

QUESTIONS AND ANSWERS

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6276

November 6, 1991

The Honorable Ralph Oman
 Register of Copyrights
 Library of Congress
 Washington, D.C. 20540

Dear Register Oman:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

As mentioned during the hearing, Senator Leahy has enclosed some supplemental questions for inclusion in the hearing record. Please return the questions with your answers to the attention of Mara Mallin by November 18, 1991. Also, I encourage you to include any additional information that you feel will be beneficial to the hearing record, the general public and to the members of Congress.

Again, I thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,



DENNIS DeCONCINI
 Chairman
 Subcommittee on Patents,
 Copyrights and Trademarks

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RESPONSES TO ADDITIONAL QUESTIONS FROM SENATOR LEAHY ON
DIGITAL AUDIO TAPE LEGISLATION

QUESTION 1. Some critics say that this agreement sets a troubling precedent. They say that if copyright holders in the music industry can get royalties on the machines that copy their music, other copyright holders may demand a royalty on the machines that play and record the material they create -- be it computer programs, or, in the future, digital video. Do you believe this legislation creates a troubling precedent?

ANSWER: No. This legislation does not create a troubling precedent. First, by its terms, S. 1623 limits its potential for creating any precedent -- good or bad. Section 1003 of the bill states that:

Except as expressly provided in this chapter with respect to audio recording devices and media, neither the enactment of this chapter nor anything contained in this chapter shall be construed to expand, limit, or otherwise affect the rights of any person with respect to private home copying of copyrighted works, or to expand, limit, create, or otherwise affect any other right or remedy that may be held or available to any person under chapters 1 through 9 of this title.

Thus, the bill eliminates possible interpretations of newly created or greater rights based on its provisions. This is so not only for computer programs and audiovisual works, but also for analog home recordings of music. But for the specific rights created within the bill, copyright owners should fare no better or worse under this legislation than under existing law.

In addition, digital audio recording devices are defined in such a way as to exclude audiovisual works and computer programs. Thus, the bill is narrowly drawn and insulated against broad application by its terms.

Second, precedent regarding home copying royalties is already established. The laws of seventeen other countries, including most western European countries, provide remuneration to authors of musical works and sound recordings for home copying. Japan and several other countries are also considering such legislation. I believe the international community will be greatly influenced in favor of home copying legislation if this bill is enacted. But rather than setting new precedent, S. 1623 fits neatly into the prevailing scheme in industrialized countries of dealing with home copying of musical works recorded on phonorecords.

QUESTION 2. Some say that copying for personal use -- for example, copying a CD to a digital audiotape for use in your car -- is a "fair use" under the Copyright Act. Do you agree? If such copying is a "fair use," do you believe that consumers should still have to pay a royalty for such use?

ANSWER: The copyright law gives four factors that a court is to use to determine whether or not a particular use is fair: (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.

With respect to the first and second factors, taping for use in a car would not be for educational purposes, ordinarily, but rather for entertainment. Courts are disposed less favorably toward fair use respecting entertainment uses as opposed to educational and informational uses. The third factor, if the entire work were copied, would also weigh against fair use. The Supreme Court (*Harper & Row v. the Nation Enterprises*, 471 U.S. 539 (1984)) has indicated that the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work is of paramount importance. The making of multiple copies would seem to have a negative impact on the market for copyrighted works since a person who might have purchased two recordings -- just as a person may purchase two copies of the same book -- would purchase only one.

In the *Betamax* case (*Universal City Studios v. Sony*, 464 U.S. 417 (1984)) the Supreme Court indicated that while home taping for the purpose of viewing a broadcast program at another time (known as "time-shifting") fell within fair use, taping for the purpose of making permanent copies ("librarying") was given no such exemption. Copying a CD to a digital audiotape for use in a car digital audio system, would seem to fall outside the *Betamax* guidelines since a permanent copy is retained.

As you know, fair use is for judicial determination, so my opinion is advisory. However, applying the case law and the statutory fair use factors to this question, I cannot say that the making of permanent copies of copyrighted works for personal use is fair.

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

November 6, 1991

Mr. John V. Roach
 Chairman, Tandy Corporation
 1 Tandy Circle
 Fort Worth, Texas 76102

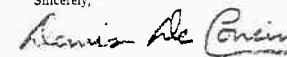
Dear Mr. Roach:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

As mentioned during the hearing, Senator Leahy has enclosed some supplemental questions for inclusion in the hearing record. Please return the questions with your answers to the attention of Mara Mallin by November 18, 1991. Also, I encourage you to include any additional information that you feel will be beneficial to the hearing record, the general public and to the members of Congress.

Again, I thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,



DENNIS DeCONCINI
 Chairman
 Subcommittee on Patents,
 Copyrights and Trademarks

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Question for John Roach from Sen. Leahy

Question: Can you describe how the failure up until now to reach an agreement on digital home taping affected the ability of manufacturers to bring digital recording equipment to the American market? Has this equipment been more readily available in overseas markets?

Answer: Digital recording technology has been available for a number of years in DAT format. Other digital formats for both tape and disk are fairly recent developments. Because of the opposition to digital home taping by the music industry until now, the DAT format was not supported with pre-recorded software, a requisite ingredient for a successful digital successor to the very popular analog cassette currently in use. Further, litigation, both filed and threatened, against digital recording equipment manufacturers virtually paralyzed the advancement of the products in the U.S. Tandy Corporation has worked on two digital recording technologies for several years, but could not introduce them in the uncertain legal environment. The Audio Home Recording Act settles forever the right of the consumer to make home recordings for non-commercial purposes, and thus, the liability of a manufacturer for contributory copyright violation. Also, music industry cooperation in supporting at least one new music format is assured. Enactment of the Act will assure that American consumers have access to advanced audio technologies and pre-recorded music contemporaneously, if not in ahead of the rest of the world.

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United States Senate
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 WASHINGTON, DC 20510-6275

November 6, 1991

Ms. Linda Golodner
 Executive Director
 National Consumers League
 815 15th Street, N.W., Suite 928-N
 Washington, D.C. 20005

Dear Ms. Golodner:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

As mentioned during the hearing, Senator Leahy has enclosed some supplemental questions for inclusion in the hearing record. Please return the questions with your answers to the attention of Mara Mallin by November 18, 1991. Also, I encourage you to include any additional information that you feel will be beneficial to the hearing record, the general public and to the members of Congress.

Again, I thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,

Dennis DeConcini
 DENNIS DeCONCINI
 Chairman
 Subcommittee on Patents,
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815 15th Street NW • Suite 928-N • Washington, DC 20005 • (202) 639-8140

Linda F. Golodner, Executive Director
November 18, 1991

The Honorable Patrick J. Leahy
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Leahy:

This letter is in response to your supplemental question for inclusion in the hearing record on the Audio Home Recording Act of 1991. Your question: There are critics of this legislation who claim it is bad for consumers since it puts some restrictions on home taping and requires the payment of a royalty, the cost of which will be passed on to consumers. How do you respond to such critics?

The agreement reached by the consumer electronics and music industries and creative artists on the subject of digital audio recording technology opens the door for consumers to finally be able to enjoy access to this exciting new technology. Passage of the legislation will also mean that the cloud of illegality of home taping will be lifted for consumers.

The royalty required of the manufacturer or the importer to be added to both equipment and tape may well be passed on to the consumer at point of sale. As you know, the amount for each tape is estimated to be pennies and for the equipment will be a one-time capped charge. However, it is important to be aware of the realities of this marketplace. We all know that the record and tape industry and the electronics industry is highly competitive. Simply by opening the newspaper or walking through a shopping center a consumer can easily determine who is giving the best price for the purchase of equipment and tapes. If the price is not right one week, you can just wait for holiday and special sales to get the price you want. Quite frankly, we don't expect this competitive environment to change. The consumer should still be able to comparatively shop and get the best deal available.

For additional comments on this subject, please refer to the testimony I presented to the subcommittee on October 29, 1991. If you would like additional information or wish further clarification of our position, please let me know.

Sincerely,

LINDA F. GOLODNER
Executive Director

Officers: Robert R. Nathan, Honorary Chairman • Esther Peterson, Honorary President • Jack Blum, President • Ruth Jordan, Vice President • Bert Seidman, Vice President • Jane King, Secretary • Barbara Warden, Treasurer

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 6, 1991

Mr. Jay Berman
President, Recording Industry Association of America
1020 19th Street, N.W., Suite 200
Washington, D.C. 20036

Dear Mr. Berman:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

As mentioned during the hearing, Senator Leahy has enclosed some supplemental questions for inclusion in the hearing record. Please return the questions with your answers to the attention of Mara Mallin by November 18, 1991. Also, I encourage you to include any additional information that you feel will be beneficial to the hearing record, the general public and to the members of Congress.

Again, I thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,

DENNIS DECONCINI
Chairman
Subcommittee on Patents,
Copyrights and Trademarks

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ANSWER TO QUESTION FROM SENATOR PATRICK LEAHY

1. As I understand it, the time may soon be here when music is broadcast digitally. At that point, consumers will have the ability to make a digital recording without ever buying the sound recording in the first place. How does your industry propose to tackle that problem?

Answer. The advent of new digital technologies, including digital audio broadcasting, does indeed present a threat to the recording industry. Furthermore, this threat goes far beyond the mere ability to make a digital copy without purchasing the original sound recording. Services that provide instantaneous access to CD-quality music, such as digital audio cable and pay per listen, will eliminate the need to even make a copy -- the consumer essentially can have the recording "delivered" directly into the home. In addition, consumers will actually pay a subscription fee to the offerors of these services, taking money out of their pockets that would otherwise be spent to purchase records. These services will then be in a position to exploit our product for a profit without any clear obligation to compensate us. As such, to protect the holders of the sound recording copyright, we would urge Congress to pass legislation creating a right of public performance for sound recordings.

Recently, the Copyright Office issued a report requested by Senator DeConcini on the copyright implications of digital audio transmission services. In this report, the Register reiterated the Copyright Office's longstanding recommendation that Congress establish a performance right in sound recordings. The basis for the Copyright Office's recommendation is three-fold. First, new digital audio transmission technologies are likely to fundamentally change the manner in which sound recordings are marketed to and enjoyed by listeners, to the detriment of the sound recording copyright owner. Second, even in today's marketplace, the Copyright Office has recommended a performance right for sound recordings. Specifically, the Copyright Office's report concludes generally that there is no economic justification for depriving copyright owners of sound recordings of the same rights afforded to owners of all other classes of copyrighted works that can be publicly performed.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

1020 Nineteenth Street, N.W. ■ Suite 200 ■ Washington, D.C. 20036 ■ Phone: (202) 775-0101 ■ Fax: (202) 775-7253

Page Two

And third, the absence of a performance right in the United States places us in stark contrast to established and growing worldwide norms, impairs our trade negotiators' credibility when they seek enhanced respect for intellectual property principles among our trading partners, and impedes the U.S. recording industry's access to international performance right royalty pools.

In conclusion, we fully support S. 1623 as the appropriate solution to the difficult issue of audio home recording. At the same time, however, digital audio transmission technologies pose additional challenges to the rights of sound recording copyright owners beyond the home copying issues addressed by S. 1623. Accordingly, we encourage Congress to separately establish a performance right for sound recordings.

Respectfully submitted,

A handwritten signature in dark ink that reads "Jason S. Berman" with a stylized flourish at the end.

Jason S. Berman
President

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 AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

November 6, 1991

Mr. Gary Shapiro
 Group Vice-President, Consumer Electronics Group
 2001 Pennsylvania Avenue, N.W.
 Washington, D.C. 20006

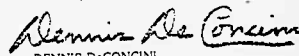
Dear Mr. Shapiro:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

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Sincerely,



DENNIS DeCONCINI
 Chairman
 Subcommittee on Patents,
 Copyrights and Trademarks

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Recording Industry
Association of
America

(C) Copyright
Coalition

Electronic Industries
Association, Consumer
Electronics Group

JOINT ANSWER TO QUESTION FROM SENATOR
PATRICK LEAHY

1. Some say that copying for personal use -- for example, copying a CD to a digital audiotape for use in your car -- is a "fair use" under the Copyright Act. Do you agree?

If such copying is a "fair use," do you believe that consumers should still have to pay a royalty for such use?


Answer: Questions as to the circumstances under which private, noncommercial copying by individuals may be considered "fair use" under the Copyright Act are among those that had previously caused controversy among the parties that have endorsed the Audio Home Recording Act. (Interests represented by Mr. Berman and Mr. Murphy would say "No" in response to the first question; those represented by Mr. Shapiro would say "Yes".)

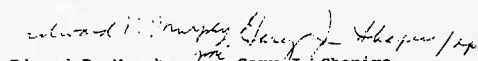
But our joint response today is that the controversy posed by this question is avoided by enactment of the Audio Home Recording Act. Section 1002 specifically provides that making such a copy "... by a consumer for private, noncommercial use is ... not actionable." Consumers would gain a major benefit under the Act, since the threat of litigation over whether such copying is a "fair use" would be removed, and consumers' access to new digital audio technologies is likely to be enhanced.

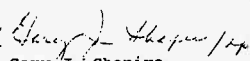
All of us believe that the system provided for in S. 1623 for the payment of modest royalties is an appropriate mechanism to resolve a longstanding and complex legal controversy and to avoid the costs and uncertainties of litigation. Moreover, it bears emphasis that the Act does not provide that consumers pay royalties, based on particular instances of copying or otherwise. Rather, it provides that manufacturers and importers pay royalties based on sales of equipment and media to consumers.

We believe the compromise of interests embodied in the Act is fair to all, and in the public interest.

Respectfully submitted,


Jason S. Berman
President
Recording Industry
Association of
America


Edward P. Murphy
President
National Music
Publishers'
Association, Inc.


Gary J. Shapiro
Group Vice President
Consumer Electronics
Group
(EIA/CEG)

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 6, 1991

Mr. Edward P. Murphy
National Music Publishers' Association
The Harry Fox Agency
205 East 42nd Street
New York City, New York 10017

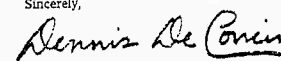
Dear Mr. Murphy:

Thank you for taking time out of your busy schedule to testify at the hearing on the Audio Home Recording Act of 1991. The members of the subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

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Again, I thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,


DENNIS DeCONCINI
Chairman
Subcommittee on Patents,
Copyrights and Trademarks

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• Copyright Coalition

Recording Industry
Association of America

JOINT ANSWER TO QUESTION FROM
SENATOR PATRICK LEAHY

Question

The so-called "Athens Agreement" reached between the recording industry and the electronics industry in 1989 provided that digital audio recorders had to be built with the Serial Copy Management System, but did not provide for royalty payments. How do you respond to critics who say that it is unfair to consumers to require both the SCMS -- which limits the extent of home taping -- and a royalty?

Answer

We believe that any criticism of the Audio Home Recording Act as unfair to consumers overlooks the major benefits to consumers from passage of the bill. The bill would permit consumers to copy prerecorded music for private, noncommercial use without fear of copyright infringement litigation. Indeed, the immunity from lawsuit extends to both analog and digital copying, even though the bill imposes no royalties and no copying restrictions in the analog area (which is the dominant audio recording technology in the marketplace today).

Moreover, there is nothing unfair or duplicative about SCMS combined with royalty payments. SCMS restricts only the ability to make "second generation" copies of prerecorded music (i.e., copies of copies). It does not restrict the making of "first generation" copies (e.g., copies from the original CD, cassette, or record). Thus, under SCMS, a consumer who purchased a CD in a local retail store could still use his digital audio recorder to make multiple digital copies of that CD.

From the music industry's perspective, however, "first generation" digital copying of copyrighted music does cause major economic harm to songwriters, music publishers, performing artists, and record companies. Digital copying permits the creation of copies that are audibly indistinguishable from the original CD, cassette, or record. The royalty payments contemplated

under the bill are very modest in the context of "first generation" digital copying, particularly when compared to royalty systems in place in other nations.

It is important to recall that the key reason the "Athens Agreement" was not supported throughout the music industry was because it did not contain a royalty component. Although some segments of the music industry supported the "Athens Agreement" as a useful first step in responding to the introduction of digital audio tape (DAT) technology, the rapid appearance of other digital audio recording technologies has clearly suggested the need to find a comprehensive solution that applies to all such technologies.

Upon closer analysis, therefore, it should be clear that SCMS and royalties are designed to deal with distinct issues within the context of audio home recording. Together, SCMS and royalties provide an essential blend of remedies. Without some protection against serial copying, the music industry would have urged much higher royalty payments. In fact, as was noted earlier, the royalty payments contemplated by the proposed legislation are significantly less than those typically adopted in other countries to address audio recording technologies.

In closing, it should be reemphasized that the consumer would enjoy key benefits under this legislation, including unfettered access to the latest digital audio recording technologies. We believe that the compromise contained in the bill is fair to all, and that it is very much in the public interest.

Respectfully submitted,

Edward P. Murphy
Edward P. Murphy
President
National Music Publishers'
Association, Inc.

Jason S. Berman
Jason S. Berman
President
Recording Industry
Association of America