in Chicago and New Orleans. I read in Jay Berman's testimony that the companies he represents manufacture and distribute nearly half of all sound recordings sold worldwide. Indeed, if America has a competitive advantage in the new world economy, it is undoubtedly in the products of the mind -- the movies and software and sound recordings that we create for the rest of the world.

But the pace of technological change puts pressure on our laws to keep up. And when our laws fail to do this, the result can be the kind of logjam that has stymied the spread of digital audio technology in this country.

That is why I am pleased to be an original co-sponsor of Chairman DeConcini's Audio Home Recording Act. I am glad that the various interested parties were able to reach an agreement that is fair to the creative community of composers and performers, to the recording and electronics industries, and to consumers.

For years now, new digital recording technologies have made it possible to create flawless copies of digital masters. Yet these new technologies are not widely available to American consumers because of the stalemate that existed between the music and the consumer electronics industries. Creative artists were concerned that they would receive little compensation for their work if unlimited digital copies could be made of their pre-recorded music without adequate legal safeguards. Consumer electronics manufacturers were concerned that they would face copyright infringement lawsuits if they sold digital audio recorders in the United States. And there was, in fact, litigation when such recorders were imported for sale.

As a result of the legal deadlock, American consumers have been unable to enjoy the benefits of digital home recording technology. New products have been stuck in the pipeline because our laws have not kept up with changes in technology.

The Audio Home Recording Act of 1991 would break the stalemate by providing a stable legal environment for emerging digital audio technologies. Hardware manufacturers will be able to introduce new digital recording equipment without fear of liability for copyright infringement. Creators and copyright owners of pre-recorded music will receive compensation for digital copying of their music. American consumers will gain access to the most advanced audio recording technologies in the world. And finally, the bill will clarify the right of consumers to copy pre-recorded music for their private, non-commercial use -- within the limits prescribed by the Serial Copy Management System.

This is not a perfect bill. But it will provide benefits to millions of American consumers. It will break the legal logjam that has hampered the introduction of digital audio recorders into U.S. markets for several years. We have not let legal barriers stand in the way of other new technologies -- such as VCRs, personal computers, modems, and fax machines -- and as technological change continues at an exhilarating pace, we must make sure that our laws adapt flexibly and rapidly.

Mr. Chairman, I want to thank you for holding these hearings. This is one of the most intensely debated issues to come before the Patents Subcommittee in years. Your leadership has been essential in facilitating agreement between those who create our music and those who create the products that bring that music to us.

I know that songwriters, musicians, recording companies, music publishers, and consumer electronics manufacturers have worked hard on this issue. I am pleased that they stayed at the bargaining table and reached a compromise. I hope that the interested parties will continue working together in the future. And I look forward to hearing from the witnesses who have gathered to speak on this important legislation.

Senator LEAHY. Also, I want to thank you for holding these hearings. The fact that a compromise appears to have been worked out is in large part due not only to the actions of the people testifying here today, but also to your willingness to keep moving forward with legislation. I think this will break the legal logjam that we've seen, so I'm glad we're having the hearings, and I'm glad that the song writers, the musicians, the recording companies, the music publishers, and the consumer electronics manufacturers and everybody else stayed at the bargaining table long enough to get a compromise and make it that much easier to go forward.

So I compliment you, Mr. Chairman.

Senator DeCONCINI. Well, I thank you, Senator Leahy, and I appreciate your early support of this legislation and also your staff and your involvement in encouraging our friends here on all sides to put together something short of us going out on our own, which we have on occasion done, not always in the best interest of everybody but trying to address a public need, and your leadership is greatly appreciated.

Senator DeCONCINI. Mr. Berman, would you like to testify now?

Mr. BERMAN. I'll defer again.

Senator DeCONCINI. Whenever you're ready, Mr. Berman.

Mr. BERMAN. I'm so intrigued by the testimony, I'm perfectly willing to.

Senator DeCONCINI. Would you like to come back tomorrow? I'll be glad to extend these hearings tomorrow for you. [Laughter.]

Senator LEAHY. Are you having a good time, Jay, is what he's asking you.

Senator DeCONCINI. Mr. Shapiro?

STATEMENT OF GARY J. SHAPIRO, GROUP VICE PRESIDENT, CONSUMER ELECTRONICS GROUP, ELECTRONICS INDUSTRY ASSOCIATION, WASHINGTON, DC

Mr. SHAPIRO. Thank you, Senator DeConcini.

Mr. Chairman, Senator Leahy, my name is Gary Shapiro. I'm the group vice president of the Electronics Industry Association's Consumer Electronics Group, one of the industry groups that participated actively in working toward the compromise embodied in the bill before you. I also have the honor of serving as the chairman of the Home Recording Rights Coalition, of which EIA is a member. Thank you for inviting me to testify today.

I am pleased to convey the unqualified support of both EIA and the Home Recording Rights Coalition for the Audio Home Recording Act of 1991. The Consumer Electronics Group of the Electronics Industry Association represents the leading manufacturers of electronics products that entertain and inform American consumers. The Home Recording Rights Coalition is a coalition of consumers, retailers, and manufacturers of recording products. Since its founding 10 years ago, the Home Recording Rights Coalition has sought to preserve the rights of consumers to make noncommercial home recordings for private use.

I have been personally involved in the issue of home recording for more than 10 years. I was with you, Mr. Chairman, in this room on November 30, 1981, and since then, it is a tribute to you, Mr. Chairman, that you have continued for the last decade to urge all interested parties to find a reasonable compromise that serves the consumer interests and that you have introduced legislation embodying such a compromise in the legislation before you.

In my view, the Audio Home Recording Act is significant because it forever ends the debate over private, noncommercial audio home recording, and it opens the door to a vibrant market for new digital audio technologies. The act will encourage record companies and music publishers to support this new digital audio technology enthusiastically, and it means that digital audio recorders will be appearing on retailers' shelves as products rather than in court as exhibits. The royalty rates set by this legislation are lower than anything proposed in the past, and they are limited to the new consumer-model digital audio recorders and media and do not affect existing analog recorders or media at all.

Even with these benefits, it still required some soul-searching after years of opposition to support a bill that includes a royalty provision. We continue to believe that consumers have the right to use their own recorders to record for private, noncommercial purposes any signal they have lawfully acquired. We endorse the Audio Home Recording Act because it permits consumers to make first-generation digital audio recordings of any lawfully acquired signal. It promotes certainty in the courts, predictability in the marketplace, and new choices for consumers. We therefore urge its expeditious enactment.

If I may, Mr. Chairman, I would like to summarize briefly why this particular compromise is worthwhile from the perspectives of consumers, retailers, and manufacturers.

First, the prohibition on copyright infringement actions is very important to consumers, manufacturers, and retailers. Our broad support for the Audio Home Recording Act is based largely on section 1002. That section provides specifically that the copying of a phono record by a consumer for private, noncommercial use is not for direct or indirect commercial advantage and is therefore not ac-

tionable. For retailers, this means they can now order stocks of new generations of home recorders; for manufacturers, it means they can plan large-scale product development; and for consumers, it means they can have access to these new technologies, and it forever removes the cloud of doubt over the legality of these products.

No one can really predict what sorts of products American consumers will buy; however, one thing seems certain: consumers ought to be able to choose freely among the best products that technology can provide.

Mr. Chairman, you said the biggest winner here is the American consumer, and I agree with you. So far, the controversy and uncertainty over audio home recording has only denied consumers the chance to choose among these new formats which will be supported by economies of scale and marketing commitment. With enactment of this legislation, I see an immediate future with new hardware technologies, new software choices, and prices declining as mass market volume is achieved, just as has happened with other major consumer electronics breakthroughs.

Audio retailers need these new products. With the Nation in a recession, our retailers are struggling. Today their customers are reading about these new technologies and prototypes, and so they are less interested in the excellent recording products on the shelves now, yet these new high-tech products are not generally available.

This legislation does have the support of such retailer groups as the National Association of Retail Dealers of America and other retailers. They support it because it promises to transform the market, giving them new products to sell at reasonable prices and without imposing upon them or their customers any paperwork or collection of funds. For manufacturers, the act is also a reasonable compromise. Manufacturers support this bill because it does not degrade or devalue their own intellectual property rights in favor of any other rights. It elevates their costs, but only slightly and in a highly predictable manner. In this sense, it is not much different from the routine licensing compromises made over conflicting assertions of patent and other intellectual property rights to which businesses agree every day.

The act is also very carefully circumscribed in its provisions and its effect. It covers only consumer-model digital audio recording devices designed or marketed for the primary purpose of making copies of audio recordings. The following products are not digital audio recording devices under this legislation: today's analog cassette tape recorders, personal computers, VCR's, multimedia devices, answering and dictating machines, and professional products.

Nobody is more concerned than we about the possibility of an incorrect or overly broad interpretation of this legislation, either directly or in terms of precedent. We can say with confidence that the bill comports with its intention—that is, the royalty obligation and serial copying limitation govern only recorders and blank media that are in the marketplace explicitly or primarily for the purpose of consumer digital audio recording from music albums. Thus, VCR's, computers, and other devices that may be capable of digital audio recording are not covered by the bill unless the capa-

bility for consumer music copying makes all other capabilities of the recording devices secondary.

Likewise, the events and circumstances leading to this proposed compromise are complex and unique. We definitely do not view this bill as a precedent for legislation in any other field or about any other products, nor do we view this legislation as promoting or favoring any particular digital or analog audio recording format, proposed or existing, new or old. This bill holds the door wide open for everyone. Who succeeds and who fails will be determined in the marketplace, which is as it ought to be.

Before concluding, Mr. Chairman, I wish to salute you for your decade of leadership on the home recording front. We know you have worked long and hard to be fair to everyone, especially the American consumer. We believe the Audio Home Recording Act of 1991 is a worthwhile and necessary compromise to break the stalemate over digital audio home recording. Having been urged by Congress to find common ground from which to promote new technology and enhance music creativity, we now look forward to working with you to enact this historic compromise.

Thank you.

[The prepared statement of Mr. Shapiro follows:]

STATEMENT OF
GARY J. SHAPIRO
GROUP VICE PRESIDENT
CONSUMER ELECTRONICS GROUP
ELECTRONIC INDUSTRIES ASSOCIATION

Before the
United States Senate
Committee on the Judiciary
Subcommittee on Patents, Copyrights and Trademarks

Supporting S. 1623
THE AUDIO HOME RECORDING ACT OF 1991

October 29, 1991

Mr. Chairman and Members of the Subcommittee:

My name is Gary J. Shapiro. I am group vice president of the Electronic Industries Association's Consumer Electronics Group, one of the industry groups that participated actively in working toward the compromise embodied in the bill before you. I also have the honor of serving as chairman of the Home Recording Rights Coalition (HRRRC), of which EIA is a member. Thank you for inviting me to testify today. I am pleased to convey the unqualified support of both EIA and the HRRRC for the Audio Home Recording Act of 1991.

The Consumer Electronics Group of EIA represents the leading manufacturers of electronic products that entertain and inform American consumers. These companies manufacture, sell, and service a wide variety of devices, including radio and television receivers, VCRs, video cameras, compact disc players, loudspeakers, and numerous other products.

The HRRRC is a coalition of consumers, retailers and manufacturers of recording products. Since its founding a decade ago, HRRRC has sought to preserve the rights of consumers to make noncommercial home recordings for private use.

I have been personally involved in the issue of home recording for

more than ten years. It is a tribute to you, Mr. Chairman, that you have continued for the last decade to urge all interested parties to find a reasonable compromise that serves the consumer interest, and that you have introduced legislation embodying such a compromise in the form of the Audio Home Recording Act.

In my view, the Audio Home Recording Act is significant because it ends the debate over private, noncommercial audio home recording, opening the door to a vibrant market free of legal concerns:

- o The Act will encourage record companies and music publishers to support new digital audio technology enthusiastically. As we learned with the phenomenal growth and acceptance of the digital compact disc, when the music industry feels it has a stake in new devices its support can benefit everyone.
- o The Act means that new digital audio recorders will be appearing on retailers' shelves as products, rather than in court as exhibits. For too long the public has paid the costs of controversy, and suffered from the absence of new products.
- o The royalty rates set by this legislation are lower than anything proposed in the past, and are limited to new consumer-model digital audio recorders and media.

Even with these benefits, it still required some soul searching, after years of opposition, to support a bill that includes a royalty provision. We continue to believe that consumers have the right to use their own recorders to record, for private noncommercial purposes, any signal they have lawfully acquired. We endorse the Audio Home Recording Act because it permits consumers to make first-generation digital audio recordings of any lawfully acquired signal. It promotes certainty in the courts,

predictability in the marketplace, and new choices for consumers. We therefore urge its expeditious enactment.

If I may, Mr. Chairman, I would like to elaborate on why this particular compromise is worthwhile from the perspectives of consumers, retailers and manufacturers.

The Prohibition on Copyright Infringement
Actions Is Important to Consumers
Manufacturers and Retailers

Mr. Chairman, our broad support for the Audio Home Recording Act is based largely on Section 1002 of the Act. This section provides that no legal action may be brought alleging infringement of copyright based on the manufacture, importation, or distribution of digital audio recording devices or media, or of analog audio recording devices or media, that are not used for commercial purposes.

Section 1002 provides, specifically:

"[T]he copying of a phonorecord by a consumer for private, noncommercial use is not for direct or indirect commercial advantage, and is therefore not actionable."

Thus, the source or motive for such home taping is irrelevant. This legislation clearly provides that private home audio recording cannot be the subject of any copyright-based legal challenge.

What this means is that retailers can now order stocks of new generations of home recorders without concern that supplies might suddenly be cut, or prices sharply elevated, because of threatened litigation or other uncertainties in the marketplace. It means that manufacturers can plan large scale product development, introduction and marketing campaigns without worrying about the precise recording uses to which consumers will put home audio recorders.

S. 1623 Will Mean Wider Choices
and Better Prices for Consumers

No one can really predict what sorts of products American consumers will buy. However, one thing seems certain: consumers ought to be able to choose freely among the best products technology can provide.

So far, the controversy and uncertainty over audio home recording has only denied consumers the chance to choose among new formats supported by economies of scale and marketing commitment. With enactment of this legislation, I see an immediate future with new hardware technologies, new software choices, and prices declining, as mass market volume is achieved -- just as has happened with other major consumer electronics breakthroughs.

Audio Retailers Need New Products
and Support this Legislation

With the nation in recession, our retailers are struggling. But even before the present recession, retailers specializing in audio components were having a particularly tough time. Today, their customers read about new technologies and prototypes, so are less interested in the excellent recording products on the shelves now. Yet the new, high-tech products are not generally available.

Another key proponent of S. 1623 is the National Association of Retail Dealers of America (NARDA). Like EIA, NARDA opposed previous legislation that would have imposed royalties on consumer recorders and blank tape. However, NARDA and many other groups support S. 1623 because it promises to transform the market, giving them new products to sell at reasonable prices. Retailers also insist that any legislation should not embroil their stores or their customers in paperwork, or the collection of funds. This bill avoids any such entanglements.

For Manufacturers, the Act
Is A Reasonable Compromise

Manufacturers support the Audio Home Recording Act because it does not

degrade or devalue their own intellectual property rights in favor of any other rights. It elevates their costs, but only slightly, and in a highly predictable manner. In this sense, it is not much different from routine licensing compromises, made over conflicting assertions of patent and other intellectual property rights, to which businesses agree every day. The fact that a manufacturer agrees to a reasonable compromise does not mean that a manufacturer accepts that its product is or was infringing. It allows a manufacturer to get on with business, which is how it best serves the consuming public.

The Audio Home Recording Act is Carefully
Circumscribed in its Provisions and Effect

This legislation covers only consumer model "digital audio recording devices" designed or marketed for the primary purpose of making copies of audio recordings. The following products are not digital audio recording devices under the bill:

- Today's analog cassette tape recorders;
- Personal computers, videocassette recorders and multimedia devices;
- Answering and dictating machines; and
- Professional products as would be used by professional musicians or recording studios.

Nobody is more concerned than we are about the possibility of an incorrect or overly broad interpretation of this legislation, either directly or in terms of precedent. We and the other industry representatives involved have consulted with representatives of other groups and industries to ensure that we have not overlooked anything in this respect.

With the benefit of these extensive consultations, we can say with confidence that the bill comports with its intention -- that is, the royalty obligation and serial copying limitation govern only recorders and blank media that are in the marketplace explicitly or primarily for the purpose of consumer digital audio recording from music albums. Thus, VCRs, computers, and other devices that may be capable of digital audio recording are not covered by the bill, unless the capability for consumer music copying makes all the other capabilities of the recording device secondary.

Similarly, the events and circumstances leading to this proposed compromise are complex and unique. We definitely do not view this bill as a precedent for legislation in any other field, or about any other products. Nor do we view this legislation as promoting or favoring any particular digital or analog audio recording format, proposed or existing, new or old. This bill holds the door wide open for everyone. Who succeeds and who fails will be determined in the marketplace, which is as it ought to be.

Before concluding, Mr. Chairman, I wish to salute you for your decade of leadership on the home recording front. We know you have worked long and hard to be fair to everyone, especially the American consumer. We believe the Audio Home Recording Act of 1991 is a worthwhile and necessary compromise to break the stalemate over digital audio home recording.

Having been urged by Congress to find common ground from which to promote new technology and enhance music creativity, we now look forward to working with you to enact this historic compromise.

Thank you.