AUDIO HOME RECORDING ACT OF 1991

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

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Mr. HUGHES. The Chair recognizes the distinguished ranking Republican, Mr. Moorhead.

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

I join the chairman in welcoming Ralph Oman, the Register of Copyrights, here again, who has helped us so much on legislation, and to certainly welcome Barry Manilow and all of the other key people that are here from the recording industry and adjacent fields.

I would also like to commend the major industries affected by this legislation for their hard work in bringing this compromise agreement to Congress. It has been a long time in coming, and you are to be commended for your efforts.

This legislation would clearly help the equipment manufacturers and the record and electronic industries, but it is also important that we help the copyright owners, without whom there would be no need for this legislation.

It is also important that this legislation be in the best interest of the public. From the birth of this country, copyright and patent law have been primarily designed not to serve the interests of the creators but to serve the overall public interest. It is our purpose here this morning to make sure that H.R. 3204 strikes the proper balance between the public interest on one hand and the proprietary rights of the creators on the other.

I am looking forward to this morning's witnesses in this hearing, and certainly thank all of you who have come to help.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

Does the gentlelady from Colorado have an opening statement?

Mrs. SCHROEDER. No. I am just delighted everybody worked so hard on this, Mr. Chairman, and I want to apologize because at 10 o'clock I have to go chair a hearing too. But I wanted to show my interest and show my thanks.

Mr. HUGHES. Thank you for joining us.

The gentleman from North Carolina.

Mr. COBLE. No opening statement, Mr. Chairman, just to extend a welcome to the panels, and I look forward to hearing them. I just received a call, so I may be like Mrs. Schroeder. I may have to go to another meeting. But thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

Let me, if I might, just present our first witness. He is Mr. Ralph Oman, the Register of Copyrights and the Assistant Librarian for Copyright Services in the Library of Congress. Mr. Oman became Register in the fall of 1985. Prior to that he served as chief counsel for the Senate Subcommittee on Patents, Copyrights and Trademarks under the leadership of Senator Charles Mathias. Mr. Oman has done an excellent job of heading the Copyright Office, an entity of government critical to the creative community, the Congress, and to the public.

Mr. Oman is joined at the witness table by Ms. Dorothy Schrader, General Counsel of the Copyright Office, and I believe by——

Mr. OMAN. Charlotte Givens Douglas, the Principal Legal Adviser to the General Counsel.

Mr. HUGHES. Charlotte, we welcome you likewise.

Ralph, we have a copy of your written statement which, without objection, will be made a part of the record, and you may proceed as you see fit.

You look remarkably well, you and Dorothy, having just arrived from Europe. You must have just gotten off the plane.

Mr. OMAN. It has just been a matter of hours, but it is good to be here, Mr. Chairman.

Mr. HUGHES. We are delighted that you can join us.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, AND CHARLOTTE GIVENS DOUGLAS, PRINCIPAL LEGAL ADVISER TO THE GENERAL COUNSEL

Mr. OMAN. Let me add my voice to the chorus that we have heard this morning singing the praises of the audio hardware industry and the music industry for working out this compromise on the digital technology. This compromise is good news for everyone who enjoys music.

Congress has considered several broad home taping proposals during the last decade, but it never moved beyond the consideration stage. The debate heated up when the digital audio tape recorder hit the U.S. market in 1987.

At the heart of these discussions is the basic question of whether or not an author should be compensated for the unauthorized home taping of copyrighted music. This debate is not limited to the United States. Governments all over the world are studying the home taping issues, exactly who should pay what and to whom.

As you know, Mr. Chairman, and as you just mentioned, I have returned from the Committee of Experts meeting in Geneva on a possible protocol to the Berne Convention. The World Intellectual Property Organization proposed a provision that would permit private reproduction other than serial digital reproduction based on a payment provided by a levy on the equipment, blank tapes, or both. The provision would also ensure compliance with the Berne Convention respecting the principle of national treatment.

Work on that provision will continue in November and your action on the DAT bill, or the DART bill, will have an important bearing on the outcome of those deliberations in the WIPO. So far 17 countries have passed laws to compensate copyright owners for unauthorized private copying of their works. Only a few of these share the royalties with foreign composers and publishers and record companies.

But there is good news from Japan. Japan is the second largest recording market after the United States, and Japan has agreed to compensate U.S. authors in the new Japanese home taping legislation. That is a tremendous breakthrough and part of this growing consensus that we see around the world.

The proposed Audio Home Recording Act of 1991 implements two systems, which you have mentioned, Mr. Chairman, a technological solution and a royalty compensation solution, both limited to the digital technology. The bill would mandate the Serial Copy Management System (SCMS) and the SCMS circuitry permits the copying of multiple copies from original digital source material, but you

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cannot make copies of these copies. For the first time Congress has explicitly authorized home taping, so it removes once and for all the threat of contributory infringement that has clouded the technology from the start. And that is the technological solution.

The royalty solution requires importers and manufacturers of the digital audio recorders and the blank tapes to pay a small royalty to the copyright owners.

The Audio Home Recording Act is a good bill. The Copyright Office supports it. The recording industry, the music industry, and the electronics industry all support the compromise, as do the performers. The big winner is the American consumer, who will see this wonderful new technology prosper and bring great listening enjoyment.

The legislation will have a positive impact on protection for American composers and copyright owners worldwide. Many of the countries that collect royalties distribute them to foreign authors only on the basis of reciprocity. American authors now out in the cold can look forward to the day when they can claim their fair share from royalties abroad.

With respect to SCMS, the proposal incorporates an existing technical standard but would be flexible enough to cover new standards as they are approved by the Secretary of Commerce. The basic elements of the technical requirements seem reasonable and workable. The bill achieves both the certainty of known standards and the flexibility of accommodating future developments.

The proposal seems sound, fair and workable. All creative and proprietary interests are accommodated, and consumers will have a much wider selection of materials in the digital format, and prices should fall. The record companies will sell more product. Everyone seems to benefit, and at last the American creators of the copyrighted music will share the profits from this extraordinary technology as well as the manufacturers of the equipment.

In many ways the bill will open the door to the bright future of recording technology. Without it, that technology will remain mostly a promise and potential.

This concludes my oral statement, Mr. Chairman, and I would be pleased to answer any questions now or in writing.

Mr. HUGHES. Thank you very much, Ralph.

[The prepared statement of Mr. Oman follows:]

Statement of Ralph Oman
Register of Copyrights and
Associate Librarian for Copyright Services
Before the Subcommittee on Intellectual Property
and Judicial Administration
House Committee on the Judiciary
102nd Congress, Second Session

February 19, 1992

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 H.R. 3204.

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. You and Representative Brooks introduced H.R. 3204, on August 2, 1991, a day after Senator DeConcini introduced in the Senate an identical bill. Both bills, known as the Audio Home Recording Act (AHRA), have wide support, with nearly one hundred cosponsors in both Houses of Congress.

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).

In addition to royalty provisions, the proposed legislation contains a provision applying to consumer protection for home copying, and a requirement to include the Serial Copy Management System (SCMS) in consumer digital audio recorders. Legal actions for copyright infringement based on private, non-commercial audio recording of either digital or analog product 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.[1] Video recording equipment and media would not be affected, nor would dictation machines, telephone answering machines, or professional model digital audio recording equipment.

The path to an audio home recording statute has been a long one with several roadblocks that seemed almost insurmountable until the interested parties removed the barriers as they did in the July compromise. Before analyzing the bill and giving the Copyright Office position on H.R. 3204 as introduced, I would like to briefly sum up the background leading to this legislation.

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1 The definition of digital audio recording medium excludes a material object that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, excluding, without limitation, computer programs or data bases. H.R. 3204 §1001(4(B)ii.

I. HISTORICAL BACKGROUND

For many years, composers, lyricists, and musicians have become increasingly uneasy over the threat that technological advancements pose to their income, especially the advancements that make copying of their work easier. The 1971 Sound Recording Act made sound recordings copyrightable under federal copyright law for the first time, effective February 15, 1972. The legislative history of the Act is often cited to support the position that Congress intended to leave home audiotaping unrestricted. The House Report stated:

> In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years. [2]

This language did not appear in either the Senate Report to the Sound Recording Act or the committee reports accompanying the 1976 omnibus revision of the copyright law. Both commentators and copyright proprietors

2 H.R. Rep. No. 487, House Committee on the Judiciary, 92nd Cong., 1st Sess. 7 (1971).

maintain that this omission was intentional and supports their position that private copying of audio tapes is not a fair use. [3]

The conflict between consumers and copyright proprietors over home taping intensified during the early eighties when the courts were considering whether or not the use of videocassette recorders to tape off the air infringed the copyright of the owner of the material being taped. The courts had a difficult time resolving this issue. In the complex "Betamax" litigation, [4] the copyright owners of motion pictures taped off the air alleged that the sale of the Betamax videocassette recorder constituted contributory copyright infringement by presenting the means to infringe. Plaintiffs asserted that Sony sold videocassette recorders (VCRs) with the knowledge that they would be used to make copies of copyrighted works. The district court ruled in favor of Sony and the other defendants; the appellate court reversed, but the Supreme Court ultimately ruled in favor of Sony, finding that such taping was a fair use. The Court based its decision on two grounds. First, section 107 of the Copyright Act was interpreted to permit taping for purposes of delayed viewing -- "time-shifting." Second, copyright owners had voluntarily broadcast these programs over the airwaves for home viewing.

The "Betamax" decision is limited as a precedent. It does not answer all of the questions posed by private copying. For example, it does not deal with copying for the purpose of building a videotape library, or

3 See Nimmer, Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth, 68 Va.L.Rev. at 1509-1510.

4 Universal City Studios, Inc. v. Sony Corp., 464 U.S. 417 (1984) rev'g 659 F.2d 963 (9th Cir. 1981), rev'g 480 F. Supp. 429 (C.D. Cal. 1979).